[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN TIMBER WORKERS' UNION AND ANOTHER . . . . . } APPLICANTS;

AND

THE SYDNEY AND SUBURBAN TIMBER MERCHANTS' ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

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SYDNEY, *July* 15, 18.

Rich, Dixon Evatt and McTiernan JJ.

*Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Industrial dispute or matter provided for in an award of the Court or the subject of proceedings before the Court—Power to restrain State tribunal from dealing with dispute or matter—Order—Matters to be specified—Costs—Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 20*, 21AA.

An order under sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 must contain a specific description of the matters with which the State industrial authority is restrained from dealing; an order which does not contain such a description is invalid because it does not comply with an essential condition which must be fulfilled before the operation of the prohibition contained in the section is effective.

A State industrial authority cannot, under sec. 20, be restrained from performing its functions in relation to persons who are not parties to the

* Sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 provides:—"(1) If it appears to the Court or a conciliation commissioner that any State industrial authority is dealing or about to deal with an industrial dispute, with part of an industrial dispute or with a matter which is provided for in an award of the Court or a commissioner or is the subject of proceedings before the Court or the commissioner, the Court or the commissioner may make such order restraining the State industrial authority from dealing with that dispute or any part thereof, or with that matter, as the Court or the commissioner thinks fit, and thereupon the authority shall, in accordance with that order, cease to proceed in the dispute or part thereof or in that matter. (2) Any award, order or determination of a State industrial authority made in contravention of an order made under this section shall, to the extent of the contravention, be void."

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industrial dispute of which the Commonwealth Court of Conciliation and Arbitration has cognizance and are not bound or liable to be bound by an award made or to be made in that dispute.

The expression "a matter which is provided for in an award" in sec. 20 involves not merely a subject of regulation but objects, namely, the parties bound by an award. Similarly, the expression "a matter . . . the subject of proceedings" connotes parties as well as a subject for decision.

The meaning of the expression "part of an industrial dispute," in sec. 20, considered.

*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c. (State) Conciliation Committee*, (1926) 38 C.L.R. 563, and *Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)* v. *Western Australian Sawmillers' Association*, (1929) 43 C.L.R. 185, referred to.

Costs awarded on a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated*, (1924) 35 C.L.R. 349, at p. 354, referred to.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

Upon an application made under sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 by the Sydney and Suburban Timber Merchants' Association the Commonwealth Court of Conciliation and Arbitration (Judge *Drake-Brockman*), on 12th April 1935, made absolute an order nisi restraining the Sawmillers &c. (Cumberland and Newcastle) Conciliation Committee, constituted under the *Industrial Arbitration (Amendment) Act* 1926 (N.S.W.), from dealing with any matter for which provision had been made in an award of the Commonwealth Court of Conciliation and Arbitration, dated 23rd January 1929, as varied, or in part thereof and/or dealing with any matter which was the subject of an actual, threatened, pending, or probable dispute between the Timber Merchants and Sawmillers' Association and others and the Australian Timber Workers' Union and others. In the course of his judgment Judge *Drake-Brockman* said:—"An award of the Court made on 23rd January 1929 operates in this industry, and an application has been made by certain employers for a new award in respect to which a compulsory conference was called by the Court, and, no

settlement being effected, the dispute was referred into Court. At the time that the compulsory conference was held the representative of the" Australian Timber Workers' "Union intimated to the Court that it was the intention of the union to serve on the employers a log of claims covering wages and conditions in the industry. This has not yet been done. It appears from the evidence of . . . the secretary of the New South Wales branch of the union that the application to the conciliation committee is claimed to be made in respect to some 700 men who it is said are not bound by the existing award. No very precise information concerning this claim was placed before the Court, and it is asserted, as seems probable, that a great many of these men are parties to the dispute at present before the Court because the employers concerned in the pending dispute have served their claims upon every individual employed by them and upon all individuals whose whereabouts they could discover who are normally employed in the industry. The employers' claims have also been served upon the union. It seems probable, therefore, that a great many of the 700 men are in fact involved in the pending dispute and that still more of them are indirectly concerned because the employers have asked that they shall be bound by the award to be made in respect of all their employees whether members of the union or not." The secretary "claimed that there were a number of employers in the industry employing non-unionists who were not parties to the pending dispute. A list of names of some of these employees was handed to the Court as a confidential document. A comparison of this list with a list of the employers concerned in the pending dispute shows that a number of the names appear on both lists. The evidence of" the secretary "discloses that none of the men on whose behalf the union is seeking a State award are members and that they are not parties to the application for such an award. If and when the union serves its new log of claims on the employers, presumably all known employers in the industry in New South Wales will be included. Having regard to the nature of the evidence placed before the Court it is impossible to say how many, if any, employees in the industry are not covered by the existing award or the pending dispute. If there be any it is competent for the union by appropriate action to bring

