REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1931-1932.

[HIGH COURT OF AUSTRALIA.]

ANTHONY HORDERN AND SONS LIMITED AND OTHERS . . . . . } APPLICANTS;

AGAINST

THE AMALGAMATED CLOTHING AND ALLIED TRADES UNION OF AUSTRALIA } RESPONDENT.

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MELBOURNE, *Feb.* 25, 26; *Mar.* 1.

SYDNEY, *April* 26.

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

Industrial Arbitration—Preference to unionists—Award—Preference granted without limitation—"Other things being equal"—Preference not restricted to such qualification—Validity of award—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 21AA, 40.*

An award of the Commonwealth Court of Conciliation and Arbitration granted preference to unionists in the following terms:—That in all cases in which an employer employed on an average fewer than fifty operatives female members of the Union should be employed in preference to other females; employers or employees and other persons (not being sons or daughters of employers) offering or desiring service or employment at the same time, preference shall, in such manner as is specified in the award or order, be given to such members, other things being equal."

* The *Commonwealth Conciliation and Arbitration Act* 1904-1930, by sec. 40 (1) (*a*), provides that "The Court, . . . by its . . . award, or by order made on the application of any organization or person bound by the award, may . . . direct that, as between members of organizations of

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and in all cases in which an employer employed on an average fifty or more operatives, that female members of the Union should be employed in preference to other females, other things being equal.

Held, by *Gavan Duffy* C.J., *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that the power of the Court to grant preference to unionists was limited by sec. 40 of the *Commonwealth Conciliation and Arbitration Act*, and that the provisions of the award relating to preference were invalid as not complying with the requirements of that section.

SUMMONS and rule nisi for writ of prohibition.

These proceedings comprised a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 and also a rule nisi for a writ of prohibition, both raising the same question, namely, whether an award or order of the Commonwealth Court of Conciliation and Arbitration dated 8th December 1931 made by his Honor Judge *Drake-Brockman* was within its jurisdiction and authority. In the years 1927, 1928 and 1931, various industrial disputes relating to the clothing trade were before that Court in which an organization called the Amalgamated Clothing and Allied Trades Union of Australia claimed, *inter alia*, that "preference of employment shall be given by respondents to members of the claimant Union." Awards were made in the disputes, but the Court did not see fit to grant the preference claimed at that time. In May 1931 the organization applied to the Arbitration Court to vary these awards by inserting therein the following clause: "Preference of employment shall be given by respondents to members of the claimant Union in engaging or retaining in employment employees." On this application the Court made an order that in all cases in which an employer employed on an average fewer than fifty operatives, if and so long as certain conditions were observed by the Union, female members of the Union should be employed in preference to other females; and in all cases in which an employer employed on an average fifty or more operatives, if and so long as the above-mentioned conditions were observed by the Union, that female members of the Union should be employed in preference to other females, other things being equal. Anthony Hordern and Sons Limited and various other persons affected by the order took out a summons against the Amalgamated Clothing and Allied Trades Union of Australia under sec. 21AA of the *Commonwealth Conciliation*

and Arbitration Act 1904-1930 asking for the determination of the questions—(1) whether the said award and order or any part thereof is bad, because (*a*) the matter awarded and ordered was not in dispute between the parties to the award, and (*b*) the matter awarded and ordered is contrary to the provisions of secs. 40 (1) (*a*) and 81A of the *Commonwealth Conciliation and Arbitration Act* 1904-1930; and (2) whether upon its proper construction the said award and order is subject to qualification by reason of the provisions of sec. 40 (1) (*a*) and 81A of the said Act. This summons was ordered by *Starke* J. to be argued before the Full Court. The applicants also applied for a writ of prohibition to set the order aside. This also was referred to the Full Court.

The two applications were now heard by the Full Court at the same time.

Robert Menzies K.C. (with him *Stanley Lewis*), for the applicants. The award for preference made in this case was not within the jurisdiction of the Arbitration Court. The order was not consistent with the terms of sec. 40 of the *Commonwealth Conciliation and Arbitration Act*, and, secondly, it was not made within the ambit of the dispute in respect of which the Arbitration Court had jurisdiction. Preference was given to female members of the Union. It is a preference within the Union over all others male or female, unionists or non-unionists. The preference granted is of a special divided kind and is given to some members of the organization over other members, and that is not the kind of preference contemplated by sec. 40 of the Act. Moreover, such preference is not within the ambit of the dispute. If preference is given it must be given to members because they are members of an organization and not merely because they form a particular class within the Union. Sec. 40 of the Act contains full and exclusive terms to deal with preference, and there is no jurisdiction in the Court to grant preference except in the terms of sec. 40. But, assuming that that contention is wrong, this dispute was not one which included a demand by either party for the kind of preference that was awarded. Under sec. 40 the Court cannot grant a split preference as was done here. In no case can an award of preference be made except to members of a union as such. Sec.

