"attractions" at Sorrento were subordinate. What was paid for was not an entertainment and, if there was any entertainment at Sorrento, it was not paid for.

McTiernan J. I agree.

Order nisi discharged.

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Federal Commissioner of Taxation v. Victorian Hardware Club.

Solicitor for the Commissioner of Taxation, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *Eggleston & Eggleston*.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN INSURANCE STAFFS' FEDERATION . . . . . } Applicant;

AND

THE ATLAS ASSURANCE COMPANY LIMITED AND OTHERS . . . } Respondents.

Dist 47 C.L.R. 22

Ref'd to 80 C.L.R. 82

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Melbourne, *Sept.* 28, 29; *Nov.* 6.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration—Industrial dispute—Log served by employees claiming salary at stated rate—Log served by employers suggesting salary at lower rate—Award fixing salary at an intermediate rate—Application by employers to reduce award rate by ten per cent—Reduction of award rate below amount offered by employers—Jurisdiction of Commonwealth Conciliation and Arbitration Court to reduce salary below that amount—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 21AA, 28 (3).

An award cannot be made by the Commonwealth Court of Conciliation and Arbitration prescribing a minimum wage lower than any amount in difference in the industrial dispute, and, unless a new industrial dispute extending beyond one State has arisen, an award cannot be varied so as to prescribe such a minimum wage.

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When organizations of employees and of employers serve upon one another, and upon employers and employees respectively, logs of wages and conditions and the employees' log specifies the amounts they require to be paid, and the employers' log the lower amounts they desire to be adopted, as minimum rates of pay, no dispute arises as to minimum rates lower than those specified in the employers' log.

So *held* by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting).

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 referred to Full Court.

On 14th May and 1st June 1927 the Australian Insurance Staffs' Federation served a log of demands on the various insurance offices, employers made respondents to this summons. On 30th May 1927 the employers served a separate log of demands upon the Federation and also upon a large number of individual employees in the State of New South Wales who were not members of the Federation. The Federation's log demanded of the employers the payment of certain minimum salaries to members of the Federation. For the seventh year of service, which was taken by way of illustration, the demand was a minimum salary of £265 per annum. This was also the minimum salary claimed for male employees of twenty-one years of age. The employers demanded that the schedule of industrial conditions set out in their log "should govern the wages . . . of all their respective employees," the wages scheduled being described as those "such employers desire," and being considerably lower than those demanded by the Federation. The rate of pay claimed was £220 per annum for the seventh year of service, again taken as a test illustration. The log asked the Federation and the individual employees to reply on or before 15th June 1927 whether it and they agreed to be bound by the terms set out.

The employers' log was expressed to apply to the State of New South Wales, Victoria, South Australia and Western Australia.

On or about 22nd June 1927 the employees and the Federation both applied for the holding of compulsory conferences under sec. 16A of the *Commonwealth Conciliation and Arbitration Act*, and two summonses were issued by the Conciliation Commissioner for

the holding of conferences. The two conferences were held at the one time on 27th June 1927. No agreement was reached between the parties, and on the same day both disputes, one in relation to the Federation's demands and the other in relation to the employers' demands were referred to the Court under sec. 19 (*d*) by two orders of reference. The order of reference in the dispute initiated by the Federation alleged the existence of an industrial dispute "as to the matters set forth in the first schedule hereto," which schedule merely set forth the demands in the log served by the Federation. The order of reference in the dispute initiated by the employers alleged an industrial dispute "as to the matters set forth" in the log of demands served by the employers on the Federation and the individuals mentioned.

On 23rd September 1927, by consent, the Commonwealth Court of Conciliation and Arbitration made a single award in the matters of the two disputes. The employers were named as parties to the award, the salary (for the seventh year) agreed upon and contained in the award being £225 per annum. The award was to be in force for a period of one year from 1st September 1927. After 1st September 1928 the award continued in force by virtue of sec. 28 (2) of the Act. Subsequently, various other awards were made binding various other employers and fixing the same rates of salary as those agreed upon in the previous award. None of the awards contained any provision for the periodical adjustment of wages in accordance with the rise or fall in the cost of living, nor was a claim for such a provision contained in any of the logs.

On 20th October 1927 another log was served upon the Federation by certain employers and upon individual employees in New South Wales, claiming rates identical with those fixed by the award, and an award dated 26th November 1927 was made adopting those rates binding these employees and employers.

On 6th February 1931 a large number of employers parties to the award in question caused a summons to be issued in the Commonwealth Court of Conciliation and Arbitration calling upon the Federation to show cause why such award "should not be varied" in the following respects: "(a) by reducing all wages fixed by the award in accordance with the fall in the cost of living

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since the award was made, and then reducing the wages so ascertained by ten per centum; (b) by making all consequential alterations." The grounds stated on behalf of the employers in support of the application to vary were "(a) that the rates of pay fixed by the said award are now too high having regard to the fall in the cost of living since the award was made; . . . (c) that, taking into consideration the present economic position, the wages fixed by the award are too high." In opposition to the application it was contended in the Arbitration Court for the Federation that the Court had no jurisdiction to make the order asked, on the ground that a reduction of ten per centum would cause the wages to be reduced below those contained in the employers' logs and that any such order would therefore be outside the ambit of the disputes, which were limited on the one hand by the employees' log and on the other by the employers' log; and that the making of the order as asked would result in the wages of an adult in his seventh year of service (this being the minimum rate for male employees of twenty-one years of age), which were fixed by the award at £225, being reduced to £202 10s., whereas the employers' demand was in that award for £220 and in the later awards for £225.

On 17th July 1931 the Arbitration Court made an order reducing all wages prescribed in the award by ten per centum. This operated as a reduction of the seventh year's salary from £225 to £202 10s., that is, below the sum of £220, the salary which had been mentioned for such year in the log of the employers.

On 28th August 1931 the Australian Insurance Staffs' Federation issued a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* asking for the determination of the following questions of law, namely, (1) whether the Court had jurisdiction, in making the said orders, to vary the said awards by reducing all wage rates prescribed by the said awards and payable thereunder from time to time by ten per centum; (2) whether the Court had jurisdiction to vary the said awards so as to prescribe wage rates lower than those sought by the respondents in the logs of wages served by the respondents on the applicant; (3) whether the said orders were within the area or scope of the industrial disputes within the Court's cognizance.

This summons came on for hearing on 3rd September 1931 before *Starke* J., who, pursuant to sec. 18 of the *Judiciary Act* 1903-1927, ordered that it be argued before the Full Court of the High Court.

Gorman K.C. (with him *Fraser*), for the applicant. The only question of importance under the summons is that raised by question (c). Whether ten per centum is taken off £225 or £220, it brings it below the amount offered by the employers' log. Sec. 28 (3) of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 was the power invoked by the Arbitration Court to vary the award, and it is the Arbitration Court's interpretation of the power to vary with which the applicant disagrees. Sec. 19 sets out the disputes of which the Court has cognizance. There was no dispute between the parties when the reduction was made and the application was merely one to vary. There must be a dispute before the jurisdiction arises, though the award may be set aside entirely or it may be varied, provided that the variation is limited to the ambit of the dispute. Such an interpretation makes sec. 28 (3) valid; the interpretation given to it by the Arbitration Court makes it invalid (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1); *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2)). The addition of sec. 28 (3) enables the Court to set aside the award even during the specified period, and empowers a variation to be made after the specified period has expired and enables it to be made retrospectively. The only power which the Court of Conciliation and Arbitration has is to arbitrate upon disputes, and consequently to get power to arbitrate there must be a dispute, and the only power of the Court is to arbitrate on matters in dispute. There was never any dispute as to whether the amount should be over £265 or below £220. The respondent desires to vary the award by saying that the Court can fix a figure about which there has never been any dispute. Sec. 28 does not add to the manner in which the matter can come before the Court. Arbitration presupposes disputants and a dispute. There was no disagreement at all at the time when this order was made. There was an award standing which could have been set

(1) (1925) 36 C.L.R. 442, at p. 458. (2) (1920) 28 C.L.R. 209, at p. 223.

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aside. If there were a dispute the Court would have to determine the existing award and then provide in the appropriate way. The power of the Court is limited to the settlement of a dispute, and outside £220 and £265 there is no dispute (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1)). Before proceedings are commenced, there must be a dispute existing. Here there was no dispute existing at all, and it is not within the power of Parliament to enact such a provision enabling the Court to adjudicate unless there is a dispute. The only powers which the Court of Conciliation and Arbitration has are those given by virtue of the *Commonwealth Conciliation and Arbitration Act*. The dispute is limited to the margins between the employers' and the employees' logs (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (2); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (5); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (6)).

[EVATT J. referred to *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (7).]

The power given by the Constitution is to make laws with respect to arbitration for the prevention and settlement of disputes. There can be no arbitration without disputants and a dispute. What the parties claim and deny constitutes the dispute, and anything which goes beyond that exceeds the power of the Legislature and the Court. The dispute which formerly existed did not extend beyond £265 or below £220, and the service of the summons by the employers did not create a new dispute.

