[HIGH COURT OF AUSTRALIA.]

THE METAL TRADES EMPLOYERS ASSOCIATION AND OTHERS . . . . . } CLAIMANTS;

AND

THE AMALGAMATED ENGINEERING UNION AND OTHERS . . . . . } CLAIMANTS AND RESPONDENTS.

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SYDNEY, *Oct.* 17, 18 *Dec.* 17.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—Industrial dispute—Parties—Employees' organization—Award—Application to all persons employed in the industry, whether members of organization or not—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 4, 18, 19, 24, 29, 31 (2), 38, 44.

A union of employees in an industry served on employers in that industry in various States a log of demands as to terms of employment, requiring that those terms should govern the employment of all persons, whether members of the union or not, employed in the industry by a respondent. Some of the employers served with the log did not employ any members of the union. The employers did not accede to the union's demands.

Held, by *Latham* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* and *Dixon* JJ. dissenting), that, as between the union and the employers served with the log, there was an industrial dispute for the settlement of which the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make an award, binding as well on the employers who did not employ members of the union as on those who did, as to the terms of employment of all employees, including non-unionists.

Held, also, that where a union served on employers a log demanding a specified minimum rate of pay "to be paid by any respondent to employees" and delivered with the log a letter stating that the council of the union requested "you to grant to them" the demands in the log, the question of the terms of employment of non-unionists was not within the ambit of the dispute arising out of the employers' refusal of the demands.

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Amalgamated Engineering Union v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.*, (1928) 41 C.L.R. 402, overruled.

Burwood Cinema Ltd. v. *Australian Theatrical and Amusement Employees' Association*, (1925) 35 C.L.R. 528, *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.*, (1929) 43 C.L.R. 29, and *Long* v. *Chubbs Australian Co., Ltd.* (1935) 53 C.L.R. 143, considered.

CASE STATED.

A number of industrial disputes to which (*a*) the Metal Trades Employers Association and its members, and other employers in the engineering and metal trades industries, and (*b*) the following organizations of employees: the Amalgamated Engineering Union, the Australasian Society of Engineers, the Blacksmiths Society of Australasia, the Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia, the Federated Moulders (Metals) Union of Australia, the Electrical Trades Union of Australia, the Federated Ironworkers Association of Australia, the Sheet Metal Working Industrial Union of Australia, the Federated Stove and Piano Frame Makers Association of Australia, the Australian Workers Union, the Federated Jewellers Watchmakers and Allied Trades Union of Australia and the Australian Plumbers and Gasfitters Employees Union were parties, were, pursuant to sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, referred into the Commonwealth Court of Conciliation and Arbitration. During the hearing of the disputes the question of the jurisdiction of that Court to make an award binding upon employers in respect of employees not members of any of the organizations of employees parties to the disputes, was raised by a number of South Australian employers. Judge *Beeby* prescribed that elsewhere than in South Australia the award should be binding upon employers as to employees whether members of those employees' organizations or not, and stated, for the opinion of the High Court, a case under sec. 31 (2) of the Act, which was substantially as follows:—

1. On 15th May 1935 I as a Judge of the Commonwealth Court of Conciliation and Arbitration made an award of that Court in the matters above-mentioned. Clause 29 (*b*) of the award

provides that "it shall be binding upon (i.) the organizations of employees" set forth above "and the members thereof respectively; (ii.) the Metal Trades Employers Association and the members thereof and the employers mentioned" in a schedule thereto, "(*a*) in South Australia as to employees members of the organizations" of employees set forth above; "(*b*) elsewhere as to employees whether members of the said organizations or not." Clause 29 (*c*) reserves for further consideration the question whether the award should have any wider operation in the State of South Australia.

2. Those matters were before the Court pursuant to orders under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930.

3. After the orders referred to in par. 2 hereof had been made the disputes were listed before me and an extensive hearing of the disputes and an investigation of the metal trades industry was held. The Metal Trades Employers Association and employers in the States of New South Wales, Victoria, South Australia, Tasmania and Queensland were represented by advocates or counsel and the above-mentioned organizations of employees other than (*a*) The Australian Workers Union, (*b*) The Federated Jewellers Watchmakers and Allied Trades Union of Australia, and (*c*) The Australian Plumbers and Gasfitters Employees Union, were represented by officials or advocates.