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40 contains the only power to grant preference (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1)). Both grants are bad, namely, the grant to female unionists as such, and the grant to female unionists other things being equal. Sec. 40 is a code and contains the only terms on which preference can be given. If it is not a code, but an addition to the powers of the Court, then, even though no preference has been claimed by the parties, it would confer on the Court power to impose terms not within the dispute. Sec. 40 is idle unless it is a delimitation of powers. It does not add to but subtracts from the powers of the Court. Sec. 40 must be looked to for the purpose of seeing to what extent the Arbitration Court can grant preference (*Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2). Parliament was engaged under sec. 40 in regulating the grant of preference. *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* is wrong in so far as it permits an internal preference, and should be reconsidered by a Full Bench. Irrespective of the terms of the dispute, sec. 40 requires preference to be given to members of an organization, and requires preference of members over non-members. The award was inconsistent with sec. 81A. The learned Judge intended to distinguish between one class and another class between whom other things should be equal. This award could not be construed as subject to the clause " other things being equal." The general rule is that cited in the *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (3). When dealing with preference, not only is an advantage given to some but an injury is inflicted on others. The preference here awarded is outside the ambit of the dispute because the demand in the log for preference to members of the Union is not consistent with preference to some part of the members of the Union.

Stanley Lewis. Sec. 40 is a code and completely regulates the grant of preference. If there is any ambiguity in sec. 40 that construction should be given to it which takes away the common law rights as little as possible.

(1) (1924) 34 C.L.R. 482, at pp. 495, 496, 535, 536, 548, 549.

(2) (1929) 43 C.L.R. 29, at p. 44.

(3) (1931) 45 C.L.R. 409.

Blackburn, for the respondent. The Court's jurisdiction to grant preference in a case in which it is actually claimed in the dispute is not limited by sec. 40. That section does not limit the Court's power to determine the question of preference. If preference is actually being disputed, that dispute can be settled without reference to sec. 40. Sec. 40 gives power to award a limited preference in cases where preference is not in issue (*Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (1)). Sec. 40 is an independent power, independent of the actual claim for preference (*Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia* (2); *The Tramways Case* [*No.* 2] (3)). If sec. 40 does cut down power to award preference when it is claimed, it can only cut it down as to members of a registered organization. The scheme of the Act is to impose on the Court a duty to determine and settle the whole dispute and to leave it free as to that settlement. The whole scheme of the Act is to leave the Court's discretion as to that untrammelled, with the possible exception in sec. 28 in fixing a maximum term that may be provided and overriding the provisions of sec. 81A. With these exceptions the scheme of the Act is to leave the Court free to determine the whole matter. Preference can be awarded in a claim as to wages though no question of preference is raised or denied. Sec. 40 confers jurisdiction to grant preference not only where preference is in dispute but where it is not in dispute. It covers the whole ground of preference (*Ex parte Stephens* (4)). If sec. 40 had not been enacted, there would not have been power to grant preference where preference was not in dispute. The effect of sec. 40 is to give a special affirmative power to allow a grant of preference where preference is not in dispute (*Taylor and Oakley* v. *Mr. Justice Edwards* (5)). Sec. 40 is not restrictive in form, but is enabling, and was enacted to enable the Court to grant preference though preference was not claimed. If unlimited preference is claimed the Court can grant it and if it is part of the dispute the Court must deal with it, but the Court may grant preference where it is not in actual dispute. If the Court thinks it necessary to grant a limited preference it

(1) (1911) 5 C.A.R. 48, at pp. 98, 99.
(2) (1913) 17 C.L.R. 261.
(3) (1914) 19 C.L.R. 43, at pp. 81, 133.
(4) (1876) 3 Ch. D. 659, at p. 660.
(5) (1900) 18 N.Z.L.R. 876.

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should grant it. Sec. 40 (1) (*a*) was not necessary to grant the Court power to deal with preference where it was in actual dispute, but it was necessary to enable the Court to deal with it where it was not in actual dispute. Sec. 40 (2) says that if the Court thinks that limited preference is necessary it should give that preference even though absolute preference is claimed. It covers every case whether preference is claimed or whether it is not. The particular language of sec. 40 is used because the Legislature is conferring a new power. Sec. 40 (1) (*a*) contemplates a case where the arbitrator says " I think, in order to settle this industrial dispute, I ought to give this preference, but I recognize I am doing something not covered by the dispute between the parties," and the Legislature gives him that power to deal with it (*Gilchrist's Case* (1)). The words in the award " other persons " mean " other female persons." The award does not apply at all in a competition between men and women. It only refers to a preference as between women operatives. It intended to grant preference to members of the Union of one sex as against non-unionists of the same sex. The claim in the award is for preference in employment. That means that where members of the claimant Union and non-members come into competition, the member of the Union is to get preference. That means where it is a question between two women, the member of the Union gets preference.