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them under the existing award and to make them and the employers by whom they are employed parties to the award or the dispute. In the circumstances I am unable to see that any useful purpose would be served by the making of a State award in respect of substantially the same parties as are or may be involved in proceedings pending before the Court both as to subject matter and personnel. Individuals who may be outside the pending dispute or are not covered by the present award have taken no steps to secure an award either from the Court or the State tribunal. When they do so it will be the appropriate time to consider what is the proper action to be taken in connection therewith. I make the order absolute."

By a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, to which the Sydney and Suburban Timber Merchants' Association, the Box and Case Manufacturers' Association, the Newcastle Timber Merchants' Association, and the Master Builders' Association were respondents, the Australian Timber Workers' Union and the Amalgamated Timber Workers' Union of Australia, New South Wales Branch, applied to the High Court for a decision on the following questions :—

(1) Whether the order and injunction made by Judge *Drake-Brockman* on 12th April 1935 was validly made, on the following grounds—(*a*) that the order or injunction did not set forth with any degree of particularity or legally or sufficiently the matters or parts of matters which the State conciliation committee was restrained from dealing with ; and (*b*) that the order and injunction purported to restrain the conciliation committee from dealing with claims properly before it relating to employers and/or employees who were not parties to the Federal award or to the alleged actual threatened pending or probable dispute between the Timber Merchants and Sawmillers' Association and others, and the Australian Timber Workers' Union and others.

(2) Whether Judge *Drake-Brockman*, as a Judge of the Commonwealth Court of Conciliation and Arbitration had any jurisdiction or authority to make the order or issue the injunction in the terms and to the purported effect in which the same was made and issued.

In an affidavit filed in support of the summons the secretary of the Amalgamated Timber Workers' Union of Australia, New South Wales Branch, who was also the president of the Australian Timber Workers' Union, stated that the first-mentioned union, an industrial union of employees duly registered under the provisions of the *Industrial Arbitration Act* 1912 (N.S.W.), had made an application to the State conciliation committee referred to above for an award for employees engaged in the industry in the State of New South Wales and under the jurisdiction of that committee; that although a great number of employees, members of the Australian Timber Workers' Union, were covered by the award dated 23rd January 1929, made by the Federal Court, it was estimated that at least half of the employees engaged in the industry in the State were not covered by the award and would not be covered by any award which might be made lawfully by the Federal Court in pursuance of the settling of the dispute referred to in the order; that there were large numbers of employers in the timber industry in the State who were not bound by the award nor would be bound by any award made in the future by the Federal Court; and that it was unfair from a competitive point of view that some employers should be governed by an award and others should be free therefrom.

*Evatt* J. referred the summons to the Full Court and it now came on for hearing.

*J. A. Ferguson* (with him *A. H. Ferguson*), for the applicants. Upon the proper interpretation of sec. 20 of the *Commonwealth Conciliation and Arbitration Act* it is necessary that the matters with which a State industrial authority is restrained from dealing must be specified clearly in the order absolute, and the restraint under sec. 20 cannot lawfully proceed beyond the ambit of the Federal dispute or the Federal award: that is, the power of the Commonwealth Court of Conciliation and Arbitration under sec. 20 is limited to restraining the local tribunal from dealing with matters which are the subject of, or employers and employees, associations and unions, who are parties to, a Federal award or dispute; otherwise the State tribunal has a perfect charter to deal with all other matters and all

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other persons as it thinks fit (*Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)* v. *Western Australian Sawmillers' Association* (1) ). The prohibited matters should be set forth in the order with great particularity. The parties in the matter before the State industrial authority are different from those in the award or dispute before the Federal Court. The Federal award binds only those employers who were members of the respondent associations when the award was made, or who were parties to the dispute when the award was being made. Parties bound by an award of the Federal Court are as set forth in sec. 29 of the Act. At any given time there is always a considerable number of employers who are not members of an association of employers relating to the industry, and of employees who are non-unionists, or who were at one time members or unionists and later ceased to be so. Those employers and employees are not caught by the Federal award. The Federal Court has no power to insist that, instead of applying to a State industrial authority, employers and employees not covered by an award should apply to the Federal Court in order to make the Federal ambit more complete. The fact that there are, and always will be, employers and employees outside the scope of the Federal award makes it proper that the State industrial authority should be able to make a common rule and thereby catch all those employers and employees who are not impressed either by the Federal dispute or the Federal award. Sec. 20 was reviewed by this Court in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c. (State) Conciliation Committee* (2). The State industrial authority has jurisdiction to deal with persons who are not bound by the Federal award or dispute (*Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)* v. *Western Australian Sawmillers' Association* (1) ). Notwithstanding the difference in the facts, the principle enunciated in that case is applicable in this case. Similar questions were considered by the Federal Court in *H. V. McKay Pty. Ltd.* v. *Court of Arbitration of Western Australia* (3). The respondents forced this application upon the