4. The claims in the respective matters abovementioned so far as relevant to the present case are as follows:—(*a*) *No.* 427 *of* 1933: The claim by the Metal Trades Employers Association, an organization of employers, and by employers joining therewith served upon all the organizations of employees named in the title of this case stated is expressed thus:—"Log of Wages and Conditions of Employment: To regulate wages and working conditions to apply to employees in the employ of claimants. Wages—Adults. Clause 1 (*a*)—The basic wage required to be paid to adult male employees wherever employed in any part of the Commonwealth of Australia by a claimant to the award herein, shall be an amount determined by the Commonwealth Court of Conciliation and Arbitration, after a proper inquiry, as will enable secondary and primary industries to profitably progress

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and expand. Clause 2—In addition to the basic wage payable as set out in clause 1 hereof, the following marginal rates shall be payable to adult male employees engaged on the following classifications :—" [Here follows a table of classifications of employees and marginal rates claimed for such classifications respectively.] " Area, Incidence and Duration : Clause 20—This award shall come into operation on the first day of November, 1933, and shall remain in operation for a period of five years and shall be binding upon the claimant persons, firms and companies whose names are set out in the schedule annexed hereto and their employees members of the organizations of employees whose names are set out in the schedule annexed hereto." Accompanying the log served by the said organization of employers and the said employers in this matter was a letter dated 2nd November 1933, of which omitting formal parts the following is a copy :—" The members of the Metal Trades Employers Association, and other employers whose activities extend to all States of the Commonwealth, are opposed to the present method of fixing the basic wage applicable to the industries in which members of your organization are employed, on the classifications set out in the attached log. The present method of fixing the basic wage is unsuitable for present-day conditions, and is causing unrest and dissatisfaction generally. Many of the conditions of employment at present operative in the industry are also the subject matter of argument, and not in the best interests of all parties. Realizing that your organization also is opposed to the present basic wage and conditions generally, to obviate expansion of our difficulties the attached log of claims has been drawn up as a means of preventing unrest in the industry, it is asked that you agree to the conditions as set out in the log. It may be that you would prefer this matter to be settled by the Commonwealth Court of Conciliation and Arbitration. I have been directed to ask that you inform us within 21 days whether you agree that the matter should be determined by the Court, or that you are agreeable to the conditions as set out in our log of claims."

(*b*) *No.* 172 *of* 1934 : The claim of the Amalgamated Engineering Union served upon employers in the States of New South Wales, Victoria, South Australia and Tasmania was headed : " Log of Wages and Conditions of Employment : To govern the wages and

working conditions of all persons employed by a respondent in any branches of the industry named in the log." The claims when served were accompanied by a letter from the union requesting the respective employers to "grant to your employees the wages and working conditions as set out in the log enclosed herewith." (*c*) *No.* 177 *of* 1934: The claim of the Australasian Society of Engineers served upon employers in the States of New South Wales, Victoria, South Australia and Tasmania and the letter served therewith were substantially similar in this regard to the claim and letter mentioned in (*b*) of this paragraph. (*d*) *No.* 181 *of* 1934: The claim of the Blacksmiths Society of Australasia served upon employers in the States of New South Wales, Victoria and South Australia and the letter served therewith were substantially similar in this regard to the claim and letter mentioned in (*b*) of this paragraph. (*e*) *No.* 118 *of* 1934: The claim of the Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia served upon employers in the States of New South Wales, Victoria, South Australia, Tasmania and the Federal Capital Territory was headed as in (*b*) of this paragraph mentioned. The claims when served were accompanied by a letter requesting employers respectively "to grant to your employees whether members of the union or not such improvements in wages and working conditions as are contained in the log of wages and working conditions enclosed herewith." (*f*) *No.* 146 *of* 1934: The claim of the Federated Moulders (Metals) Union of Australia served upon employers in the States of New South Wales, Victoria, South Australia and Tasmania was headed:—"General Log of Wages and Conditions of Employment: 1. Wages.—The minimum rate of pay to be paid by any respondent to employees shall be as follows:—" [Here follows a table of classifications of employees and marginal rates claimed for such classifications respectively.] The claims when served were accompanied by a letter from the union in the following terms, so far as is now relevant: "I am directed by the Federal Council of the above union to respectfully request you to grant to them improvements in the working conditions as contained in the log of wages and working conditions enclosed herewith." (*g*) *No.* 219 *of* 1934: The claims of the Electrical Trades Union