Robert Menzies K.C., in reply.

Cur. adv. vult.

April 26. The following written judgments were delivered :—

GAVAN DUFFY C.J. AND DIXON J. The question for decision is whether an order is valid which the Commonwealth Court of Conciliation and Arbitration has made requiring employers to give preference to unionists in employing female operatives. The provisions of the order do not conform with the conditions which sec. 40 of the Act prescribes in conferring power upon the Court of Conciliation and Arbitration to direct that, among persons offering or desiring service or employment at the same time, members of

(1) (1924) 34 C.L.R., at p. 538.

organizations shall be preferred. Employers whose operatives number less than fifty are required to give preference, not "other things being equal" as the section provides, but unconditionally; no "manner" is "specified in the award or order" in which preference shall be given; and although its meaning is not certain, the order seems to go beyond cases in which persons are "offering or desiring service or employment at the same time," and to intend to impose upon employers a general duty of employing women who are members of the organization in preference to other females.

It follows that the order cannot be supported as an exercise of the power conferred by sec. 40; and, in fact, the learned Judge of the Court of Conciliation and Arbitration who made the order purported to act, not under that section, but under the general power of the Court given by secs. 24 (2) and 38 (*a*) to hear and determine industrial disputes. But, in our opinion, the general power of the Court does not authorize his order. The order deals with preference of members of an organization over other persons in employment, and over that subject a limited and qualified power is specifically given by sec. 40. Extensive and unfettered as the authority of the Court of Conciliation and Arbitration to award preference in settlement of a dispute might have been in virtue of its general power, yet, when sec. 40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing. When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power. It is said, however, that the purpose of sec. 40 is to confer a wider power of giving preference than could be exercised under the general power of settling disputes; that it was framed in order to authorize the Court to give preference although between the parties affected by the order no industrial dispute existed for the settlement of which preference was an appropriate or relevant remedy. But even if this be so, it seems undeniable that sec. 40 was intended also to apply when "preference is necessary for the

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settlement of an industrial dispute." For so much is said in terms by sub-sec. 2 of sec. 40. In other words, the power specially given by sec. 40 extends to every case in which preference in employment is sought for members of an organization over those who are not members. An affirmative grant of such a power, so qualified, appears necessarily to imply a negative. It involves a denial of a power to do the same thing in the same case free from the conditions and qualifications prescribed by the provision.

Further support for this conclusion may be found in the history of sec. 40 and in some considerations which arise upon the face of the statute as it now stands amended. As sec. 40 was enacted in 1904, it contained three provisoes which required the Court to take elaborate precautions for the purpose of bringing the application for preference to the notice of the persons and organizations who might be interested, to allow them to be heard and to avoid an oppressive use of the order for preference. It seems unreasonable to suppose that under the general power to determine disputes the Court was to be at liberty to disregard safeguards of such a nature. Again, as the section now stands, it positively excludes children of employers from the adverse operation of an order of preference. If a parallel and alternative power exists whenever there is an industrial dispute involving preference of employment, the intention of the Legislature to exclude children can never in such a case be effective. For, if the Court were to make an order which ignored the exception, it would, by so doing, evidence its reliance upon the supposed alternative power.

The first question in the summons should be answered that the order dated 1st December 1931 of his Honor Judge *Drake-Brockman* varying the awards in the manner therein set out is bad. The remaining question does not arise. It is unnecessary to issue a writ of prohibition and the rule nisi should lapse.

STARKE J. These proceedings comprise a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and also a rule nisi for a writ of prohibition, both raising the same question, namely, whether an award or order of the Commonwealth Court of Conciliation and Arbitration dated 1st December

1931 is within its jurisdiction and authority. In the years 1927, 1928 and 1931, various industrial disputes relating to the clothing trade were before that Court, in which an organization called the Amalgamated Clothing and Allied Trades Union of Australia claimed, *inter alia*, that "preference of employment shall be given by respondents to members of the claimant Union." Awards were made in the disputes, but the Court did not see fit to grant the preference claim at that time. In May of 1931 the organization applied to the Arbitration Court to vary these awards by inserting therein the following clause: "Preference of employment shall be given by respondents to members of the claimant Union in engaging or retaining in employment employees." The Court, on this application, made an unusual order. It did not grant the preference sought, but, in all cases in which an employer employed on an average fewer than fifty operatives, the Court prescribed, if and so long as certain conditions were observed by the Union, that female members of the Union should be employed in preference to other females. And in all cases in which an employer employed on an average fifty or more operatives, the Court prescribed, if and so long as certain conditions were observed by the Union, that female members of the Union should be employed in preference to other females, other things being equal.