(1) (1929) 43 C.L.R. 185.
(2) (1926) 38 C.L.R. 563.
(3) (1929) 28 C.A.R. 333.

applicants, who have had to contest the matter at every stage. In those circumstances the applicants, if successful, should be granted their costs.

*O'Mara*, for the respondents. This case is distinguishable from the *Western Australian Timber Workers' Case* (1). Facts proved in this case justified the making of an order under sec. 20. Whether it was appropriately worded is another question. Here there is an award in fact, made within the constitutional powers of the Federal Court; also an actual dispute between definite and ascertainable parties. The application to the State industrial authority would involve that authority's dealing with an industrial dispute in the true sense of the word. Sec. 20 empowers the Federal Court to exclude or restrain a State industrial authority from interfering in matters of which it has cognizance. The Court has power under sec. 38 (*q*) to correct and amend any error, defect or irregularity, whether in substance or in form. There is ample information and particularity in the award to enable the State industrial authority, and the parties restrained, from making a mistake as to what was meant by or referred to in the order. In the circumstances neither the State tribunal nor the parties were likely to be misled. There cannot be any possibility of mistake as to the terms of the dispute referred to or the parties to it. The order of Judge *Drake-Brockman* sufficiently states the subject matter of the dispute. Under sec. 20 the Federal Court has power to restrain a State tribunal from dealing with matters, irrespective of parties. The matters that engage the attention of the Court are the hours, wages and conditions as relating to an industry, not as between parties. A purpose of sec. 20, which has been amended since the decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers, &c. (State) Conciliation Committee* (2), is to prevent a simultaneous inquiry by the two Courts into those matters. Any matter for which provision has been made in a Federal award, or of which the Federal Court has cognizance, is outside the jurisdiction of a State tribunal, and any award or order made by a State tribunal in respect of such matters is void under sub-sec. 2 of sec. 20.

(1) (1929) 43 C.L.R. 185.

(2) (1926) 38 C.L.R. 563.

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*J. A. Ferguson*, in reply. The order, by the generality of its terms, is not confined to the parties to the Federal dispute. It was not intended that the power conferred by sec. 20 should be exercised in such a way as to restrain a State industrial authority from dealing with any person.

*Cur. adv. vult.*

THE COURT delivered the following written judgment :—

The application is made for the purpose of obtaining a declaration that an order made under sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 by his Honor Judge *Drake-Brockman* is invalid.

The meaning and effect of this section in its previous and in its present form were examined in this Court in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers, &c. (State) Conciliation Committee* (1) and in *Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)* v. *Western Australian Sawmillers' Association* (2). The section does not give judicial power to the Commonwealth Court of Conciliation and Arbitration, or the conciliation commissioner. The power it gives is not to restrain a State tribunal which exceeds the lawful jurisdiction or authority it possesses by disregarding the restraints which arise under Federal law. It assumes that the exercise or intended exercise of authority by the State tribunal is lawful but, because of the effect produced upon an inter-State dispute, the section empowers the Commonwealth Court or commissioner to forbid the State tribunal to deal with the dispute. Upon such an order being made in pursuance of the power so given, sec. 20 itself makes it unlawful for the State tribunal to proceed in the dispute. Until the order is made, the State tribunal retains authority over the matter and when the order is made, its inability to proceed arises from the direct operation of the section, which takes effect on the making of an order in accordance with its provisions. But unless the order is made so as to satisfy the conditions which bring the prohibition of the section into operation, the authority of the State tribunal remains unaffected, and in that sense the order is invalid.

(1) (1926) 38 C.L.R. 563. (2) (1929) 43 C.L.R. 185.

