was, in my opinion, a case for the application of the doctrine of the last chance.

H. C. OF A. 1933. JOSEPH v. SWALLOW & ARIELL PTY. LTD.

Judgment of the Supreme Court and of the County Court set aside and a new trial ordered.

Solicitor for the appellant, *Dudley A. Tregent.*
Solicitors for the respondent, *Bullen & Burt.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WORKERS' UNION . APPLICANT;

AND

THE COMMONWEALTH RAILWAYS COMMISSIONER . . . . . } RESPONDENT.

Industrial Arbitration—"Basic wage"—Conditions precedent to alteration—Award of single Judge—Commonwealth Railways—Employees—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *sec.* 18A (4) (i) (*b*) —*Arbitration* (*Public Service*) *Act* 1911 (*No.* 11 *of* 1911)—*Arbitration* (*Public Service*) *Act* 1920 (*No.* 28 *of* 1920), *sec.* 11.

H. C. OF A. 1933. MELBOURNE, *March* 13, 14. SYDNEY, *April* 21. Rich, Starke, Dixon, Evatt and McTiernan JJ.

An award of the Commonwealth Court of Conciliation and Arbitration fixed a minimum wage for employees of the Commonwealth Railways Commissioner. The amount of the wage was computed by reference to an index figure for Port Augusta in a statistical table relating to the cost of living, and by the addition of two sums of money. The award also provided for the adjustment of this amount according to the variations of an index figure for certain towns in South Australia. By an award made in a dispute which subsequently arose, a single Judge of the Court awarded that the minimum wage should be determined, for employees residing in a defined area, by relation

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to a composite index figure, to be ascertained by taking the index figure for Port Augusta and also taking into account the prices of certain foodstuffs at the railway stores, and, for the other employees, by relation to the index figure for Kalgoorlie. The award provided for the addition of one, but not the other, of the sums of money which had been specified in the prior award. The wage thus prescribed was less than that under the prior award.

Held that, by reason of sec. 18A (4) (i) (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, a single Judge of the Court had no jurisdiction to make the latter award, because (by the whole Court) it altered the basic wage, and (by *Starke* J.) it also altered the principles on which the basic wage was computed.

The meaning, in sec. 18A (4) (i) (*b*) of the *Commonwealth Conciliation and Arbitration Act*, of the expression " basic wage " considered.

Per Starke J.: Sec. 11 of the *Arbitration (Public Service) Act* 1920 does not oust the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to deal with an industrial dispute with which, apart from the *Arbitration (Public Service) Act* 1911, the Court would have had jurisdiction to deal under the *Commonwealth Conciliation and Arbitration Act*.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*.

In 1924, *Powers* J., as President of the Commonwealth Court of Conciliation and Arbitration, made an award in a dispute as to the conditions of employment of persons employed by the Commonwealth Railways Commissioner on the Trans-Australian Railway (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (1)). The award fixed, for adult workers, a minimum wage, which was arrived at by adopting the index figure for Port Augusta in a statistical table relating to the cost of living and by adding to the sum so ascertained a sum of 3s. a week and a further sum of 1s. 3d. a day. The wage so fixed was 14s. per day, but the award provided for the adjustment of that sum in accordance with an index figure based on the cost of living in four towns in South Australia. In 1927, Sir *John Quick*, Deputy President, made a further award (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (2)), whereby he fixed the minimum wage at 14s. 10d. per day. In making this award, the Deputy President followed the method by which *Powers* J. had fixed the minimum wage and provided for the continuance of the method of adjustment adopted

(1) (1924) 19 C.A.R. 304. (2) (1927) 24 C.A.R. 678.

by *Powers* J. In 1932 a further dispute came before Judge *Drake-Brockman*. At that time the minimum wage as adjusted in accordance with the previous award was 12s. 4d. per day. His Honor made an award in which he provided for the ascertainment of the minimum wage in the manner which appears in the following passage from his judgment:—"After very careful consideration I have come to the conclusion that adhering to the usual principles adopted by the Court in determining the base wage necessitates the rejection of the claims of all concerned together with the unions' suggestion for a loading. . . . A portion of the railway servants resident in Port Augusta reside in houses the property of the Commissioner. The rentals of these houses are fixed on a percentage basis in relation to the capital cost involved, and are consequently rigid and do not respond to the influences ordinarily determining rents. I have come to the conclusion therefore that they should not be included as a factor determining the base wage. It appears too that the Commonwealth railways stores supply practically the whole of the requirements of the employees along the railway line as to bread groceries and dairy produce. The price list of the railway stores is not ordinarily taken in with other sources of information in fixing the index figure for Port Augusta. This is probably due to the fact that only railway servants have dealings with that store. I have come to the conclusion that the railway stores prices are a factor that should be used in determining a base wage for this industry. On the whole, I have (except as to employees resident in the vicinity of Kalgoorlie) come to the conclusion that the principle of the Court will be adhered to and substantial justice done to all concerned by fixing the base wage in relation to a composite index figure arrived at by taking in railway stores prices for bread groceries and dairy produce together with all other factors usually included in the Port Augusta index figure. I have come to the conclusion (with considerable reluctance, having in mind the consequent reduction) that there is no possible justification for adding a loading to the figures so arrived at with a view to retaining, as was urged by the unions, the present base wage. With regard to the base wage for employees resident at or near Kalgoorlie, it appears to me that it would not be just to award to them the same wage as for other