The learned Judge who made this order, Judge *Drake-Brockman*, held, and I think rightly, that, having regard to the claims or logs submitted by the Union in the industrial disputes of which the Court had cognizance, the variation asked for was within the ambit of those disputes; but he does not seem to have considered whether the order he made was within those disputes. Again, the learned Judge held that the jurisdiction given to the Court by secs. 4, 18, 19, 24 and 38 of the *Commonwealth Conciliation and Arbitration Act* to prevent and settle industrial disputes of which it had cognizance was not subject to the limitations or conditions of authority imposed upon the Court under the provisions of sec. 40 of the Act. The applicants contend that the award or order attacked in these proceedings was not within the ambit of the industrial disputes of which the Court had cognizance, and that the remedy provided by sec. 40 of the Act is exclusive and cannot be exceeded, whatever be

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the nature and extent of the industrial dispute before the Court. The first objection appeals to anyone accustomed to the degree of particularity with which controversies between parties are or ought to be developed in the Courts of law. But we cannot expect and ought not to require the same particularity in industrial disputes. Both the Arbitration Court and this Court have held that a general claim for preference by a union for all its members over other persons constitutes a real industrial dispute, and that it is for the Arbitration Court to determine how far, if at all, that claim should be allowed. If the union consists of both male and female employees, there is no reason why the Arbitration Court should not reject the claim as to males and grant it as to females. The greater claim is said to include the less. At the same time, I feel convinced that the award of the Arbitration Court in the present case was not what the parties came to litigate—or, perhaps I had better say, to arbitrate: it was evolved by the learned Judge himself, and appears, on the evidence before us, to affect some 10,000 to 15,000 women, who were not represented before the Court and whose views were never heard and are not required, under the law as it exists, to be heard. But, whatever the hardships upon these women and the injustice they or their employers may suffer, still the award or order of the Arbitration Court is, so far, within the jurisdiction of that Court and valid.

The objection that the remedy provided in sec. 40 of the Act is exclusive must next be considered. Several of the Justices of this Court have expressed the opinion that sec. 40 empowers the Court to grant preference to unionists though preference be not in dispute: *Griffith* C.J., *Isaacs*, *Higgins* and *Rich* JJ. and I were all, I think, of this opinion, though *Griffith* C.J. was disposed to think that the provision contravened the Constitution and was invalid (*Tramways Case* [*No.* 2] (1); *Australian Workers' Union* v. *Pastoralists' Federal Council* (2); *Waterside Workers' Federation* v. *Gilchrist, Watt & Sanderson Ltd.* (3)). An industrial dispute is necessary to found the jurisdiction of the Court, but sec. 40 is valid because it provides a remedy which may be used by the Court for the purpose of preventing or settling industrial disputes. If preference or a minimum wage

(1) (1914) 19 C.L.R., at p. 81. (2) (1911) 5 C.A.R., at pp. 98, 99.
(3) (1924) 34 C.L.R., at p. 549.

—the subjects of sec. 40—be the very matter of dispute, the provisions of secs. 18, 24 and 38 give the Court ample power to determine either. But if neither be the subject of dispute, nor within the range of the industrial dispute submitted to the Court, what is to happen if the dispute cannot be prevented or settled except by provision being made for preference or a minimum wage? Here sec. 40 operates. The remedy may be given by the Court when it makes its award, or at any time thereafter on the application of any organization or person bound by the award. "That section is not," as I said in the *Waterside Workers' Case* (1), "a limitation but an expansion of the authority of the Arbitration Court: it is a substantive grant of authority to the Court in connection with industrial disputes of which it has cognizance, whether preference has or has not been put in dispute by the parties, or claimed in the proceedings before it. It may be exerted even after an award has been made, on the application of any organization or person bound by the award, and whenever, in the opinion of the Court, it is necessary for the prevention or settlement of an industrial dispute or for the maintenance of industrial peace or for the welfare of society."

In my opinion, the questions raised by the summons under sec. 21AA should be determined as follows:—1. No. 2. The order is subject to the provision of sec. 81A. It is not subject to any qualification by reason of the provision of sec. 40 (1) (*a*).

The rule nisi for prohibition should be discharged.

EVATT J. In the judgment which preceded his formal order Judge *Drake-Brockman* pointed out that the clothing trade awards of the Commonwealth Court of Conciliation and Arbitration had been framed so as to render difficult the exploitation of female labour. A term of such award had provided that the award should be binding on the respondent "in respect of every person employed by them in the industry, whether members of the Amalgamated Clothing and Allied Trades Union or not." His Honor proceeded:—

> "It has now been decided by the High Court that this Court has no power to bind respondents to an award in respect of employees who are members of the union (*American Dry Cleaning Co's Case* (2)). The consequence of this

(1) (1924) 34 C.L.R., at p. 549. (2) (1929) 43 C.L.R. 29.