The first condition prescribed by sec. 20 is that it should appear to the Court of Conciliation and Arbitration or the conciliation commissioner, as the case may be, that a State industrial authority is dealing or about to deal with an industrial dispute, with part of an industrial dispute, with a matter provided for in an award of the Court or the commissioner, or with a matter which is the subject of proceedings before the Court or the commissioner. Thus, before the Court of Conciliation and Arbitration is authorized to make an order restraining a State tribunal, one or other of four things must be made to appear to the Court. Each of these four things relates to an industrial dispute, which means, under the definition in sec. 4, an industrial dispute extending beyond the limits of any one State. That dispute may be awaiting the award of the Commonwealth Court of Conciliation and Arbitration, or it may have been settled by an award of that Court. It is the latter case which is referred to by so much of sec. 20 as relates to a matter provided for in an award. But the dispute must be one of which the Federal Court has taken cognizance (1). "Sec. 20 authorizes orders restraining a State authority when, and only when, the Court has taken cognizance of a dispute in relation to which the order is required. Upon this construction sec. 20 confers a power the exercise of which is consequential upon the Court's taking cognizance of a dispute" (per *Dixon* J. (2) ). Some difficulty arises from the distinction made in the section between dealing with an industrial dispute and with part of an industrial dispute. The power of State industrial authorities does not necessarily depend upon the existence of a dispute. Such an authority is commonly empowered to make a general industrial regulation irrespective of a dispute. By the exercise of that power, however, it is possible for the authority to determine a dispute or in some other way directly affect it. Accordingly this Court held that if the State authority "claims the power to deal with persons and subject matters within the ambit of that dispute and proceeds to exercise that power, then . . . it is dealing with that dispute" (per *Gavan Duffy*, *Rich* and *Starke* JJ. (3) ). But it must be in rare cases only that a State tribunal can cover an entire

(1) (1929) 43 C.L.R., at pp. 204, 205. (2) (1929) 43 C.L.R., at p. 205.
(3) (1926) 38 C.L.R., at p. 580.

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inter-State dispute. It is held that a State industrial authority deals with an inter-State dispute when it applies to that integral part of it that extends into the State the tribunal's power of conciliation and arbitration so as to determine, as between the parties concerned and within the State, their mutual legal rights respecting the industrial matters in contest (per *Isaacs* J. (1) ). The expression " part of an industrial dispute " therefore does not appear to be directed to the distinction between so much of an industrial dispute as lies within a State and so much as extends beyond it. It appears to be directed to a division of an inter-State dispute into parts by reference to subject matter or classes of disputants. The third of the things, one or other of which must be made to appear, is that the State tribunal is dealing with or about to deal with a matter provided for in an award. An award provides for a matter by imposing upon the parties bound by the material part of the award an industrial regulation involving rights and duties in reference to some particular subject. Possibly it provides for a matter also when it denies to a claimant relief of this character. But the provision of an award necessarily applies to definite parties ascertainable under sec. 29. The expression " a matter which is provided for in an award " involves not merely a subject of regulation but objects, viz., the parties bound by an award. In the same way, a matter which is the subject of proceedings before the Court is necessarily the subject of dispute between the disputants, and, again, this expression connotes parties as well as a subject for decision. Each of the four things must be specific and not generic. The State tribunal must be dealing with or about to deal with a specific dispute, a specific part of one, or a specific matter or matters (2). If one of these four things appears, a Court may make an order restraining the State industrial authority. A discretion is given to the Court, which goes not only to the question whether an order should be made at all, but also to the extent of the restraint and to terms and conditions limiting the restraint. But if the Court determines to make an order, it is the same specific dispute, or specific part thereof, or specific matter, that must be the subject of the restraint. " It is not to be an order restraining the State authority from dealing

(1) (1926) 38 C.L.R., at p. 571.

(2) (1929) 43 C.L.R., at pp. 200, 206.

with Federal disputes generally, or with the matter of a Federal award generally, leaving the State authority to conjecture what it is that is forbidden and will be valueless. That would not be fair either to the State authority or to the numerous parties before it, and, if a more reasonable construction is equally open, the latter should be adopted . . . The State authority is entitled, and those before it are entitled, under sec. 20, to be told with substantial precision just what 'matter' before that authority the Commonwealth Court declares shall not be done" (per *Isaacs* J. (1)). A specific description of the thing with which the State industrial authority is restrained from dealing must be given in the order so that the section may operate upon it. By the section the State industrial authority is commanded, in accordance with that order, to cease to proceed in the dispute, or part thereof, or in that matter. If the dispute, or part thereof, or matter, is defined with sufficient precision to satisfy the condition upon which the operation of the section depends, the duty of the State tribunal to cease arises, but that duty is limited to proceeding in the dispute or part or matter defined. In all other respects it may exercise its authority. But, once again, the dispute or the matter is a conception involving not only a subject but parties. At the root of the decision of this Court in the *Western Australian Timber Workers' Case* (2) lies the principle that under sec. 20 the State industrial authority cannot be restrained from performing its functions in relation to persons who are not parties to the industrial dispute of which the Commonwealth Court of Conciliation and Arbitration has cognizance and are not bound or liable to be bound by an award made or to be made in that dispute. This was fully recognized in a judgment delivered in that Court shortly after the decision of this Court in the *Western Australian Timber Workers' Case* (2). In *H. V. McKay Pty. Ltd.* v. *Court of Arbitration of Western Australia* (3), his Honor Chief Judge *Dethridge* said :—" The Court's power of having cognizance of a dispute is limited not only to the subject matter of a justiciable dispute, but also to the persons or bodies properly made parties to the dispute. It cannot restrain a State authority in respect of any other subject