Robert Menzies K.C. (with him *Stanley Lewis*), for the respondents. The Arbitration Court itself, in making the award the variation of which is now in question, made the award in respect of two distinct

(1) (1924) 35 C.L.R. 349, at pp. 351-352.
(2) (1909) 8 C.L.R. 419, at pp. 430, 438, 450.
(3) (1924) 34 C.L.R. 482, at p. 546.
(4) (1910) 11 C.L.R. 1, at pp. 60-61.
(5) (1920) 27 C.L.R. 560, at p. 564.
(6) (1925) 35 C.L.R. 462, at p. 482.
(7) (1924) 34 C.L.R., at p. 549.

disputes, the first created by the service of the employees' log and the other by the service of the employers' log and the failure to comply with those logs. As there were two disputes thus created the Court had jurisdiction to award anything from zero upwards to £265 per annum (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *A1 Amalgamated* (1)). When the Arbitration Court has purported to deal with the log, this Court cannot in proceedings under sec. 21AA go on to determine whether there is or is not a dispute. There were two disputes, and they have always been kept separate. The order of the Court attaches itself to the two awards made in respect of two disputes. At this stage sec. 21AA is not appropriate. The sole question is whether the persons in the employees' log are covered by this argument. Treating the employees' and the employers' logs as creating separate disputes, the employees' log in relation to New South Wales does, as a result of the *A1 Amalgamated Case*, justify a reduction of wages to an amount which the Court thinks proper. As to the effect of the employers' log, assuming that this Court can treat this award as being made in one dispute, it becomes necessary to determine what the employers' demand in relation to industrial matters means. When an employer serves a log on an employee it means that the employer wants something not more than the minimum stated in the log. The employer's log means that the most the employer is prepared to pay is the minimum mentioned. When the parties go to Court on such a log, there is in issue everything from the minimum stated down to zero. Counsel referred to *Ince Bros.* v. *Federated Clothing and Allied Trades Union* (2) and *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (3). As to the effect of sec. 28 (3), when Parliament authorizes the Court to set aside or vary the terms of an award it is giving to the Court in relation to a matter which has been determined by the Court power to make a variation to whatever extent the Court considers just. Sec. 28 (3) was brought into operation to get over the difficulty that there cannot be a dispute as to an award during the currency of that award. When the

(1) (1924) 35 C.L.R. 349.
(2) (1924) 34 C.L.R. 457.
(3) (1928) 41 C.L.R. 402, at p. 421.

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employers' summons was resisted by the employees' organization and union there was a definite dispute as to an industrial proceeding, and the judgment of the Arbitration Court settled such dispute on the terms of the judgment. Sec. 28 (3) expressly provides new machinery for dealing with a new dispute constituted by the summons and the arbitration. If the matter was a dispute cognizable by the Court in the ordinary way, it would be necessary to go further back than the summons, but the dispute raised by the issue of the employers' summons is cognizable by reason of sec. 28 (3). Irrespective of a new dispute, sec. 28 (3) authorizes from a constitutional point of view something to be granted, though it is not in dispute as long as it arises out of something in controversy.

Cur. adv. vult.

NOV. 6.

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND STARKE J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for a decision upon the question whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make an order reducing, by ten per centum, all wages prescribed by certain awards, four in number, and payable thereunder. The objection is that the variation is beyond the ambit of the dispute or disputes the subject of the awards. A statement of the facts in relation to one award will make the matter clearer. About May 1927 the Australian Insurance Staffs' Federation served a claim, or "log" as it has been called, upon employers. This log claimed minimum salaries and working conditions that should be paid to and govern the employment of members of the Federation. We may take for illustration the claim in respect of the annual rate of pay for males in the seventh year of service, namely £265. About May or June 1927 the employers also served a claim or log upon the Federation and various employees. The employers, in this log, claimed that wages and conditions under which their employees were then working should be altered, and set forth the wages and conditions the employers desired. The rate of pay desired for males in the seventh year of service was £220 per annum. The employers' and employees'

logs were by no means identical, or even similar, in respect of subject matter, and they were always treated and dealt with in the Arbitration Court as two separate and independent industrial disputes extending beyond the limits of one State; but both claims and the disputes raised by the claims were dealt with together, and one award was made prescribing a rate of pay for males in the seventh year of service of £225 per annum. This was also the minimum rate of pay at twenty-one years of age for male employees. A reduction of ten per centum brings the remuneration prescribed for males in the seventh year of service down to £202 10s. per annum, which is below the rate of £220 "desired" by the employers in their log. Such a reduction, it is said, contravenes the provisions both of the Constitution and of the Arbitration Act 1904-1930.

The Constitution, sec. 51 (xxxv.), authorizes the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Although in every industrial dispute there must be defined disputants, and a subject of dispute more or less defined, still the power contained in the Constitution is conferred as well for the public interest as for that of the parties to the dispute (existing or threatened). So long as the prevention or settlement of a dispute is effected by means of conciliation or arbitration, and results in an agreement or a direction relevant to the dispute as it exists at the time of such agreement or direction, it is within the constitutional power. The authority which may be conferred upon a conciliation or arbitration tribunal is not confined to the grant of the relief or the claims made by the parties to the controversy. Parliament may well, in the interests of the community, provide that the authority it creates shall make such orders and give such relief in the dispute as it shall think reasonable and necessary for "the prevention or settlement of the industrial controversy." No case has been decided in this Court which contravenes this proposition; its decisions have been confined to questions of the proper interpretation and limits of the Arbitration Acts 1904-1930. Under these Acts it has long been held that the function of the tribunals thereby created is to prevent and settle industrial disputes extending

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beyond the limits of a State, and that while jurisdiction does not extend beyond the ambit of the dispute submitted and in respect of which the tribunal has cognizance, yet the tribunal is not restricted to the grant of the specific relief claimed, but may deal with all matters incidental and ancillary to the dispute. "It may give anything between the maximum and the minimum limits of the dispute, but it can pass neither further forward than the maximum nor further back than the minimum" (*Whybrow's Case* (1); *Broken Hill Case* (2)). In accordance with this limitation on jurisdiction the power which a tribunal has under sec. 38 of the Acts to vary its orders in respect of every industrial dispute of which it has cognizance only authorizes a variation within the ambit of the dispute originally submitted (*Waterside Workers' Case* (3); *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (4); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (5)). The ambit of the dispute is simply the area of the controversy or the issue between the disputants. Thus, where employees claimed, and the employers disputed, that certain "wages shall . . . be paid to employees . . . according to their several classifications and duties, as set out hereunder" (6), this Court held that the controversy or issue was whether the sums stated, or lesser sums, should be paid (*Al Amalgamated Case*).

The employees' claim or log in the present case, to which reference has already been made, claimed minimum rates, and the employers disputed or did not concede them. It accordingly falls within the class governed by the *Al Amalgamated Case* (5), so that the controversy here was whether the rates specified, or lesser rates, should be paid. The reduction of ten per centum made by the Arbitration Court is thus within the ambit of this dispute.

The employers' claim or log was that wages should be altered, coupled with the expression of a desire as to the rates that should be paid. The employees or their organizations disputed or did not concede the rates suggested. Therefore the controversy here was whether wages should be altered. No limit was imposed, upwards or downwards, and the Arbitration Court was thus free to prescribe

(1) (1910) 11 C.L.R., at p. 61.
(2) (1909) 8 C.L.R. 419.
(3) (1920) 28 C.L.R., at p. 225.
(4) (1919) 27 C.L.R. 72, at pp. 84-85.
(5) (1924) 35 C.L.R. 349.
(6) (1924) 35 C.L.R., at p. 350.

such rates as it deemed reasonable and just. The reduction of ten per centum made by the Arbitration Court is thus within the ambit of this dispute also.

The same results would follow from a consideration of the claims or logs which formed the basis of the remaining three awards already referred to. The order of the Arbitration Court reducing wages payable under the four awards might, then, be justified under the power of the Court contained in sec. 38 (*o*) of the Acts to vary its awards or orders. But the Arbitration Court was oppressed with the decisions of this Court upon that section, and preferred to act upon another section, namely 28 (3), the relevant portion of which is as follows: "Notwithstanding anything contained in this Act, if the Court . . . is satisfied that circumstances have arisen which affect the justice of any terms of an award, the Court . . . may, in the same or another proceeding, set aside or vary any terms so affected." This power was given in 1920 (Act No. 31 of 1920, sec. 13) after the decision of this Court in the *Gas Employees' Case* (1) (see also *Waterside Workers' Case* (2)) denying the jurisdiction of the Arbitration Court to make an award altering the provisions of an existing award, whether in the same dispute or any other dispute, except by way of variation within the limits of the original dispute under the powers contained in sec. 38 (*o*). It must be observed that the new provision (sec. 28 (3)) deals with awards and not with the settlement of disputes. An award must be made in a dispute, but if circumstances have arisen which affect the justice of an award, the Court may set it aside. Thus, in the present instance, instead of reducing award rates by ten per centum, the Court might, as was conceded at the Bar, have completely set aside the four awards. According to the argument presented to this Court, however, the Arbitration Court cannot, though circumstances have arisen which affect the justice of terms of the award, vary those terms, unless the variation be within the ambit of the original dispute. Unless it is sought to rest the argument upon the cases decided under sec. 38 (*o*) of the Acts, it is difficult to perceive any reason for this construction of sec. 28 (3). The power to vary under sec. 38 (*o*) was only given as regards "every industrial dispute of

(1) (1919) 27 C.L.R. 72.

(2) (1920) 28 C.L.R. 209.