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decision is that there is in fact very little protection for about 80 per cent of the females employed in this industry and there is, consequently, a very wide field of possible exploitation should employers decide to take advantage of the present state of the law. In circumstances where there is keen competition for labour the danger in this regard is perhaps not very great; but, in circumstances such as obtain at present with the large surplus of labour and a particularly keen competition amongst women for the limited amount of employment available, there is a very definite danger that some employers may be tempted to take full advantage of the opportunity to exploit female labour."

Evidence was tendered that, as a result of the Union's having failed to secure award conditions for female workers, sweating existed, and his Honor came to the conclusion of fact that

> "there is some sweating in this industry; but it has not been conclusively proved that such practices are as prevalent as asserted. (I do not overlook the extreme difficulty of obtaining such proof.) However that may be, what is proved beyond a doubt in my mind is that, in the present condition of the law and in the present circumstances of this industry, any employer who has the will to sweat can succeed in his purpose and keep within the law. It is also quite clear in my mind that this 'will to sweat' shows a very definite inclination to increase."

He therefore made an order for variation of the existing awards by providing that, in the smaller establishments, where the danger of exploitation was greater, female members of the Union should be "employed in preference to other females," whilst in the larger establishments, female members of the Union should "be employed in preference to other females, other things being equal."

The obvious effect of such a variation would be to prevent or minimize the danger of "sweating," by inducing female operatives to join the recognized trade union, the members of which enjoyed definite and secured award conditions. But the preference awarded to female members was made conditional upon the Union's allowing all competent employees of good repute to join its ranks. By so joining, female workers would be entitled to the benefits of the existing award wages and conditions.

Sec. 40 (1) (*a*) of the *Commonwealth Conciliation and Arbitration Act* provides:

> "The Court, or a Conciliation Commissioner by its or his award, or by order made on the application of any organization or person bound by the award, may—(*a*) direct that, as between members of organizations of employers or employees and other persons (not being sons or daughters of employers)

offering or desiring service or employment at the same time, preference shall, in such manner as is specified in the award or order, be given to such members, other things being equal."

It is obvious that the measure of preference awarded is greater than that described in sec. 40 (1) (*a*), which only operates "other things being equal," and at the point of engagement. But, with respect to the smaller clothing factories, the preference awarded by Judge *Drake-Brockman* is not qualified by the condition "other things being equal," and is by no means, as I read the order, restricted to the point of engagement, but extends to the "employment" of females, regarded as a continuing relationship. If sec. 40 (1) (*a*) represents the exclusive legal authority of the Arbitration Court to award preference, the order cannot be supported.

The three grounds on which the validity of the order of Judge *Drake-Brockman* has been attacked are :—

I. That the Commonwealth Arbitration Court has no jurisdiction to make an order or award in settlement of an industrial dispute as to the preferential employment, at all events, of members of a registered organization, except upon the conditions mentioned in sec. 40 (1) (*a*) of the *Commonwealth Conciliation and Arbitration Act*.

II. That if sec. 40 (1) (*a*) is not the sole authority to make such an order or award, the order made in the present case was not "within the ambit of" any dispute between the parties as to preferential employment.

III. That the terms of sec. 81A of the Act, which provides that

> "Nothing in any award or order made under this Act, or in any agreement relating to industrial matters, shall *operate* to prevent the employment of returned soldiers or sailors,"

have not been observed by the Court in making its award.

These objections will be considered in order :—

I. The applicants rely upon what is described by *Jessel* M.R. as "the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done" (*Ex parte Stephens* (1)).

They say that sec. 40 (1) (*a*) gives a special affirmative power to award preference to unionists, and that the general power of the Court to settle industrial disputes by award makes sec. 40 (1) (*a*)

(1) (1876) 3 Ch. D., at pp. 660, 661.

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unnecessary, except for the purpose of limiting the cases in which preference orders can be made.

It is true, of course, that disputes as to preferential employment are industrial disputes which may be brought within the general jurisdiction of the Arbitration Court under sec. 24. Industrial matters include " all matters pertaining to the relations of employers and employees, and the employment, preferential employment, dismissal, or non-employment of any particular persons, or of persons of any particular sex or age, or being or not being members of any organization, association, or body . . . " (sec. 4).