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of Australia served upon employers in the States of Victoria, South Australia and Tasmania (and upon employers in New South Wales in respect of a smaller section of the Electrical Trades industry) was headed: "Log of Wages and Conditions of Employment: To govern the wages and working conditions of all persons employed by a respondent in any of the branches of the industry named in the log." The claims when served were accompanied by a letter in the following terms, so far as is now relevant: "I am forwarding herewith on behalf of the above-named union a copy of a log of wages and working conditions which it is desired should apply to the members of the union in your employ." (*h*) *No.* 220 *of* 1934: The claims of the Sheet Metal Working Industrial Union of Australia served upon employers in the States of New South Wales, Victoria and South Australia were headed as in (*g*) of this paragraph mentioned. The claims when served were accompanied by a letter in the following terms so far as is now relevant: "Under instructions from the above union I am forwarding herewith a log of wages and working conditions which it is asked should be made applicable to members of the union in your employ." (*i*) *No.* 204 *of* 1934: The claims of the Federated Ironworkers Association of Australia served upon employers in the States of New South Wales, Victoria and South Australia were headed thus: "Log of Wages and Conditions of Employment: To govern the wages and working conditions of all members employed by a respondent in any of the branches of the industry named in the log." The claims when served were accompanied by a letter from the association commencing as follows:—"I am forwarding herewith under instructions from the Federated Ironworkers Association of Australia a log of wages and working conditions which it is desired should be made applicable to members of the association in your employ." (*j*) *No.* 187 *of* 1934: The claims of the Federated Stove and Piano Frame Makers Association of Australia were not served upon employers in the State of South Australia and are not relevant to this case.

5. The Metal Trades Employers Association is an association of employers registered as an organization of employers under the Act. Its members are employers in the metal trades industry principally

in the State of New South Wales. The employers joining with the Metal Trades Employers Association as claimant employers in dispute No. 427 of 1933 are employers in the industry principally in the States of New South Wales and Queensland. The claimant employers do not carry on manufacturing to any appreciable extent, if at all, in the State of South Australia. Except to the limited extent, if at all, to which dispute No. 427 of 1933 embraces employer claimants in the State of South Australia there is not pending in this Court any industrial dispute in which employers in the State of South Australia are claimants.

6. The existence of industrial disputes extending beyond the limits of any one State on all matters raised in the said claims was not denied by any party represented before the Court. During the hearing the question of the jurisdiction of the Court to make an award binding upon employers in respect of employees not members of either of the above-mentioned organizations of employees was raised. The employer parties in the States of New South Wales, Victoria and Tasmania then stated that they would agree to the award being so made, and, having regard to the claims referred to in par. 4 hereof, I prescribed that elsewhere than in South Australia the award mentioned in par. 1 hereof shall be binding upon employers as to employees whether members of the said organizations or not.

7. Counsel for a large number of employers in the State of South Australia, parties to the disputes, objected that this Court had no jurisdiction to make an award binding upon employers in respect of employees not members of the organization or organizations by which claims had been served upon such employers. Counsel for the employers stated that they desired this question of jurisdiction to be determined by the High Court of Australia.

8. Certain employers in the State of South Australia, respondents to the claims of the organizations of employees, have not at any relevant time employed any member of the claimant organizations.

9. I therefore state this case for the opinion of the High Court upon the following question, which in my opinion is a question of law :—

Has the Commonwealth Court of Conciliation and Arbitration jurisdiction to prescribe that the said award in so far as it

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relates to matters raised in the claims of (i) The Amalgamated Engineering Union; (ii) The Australasian Society of Engineers; (iii) The Blacksmiths Society of Australasia; (iv) The Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia; (v) The Federated Moulders (Metals) Union of Australia, shall be binding in the State of South Australia upon employers in respect of employees not members of either of the said organizations of employees (*a*) where such employers do not at any material time employ members of the relevant organization of employees; (*b*) where such employers do employ members of the relevant organization of employees?