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employees. While a branch of the railway stores is situate at Parkeston, the fact is that the only housing accommodation available necessitates their living in Kalgoorlie and the distance between the two centres compels most of them to do the major portion of their shopping in Kalgoorlie itself. In addition these employees are compelled to procure accommodation at Kalgoorlie prices for house rents which are much in excess of those in fact paid by Commonwealth railway employees elsewhere. In the circumstances I have decided to adopt the Kalgoorlie index figure for the purpose of ascertaining the base wage of those employees who reside west of the 1,021 mile post of the East-West Railway. Mr. *Murphy* (for the Australian Workers Union) in his final address took the objection that it was not competent for a single Judge to interfere with the existing 'basic wage' even to the extent of bringing it into line with the ordinary practices of the Court. I do not think his objection was well founded. What has been provided in the award with respect to the basic wage is in my view within the jurisdiction of a single Judge and follows the usual practices of the Court." As a result of this method of computation, the minimum wage was fixed (subject, until otherwise ordered, to a reduction of ten per cent) at 12s. 1d. per day for those employees who resided west of the 1,021 mile post of the Trans-Australian Railway, and at 11s. per day for other employees.

The Australian Workers Union took out a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for the determination of the following questions:—

(1) Whether the award made by Judge *Drake-Brockman* was an award altering the basic wage.

(2) Whether the said award was an award altering the principles on which the basic wage was computed.

(3) If the answer to question 1 or question 2 was in the affirmative, whether his Honor had jurisdiction to make the said award.

H. S. Nicholas, for the applicant. The question is whether Judge *Drake-Brockman* acted within his jurisdiction under sec. 18A (4) in altering the basic wage. The principle alluded to in the section is

that laid down by *Higgins* J. when he first became President of the Court. In this case the three Judges of the Arbitration Court laid down a basic wage, and Judge *Drake-Brockman* took the basic wage laid down by *Powers* J. Judge *Drake-Brockman* had no power to make the alteration he made, because of the provisions of sec. 18A (4) (i) (*b*). There is a difference between altering the basic wage and altering the principles on which it is computed. Sec. 18A (4) deals with the jurisdiction of the Court in settling disputes. The provisions of sec. 18A have not been followed. There is no basic wage unless you find it in an award (*Federated Engine Drivers and Firemen's Association of Australasia* v. *Albany Bell Ltd.* (1); *Australian Workers' Union* v. *Commonwealth Railways Commissioner* (2)). Other additions, including the "*Powers* 3s.," were added. Elements other than the statistician's figures are to be taken into account. The statistician's figures exclude clothing, though clothing is considered in fixing the basic wage. If a single Judge alters the basic wage, sec. 18A (4) is transgressed. In dealing with the basic wage it is not relevant to consider whether the industry can survive (*Australian Workers' Union* v. *Abramowski* (*The Fruitgrowers' Case*) (3)). The Legislature added the words in sec. 18A (4) relating to the alteration of an award to prevent altering details as well as altering principles. Shortly before sec. 18A (4) was passed, Chief Judge *Dethridge* drew a distinction between the principles of computation and the details of it, and reduced the "*Powers* 3s." to 6d. Immediately after that, the Legislature repealed sec. 25D and enacted sec. 18A (4).

[EVATT J. referred to *Graziers' Association of New South Wales* v. *Australian Workers' Union* (4).]

The amendment of the Act depended more on *Australian Workers Union* v. *Abramowski* (5) (*Anderson* on *Fixation of Wages in Australia*, p. 337). The "*Powers* 3s." was added to the *Higgins* standard to make the wage more closely correspond to that standard. It was put on because of the lag in wage adjustment due to the fact that the statistician's figures were compiled once a year only (*Federated Engine*

(1) (1921) 15 C.A.R. 704.
(2) (1924) 19 C.A.R. at pp. 311, 312.
(3) (1930) 28 C.A.R. 597, at p. 603.
(4) (1930) 29 C.A.R. 261, at pp. 272, 278.
(5) (1930) 28 C.A.R. 597.