The general power of the Court to settle all industrial disputes concerning preferential employment, would ordinarily be exercised by an award granting such preferential employment in whole or in part, or refusing it. But the power in sec. 40 (1) (*a*) to make orders of preference is intended to cover cases where there is an industrial dispute being settled by the Court, but the actual subject of dispute does not touch or concern the question of preferential employment.

Higgins J., in *Australian Workers' Union* v. *Pastoralists' Federal Council* (1), said :—

> " There is a separate application for preference for members of the claimant organization. In my opinion, I have power to grant such an application, even though preference was not a subject of dispute (sec. 40)."

And *Griffith* C.J., in *The Tramways Case* [*No.* 2] (2), said :

> " Sec. 40 of the Arbitration Act purports to empower the Court to grant preference to unionists even when the matter is not in dispute."

These opinions as to the construction of sec. 40 are strongly supported by a perusal of the section itself. Sec. 40 (2) expressly empowers the Court to award the measure of preference set out in sec. 40 (1) (*a*) when it is of opinion that such award is necessary either " for the maintenance of industrial peace " or " for the welfare of society." These are words of general import and are used in contrast to " the prevention or settlement of the industrial dispute " before the Court. Moreover, the power to prescribe a minimum wage which is contained in sec. 40 (1) (*b*), if exercised, must be accompanied by a provision fixing a lower rate in the case of employees who are unable to earn such minimum. This also points to a power exercisable in relation to orders settling an industrial

(1) (1911) 5 C.A.R., at pp. 98, 99. (2) (1914) 19 C.L.R., at p. 81.

dispute, but not necessarily disputes about a minimum wage payable to parties to such dispute.

It has been suggested that sec. 40 (1) (*a*), interpreted in this way, may be beyond the constitutional competence of the Commonwealth Parliament. The case of *Gilchrist, Watt & Sanderson Ltd.* (1) treats sec. 40 (1) (*a*) as being valid, but in that case the industrial dispute settled by the order made, did, in fact, extend to the question of preference to unionists. But, assuming for the moment that sec. 40 (1) (*a*) is invalid so far as it authorizes orders of preference to members of organizations where that subject is not in dispute, and that the result of sec. 15A of the *Acts Interpretation Act* 1901-1930 is to limit the application of sec. 40 (1) (*a*) to cases where such preference is a subject of dispute, this reading down of the sub-section cannot affect the interpretation of the general powers and duties contained in secs. 24 and 38 (*a*) of the Act. If sec. 40 (1) (*a*), naturally interpreted, is invalid, sec. 15A may operate to make it valid by restricting its scope and application. But, for the general purpose of interpreting the Arbitration Act, I think that we are bound to assume the validity of the whole of sec. 40 (1) (*a*).

It follows that sec. 40 (1) (*a*) should be regarded as having an application extending beyond cases of the disputes as to preference which the Arbitration Court is empowered to settle pursuant to secs. 24 (2) and 38 (*a*) of the Act. The rule of construction stated by *Jessel* M.R. has no application for the purpose of limiting orders in settlement of preference disputes to the kind of orders mentioned in sec. 40 (1) (*a*), because the sub-section gives a power which is not included in the general power of secs. 24 (2) and 38 (*a*).

This was certainly the view of *Starke* J. in the *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1), and, very possibly the view implicit in the judgment of *Isaacs* and *Rich* JJ. *Starke* J. said that sec. 40

> "is not a limitation but an expansion of the authority of the Arbitration Court; it is a substantive grant of authority to the Court in connection with industrial disputes of which it has cognizance, whether preference has or has not been put in dispute by the parties, or claimed in the proceedings before it. It may be exerted even after an award has been made, on the application of any organization or person bound by the award, and whenever, in the

(1) (1924) 34 C.L.R. 482.

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opinion of the Court, it is necessary for the prevention or settlement of an industrial dispute or for the maintenance of industrial peace or for the welfare of society" (1).

This opinion is supported by many considerations. Sec. 40 is limited to cases where preference is to be awarded to persons who are members of "associations" which have become registered under the Act as "organizations." But there may be industrial disputes as to preference to unionists, extending throughout the Commonwealth, and in which trade and industrial unions not registered under the Act, are the main protagonists. The Court may acquire cognizance of such disputes as to preference without the filing of any plaint, which is only one of four specified methods of bringing disputes before it (sec. 19). It then becomes the duty, not merely the right, of the Court to settle each and every part of the dispute pursuant to sec. 24 of the Act. The argument that sec. 40 limits the cases where preference may be awarded, assumes that such a dispute as I have envisaged can never be settled by the Commonwealth Arbitrator. This is an absurd result because in such a case State tribunals would not be able to intervene with any hope of success.