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which" the Court had "cognizance"—which justifies, no doubt, the decision that the power must be exercised in relation to the particular dispute and the controversy between the parties. But sec. 28 (3) has nothing whatever to do with the original controversy between the parties: it is concerned with matters affecting the justice of the award though such matters may arise wholly outside that controversy. It is a strange construction that concedes power under sec. 28 (3) to set aside awards, and yet denies power to alter them—for a variation is but an alteration—unless the variation be within the ambit of the original controversy between the parties. There is nothing in sec. 28 (3), as there is in sec. 38 (*o*), which justifies such a construction.

In our opinion, the questions raised by the summons should all be answered in the affirmative.

RICH J. We have to consider the validity of an order of the Court of Conciliation and Arbitration made during this winter of our discontent directing a reduction by ten per centum of minimum rates of salaries fixed by awards made in 1927 and 1928. This order has brought once more into the light the difficulties which attend the general regulation of industrial conditions under the guise and cover of settling industrial disputes in the exercise of the constitutional power entrusted to the Commonwealth to settle two-State disputes by arbitration. We know that those who were responsible for introducing this power into the Constitution, which had already been drafted, had in mind wide-spread industrial disturbances of an exceptional nature which they considered the State law was unable adequately to deal with. The abstract terms which they employed to describe the power were perhaps necessarily indefinite, and they have been found to possess all that elasticity which notoriously belongs to indefinite terms. I ventured to refer to this in *Federated State School Teachers' Association of Australia* v. *State of Victoria* (1). The decisions of this Court have uniformly insisted that the Federal jurisdiction is contingent upon the existence of an industrial dispute threatened, impending or probable. But in determining what is an industrial dispute the mildest controversies

(1) (1929) 41 C.L.R. 569, at pp. 590, 591.

have been included. The cases have uniformly insisted that the dispute must be industrial; but in determining what is industrial the meaning of the term has been extended to include the pursuits which ministered to the needs of the industrial system, and so we have the insurance officers before us in this application. The decisions uniformly insist that the dispute must be inter-State, but concurrent disagreement in two States between independent sets of parties in industrial relations now seems almost enough to satisfy this requirement. Again, the Federal power must proceed by conciliation and arbitration and not otherwise (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)). But this has proved no obstacle to the Court of Conciliation and Arbitration framing complete codes of rules for the regulation of an industry. Liberal, however, as has been the application of the limitations imposed by the Constitution upon the Federal power, those limitations cannot be escaped. But the very width of application which has been given to them has increased the difficulties of ascertaining the boundaries of the power. The enlargement by judicial decision has been progressive, and has been accomplished by the double process of the Court of Conciliation and Arbitration making, whether by experiment or otherwise, awards the validity of which was uncertain or disputable, and this Court resolving the doubt in favour of that Court's decision. As a result, perhaps less certainty of definition has been achieved than might be desired, but only an optimist could hope at once for a widening jurisdiction and fixity of definition. But at no time had there been any doubt that the existence and the ambit of a dispute determine the power of the Court of Conciliation and Arbitration to embody its will in an award. To go outside matters in a dispute and to regulate wages or conditions otherwise than by a decree which is fairly incident to composing the difference between the parties is neither to arbitrate nor to settle an industrial dispute. It is easy to understand that when great reductions in wages are considered necessary for our economic well-being, and minimum rates are found fixed by awards made in more prosperous times, it should seem a natural course to take to effect the reduction by the variation of the prescribed rates. The award is inevitably

(1) (1930) 44 C.L.R. 319.

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regarded as a subsisting regulation of wage rates which should be altered to suit the times. It is forgotten that its sole justification lies in the theory that it is an arbitral decree designed to settle an industrial dispute by determining the controversy between the parties. If it is varied, it remains as varied an arbitral award settling the same dispute, depending for its authority upon the existence of that dispute and upon the appropriateness of its terms to the settlement of that dispute. Consequently the limits of the power to vary must be found in the ambit of the dispute. The Constitution does not require that every dispute should have its separate award, and if a new dispute arises there is nothing in the Constitution to prevent the Court of Conciliation and Arbitration taking up an old award, varying it and applying the variation as a remedy for the new dispute or the new or old in combination. The Act of Parliament made under the Constitution does not always permit this to be done, but sec. 28 (3) provides that, if the Court of Conciliation and Arbitration is satisfied that circumstances have arisen which affect the justice of the terms of an award, it may " in the same or another proceeding " refer to or include a proceeding in a new dispute. In the present case it is said on behalf of the employees that the reduction of ten per centum makes the awards prescribe minimum rates of salary lower than those which were in controversy in the industrial dispute in which the awards were made, and that no new dispute had arisen justifying the variation or, if one did arise, it had not been submitted to the Court's cognizance. There were five alleged industrial disputes which the awards purported to settle. It is unnecessary to state the facts in detail. It is enough to say that some of these alleged industrial disputes were said to consist of no more than logs served by the employers specifying rates and conditions which the employers desired, and presumably of the failure of the employees served to give an answer. Others were said to consist of logs served by the employees demanding minimum rates and conditions. The logs served by the employees were answered by the logs served by the employers. Where employers and employees exchanged logs, whatever might be the precise order of time in which the respective logs were delivered it does not seem to me to be possible to take the artificial course

adopted by the Court of Conciliation and Arbitration when the alleged disputes were referred into Court and treat each log as creating a separate dispute consisting of a disagreement arising from failure to answer the demands or requests it contained. The exchange of rival views between employers and employees on the same subject matter creates one and not two disputes or controversies. The employers' log specified wages, and I cannot understand the log to mean that the employers were not prepared to pay the wages which they themselves set out. The payment of lower amounts was not, in my opinion, within the controversy either in cases where the dispute arose out of the delivery of the employees' log only or in cases where it arose out of the delivery of employers' and employees' logs. The ten per centum reduction varied the awards so that they prescribe wages lower than the amounts specified in the employers' log. The Judges of the Court of Conciliation and Arbitration appear to have considered that, in the absence of a further dispute, such a variation could not be made. In their judgment in this case they refer to the reasons which they gave in another matter, in the course of which they say :—" The question then arises, whether the employees' log and its refusal opened up a dispute concerning rates lower than those conceded by the employers in their logs. Standing by itself, the employees' log might be held to bring into dispute the question of rates, with no limitations other than those in the upward direction arising from the amounts being specified in the log, but the proper inference to be drawn here from the *antecedent* demands of *employers* and *subsequent* demands of *employees* considered together is, in our opinion, that there was no dispute *with the employers who served logs* created by any or all of these logs as to rates lower than those specified in the employers' logs." I agree with this view of the matter. But their Honors considered that in virtue of sec. 28 (3) the Court of Conciliation and Arbitration had jurisdiction to make the variation because a new dispute had arisen of sufficient ambit to justify the reduction. If this were not so, I think the variation would be invalid. To settle a dispute by prescribing a rate of wages lower than the rate in controversy—the rate the employers concede or are willing to pay —does not appear to be arbitration for the settlement of that

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dispute. Circumstances may arise, although I have not been able to imagine them, in which the fixing of lower wages than are conceded is relevant to the composition of differences between the parties; but in the circumstances of the cases before us I am unable to see how it could be thought necessary or expedient for the preventing or settling the dispute within the meaning of sec. 38B of the Act or in any way to arise out of or be connected with the original dispute. I turn, therefore, to the new dispute which is alleged as a justification for the variation. The first difficulty I encounter is the complete absence of any communication between the parties before this application came into a Court of Conciliation and Arbitration or any evidence of the state of their aspirations or desires. No doubt the motives which we cannot but know are likely to be supplied by the prevailing condition of affairs, contain all the factors from which disputes arise. But it is difficult to treat the mere application to a Court to reduce wages and the opposition thereto in Court as bringing into existence the very dispute which the proceedings are supposed to be settling. But in any case sec. 28 (3), in referring to another proceeding, appears to me to mean a proceeding in a dispute of which the Court has taken cognizance under sec. 19. Cognizance is the commencement of the Court's proceeding in any dispute. From the beginning the scheme of the statute has been to enable the Court to acquire in various ways cognizance of industrial disputes and then, and then only, to charge it with the duty and give it the authority to deal with them. There is nothing in sec. 28 (3) to suggest a departure from the scheme; on the contrary the very reason for interpreting its provisions as allowing a variation of an award to be made in a new dispute lies in its reference to another proceeding which, in view of the scheme of the Act, appears to mean a proceeding in another dispute commenced by the taking of cognizance under sec. 19. I therefore think the Court of Conciliation and Arbitration derived no authority from any new dispute. The order of variation is, in my opinion, invalid. I cannot doubt that the question of the invalidity of the order is within sec. 21AA a question of law arising in relation to an order of the Conciliation and Arbitration Court. The fact that the parties are not in agreement as to the inferences of fact which must be considered before the

ultimate question of law is determined, does not deprive this Court of jurisdiction under that section. The section gives us original jurisdiction in justiciable matters, and, unless the facts are predetermined—and here no provision is made for a predetermination—we must determine them ourselves although in the end we are confined to a question of law arising from them. Nor do I think that *Ince's Case* (1) prevents us from ascertaining the ambit of the original disputes although they have been settled by award.

The questions should all be answered No.