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Drivers and Firemen's Association of Australasia v. *Albany Bell Ltd.* (1)). There is no such thing as a basic wage for the whole of Australia, and the award only binds the parties to the dispute. From the date of that case, adjustment tables became part of the award. In country localities the Court allowed itself greater latitude than in dealing with urban claims (*Australian Timber Workers' Union* v. *John Sharp & Sons Ltd.* (2)). That judgment shows that the Court has to resort to something arbitrary in determining the basic wage in the country (*Federated Engine Drivers and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (3)). Judge *Drake-Brockman* was not acting in accordance with the principle of the statute, which protects the basic wage in a manner in which it had not hitherto done. [He referred to *A New Province for Law and Order* by *Higgins* J., first pamphlet, p. 5; *Wages and Prices* by *Giblin*, pars. 3, 8, 17, 48.]

Sir *Edward Mitchell* K.C. (with him *Russell Martin*), for the respondents. The expression " basic wage " in sec. 18A (4) (i) (*b*) means what had become known as such in *Ex parte H. V. McKay* (*The Harvester Case*) (4). The principles which are referred to in that paragraph are those which were considered fundamental in that case.

[STARKE J. referred to *Australian Workers' Union* v. *Commonwealth Railways Commissioner* (5).]

The basic wage is fixed to enable the worker to keep himself, his wife and three children, and has nothing to do with the wage of the skilled worker (*Statement by the Full Court* (6)). The judgment of Judge *Drake-Brockman* must be read in connection with sec. 25. The statistician's figures cannot be made conclusive evidence in all cases. The basic wage means the standard of living prescribed by *Higgins* J. in the *Harvester Case* (4), in accordance with the then relevant prices of commodities, to be adjusted with the change of prices as compared with prices ruling when that judgment was delivered, fixing 7s. a day as the basic wage. There is no

(1) (1921) 15 C.A.R., at pp. 715, 716.
(2) (1920) 14 C.A.R. 811, at pp. 830, 831, 833.
(3) (1911) 5 C.A.R. 9, at pp. 14, 15.
(4) (1907) 2 C.A.R. 1.
(5) (1920) 14 C.A.R. 496.
(6) (1923) 17 C.A.R. 376.

definition of basic wage in the Act, and now power to enact a basic wage is there given, though there is power to enact a minimum wage (*Graziers' Association of New South Wales* v. *Australian Workers' Union* (1)). The index numbers cannot be conclusive, because that would be contrary to sec. 25. Where the employer supplied goods or housing to the employees, that should be taken into account in fixing the basic wage. The basic rate is the equivalent of 7s. readjusted to accord with the altered values from time to time (*Federated Engine Drivers and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (2)). *In re Fairest Method of Securing "Harvester" Judgment Standard to the Workers* (3) explains the origin of the "*Powers* 3s." The adoption of the 3s. increase was made before the present legislation was passed. Judge *Drake-Brockman* abolished the existing award. There was jurisdiction to do that, and the former award was annulled. Sec. 28 (1) provides that the award should be expressed so as best to express the decision of the Court and to avoid unnecessary technicality. Sec. 18A was not intended to apply to all awards and does not apply to alterations of detail. This amendment was intended to apply only to the alteration of such rights as would affect the basic wage, and was inserted only for the purpose of protecting the Harvester award plus the "*Powers* 3s." and any other adjustments required to make the Harvester award effective. Sec. 38, which gives a wide jurisdiction to the Court, must be read subject to the fact that there is no definition of "basic wage" in the Act, there being no power to prescribe a basic wage but only power to prescribe a minimum rate of wage. An obligation is placed upon the Court under sec. 23 (1) to investigate every industrial dispute and, in the course of such investigation, the Court shall make all such suggestions as it thinks right for the purpose of settling the dispute. Under sec. 24, if an agreement is arrived at, the memorandum of its terms is to be made in writing and certified by a Judge and then filed with the Registrar, and it then has the effect of an award. An alteration of the terms of such an agreement cannot require the approval of three Judges. The

(1) (1930) 29 C.A.R., at p. 273. (2) (1911) 5 C.A.R., at pp. 14, 15.
(3) (1922) 16 C.A.R. 829.

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Judge is at liberty to inform his mind in any way he thinks fit and, in this case, he acted in a proper manner and within his jurisdiction.