Then it is said that sec. 40 is at any rate the sole measure of the Court's power to award preference in cases where registered organizations are parties to an industrial dispute. But one of the purposes of the Act is to encourage trade unions to become registered as organizations. It would be very surprising if one of the results of its registration were to debar a union from obtaining anything more than the limited preference—"other things being equal"—specified in sec. 40.

The outstanding feature of the Act is that the Arbitration Court is commanded to prevent and settle all industrial disputes extending beyond the limits of one State. The powers conferred and methods specified are ancillary to this principal command. I should have supposed it somewhat difficult to uphold sec. 40 (1) (*a*) as a valid enactment if, on true construction, it means that "Although there is an industrial dispute as to preference to members of registered organizations and, in the opinion of the Arbitrator, it can be settled only by way of ordering an unqualified preference to all members,

(1) (1924) 34 C.L.R., at p. 549.

the Arbitrator is restricted and bound down by the conditions of sec. 40 (1) (*a*) and must not settle the dispute as he thinks fit." It is one thing to prescribe methods of arbitrating in relation to settling disputes. It is a different thing to say that the arbitrator may settle a dispute only by making his award in accordance with the direction of Parliament.

As I accept and follow the view of *Starke* J. that sec. 40 (1) (*a*) does not impede the Arbitration Court from settling a dispute as to preference in the way it thinks fit, it is not necessary to express any opinion as to its validity if it were to be construed as denying the Court's power of settling each part of the industrial dispute.

II. The order as to preference made in the present case bears some resemblance to that made by the Arbitration Court in the award, which, in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson* (1), was held by this Court to have been made within jurisdiction.

In that case, the claim made by the Union was that, throughout Australia, "members of the Federation shall have preference of employment over non-members." The employers did not accede to the demand. In settlement of the resulting industrial dispute, the Court of Arbitration made an order of a very unusual character. Preference (other things being equal) was awarded to returned soldiers and sailors who were members of the Federation, as against all other persons. Preference was thus accorded against all persons who were members of the Federation, as well as against non-members. And the order made was limited to that part of the Australian wharf-labouring industry carried on in the port of Sydney.

Such limited preference seems to have been regarded by the majority of the High Court as being an order bearing a sufficiently close relation to the dispute as to preference.

Isaacs and *Rich* JJ. dealt at p. 540 with the argument that

> "the dispute on which the award was made claimed 'preference' generally and that alone could be granted—if not granted *in toto*, preference must be refused."

They said:

> "The words are wide enough to include complete preference, and therefore the limited preference granted was within the ambit of the dispute. The point is really not arguable."

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At pp. 546-547 *Starke* J. said :—

"Preference was claimed; but the Court is not restricted to the relief claimed, and may give such relief, within the ambit of the claim, as seems to it expedient (*Commonwealth Conciliation and Arbitration Act*, sec. 38B). Now, the Court refused the full claim to preference, but granted it in part and also a lesser remedy, namely, that the employers should not discriminate against members of the union. Such a provision as this is, in my opinion, clearly within the ambit of the claim, and is an industrial matter which the Arbitration Court is competent to award (*Commonwealth Conciliation and Arbitration Act*, sec. 4)."

Isaacs and *Rich* JJ. also said that the preference claimed by the Union

"was as between union members on one side and 'other persons,' that is, non-members of the union on the other. It is obvious that where 'preference' is asked for between two classes it means going the whole distance of placing class A before class B. Like every other demand it may be granted in full or in part" (*ibid.* (1)).

And they pointed out that

"the learned President went the whole way on the road to preference as to returned soldiers and sailors" (*ibid.* (2)).

In the present case, the Arbitration Court gave preference of employment to female members of the Union over all other females, and did not award to such female members any preference as against male members of the Union. In other words, the Union's demand that preference to unionists should be granted, was allowed at all points of the industry where there might arise a competition between females for employment. Part of the Union's claim that its members should be preferred over all other persons was thought just, and awarded. In larger establishments, where there was thought to be less danger of exploitation and "sweating," the preference granted was qualified by the condition —"other things being equal." The discrimination between larger and smaller establishments only means that the dispute between the parties has been settled by moulding a somewhat different remedy to meet varying conditions. The award is as much within the authority of the Court, as the award in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson* (3), which limited preference to one part of the Commonwealth—the port of Sydney.

In my opinion the order made is clearly within the scope of the parties' industrial dispute. To this part of the case, the reasoning

(1) (1924) 34 C.L.R., at p. 535. (2) (1924) 34 C.L.R., at p. 536.
(3) (1924) 34 C.L.R. 482.

of the previous decision in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson* (1) applies.

III. The third ground of attack is also disposed of by the reasons of the majority of the Court in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson* (1). Sec. 81A of the Act deals with the effect and operation of awards and orders. Nothing that has been done by Judge *Drake-Brockman* was intended to, or did, impair the force of sec. 81A.