DIXON J. By an award which came into operation on 1st September 1927, an award which came into operation on 25th November 1927 and another which came into operation on 1st May 1928, the Commonwealth Court of Conciliation and Arbitration prescribed minimum rates of pay for employees of insurance offices. The fixed period of these awards has long since expired, but they remain in force by virtue of sec. 28 (2) of the Act. The Court of Conciliation and Arbitration has now made a variation of the awards to operate for six months from 31st July 1931 "reducing all wage rates prescribed by the awards and payable thereunder from time to time by ten per centum." The validity of the orders of variation is attacked upon the ground that the reduction would establish minimum rates below those proposed by the employers in logs which are said to define the ambit of the disputes settled by the original awards. It appears that on 14th May and 1st June 1927 an industrial organization of employees served upon a large number of employers a log demanding for its members working conditions and minimum salaries which were set out in detail. On 30th May 1927 these employers served upon the employees' organization and many employers who did not belong to that organization, which had few members in New South Wales, a log of conditions and salaries described as "the wages and conditions such employers desire," but confined in application to Victoria, New South Wales, South Australia and Western Australia. The document began:—"The employers on whose behalf this log of wages and conditions of employment is served . . . claim that the wages and conditions under

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

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which their employees are at present working should be altered. They claim that all existing awards, agreements and practices should be determined and that this log should govern the wages and conditions of employment of all their respective employees, whether members of any organization or not." Without, so far as appears, any further communication between them, each side applied to the Court of Conciliation and Arbitration for a compulsory conference treating failure to comply with its log as giving rise to a separate industrial dispute. Compulsory conferences were accordingly summoned for the same day, when the Conciliation Commissioner, proceeding upon the view that there were separate disputes, made two orders referring the alleged disputes separately into Court. I cannot think the view that there were two disputes is right. Both logs dealt with the same subject matter, and each stated what its authors desired or required upon the subject. As between the organization of employees and the employers the nature and scope of the dispute was determined by the documents. If and so far as the log delivered by the employers provided their answer to a particular demand of the employees' organization, and vice versa, it appears to me to be impossible to treat the area of dispute as extending beyond the demand and the answer. In respect of Queensland the employers' silence might perhaps be taken as equivalent to a complete refusal to agree to any rates or salaries or conditions to prevail in that State. In the same way the individual employees who failed to reply to the service of the employers' log upon them might perhaps be taken as refusing its requests altogether. What precisely this log requested them to do is not clear. In some respects it reads more like a notification of what the employers will seek at the hands of some authority, no doubt the Court of Conciliation and Arbitration, than a demand upon the employees for something within their volition. But, whatever its effect, I am unable to agree with the contention that it propounds a demand that the salaries payable to employees shall be those specified or less. It appears to me to express the employers' desire that the salaries paid shall be those stated and to imply a willingness to pay such salaries at least. The Court of Conciliation and Arbitration made a single award under both orders of reference.

It adopted rates of salary considerably less than those of the organization's log, but somewhat more than those of the employers' log. About a month later four more insurance companies served the employers' log upon the employees' organization, and very many insurance companies served upon the organization and upon a great number of individual employees in New South Wales who were not members of the organization, a log expressed in the same form but adopting the rates of salary prescribed by the award. These logs were treated as generating two disputes which were made the subject of compulsory conferences and orders of reference into Court. The second of the three awards was made in settlement of these alleged disputes. It prescribed the same rates and conditions. Six months later another log in the same form adopting the rates of the award was served by a great number of insurance companies upon the employees' organization and upon many individual employees in New South Wales who were not members of the organization. This led to the third award, which again prescribed the same rates and conditions.

In none of these alleged industrial disputes, in my opinion, did the employers demand, request or seek rates of salary below those stated in their logs in respect of the States to which and the persons to whom the logs applied: and I think the logs implied a readiness and willingness to pay those rates. It appears to me to follow that the payment of lower rates was not in dispute in any of the industrial disputes in settlement of which the three awards were made. But the awards, as they have now been varied, prescribe minimum rates of salary which are in fact lower. Unless a justification for the orders of variation can be found in some further industrial dispute, the result is that awards now stand in force establishing minimum wages lower than rates which were not in dispute. The awards operate not merely to make it unlawful to pay less than such wages, but also to determine the appropriate minimum to the exclusion of all wage regulation except under some other Federal law (*Ex parte McLean* (1); *H. V. McKay Pty. Ltd.* v. *Hunt* (2); *Clyde Engineering Co.* v. *Cowburn* (3)). Assuming that no other industrial dispute has

(1) (1930) 43 C.L.R. 472.
(2) (1926) 38 C.L.R. 308.
(3) (1926) 37 C.L.R. 466.

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come into existence which authorizes the variation, the matter should, I think, be considered just as if, in the first instance, minimum rates had been established by the awards at amounts lower than the employers proposed in the disagreement which caused the dispute. Sec. 38B of the statute provides that the Court shall not be restricted to the demands made by the parties in the course of the dispute but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of preventing or settling the dispute. But the relief given must be relevant to the actual dispute, incidental or conducive to its settlement. In *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (1), a term of an award was held invalid which prescribed minimum rates for apprentices higher than those demanded in the log. *Isaacs* J. (as he then was) said (2):—"In my opinion the Court had no greater jurisdiction to award a higher wage than was asked, than it had to reduce wages below what was actually in dispute. It is the *dispute* that has to be regarded and adjudicated upon. In deciding the dispute, it must always be remembered that, as stated by Lord *Macnaghten* in *Midland Railway Co.* v. *Loseby and Carnley* (3):—'In coming to his determination it must be open to the arbitrator to investigate and to determine any question *incidental* to that referred to him—any question which must be determined in order to determine finally the point in difference.' There is nothing in the world to prevent employers or employees from making their respective demands as wide as they please; but when they choose to select one particular limited demand as the subject or point of dispute, and refer that to the Court, then that is what the Court has to decide. It may give anything between the maximum and the minimum limits of the dispute, but it can pass neither further forward than the maximum, nor further back than the minimum."

I think it follows that the rates awarded by the variation could not have been prescribed by the original award. Sub-sec. 3 of sec. 28 empowers the Court, if it is satisfied that circumstances have arisen which affect the justice of any terms of the award, in the same or another proceeding to set aside or vary any terms so affected.

(1) (1910) 11 C.L.R. 1. (2) (1910) 11 C.L.R., at p. 61.
(3) (1899) A.C. 133, at p. 137.

No doubt the Court of Conciliation and Arbitration could have set aside the term prescribing minimum rates altogether, and, if a new dispute existed relating to the lowering of wages, it might, in a proceeding in that dispute, have acted under the sub-section by ordering a reduction below the limits of the original dispute. But unless warranted by a new dispute, I do not think a variation of the old awards can be made under the provisions of sub-sec. 3 if the variation goes beyond the limits imposed by the old dispute upon the Court's power to make an award. It is said that a new industrial dispute did come into existence and that it afforded a justification for the reduction which the variation would accomplish. The Court of Conciliation and Arbitration did not acquire cognizance of any such dispute under sec. 19, and there is much to be said for the view that, when sec. 28 (3) speaks of "the same or another proceeding," it is contemplating a proceeding arising out of the Court's cognizance of the same dispute and a proceeding arising out of its cognizance of a new dispute. (Compare the opening words of sec. 38.) But in this case there is nothing to establish a new dispute except the application on the part of the employers for the variations and the opposition to them on the part of the organization. No doubt the known circumstances make it easy for an industrial dispute to arise about reduction of salary, but it does not appear that any such dispute extending beyond the limits of any one State in fact came into existence, or was threatened, impending or probable. For these reasons, I am of opinion that the orders of variation were beyond the jurisdiction of the Court of Conciliation and Arbitration.

The proceedings before this Court in which the validity of the orders is impeached are brought under sec. 21AA. The decision in the case of *Ince Bros.* v. *Federated Clothing &c. Union* (1) establishes that after a dispute has been settled by award a decision cannot be obtained under this provision on the question whether a dispute exists, and that the parties are confined to applications for decisions on questions of law arising in relation to the dispute or to the proceeding or to any award or order. I have had some doubt whether the question of the validity of the orders of variation is a question of

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

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law, depending as it does to a great extent upon the ascertainment of the ambit of the disputes settled by the original awards. But I do not think the Court can be restricted under sec. 21AA to the decision of a question of law arising upon ultimate facts which are admitted. The proceedings cannot be like a special case which is either stated by the parties who agree on the facts or by another tribunal which has already found the facts. Of necessity the facts which raise the question of law must be ascertained by this Court for itself. In this view of the section it is competent for this Court to make the inferences upon which the ultimate question of law arises, namely, the validity of the orders of variation. Further the suggestion that a new dispute existed may be investigated as an allegation of a fact which would or might intercept the legal conclusion from the other facts. This view seems to me to be supported by the decision of the Court on applications under sec. 21AA in *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall and Sons*; *In re American Dry Cleaning Co.* (1), and, perhaps, in *Alderdice's Case* (2). The existence or non-existence of a new dispute, even if the summons were amended, could not, in my opinion, be decided as a separate question under the earlier words of sub-sec. 1 of sec. 21AA because, although no award in that alleged dispute has been made, it has not been submitted to the Court's cognizance under sec. 19. See *Western Australian Timber Workers Industrial Union of Workers (South West Land Division)* v. *Western Australian Sawmillers' Association* (3).

In my opinion each of the three questions in the summons should be answered No.