H. S. Nicholas, in reply. If, in order to comply with sec. 25, the Judge makes an alteration in the basic wage, he is acting inconsistently with sec. 18A. The basic wage used to be a fixed sum, but this new method was adopted by putting in a variation clause. No single Judge can go below the basic wage fixed by the Full Court. In the cases referred to for the respondent, no dictionary meaning is given to the expression "basic wage," because the Harvester award is referred to as giving every worker a minimum standard of living. But, in order to ensure that he will get the full benefit, variations such as the addition of the "*Powers* 3s." and the taking of index numbers are included, in order to give the worker the same benefit as he would get under the Harvester award. These elements are all parts of the basic wage, which is the sum of money which has to be paid or computed. [He referred to *Commonwealth Railways Act* 1917-1925, secs. 46 (2), 47, 49, 50; *Commonwealth Public Service Act* 1922-1931, sec. 7, definition of "The Public Service," and secs. 8, 11, 12; *Commonwealth Conciliation and Arbitration Act* 1904-1930, sec. 4, definition of "Industrial dispute".]

Cur. adv. vult.

April 21.

The following written judgments were delivered:—

RICH, DIXON AND MCTIERNAN JJ. Sec. 18A (4) (i) (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 enacts that the Commonwealth Court of Conciliation and Arbitration shall not have jurisdiction to make an award altering the basic wage or the principles upon which it is computed unless the question is heard by the Chief Judge and not less than two other Judges and the alteration is approved by a majority of the members of the Court by whom the question is heard. The expression "the basic wage" came into use through the system of industrial arbitration as a description of the primary wage payable to an unskilled worker. Presumably it was so called, because, not only was it the lowest rate for adult workmen, but it was basal in the assessment of the

remuneration for skilled labour. It appears that much uncertainty and difference of opinion exist as to the precise sense in which the expression is used in this provision. The statute is dealing with the Court of Conciliation and Arbitration, and it is through the use in that Court of the expression that it has obtained currency. It is, therefore, natural to resort to the awards and reasons given in that Court to ascertain the connotation with which the Legislature should be understood to have used it. An examination of such of this material as we have been referred to has convinced us that in Australia in 1930 the words "basic wage" meant the money rate of wages specified in or ascertainable from a regulation or determination of minimum wages contained in an award or other instrument as the rate prescribed for an unskilled labourer. In this statute the Legislature may further be taken to have referred to a rate of that description prescribed by the Court of Conciliation and Arbitration, which, hitherto, in doing so has proceeded upon the principle that a reasonable living wage must be paid, sufficient to enable a normal man with a wife and three children to be maintained according to a suitable standard. This rate has been habitually fixed by that Court by a calculation from a rate of seven shillings a day in Melbourne in 1907, adjusted to other places and to other periods of time by means of statistical tables, and by exercising a discretion, not only in selecting the statistical table which appears appropriate in respect both of the basis of calculation and of the place as for which the table is constructed, but also sometimes in adding, or perhaps even subtracting, an arbitrary figure considered to be fair because of some local or special condition. The award of his Honor Judge *Drake-Brockman*, which is impugned as altering the basic wage or the principles upon which it is computed, purports to determine all prior awards governing the wages and conditions of employment upon the Trans-Australian or Central Australian Railway. At the time when his award was made, an award was on foot made by the Deputy President, Sir *John Quick*, which, in effect, adopted or continued the basic wage fixed by a former award made by the President, Sir *Charles Powers*. By that award a primary wage was prescribed, arrived at by adopting the index figures for the preceding quarter belonging to Port Augusta in a statistical

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table showing a relation between the cost of living estimated at seven shillings in Melbourne in 1907 and the cost of living on a corresponding standard in Port Augusta in the quarter preceding the date of the award. To the figures so obtained an addition of three shillings a week was made according to a custom then recently established by the President, and a further addition of one shilling and three pence per day was made on special grounds. This, whether by chance or design, produced an initial figure equivalent to the wage then prevailing in Adelaide. The award contained the usual provisions for an automatic adjustment of this initial figure in accordance with variations in the cost of living shown by future statistical tables. For the purpose of this adjustment statistical tables were selected for the cost of living, not at Port Augusta, but calculated upon a weighted average for four towns in South Australia, not including Adelaide.

In the award of his Honor Judge *Drake-Brockman*, for ascertaining the basic wage of employees residing west of the 1,021 mile post upon the railway, the index figure belonging to Kalgoorlie was adopted, and for other employees a special index figure belonging to Port Augusta, but calculated upon statistics which excluded rent payable for houses let by the Railways Commissioner and included prices of commodities sold at the Railways Commissioner's store, prices upon which the statistical tables had not theretofore been based. To the figure ascertained by this means, the customary three shillings a week was added. But his Honor declined to make a further addition of one shilling and three pence per day or of any other sum. The wage so fixed was prescribed as the initial figure under the title "basic wage." For the purpose of the adjustment clause the statistical table for the four South Australian towns was not adopted, but the index figure for the specific place or area was taken or intended to be taken. The result of these changes was to reduce the wage which, if the old award had remained in force, would have been payable under its provisions as the primary wage to the unskilled labourer, the wage payable for skilled labour being assessed on the basis of that primary wage. It results from the interpretation which we have given to the expression "basic wage"

in sec. 18A (4) (i) (*b*) that the award in effecting these changes assumed to alter the basic wage. The award was, therefore, made without jurisdiction.