(1) (1929) 43 C.L.R., at p. 201.
(2) (1929) 43 C.L.R. 185.
(3) (1929) 28 C.A.R. 333, at pp. 334, 337, 338.

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matter or persons or bodies." Again, "It follows that I cannot make an order restraining the Western Australian Court except as to persons or bodies properly made parties to the present disputes, and that I can make no such order as to duties and rights in respect of employees not members of a body properly made such a party."

The order made by his Honor Judge *Drake-Brockman* in the present case recites that it appears that the conciliation committee which it restrains is about to deal with matters for which provision has been made in an award which it specifies and/or is about to deal with matters the subject of an actual, threatened, pending or probable dispute between the Timber Merchants and Sawmillers' Association and others and the Australian Timber Workers' Union and others. It orders that the conciliation committee should be restrained from dealing with any matter as aforesaid. It is unnecessary to enter upon the facts beyond stating that it is clear that many persons who would be affected by a determination or award of the conciliation committee in the proceedings restrained by the order are not bound by the Federal award referred to and are not parties to the industrial dispute. The order is quite general in its terms, which upon their natural meaning extend to the subject matters provided for in the award or in controversy in the dispute, not merely as between the parties to the dispute or award, but generally and irrespective of persons. Moreover the matters for which provision has been made in the award are not specified. The tribunal is left to collect them from a perusal of the award when and if it obtains it.

Upon the natural meaning of the language of the order, it extends beyond the authority conferred by sec. 20 and does not satisfy the conditions required to bring into operation the prohibition contained in that section. During the argument before this Court, the question whether the award should be artificially interpreted so as to restrain its meaning was discussed. If within the four corners of the document any sufficient reference could be found to the parties in dispute from which they could be identified by the State tribunal, it might be possible to construe the general expression "matters the subject of dispute" as referring thereto and as confined in its meaning to a dealing by the tribunal with such matters as between the disputants. The order, however, does not even identify either in its body or in its heading the dispute of which the Court of Conciliation and Arbitration has cognizance. Moreover,

we know from the reasons of his Honor Judge *Drake-Brockman* that he did not intend his order so to be confined. Perhaps the order is an instrument within the meaning of sec. 9A of the *Acts Interpretation Act* 1904-1934. If so, under par. (*b*) of that section, the order should be read and construed so as not to exceed the authority given by sec. 20. But it is unnecessary to consider this question because it cannot affect the failure of the order to specify the matters which the State industrial authority is restrained from dealing with. The failure to state what matters, provided for in an award or the subject of the dispute, the State conciliation committee should not deal with is not an excess of the Court's authority under sec. 20. It is a non-compliance with an essential condition which must be fulfilled before the operation of the prohibition contained in sec. 20 is effective. The order is, therefore, invalid.

The applicant seeks from this Court an order that the respondent shall pay the costs of the present application. There is no definite practice not to allow costs upon a summons under sec. 21AA (per *Rich* J., *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1) ). The present case approximates in its character to ordinary litigation. The power of the Court of Conciliation and Arbitration under sec. 20 was argued before his Honor Judge *Drake-Brockman*, and the applicant resisted the order upon the same grounds as have been taken before this Court. The respondents pressed for the order and relied upon contentions of law which have failed. The decisions of this Court were cited. The proceeding is therefore analogous to an appeal upon questions fully argued in the Court below. In the circumstances, it seems proper to order that the respondents pay the costs of the application before this Court.

*Declare that the order of the Commonwealth Court of Conciliation and Arbitration of 12th April 1935 in the summons mentioned is invalid and of no effect. Order that the respondents pay the costs of this application.*

Solicitor for the applicants, *Val. Ackerman*, Hunter's Hill, by *G. G. Tremlett.*

Solicitors for the respondents, *Minter, Simpson & Co.*

J. B.

(1) (1924) 35 C.L.R. 349, at p. 354.