EVATT J. On May 14th and June 1st, 1927, the registered organization of employees, which is the present applicant, served a log of demands on the employer respondents mentioned in the consent award to be referred to later. On or about May 30th, 1927, the said employer respondents served a separate log of demands upon the Federation and also upon a large number of individual employees in the State of New South Wales who were not members of the Federation.

(1) (1929) 43 C.L.R. 29, at p. 32.
(2) (1928) 41 C.L.R. 402.
(3) (1929) 43 C.L.R. 185, at pp. 202-203.

The Federation's log demanded of the employers the payment of certain minimum salaries to members of the Federation. For the seventh year of service (which is taken by way of illustration) the demand was a minimum salary of £265 per annum. The employers demanded of the Federation that the schedule of industrial conditions set out in their log "should govern the wages . . . of all their respective employees." The wages scheduled were described "as those such employers desire." The rate of pay claimed was £220 per annum for the seventh year of service (which is again taken as a test illustration). The log asked the Federation and the individual employees to reply on or before June 15th, 1927, whether it and they agreed to be bound by the terms set out.

On or about June 22nd, 1927, the employers and the Federation both applied for the holding of a compulsory conference under sec. 16A of the *Commonwealth Conciliation and Arbitration Act*, and two summonses were issued by the Conciliation Commissioner for the holding of conferences. The two conferences were held at the one time on June 27th, 1927; no agreement was reached between the parties and, on the same day, both disputes, one in relation to the Federation's demands, the other in relation to the employers' demands, were referred to the Court, under sec. 19 (*d*), by two orders of reference.

The order of reference in the dispute initiated by the Federation alleged the existence of an industrial dispute "as to the matters set forth in the 1st schedule hereto," which schedule merely set forth the demands in the log served by the Federation.

The order of reference in the dispute initiated by the employers alleged an industrial dispute "as to the matters set forth" in the log of demands served by the employers on the Federation and the individuals mentioned.

On September 23rd, 1927, the Commonwealth Court of Conciliation and Arbitration made a single award in the matters of the two disputes. The representatives appearing informed the Court that an agreement had been arrived at between the parties in respect of all States except Queensland, and thereupon the award was made "by consent." The employers were named as parties to the award. The salary (for the seventh year) agreed upon and specified in

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the award was £225 per annum. The award was to be in force for a period of one year from September 1st, 1927. After September 1st, 1928, the award continued in force by virtue of sec. 28 (2) of the Act.

In pursuance of applications commenced on February 6th, 1931, a large number of the employer parties to the award in question caused a summons to be issued in the Commonwealth Court of Conciliation and Arbitration calling upon the Federation to show cause why such award "should not be varied" in certain respects, and on July 17th, 1931, the Arbitration Court made an order reducing all wages prescribed in the award by ten per centum. This operated as a reduction of the seventh year's salary from £225 to £202 10s. per annum, which is considerably below £220, the salary which had been mentioned for such year in the log of the employers.

Upon the hearing of the summons before the Arbitration Court Mr. G. A. Mooney, representing the Federation, contended "that the Court had no jurisdiction to make the order asked, on the ground that a reduction of ten per centum would cause the wages to be reduced below those contained in the employers' log, and that any such order would therefore be outside the ambit of the disputes which were limited on the one hand by the employees' log and on the other by the employers' log." This states the case of the employees with precision. The soundness of the contention has now to be examined. But a suggestion has been advanced that, in dealing with an industrial dispute in relation to wages, the Arbitration Court is entitled to award or order a wage, as to which there is no real disagreement between the parties. It is broadly contended that, although the parties have by their conduct clearly defined the area or extent of their wage dispute, the Arbitrator may award a wage which is not included in such area. For instance, if an industrial dispute as to wages exists between employers and employees, and the matter in dispute is whether £200 or £250, or what sum between those two figures should be the standard or basic wage, the Court is said to be entitled to award a standard of £150 or £300, or any standard wage it thinks fit. Put more generally and plausibly, the argument is that, if there is in fact a dispute on the subject of wages, the Arbitrator may deal with the subject by awarding the wage

he thinks suitable. This suggestion is intended to apply to any award or order of the Court, whether made in full or part settlement of an original dispute, or made subsequently by variation of the terms of any award or order. If the field were clear of decisions there would be much to be said for this argument, which denies the existence of any analogy between an industrial dispute with its innumerable ramifications, and a mere civil dispute between individuals, referred to arbitration by formal submission.

But so broad a view of the constitutional and statutory power has not been accepted by this Court in regard to wage claims. For instance, in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1), it was held by *Griffith* C.J., *Barton*, *O'Connor* and *Isaacs* JJ., that the Arbitration Court had no jurisdiction to award a higher rate for apprentices than the rate of wages asked for by the employees. *Isaacs* J. (as he then was) said (2):—"I cannot escape the judicial conclusion that as to some apprentices more has been awarded than was asked for and refused, and therefore more than was in dispute. . . . There is nothing in the world to prevent employers or employees from making their respective demands as wide as they please; but when they choose to select one particular limited demand as the subject or point of dispute, and refer that to the Court, then that is what the Court has to decide. It may give anything between the maximum and the minimum limits of the dispute, but it can pass neither further forward than the maximum, nor further back than the minimum."

Again, when a dispute arose, after a claim had been made by employees for a minimum wage of 13s. 2d. per day, this Court regarded the Arbitration Court as incompetent, in dealing with that dispute, to award a greater sum than 13s. 2d. as the minimum to govern the parties to such dispute (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (3)). "There would," said *Isaacs* and *Rich* JJ., "have been no jurisdiction to award more" (4).

In dealing with the jurisdiction to determine a new dispute between the parties to the old dispute, *Higgins* J. said: "True, there is a power to vary the award on the application of a party

(1) (1910) 11 C.L.R. 1.
(2) (1910) 11 C.L.R., at p. 61.
(3) (1919) 27 C.L.R. 72.
(4) (1919) 27 C.L.R., at p. 81.

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affected or aggrieved (sec. 38 (*o*); sec. 39); but as the award cannot exceed the ambit of the dispute, neither can the award as varied" (1). *Gavan Duffy* J. said: "A dispute to be settled by arbitration means a contest in which a claim, whether moral or legal, is made on one side and resisted on the other, and the settlement of a claim by award means the determination of the question at issue between the parties" (2). *Powers* J. said: "An industrial dispute about a claim for 13s. 2d. a day is, in my opinion, an entirely different dispute from one about a claim for 15s. 6d. a day" (3).

In the *Gas Case* (4) the original claim was for a minimum wage of 13s. 2d. per day, the rate awarded was 12s. 6d. per day, and the new minimum demanded, at the time when the award had still twelve months to run, was 15s. 6d. The actual decision was that the Court was not competent to entertain the new claim, and this probably involved a denial of the Court's power to award the wage of 15s. 6d. by way of variation of the old award. The majority of the Justices seem to have accepted this, either expressly or impliedly.

When the matter was again adverted to in the *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (5), the question raised was not what could be done by altering the award which embodied the settlement of the old dispute, but what could be done in a new proposed award to settle an alleged new dispute. This was pointed out by *Higgins* J., who also said, "Confusion has arisen from treating the settlement of a concrete dispute as if it were the settlement of an abstract subject, such as the subject of minimum wage. The determination of a dispute is conclusive and binding as to that dispute; but it is not conclusive or binding as to a *new dispute*, even on the same subject. The dispute in this case is not the same dispute as that of 1914. It involves a claim for a different minimum; and it is not even a dispute between the same parties" (6).

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (7), this Court held that the power of the Arbitration Court to vary awards

(1) (1919) 27 C.L.R., at p. 90.
(2) (1919) 27 C.L.R., at p. 92.
(3) (1919) 27 C.L.R., at p. 96.
(4) (1919) 27 C.L.R. 72.
(5) (1920) 28 C.L.R. 209.
(6) (1920) 28 C.L.R., at p. 236.
(7) (1920) 29 C.L.R. 106.

under sec. 38 (*o*) applied to an industrial agreement, which, by sec. 24, was deemed to be an award. One of the stated conditions, however, was that variation must be "within the ambit of the original dispute" (*Knox* C.J., *Gavan Duffy* and *Starke* JJ. (1)). The Court could vary, in the phrase of *Isaacs* and *Rich* JJ., "within the limits of the dispute" (1).

In the *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (2) this Court, for the purpose of inquiring into the jurisdiction of the Court of Arbitration to award certain rates of pay, examined the log of demands made by the employees. *Knox* C.J. said (3):—"The answer to that question" (of jurisdiction) "obviously depends on what was the ambit of the dispute in which the award was made. In the present case that ambit appears to be defined by the demand made by the log and the refusal to comply with the demand." *Isaacs* J. spoke of "the limits of the dispute" (4) and *Gavan Duffy* J. of "the area of the dispute" (4) in relation to the matters which the award might lawfully cover. No one ever suggested that it was unnecessary to show more than some dispute on the question of wages.

It seems to me that these decisions prevent us from affirming any general power in the Arbitration Court to go outside the subject matter of a wage dispute, and to award a wage, as to which there is no disagreement. It is therefore proper to consider whether the "ambit" of the dispute or disputes being dealt with by the Arbitration Court in the present case was exceeded.

But a question has been raised as to whether the High Court may, after an award is made settling a dispute, determine the area of the dispute by means of proceedings taken under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*. The decision in *Ince's Case* (5) was referred to and relied upon.

Sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* gives jurisdiction to this Court to determine questions which affect the jurisdiction of the specified arbitrators to settle or prevent industrial disputes which are submitted to them. The first kind of question relates to the existence or imminence of the alleged dispute

(1) (1920) 29 C.L.R., at p. 111.
(2) (1924) 35 C.L.R. 349.
(3) (1924) 35 C.L.R., at p. 351.
(4) (1924) 35 C.L.R., at p. 353.
(5) (1924) 34 C.L.R. 457.

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or any part of it. Unless there is, or soon will be, a real dispute covering the necessary geographical area, the Court of Arbitration cannot lawfully exercise its powers and authorities. But, assuming that the dispute submitted either exists or is threatened, impending, or probable, other questions may arise which also affect the powers of the arbitrator. The section enables the High Court to determine questions of law arising in relation to the preceeding or to any award or order. Typical instances to which the section applies are cases where, in the settlement of an admitted industrial dispute, the arbitrator makes or proposes to make an order extending beyond the subject matter of the dispute, or to persons not parties to the dispute.

In relation to the scope of sec. 21AA, an analogous case to the present is *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1). The award challenged in that case was made on August 22nd, 1924. The summons under sec. 21AA was issued on October 27th, 1924, and this Court had before it documents and circumstances from which it determined the area of the dispute. The existence of a dispute was conceded, as here. The facts relating to the dispute were not in controversy, and the conclusion as to the area or limits of the dispute was treated as one of law within the meaning of sec. 21AA. That, in my opinion, is also the position here, and the Court has jurisdiction.

Where a demand relating to salaries and wages is made by employees upon employers, it may take various forms. It frequently asks for a minimum wage of so much per day, per week or per annum. If so, it asks for two things—the grant of some minimum wage, and the fixing of the amount specified as the minimum. A general refusal of the demand therefore denies both the claim to a minimum wage and the fixing of the amount demanded.

But in Australia, there has for long been a general recognition of the employees' right to some secured minimum. Consequently, the actual or implied refusal of the demand is regarded from a practical common sense view, not as disputing the employees' right to have some binding minimum, but merely as disputing the amount claimed. Now, a dispute cannot arise at all if the sum demanded by the

(1) (1924) 35 C.L.R. 349.

employees is considered by the employers as too low or as an acceptable minimum: in either of these events, the possibility of any dispute in relation to the demand is at an end.

Therefore the failure of the employers to comply with the demand has, naturally and properly, been regarded by this Court, including *Higgins* J. with his vast experience in industrial matters, as putting in issue or dispute the question whether the salary or wage demanded *or any lower wage* should be the rule in the industry. This was not because the employers considered that the proper wage was nothing or (say) 1s. per week, but because their silence on the subject matter, or the general nature of their refusal, was interpreted as meaning that the employees' demand could not be granted because the wage claimed was too high—how much too high the employers were not prepared to say.

The disagreement resulting was said to cover the field of wages from nil to the amount demanded, and the Arbitration Court was considered to have jurisdiction to award any sum between these limits. This point of view was impliedly recognized in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1).

But disputes may also spring from the attitude taken by employees to the demands of employers. In some cases the latter also demand that a minimum wage of £*x* shall be the wage governing the industry. There is an apparent anomaly in the demand of an employer for a minimum wage to be paid, because he pays it, and he is at liberty to pay more. But here also, it is properly regarded from a common sense point of view. The employer's demand in such a case really means that he too desires the fixation of some minimum or standard wage, and that £*x* is regarded by him as a suitable figure. When therefore employees refuse to accede to such demand, either expressly or by merely ignoring it, as to what is the resulting disagreement?

Learned counsel suggested that, in such a case, the area of disagreement is—what wages from £*x* *downwards*. But there can only be dispute or disagreement at all in relation to the employers' demands if these are considered by employees to be unsatisfactory.

(1) (1924) 35 C.L.R. 349.

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That event postulates that the employees want better terms than those suggested, not worse. Better terms from their point of view mean higher wages. Therefore, if there is disagreement at all, it is as to whether the wages awarded shall be those suggested and demanded by the employers, namely, £*x* or some higher wage, i.e., better terms from the employees' point of view. How much better or higher is not stated by the employees: therefore the dispute is—what wages—£*x* *or what higher sum* should be the standard governing the industrial relationship of the parties. In such a case the employees do not expect the award of an infinitely great salary, any more than the employers in the converse case expect the award of no salary at all. But the silence of the employees really means —if it is to result in dispute—" The standard asked is too low and should be higher—how much higher we are not prepared to say."

In applying such principles to the present case, the vital point is that the employees' demand of £265 as a minimum wage was not merely refused. There was a failure to comply with it, and if that expressed the whole truth of the matter, the area of minimum wage dispute would have extended from nil to £265. But the truth was that the area of dispute did not cover so wide a field. In the case of simultaneous or almost simultaneous wage demands by employers on employees, and employees on employers, both sets of demands must be considered in relation to the attitude of the opposing party. If, therefore, employers refuse a minimum wage of £*x* demanded by the employees, and do no more, it is possible to accept the view that the subject of dispute is—what wages £*x* to £0 should be the standard. But if employers, instead of a general failure to comply, themselves state the standard they desire, namely, £*y*, and, *a fortiori*, if they *demand* £*y* as the standard, the area of dispute is £*x* to £*y* and does not extend below £*y*.

The converse proposition also applies. If employers demand £*y* as the standard wage, and the employees say nothing on the subject the ambit of the dispute is from £*y* upwards indefinitely. If, however, it appears that the standard desired by the employees is £*x* and no higher, or, *a fortiori*, if the sum they choose to demand as the standard in £*x*, the ambit of dispute is from £*y* upwards to £*x* but no higher.

In the present case the employers' demand was not for a minimum of £220 per annum, but for a governing wage of £220. Their letter asked the Federation to agree to this sum. It refused to agree, because it was demanding £265 as the suitable standard. The employers' log is to be treated as demanding the fixing of a standard, namely, £220. There could be no disagreement in respect of such log of demands as to whether the standard should be lower than £220, because the employers were willing to pay £220. But the employees' desire was for a standard of £265, and to that the employers disagreed, not merely because it was too much, but because it was too much by £45. And the employees also objected to the standard of £220 asked by the employers, not merely because it was too little, but because it was too little by £45.

A question has been raised whether the award made on September 23rd, 1927, is to be regarded as having been made in settlement of one or two disputes. The formal proceedings prior to that day, particularly the orders of reference, point to two disputes. Moreover, the parties who were in dispute in relation to the employers' log included New South Wales employees, not members of the Union. These employees must be regarded as being in disagreement with their employers, and, as to them, the subject matter of dispute as to wages was, for the reasons already advanced, what standard wage from £220 upwards should govern the parties. Between the two disputes, there was a lack of complete identity either of subject matter or of parties.

Between the Federation and the employers, however, the subject matter of wage dispute had, on the date of the compulsory conferences, which were held together and followed by two orders of reference, become identical. The subject matter of each dispute was—what sum between £220 and £265 should be the standard wage ?

It follows that the Court has made orders which went beyond the limits of the dispute originally submitted for settlement, and the next question is whether, as the Arbitration Court has held, sec. 28 of the *Commonwealth Conciliation and Arbitration Act* can be invoked as a special authority for what has been done.

The power given by sec. 28 (3) of the Act is to be exercised only where the Court is satisfied that circumstances have arisen " which

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affect the justice of any terms of an award." If so satisfied, the Court may "set aside or vary" terms which, because of their injustice, should operate no longer. The power, therefore, relates only to the terms of an existing award. The period of continuation of such award has to be specified in it (sec. 28 (1)), but, after the expiration of such period, it continues in force "until a new award has been made" (sec. 28 (2)). Such "new" award refers to an award made "for the settlement of a new industrial dispute."

The authority conferred by sec. 28 (3) may be exercised before or after the determination of the period specified in the award; but the exercise of the power is treated as distinct from the making of a new award in settlement of a new dispute. As a matter of construction, therefore, it is reasonably clear that the object of sec. 28 (3) is to enable the Court of Arbitration to exercise the power to set aside or vary, only in relation to the industrial dispute, which is and may be called "old" in that it is regarded as being "settled" by the award, but which is treated as still surviving, because such settlement may be revised and its terms altered. The power in sec. 28 (3) may be exercised in such manner as the Court of Arbitration thinks fit—notwithstanding anything contained in the Act, and the Court proceeding may, but need not be, the same as that in which the award was originally made. But the jurisdiction is still referable to the dispute in settlement of which the Court made its old award.

The Full Court of Arbitration, impressed, no doubt, by the difficulty in the cases before it, of founding jurisdiction in respect of some of its orders, gave an entirely different application to sec. 28 (3). The view it adopted was that sec. 28 (3) could be applied to an entirely new dispute—"a dispute as to the alleged injustice" of the old award, the parties to the new dispute being the "employers and employees who are parties to the application to set aside or vary" under sec. 28 (3). The alteration of the old award resulting from setting aside or varying its terms "is in substance the making of a new award upon the new dispute." Such was the reasoning.