In my opinion, the award of Judge *Drake-Brockman* is valid, and the questions in the summons should be answered:—(1) No. (2) The award is subject to sec. 81A of the Act but not to sec. 40 (1) (*a*).

The rule nisi for prohibition should be discharged.

McTIERNAN J. It is obvious upon a comparison of the terms of the award of preference to unionists, which is in question in this case, with the provisions of sec. 40 of the *Commonwealth Conciliation and Arbitration Act*, that reliance cannot be placed on that section in order to sustain the award. The part of sec. 40 relating to preference to unionists is in these terms: "(1) The Court, or a Conciliation Commissioner by its or his award, or by order made on the application of any organization or person bound by the award, may (*a*) direct that, as between members of organizations of employers or employees and other persons (not being sons or daughters of employers) offering or desiring service or employment at the same time, preference shall, in such manner as is specified in the award or order, be given to such members, other things being equal . . . . (2) Whenever, in the opinion of the Court or a Conciliation Commissioner, it is necessary, for the prevention or settlement of the industrial dispute, or for the maintenance of industrial peace, or for the welfare of society, to direct that preference shall be given to members of organizations as in paragraph (*a*) of sub-section (1) of this section provided, the Court or Commissioner shall so direct." It is contended, however, on behalf of the respondent, that the power of the Court to award preference is included in the jurisdiction conferred by sec. 24 (2) and sec. 38 (*a*) to settle an industrial dispute, and that it was intended by the

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Legislature that these sections should be a source of authority for the Court to award preference, when that subject is within the ambit of an industrial dispute. If the above-mentioned sections do, upon the true construction of the Act, include this power, the Court, in making an award of preference to unionists pursuant to that authority, is free to disregard the restrictions and conditions imposed by sec. 40. In this view the role to be assigned to sec. 40 is that it confers a special power upon the Court to award preference to unionists, in a case in which that matter was not in dispute. Reading the Act as a whole, there does not appear to me to be any reason for holding that Parliament intended to give to the Court two powers, entirely different in scope, to order "preference." I do not think that the Legislature intended that, in a case in which preference was in dispute, the Court should be free to make any award it deemed fit and that the award might be entirely unconditional, whereas, in a case in which preference was not in dispute, the Court should be fettered and its award moulded by the provisions of sec. 40. The true effect of sec. 40 is, in my opinion, to prescribe the conditions which Parliament intended should govern every award of preference, whether made in a case in which the matter was within the dispute or in a case in which it was not within the dispute, provided that in the latter case such an award was a reasonable and appropriate order, made for the prevention or settlement of the industrial dispute of which the Court had cognizance. Since the Legislature made special provision, which is sec. 40, with respect to the power of the Court to award preference, no reliance should, in my opinion, be placed upon other sections conferring general powers on the Court and including prima facie power to award preference to unionists, as a source of authority to make an award relating to preference, which would be at variance with the terms of sec. 40. In my opinion, no latent power to award preference can be discovered in the Act, which is wider and more drastic than the power which the Legislature has taken care specially to create. I think that sec. 40 is the expression of the intention of the Legislature with respect to the jurisdiction of the Court to award preference to unionists. *Expressio unius est*

exclusio alterius (*Harcourt* v. *Fox* (1)). As sec. 40 is a special enactment with respect to the power of the Court to award preference, other sections may not be resorted to for the purpose of justifying an award that transgresses the limits defined by that section within which preference may be enjoyed by the members of an organization. Moreover, there is foundation for the proposition that sec. 40 is expressly pointed to by sec. 38 (*a*), as the manner in which the power to award preference is to be exercised even in a case in which preference to unionists is within the industrial dispute before the Court. Sec. 38 (*a*) says that: "The Court shall, as regards every industrial dispute of which it has cognizance, have power—(*a*) to hear and determine the dispute in manner prescribed." Sec. 9 of the *Acts Interpretation Act* 1904-1930 enacts that "'Prescribed' means prescribed by the Act, or by Regulations under the Act." By sec. 40 the Arbitration Act prescribes the manner in which the Court may make an award of preference in the course of exercising the jurisdiction derived from sec. 38 (*a*). It is admitted that in making the award in question in this case, the Court did not observe the provisions of sec. 40, and as this section fully expresses the intention of the Legislature as to the conditions which should govern an award of preference to unionists, the award in question in this case is invalid.

First question in the summons answered that the order dated 1st December 1931 *of his Honor Judge Drake-Brockman varying the awards in the manner therein set out is bad. Otherwise no order.*

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

Solicitors for the respondent Union, *Maurice Blackburn & Tredinnick.*

H. D. W.

(1) (1693) 1 Show. K.B. 506, at p. 520; 82 E.R. 720, at p. 726.