The questions in the summons should be answered :—(1) Yes. (2) Answer unnecessary. (3) No.

STARKE J. Summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, referred by my brother *Evatt* to this Court. The questions for determination are :—1. Whether the award made by Judge *Drake-Brockman* of the Commonwealth Court of Conciliation and Arbitration on 16th December 1932 in the matter of certain disputes was an award altering the basic wage. 2. Whether the award was an award altering the principles on which the basic wages is computed. 3. If the answer to one or two is in the affirmative, whether there was jurisdiction to make the award.

A preliminary question is whether the disputes were within the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. Under the *Commonwealth Conciliation and Arbitration Act* 1904-1930, jurisdiction is given to the Commonwealth Court of Conciliation and Arbitration to make awards determining industrial disputes extending beyond the limits of any one State, including any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or any public authority constituted under the Commonwealth. The disputes in this case were between the Commonwealth Railways Commissioner and his employees, organized in various unions. The operations of the railways extended over more than one State, and the disputes related to wages and conditions of work of the employees carrying on those operations. Prima facie therefore the disputes were within the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. Two Acts, however, require consideration, the *Arbitration* (*Public Service*) *Act* of 1911, and the *Arbitration* (*Public Service*) *Act* of 1920. Under these Acts, the Public Service of the Commonwealth includes the service of any public institution or authority of the Commonwealth, and includes all persons employed in any such service in any capacity, whether permanently or temporarily,

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or whether under the *Commonwealth Public Service Acts* or not. The employees of the Commonwealth Railways Commissioner fall within this definition (see *Commonwealth Railways Act* 1917-1925). Under the *Arbitration (Public Service) Act* of 1911, an organization of employees in the Public Service was empowered to submit to the Commonwealth Court of Conciliation and Arbitration any claim relating to salaries and wages or terms and conditions of employment, and jurisdiction was given to the Court to hear and determine the claim. Under the *Arbitration (Public Service) Act* of 1920, however, a Public Service Arbitrator was constituted, and jurisdiction was given him to determine all matters submitted to him relating to salaries, wages, rates of pay or terms and conditions of service or employment of officers and employees of the Public Service. And sec. 11 of the Act provides: "(1) Notwithstanding anything contained in the *Arbitration (Public Service) Act* 1911, an organization of employees in the Public Service shall not be entitled to submit to the Court" (that is, the Commonwealth Court of Conciliation and Arbitration) "under that Act any claim relating to the salaries, wages, rates of pay, or terms or conditions of service or employment of members of the organization." But this prohibition is directed to claims submitted under the 1911 Act, which do not require and may not involve any of the elements of an industrial dispute extending beyond the limits of a State necessary to found jurisdiction under the *Commonwealth Conciliation and Arbitration Act* 1904-1930. Consequently, in my opinion, the jurisdiction of the Commonwealth Court of Conciliation and Arbitration under the last-mentioned Act is not ousted by reason of the provisions of sec. 11 of the *Arbitration (Public Service) Act* of 1920, and so attaches to the present disputes.

I now turn to the consideration of the questions raised by the summons under sec. 21AA. They depend upon the construction of sec. 18A (4) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. It provides: "Notwithstanding anything contained in this Act, the Court" (that is, the Commonwealth Court of Conciliation and Arbitration) "shall not have jurisdiction—(i) . . . to make an award . . . (*b*) altering the basic wage or the principles on which it is computed . . . unless the question is heard by the Chief Judge and not less than two other Judges, and the

alteration . . . is approved by a majority of the members of the Court by whom the question is heard." The "basic wage" is an expression commonly used in Australia. Its principal exponent was Mr. Justice *Higgins*, who, in an article contributed by him to the Harvard Law Review in January 1919 entitled *A New Province for Law and Order*, described it as the lowest wage which can be paid to an unskilled labourer on the basis of the normal needs of an average employee regarded as a human being living in a civilized community (*Official Year Book of the Commonwealth of Australia* (1932), No. 25, p. 787; *Harvard Law Review*, vol. 32, pp. 191, 192). But this wage is fixed by various industrial tribunals in Australia operating under Federal and State Arbitration Acts, and is varied from time to time according to changes in the cost of living, constitution of the family unit, &c. (*Year Book of the Commonwealth* (1932), No. 25, p. 787). "The basic wage rates fixed by State arbitration tribunals differ from those obtaining in the Federal sphere not only as regards amount, but also in respect of constitution of family unit whose need it purports to supply" (*Year Book of the Commonwealth* (1932), No. 25, p. 788). So I take it that the basic wage referred to in the Federal Arbitration Act is the basic wage fixed by the tribunal operating under that Act. A general basic rate of wage is not declared by any Federal tribunal, as is the case in some of the States. But it is possible that the Legislature may have in contemplation some formula by which the basic wage can be ascertained. According to Mr. Justice *Higgins*' formula, it was to be fixed on family lines, on the assumption that the male adult worker has to support himself, a wife and three dependent children (see *A New Province for Law and Order*, *Harvard Law Review* (1920), vol. 34, p. 105). It is quite immaterial for present purposes whether the assumption is accurate or inaccurate, though it has often been attacked (see table in *Federated Public Service Assistants' Association* v. *Commonwealth of Australia* (1); *E. Rathbone*, *The Disinherited Family*). Further, Mr. Justice *Higgins* said in the same article (*Harvard Law Review*, vol. 34, at pp. 116, 117):—"In finding the basic wage the Court uses a rough estimate which it made in an inquiry in 1907 as to 'fair and reasonable remuneration,'