The theory advanced is both subtle and attractive. Behind it is the truth that the Court of Arbitration may prevent, as well as settle a dispute, and prevent by means of arbitration, as well as conciliation (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River*

Steamship Co. [*No.* 1] (1)). The new dispute is called by the Court a "new contingent dispute," the Court inferring from the attitude of the parties before it that, although no actual dispute has yet arisen between the parties out of Court, such a dispute is so probable as to be certain : and the subject of the dispute may also be inferred from the conduct of the proceedings.

I do not think that there is anything in the constitutional power which prevents the making of such an inference as to the probability of a dispute, or the exercise of the award making power to prevent it. The real objection to the theory is, in my view, the true scope and meaning of sec. 28 (3) itself. In my opinion, the Court may exercise its jurisdiction under that sub-section on an application to it by any party to the old award. It is not essential to the power that there should be any impending dispute as to the justice of the terms of the award. In a six-State dispute settled by an award, the power may be exercised on the application of a single party to the award or of parties from one State only (sec. 39). That may not be sufficient to convince the Court of the justice or wisdom of altering the award. But an award may be found to operate unfairly in one State and fairly in five. None the less, the power under sec. 28 (3) may be exercised. Such power, in other words, is not intended for dealing with a new dispute, actual or probable. If it were so, an actual or probable extension of a dispute beyond the limits of one State would be constitutionally necessary. But, under sec. 28 (3), the Court may terminate the old award altogether, or set it aside so far as it concerns a party or parties in one State only, or in more than one State. In certain circumstances it may even act so as to give a State tribunal full authority in respect of parties and subject matter in that State. If this view is right, it is clear that the power in sec. 28 (3) cannot be regarded as a statutory authority to the Court to make a new award for the purpose of preventing the coming into existence of a new dispute.

The only possible warrant for the orders made is sec. 38B of the Act. But it was not suggested in argument here or before the Arbitration Court, that the terms of sec. 38B were a sufficient legal basis for what was done. The only argument in support of this

(1) (1913) 16 C.L.R. 591.

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could be that, if sec. 28 (3) does not allow the Arbitration Court to make what is substantially a new award in prevention of an industrial dispute, sec. 38B gives a general power to make orders in prevention of a dispute. No doubt this is an important section of the Act, but it must be read with sec. 19 and sec. 28 itself. Sec. 28, as originally framed, contemplated that, after the period specified in the award for its expiry, it would ordinarily be followed by a new award in settlement of a new industrial dispute. Injustice resulted from the fact that although the period specified duly elapsed, and a new dispute between the parties at once occurred, the new award could not cover the period between the Court's obtaining cognizance of the new dispute and the date of the new award (*Waterside Workers' Case* (1)). Hence the amendment in No. 31 of 1920, sec. 13, adding the proviso to sec. 28 (2).

But members of this Court had also questioned the power to set aside or vary the old award whilst it was continued in force by sec. 28 (2). *Isaacs* and *Rich* JJ., in the *Waterside Workers' Case* (2), said: " . . . on fuller consideration we think Parliament has not given the power of variation after the specified period has elapsed." Hence the addition of sub-sec. 3 of sec. 28 in October 1920, several months after the opinion expressed by *Isaacs* and *Rich* JJ. These amendments were both related to the primary command in sec. 28 (2) that, after its term had expired, the old award was, by force of the statute, to remain in force until a new one was made. Subject only to the proviso to sec. 28 (2) and to sec. 28 (3), the scheme of the Act was that the old award was to be followed by a new award in relation to a new industrial dispute of which the Court would acquire cognizance in one of the four ways mentioned in sec. 19, but in no other way.

In my opinion, that part of sec. 38B which empowers the Arbitration Court to make orders for the purpose of " preventing further industrial disputes " has no application to any alteration of an award which is being carried on by sec. 28 (2) until a new award is made. This was impliedly recognized in the *Gas Employees' Case* (3): sec. 38B was then in force. If sec. 38B could have been invoked by the

(1) (1920) 28 C.L.R. 209. (2) (1920) 28 C.L.R., at p. 223.
(3) (1919) 27 C.L.R. 72.

Arbitration Court, it is reasonably clear that it would have been. In short, sec. 28 (3) is the code dealing with awards carried on by sec. 28 (2). The only power in the Arbitration Court, after the expiry of the award, is to set aside any or all of the terms of the award, or to vary the terms within the ambit of the old dispute. The settlement of the old dispute may thus be altered or revised, or it may continue as a settlement no longer. But if it is decided to revise, the new settlement must not trespass beyond the subject matter as to which there was a dispute between parties, duly settled by the old award.

It is noticeable that in 1916, when *Higgins* J. was President of the Court of Arbitration and was making an award in order to prevent an industrial dispute extending beyond the State of Queensland, the procedure followed was in accordance with sec. 19 (*a*) of the Act, the Registrar certifying the impending dispute as proper to be dealt with by the Court in the public interest (*Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association*; *Ex parte Commonwealth Steamship Owners' Association* (1)): sec. 38B was then in force.

The Arbitration Court has also suggested that one express object of sec. 28 (3) was to empower the Court to grant a demand "outside the ambit of the dispute in respect of which the award had been made" by enabling it to "set aside or vary" any unjust terms of such award (*Entrepreneurs Association of Australia* v. *Australian Theatrical and Amusement Employees' Association* (2)). To "set aside or vary" is an astonishing phrase to use for the expression of such an idea. In my opinion, the question of empowering the Arbitration Court to go beyond the limits of the dispute before it, was not being considered by Parliament at all in the amendment of 1920; and, for reasons already given, it was not the purpose of Parliament to deal by such amendment with the prevention of a new dispute by means of an amendment of the old award.

The opinion to which I have come is that none of the challenged orders of variation, which gave effect to a ten per centum reduction of wages, were made in settlement of any dispute between the Federation and the employees. All the variations fixed a wage

(1) (1916) 10 C.A.R. 429, at pp. 432-433. (2) (1931) 30 C.A.R.

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considerably lower than £220. The only wage disputes between the parties over which the Arbitration Court had jurisdiction under the statute, were disputes as to an adult standard, not exceeding £265 on one hand and not less than £220 on the other. The ambit of wage dispute was still narrower in some cases. In no case did it extend lower than £220 for the test year of service. Nor can the variation be justified under sec. 28 (3) as an award made for the purpose of preventing a new dispute, because that sub-section is directed merely to the alteration of the terms of settlement of the old dispute. The awards in the present case may be set aside altogether, but, if their terms are varied, the altered awards must not exceed the limits of the old disputes. In the present circumstances, sec. 38B does not authorize the making of a new award in prevention of a new dispute between the parties to the proceedings for variation, although the conduct of parties during such proceedings may warrant an inference that a new dispute is impending or probable. After the period specified in an award has expired, no new award in exercise of the "preventive" jurisdiction of the Arbitration Court can be made, except in pursuance of sec. 19 of the Act.

The questions should be answered:—(1) No. (2) No. (3) No.

McTIERNAN J. On 6th February 1931 a number of insurance companies, which were bound by an award of the Commonwealth Court of Conciliation and Arbitration made in a proceeding entituled "In the matter of the Australian Insurance Staffs' Federation, claimant, and the Atlas Assurance Company Limited and others, respondents, No. 59 of 1927, and also the Accident Underwriters' Association of New South Wales and others, claimants, and the Australian Insurance Staffs' Federation and others, respondents, No. 61 of 1927," caused a summons to be issued out of that Court by which they applied for an order varying the award in the manner mentioned in the summons, that is to say, *inter alia*, by reducing all wages fixed by the award in accordance with the fall in the cost of living since it was made, and then reducing the wages so ascertained by ten per centum. On the same day and on the 9th February, respectively, similar summonses were issued at the instance also of a number of

employers who were bound by awards of the Court, made subsequently to that above mentioned, in proceedings entituled, respectively, "In the matter of the Australian Provincial Assurance Association Limited and others, claimants, and the Australian Insurance Staffs Federation and others, respondents, No. 165 of 1927, and also the Accident Underwriters Association of New South Wales and others, claimants, and the Australian Insurance Staffs' Federation and others, respondents, No. 166 of 1927," and "In the matter of the Accident Underwriters' Association of New South Wales and others, claimants, and the Australian Insurance Staffs' Federation and others, respondents, No. 161 of 1928," and "In the matter of the Australian Insurance Staffs' Federation, claimant, and the Australian Pastoral Fire and Marine Assurance Company Limited and others, respondents, No. 20 of 1928." These applications came on for hearing before the Full Court of the Commonwealth Court of Conciliation and Arbitration, which on 17th July 1931, made orders varying those awards by reducing all wage rates prescribed thereby and payable thereunder by ten per centum.

The Australian Insurance Staffs' Federation, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1930, applied by way of summons under sec. 21AA of that Act to this Court for a decision on questions of law which have arisen in relation to the above-mentioned orders of the Commonwealth Court of Conciliation and Arbitration. The questions are set out in the summons. This summons came on for hearing before *Starke* J. on 3rd September 1931, who, pursuant to sec. 18 of the *Judiciary Act* 1903-1927, ordered that it be argued before the Full Court of the High Court. The validity of each of the orders must, in my opinion, depend on the question whether it was made within the ambit of an industrial dispute of which the Court had cognizance. Thus two questions arise: 1. Was the variation which was ordered to be made in each case, within the ambit of the industrial dispute for the prevention and settlement of which each award was made? 2. If the answer to this question is in the negative, was such order within the ambit of another industrial dispute of which the Court had cognizance? The validity of the test proposed in the first question is, in my opinion, well

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established by the authority of decisions of this Court. In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1), *Isaacs* J. said (2):—"And in my opinion the Court had no greater jurisdiction to award a higher wage than was asked, than it had to reduce wages below what were actually in dispute. It is the *dispute* that has to be regarded and adjudicated upon. In deciding the dispute, it must always be remembered that as stated by Lord *Macnaghten* in *Midland Railway Co.* v. *Loseby and Carnley* (3): 'In coming to his determination it must be open to the arbitrator to investigate and determine any question *incidental* to that referred to him—any question which must be determined in order to determine finally the point in difference.' There is nothing in the world to prevent employers or employees from making their respective demands as wide as they please; but when they choose to select one particular demand as the subject or point of dispute, and refer that to the Court, then that is what the Court has to decide. It may give anything between the maximum and the minimum limits of the dispute, but it can pass neither further forward than the maximum, nor further back than the minimum. As unfortunately the maximum has been passed, the award is in respect of that branch invalid." (See also *R.* v. *Commonwealth Court o Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (4); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (5); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (6); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australia* (7); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (8).)

This principle may now be applied to the present case. At the time the orders varying the above-mentioned awards were made, these awards were continuing in force by the operation of sec. 28 of the *Commonwealth Conciliation and Arbitration Act*. The orders varied the awards so as to reduce the rates payable thereunder below the rates mentioned in the employers' logs to which reference

(1) (1910) 11 C.L.R. 1.
(2) (1910) 11 C.L.R., at p. 61.
(3) (1899) A.C. 133, at p. 137.
(4) (1909) 8 C.L.R., at p. 439.
(5) (1920) 27 C.L.R., at p. 564.
(6) (1924) 34 C.L.R. 482, at pp. 546-547.
(7) (1925) 35 C.L.R., at p. 482.
(8) (1924) 35 C.L.R., at p. 351.

will now be made. A typical instance of the effect of the orders varying the awards is that the rate prescribed to be paid to an employee in his seventh year of service, namely, £225 per annum, is reduced to £202 10s. per annum.

On the 14th May and on the 1st June 1927 the employees served a log on the employers, which are parties to the award first above-mentioned. That log states: "The following shall be the minimum salaries . . . to be paid to . . . members of the above Federation in the insurance industry." The log proceeds:—"Clause 1. Rates of Pay. Except as hereinafter provided the minimum rates of pay to be paid by the respondents to members of the Federation shall be as follows"; then, in a list headed "Scale of Rates of Pay for Males," there appears, for example, "7th year of service, £265 per annum." It was contended that the effect of this log was to fix the upper limit of the dispute which arose from it at the scale of rates specified, but, in the events which happened, the nether limit of the dispute was not fixed, and a variation of the award fixing, e.g., the rate of pay for an employee in his seventh year of service at £202 10s. is therefore within the ambit of that dispute. In the view which I hold, it is not necessary to consider whether this contention correctly describes the ambit of the dispute which arises from the above-mentioned log, considered apart from the events which supervened. On 30th May 1927 the employers served a log on the applicant Federation and a number of employees who were not members of the Federation. This log is addressed: "To the Australian Insurance Staffs Federation and to all employees of Assurance and Insurance Companies, and Underwriters Associations, on whom this log will be served." It states:—"The employers on whose behalf this log of wages and conditions of employment is served, . . . claim that the wages and conditions under which their employees are at present working should be altered. They claim that all existing awards, agreements and practices should be determined, and that this log should govern the wages and conditions of employment of all their respective employees, whether members of any organization or not. The following are the wages and conditions such employers desire." Par. 2 is headed: "Rates of Pay." In this paragraph appears,

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inter alia, "7th year of service, males, at the rate of £220 per annum." In my opinion, in the result, there were not two separate industrial disputes. There was, I think, but one dispute and its ambit must in this case be determined by considering the two logs in apposition, one to the other. The employers' log fixed the lower limits of the dispute as to rates of pay. The dispute which arose had, in my opinion, limits which were discernible, and it did not include any issue or contention, for example, that the salary to be paid to an employee in his seventh year of service should be less than £220 per annum, the rate mentioned in the employers' log. In view of the employees' and employers' logs respectively in this case, it would, in my opinion, be quite contrary to the known facts to say that the employers and employees were in dispute on the question whether less than the rates mentioned in the employers' log should be paid to their employees who would be bound by the award. The Court could not, consistently with the authorities which I have mentioned, have prescribed, for example, less than £220 for an employee in his seventh year of service, when it made the first award. It would be peculiar for the Court, in prescribing a rate of wages as part of an award for the prevention or settlement of a dispute, to force upon employees a lower rate of pay than that which the employers said they would pay them, or to compel the employers to pay a higher rate of wages than that which the employees said they claimed. Such an award would travel outside the termini of the dispute in which the parties were engaged. Instead of settling the dispute, it may, in fact, widen it. But whatever its result in fact, such an award, particularly if made *in invitos* the parties, could not be said to settle the dispute of which the Court had cognizance. The Court, therefore, could not originally have awarded less than the rates mentioned in the employers' log. The order varying that award—unless it can be otherwise supported—is bad because the variation of the award which the order purports to effect is beyond the ambit of the dispute of which the award is the outcome. The principle contained in the statement which I have quoted from *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1), is also fatal to the validity

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

of the orders varying the second and third awards respectively. The second award was the outcome of two logs which were served by the employers, one of which echoed the terms of the log which was served before the first award was made and the second log echoed the rates which were prescribed by that award. The third award is founded on a dispute which arose from the service of a log by the employers which also echoed the rates prescribed by the first award.

The proceeding No. 20 of 1928 was instituted by the service of a log by the Australian Insurance Staffs' Federation upon a number of employers, which included employers operating in Queensland. The Court, in making the award, said that "in the circumstances no sufficient reason has been shown for the extension of the award to Queensland," and that the award would be made "in respect of respondents in Victoria and New South Wales." The terms of the award are similar to the log, and the log sets forth rates which were prescribed by the award which was already in existence. The award which was made in these circumstances is well described by the learned Chief Judge of the Commonwealth Court of Conciliation and Arbitration in his judgment in the Full Court as a "roping-in proceeding." The employers upon whom the log was served did not, it is true, on their part serve a log stipulating the rates which they would pay. In this case it does not appear to me that it can be contended that the employers claimed that the rates should be lower than those mentioned in the log, even downwards to nil. Viewing the matter in the light of the principles stated in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1), I do not think that there was a dispute between the employers who were served and the employees that the rate of salaries to be paid to them should be lower than what was provided by the award, which was in force in the "industry."

It becomes necessary, therefore, to consider the second question above mentioned, namely, whether the order varying the award was within the ambit of another dispute of which the Court had cognizance. In its reasons for making the orders which are now in question, the Arbitration Court recognized the necessity for the

(1) (1924) 35 C.L.R. 349.

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existence of another dispute and founded its order upon the existence of a "contingent dispute," the occurrence of which, it held, was contemplated by the Legislature in enacting sec. 28 (3) as a basis for action under that sub-section. The Court decided to exercise the power, which, in its opinion, sec. 28 (3) conferred upon it. But, in my opinion, sec. 28 (3) does not empower the Court to vary an award outside the ambit of the dispute which that award determined, nor does it empower the Court to act otherwise than for the purpose of determining an industrial dispute. If the Court should vary an award within the ambit of the original dispute, it would be acting, in the language of sec. 28 (3), "in the same proceedings" as the original dispute. Should it make an order at variance with the terms of an existing award, which would in substance be a new award, the Court would be acting "in another proceeding," that is to say, for the purpose of preventing or settling another industrial dispute of which it had cognizance. This, in my opinion, is the meaning which should be given to the words "in the same or another proceeding." The object of sec. 28 (3) was, I think, to get rid of the restriction on the power of the Commonwealth Court of Conciliation and Arbitration which was discovered in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1) and in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2). It was decided in those cases that, during the period specified by the Court for which an award was to continue in force, the Court could not, in the existing state of the legislation, make another award changing the settlement already made even if grave circumstances, unforseen when the award was made, occurred and a new dispute happened concerning matters which were dealt with by the existing award. The section has removed that restriction. Thus, if the ambit of the original dispute is not wide enough to enable the Court to vary an award in the manner in which it thinks fit, having regard to the circumstances described in sec. 28 (3), the Court is empowered by the sub-section to act, notwithstanding the existing award, if there is a new dispute of which it has cognizance and "circumstances have arisen which affect the justice of any terms of an award." In the present case all that occurred was, that three

(1) (1919) 27 C.L.R. 72. (2) (1920) 28 C.L.R. 209.

summonses were served in respect of the awards which have been mentioned calling upon the respondents to the summonses to show cause why they should not be varied. The respondents appeared and contested the applications before the Court when the summonses came on for hearing. There was not, in my opinion, any " industrial dispute " upon which the orders which were made could be founded. (Secs. 18, 19, 23 and 24 of the *Commonwealth Conciliation and Arbitration Act*; *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1) and *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 2] (2).)

In my opinion the questions should be answered in the negative.

Questions answered in the negative.

Solicitors for the applicant, *Frank Brennan & Co.*

Solicitors for the respondents, *Moule, Hamilton & Derham.*

H. D. W.

(1) (1930) 42 C.L.R. 527.

(2) (1930) 42 C.L.R. 558.