(1) (1920) 14 C.A.R. 639, at p. 685.

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and the Court varies the 7s. per day, 42s. per week, as then estimated, in the ratio that the cost of living has increased since 1907. For instance, if it now takes 30s. to purchase as much as could be purchased in 1907 for 17s. 6d., the basic wage is found by this formula: 17s. 6d : 30s. : : 7s. : 12s." The above rate of 7s. has been varied from time to time in accordance with the retail price index numbers —food, groceries, rent (all houses)—prepared by the Commonwealth Bureau of Census and Statistics for the city or town in which the persons affected are employed, and the rate so obtained has been taken by the Commonwealth Court of Conciliation and Arbitration as the minimum rate of wage for an unskilled male worker. But it is clear that this formula has not been rigidly maintained by the Commonwealth Court of Conciliation and Arbitration. Thus, in 1921, the sum of 3s. was added for the purpose of securing to the worker during a period of rising prices the full equivalent of the Harvester standard, that is 7s. per diem (*Year Book of the Commonwealth*, (1932), No. 25, p. 787 ; *Statement of Full Court* (1)). Further, effect is given as far as possible to the difference in the cost of living in different localities. The Court has used its discretion in the application, for the purpose of fixing wages, of the index numbers supplied by the Commonwealth Bureau of Census and Statistics. It has selected index numbers for the purposes of its awards, and in some instances has even " loaded " those numbers. (See the examination of wages and prices issued in December 1931 by the Commonwealth Bureau of Census and Statistics). The result is that the expression " basic wage " in sec. 18A (4) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 cannot be referred to a wage ascertained by reference to any precise or definite formula, but must mean the minimum rate prescribed for unskilled labourers in an award or order of the Court. It is this rate that must not be altered unless the question is heard by the Chief Judge and not less than two other Judges.

The award of Judge *Drake-Brockman* in the present disputes, made in proceedings which lasted no less than thirty-four days, contravenes this provision. Under an award made by Deputy

(1) (1923) 17 C.A.R. 376.

President *Quick* in *Australian Workers' Union* v. *Commonwealth Railways Commissioner* (1), the basic wage was fixed at 14s. per day, which included the 3s. loading already mentioned, and also a special loading of 1s. 3d. This rate was subject to adjustment in accordance with variations shown in the cost of living by certain selected index numbers issued by the Commonwealth Bureau of Statistics. The award of Judge *Drake-Brockman* purports to determine this award, and prescribes as follows :—

"The minimum rate of wages" (subject to a reduction of ten per cent until otherwise ordered by the Court) "shall be the rate ascertained in the following manner :—

"Where the employee is stationed in the locality mentioned in the first column of Table 'A' hereunder written the employee shall be paid at the rate mentioned in the second column of the said Table 'A.'

"Table 'A.'

"First Column	Second Column.	Third Column.	
"Locality where stationed.	Basic wage.	Index number on which quarterly adjustment of wages shall be made.	
		Number.	For.
"West of 1,021 miles Trans-Australian Railway	£3 12s. 6d. per week / 12s. 1d. per day	1450	Kalgoorlie.
Elsewhere	£3 6s. per week / 11s. per day	1310	Port Augusta together with railway stores prices for bread, groceries and dairy produce."

The basic wage thus prescribed is less than that prescribed under the *Quick* award, after making adjustments in accordance with variations shown in the cost of living as prescribed by the award. The difference is due to the rejection of the special loading of 1s. 3d. and to the use, except as to residents in the vicinity of Kalgoorlie, of what Judge *Drake-Brockman* describes as "a composite index figure arrived at by taking in railway stores prices for bread groceries and dairy produce together with all other factors usually included in the Port Augusta index figure." By taking in the railway stores

(1) (1927) 24 C.A.R. 678.

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prices, the learned Judge adopted a new method of computing the basic wage. And I suppose this may also be called an alteration of the principle on which the basic wage was computed under the *Quick* award, for it departs from the method there adopted for ascertaining that wage.

A suggestion was made that the Kalgoorlie basic wage rate was severable and could be supported. But the Kalgoorlie rate is altered by the new award, and in any case the award is so bound together that the wages provisions cannot be severed.

The questions raised by the summons should be decided as follows: —1. Yes. 2. Yes. 3. No.

EVATT J. By an amendment of the *Commonwealth Conciliation and Arbitration Act*, inserted during the year 1930, a single Judge of the Court is deprived of jurisdiction "to make an award . . . altering the basic wage or the principles on which it is computed" (Sec. 18A (4): Act No. 43 of 1930, sec. 7).

The question arising in this summons is whether Judge *Drake-Brockman's* award dated December 16th, 1932, made in settlement of disputes between the Commonwealth Railways Commissioner and certain unions was in excess of jurisdiction by reason of the 1930 amendment. That question necessarily turns upon the meaning of the phrase "basic wage." It is nowhere defined in the statute, so we are remitted to other sources.

Many years ago, Mr. Justice *Higgins* in an elaborate account of the Federal arbitration system thus stated certain aspects of the "basic wage":—

> (1) "The basic or living wage is computed and awarded on the principle that a normal man has a family and must earn sufficient to support it. Nor is the basic wage confined to the money necessary for the main requisites of life—food, shelter, clothing; it allows something 'to come and go on.' The wage is based on civilised conditions—'the normal needs of the average employee regarded as a human being living in a civilised community.' That wage, as originally granted in 1907, lifted the standard of living for the poor; and, in the recent troublous years, it has followed closely the increase in the cost of living" (*A New Province for Law and Order* (1922), p. 90).
>
> (2) "The 'basic' or living wage, the minimum wage for the unskilled worker, is the primary factor in the fixing of all wages by award; and the fixing of the proper basic wage is necessarily of an importance that can hardly be exaggerated. It must vary with the cost of living in the various districts;

for instance, the basic wage for the seaports would not be a proper basic wage for inland mining districts such as Broken Hill. But sometimes by general consent a uniform basic wage is desirable, as in the case of the waterside workers or seamen; and the Court then takes as its guide the mean cost of living for the several ports" (*ibid.*, p. 52).

(3) "The Court has repeatedly invited full inquiry on scientific lines as to the cost of living, but neither the Government nor the parties have yet responded. Preferably the inquiry should be made by expert statisticians and on the basis of distinct regimens, but the responsibility of fixing the basic wage should be left with the Court. In the meantime the Court has been obliged to work out the problem on the best materials that it can get. At present the Court takes as prima facie evidence the findings as to the cost of living on then existing habits in Melbourne in 1907, and then it takes the statistician's figures as to the depreciation in the value of money as against commodities as prima facie evidence of the increase in the cost of living" (*ibid.*, p. 53).

(4) Referring to the part played by the Commonwealth Statistician in the matter, his Honor said :—

"He does not, as some people fancy, pretend to show the cost of living in a wage-earner's family; but he shows the depreciation in the value of money as regards the selected commodities, and, as he says, 'in normal circumstances properly computed index numbers of food and groceries and house rent combined form one of the best possible measures of those variations in the purchasing power of money which affect the cost of living.' Then the Court comes in, and, *until the contrary be shown*, infers that the depreciation in the value of money which is found in relation to the selected commodities is to be found also in relation to the other commodities. This method is in accordance with the views and intentions of the Statistician; for he says 'once a standard of living or living wage has been fixed, the tables published . . . can be legitimately used as showing the variations in the cost of living.' No party is bound by these tables as by a matter of absolute irrefutable law, but they are on the right method, and the Court makes use of them until it can find better evidence" (*ibid.*, p. 54).

(5) His Honor also said :—

"It is the practice of the Court to let no considerations of competition with foreign countries reduce what is found to be the proper basic wage; and this practice, it must be admitted to the credit of the employers, has never been disputed so far as I know. The proper sustenance of the persons employed (on the basis of family life) is treated in effect as a first charge on the product" (*ibid.*, pp. 54, 55).

(6) Referring to the appointment of the Federal Basic Wage Royal Commission of 1920, his Honor said :—

"the basic wage is to be fixed on family lines, on the assumption that the male adult worker has to support himself, a wife, and three dependent children. This is in accordance with the assumption of the Court in 1907; and it is also in accordance with the United States Bureau of Labour and Statistics, December 1919" (*ibid.*, p. 95).

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Of course the views of *Higgins* J. on such a question as the present are of the highest authority. They have frequently been adopted and expounded by other industrial tribunals in this country, although the terms "living wage," "minimum wage" and "basic wage" are often used interchangeably.

Thus in 1914 Mr. Justice *Heydon* of the Court of Industrial Arbitration of New South Wales stated that the worker's living wage was to be founded "on his requirements as a man in a civilized community which has resolved that, so far as laws can do it, competition shall no longer be allowed to crush him into sweated conditions" (*Inquiry re Cost of Living* (1)). *Piddington* J. in 1926 regarded the living wage as "the irreducible minimum which can be embodied in an award under the Act or in an industrial agreement made under the Act" (*In re Standard of Living Inquiry* (2)), and *Cantor* and *Street* JJ. defined the living wage as

> "the lowest wage which the conscience of the community will permit to be paid to an employee, and . . . to be paid to him not as a return for services rendered, or in proportion to the value of his services, but in order to meet the cost of maintenance of himself and his family, according to the domestic unit prescribed. It is to be the irreducible minimum below which no person, whose conditions of work are covered by an award or industrial agreement, is to be permitted to offer his services or to be employed by an employer" (*In re Standard of Living and Living Wages for Adult Male Employees* (3)).

The New South Wales system of industrial arbitration differs in important respects from that of the Commonwealth where the jurisdiction of the Court is conditioned by the actual or probable existence of a certain type of dispute, and where, as a consequence, no general rule even as to the amount of the basic wage can be promulgated in advance of an award settling or preventing a dispute.

In answering the crucial question of this case, the meaning to be attributed to the phrase "basic wage or the principles on which it it is computed," some guidance is, I think, to be found in pronouncements made during 1929 and 1930 by Judges of the Federal Court. In one case, Chief Judge *Dethridge* declined to include in his award settling a dispute any provision for what is known as the "*Powers* 3s." *Powers* J. had in 1921, when President of the Federal Court, thought it just to include the sum of three shillings per week in the

(1) (1914) A.R. (N.S.W.) 22, at p. 26. (2) (1926) A.R. (N.S.W.) 301, at p. 303.
(3) (1929) A.R. (N.S.W.) 375, at p. 421.

basic wage for reasons with which we need not now concern ourselves. In 1930 also, Chief Judge *Dethridge*, in *Graziers' Association of New South Wales* v. *Australian Workers' Union* (*Pastoralists' Case*) (1), indicated, not obscurely, the possibility or probability of using an index number which would considerably reduce the basic wage.

This actual and threatened change from what was regarded as established practice, was soon followed by the amendment in question. Its main object is clear, to protect the existing "basic wage," as embodied in an award, against any alteration on the part of a single Judge. To my mind the terms of the sub-section are too clear to admit of the meaning of "basic wage" suggested by Sir *Edward Mitchell* for the Commonwealth Railways Commissioner, namely, an amount of money sufficient to purchase, at the relevant time, and in the relevant place, commodities corresponding with the *Higgins* Harvester standard of 1907. The sub-section regards the "basic wage" as something contained in and foundational to a particular award, not awards of the Court in general.

It was also sought by the amendment to safeguard against alterations by a single Judge the "principles" of computation of the "basic wage." What these "principles" cover, in any given case, may have to be discovered by an ascertainment, so far as it is possible, of the principles by which the existing basic wage has been, and is being, computed. The leading principle is, or will upon examination turn out to be, that of ascertaining what is sufficient to provide a man, his wife and three children with a reasonable standard of living in the appropriate district.

The award in force at the date of the *Drake-Brockman* award was No. 94 of 1926, made by Sir *John Quick* on December 22nd, 1926. The basic wage was thereby made alterable from time to time under an adjustment table bringing in the index number for the four towns of South Australia. As adjusted upon this footing at the date when Judge *Drake-Brockman* made his award, the basic wage in force (by virtue of the continuance in force of the *Quick* award) was 12s. 4d. per day.

But Judge *Drake-Brockman's* basic wage was 12s. 1d. per day for an area west of the 1,021 mile post on the Trans-Australian

(1) (1930) 29 C.A.R. 261.

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Railway, and 11s. per day elsewhere. Each of these sums of money was lower than the existing basic wage. There was an alteration of the basic wage which went beyond his Honor's jurisdiction. As upon the foundation of such base rates the *Drake-Brockman* award of marginal rates was also fixed, the award in that respect also was beyond jurisdiction. It is unnecessary to determine whether there was involved, also, any alteration of the principles upon which the *Quick* basic wage was computed.

The result is that the *Quick* award as to wages continued, and still continues in force, notwithstanding the *Drake-Brockman* award. The questions in the summons should be answered:—1. Yes. 2. Unnecessary to answer. 3. No.

Questions answered:—1. *Yes.* 2. *Answer unnecessary.* 3. *No.*

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

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.