Ligertwood K.C. (with him *Wright*), for the South Australian employers referred to in par. 7 of the case stated. The question in the case stated should be answered in the negative. There was never any claim by the Federated Moulders (Metals) Union that the award should extend to any employee who was not a member of that union; therefore, so far as that union is concerned, the question should be answered in the negative (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1)). It is not within the power of the Commonwealth Court of Conciliation and Arbitration to prescribe wages and conditions to be observed by an employer with respect to persons who are not, either personally or through a representative union, parties to the dispute (*Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (2); *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (3)). Those cases are exactly in point and should be followed. The decision in *Arnall's Case* (4) is not "manifestly wrong," and therefore it should not be reviewed (*The Tramways Case* [*No.* 1] (5)); nor is it the decision of an equally divided Court within the principle of *Tasmania* v. *Victoria* (6). Furthermore, that decision has been acted upon by employers who have employed non-unionists upon terms inconsistent

(1) (1931) 45 C.L.R. 409.
(2) (1928) 41 C.L.R. 402, at pp. 411, 435.
(3) (1929) 43 C.L.R. 29, at pp. 36, 52.
(4) (1929) 43 C.L.R. 29.
(5) (1914) 18 C.L.R. 54.
(6) (1935) 52 C.L.R. 157.

with awards of the Arbitration Court and who may become liable for penalties if the decision is overruled. The definition of "industrial matters" in the *Commonwealth Conciliation and Arbitration Act* must be referred to in the scheme of the matters referred to in the judgment in *Alderdice's Case* (1). The matter dealt with in *Long* v. *Chubbs Australian Co. Ltd.* (2) related to apprentices only; therefore that case is not inconsistent with *Arnall's Case* (3). The power of the Court to deal with apprenticeship is specifically dealt with in sec. 25c of the Act. There is not any reference in the Act to non-unionists. So far as the Act purports to confer jurisdiction to deal with non-parties and non-unionists, it is unconstitutional as being in excess of the power conferred by sec. 51 (xxxv.) of the Constitution. Arbitration is a judicial function (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (4); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (5)). The jurisdiction suggested by the question in the case stated is essentially one to affect the rights and obligations of persons who are not parties to the proceedings. It is not a sufficient answer to say that the award only purports to bind employers and employees who are parties. If it is necessary to resort to arbitration, then the persons who are to be affected in the matter should be heard. The award purports to make contracts between employers and non-unionists on terms other than those specified in the award illegal contracts. This constitutes an interference with a non-unionist's right to freedom of contract. If the Court upholds the power it will lead to great practical difficulties resulting, among other things, in duplication and confusion. Acceptance of the principle of applying awards to non-unionists would be tantamount to legislation in lieu of arbitration. Arbitration is for the purpose of settling disputes between particular parties and confined to particular amounts. Non-unionists do not acquire rights or incur obligations under the awards; that is, so far as non-unionists are concerned, awards have not the force of law. This is important in view of sec. 109 of the Constitution. The limit to the power to

(1) (1928) 41 C.L.R. 402.
(2) (1935) 53 C.L.R. 143.
(3) (1929) 43 C.L.R. 29.
(4) (1910) 11 C.L.R. 311, at p. 322.
(5) (1910) 11 C.L.R. 1, at p. 25.

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create a dispute, as shown in *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1), does not extend beyond potential employers of unionists. There cannot be a "dispute" between a union and an employer with regard to his existing employees who are not members of the union.

Hannan K.C. (with him *Besanko*), for the State of South Australia. The State of South Australia adopts the argument addressed to the Court on behalf of the employers of that State. The power and jurisdiction of the Arbitration Court are subject to the rule laid down in *Whybrow's Case* (2). That Court cannot, under pretence of settling disputes, declare a common rule; its functions are judicial in nature, not legislative. Awards which are in their true nature and substance legislation are beyond the power and jurisdiction of the Court. An examination of the award shows that in its true nature it is legislative. The purpose and intention of the organizations, whether of employers or of employees, invoking the jurisdiction is to obtain an award to cover all matters in the industry, that is, to obtain a comprehensive and exhaustive code. It is not within the power of the Court to give effect to that purpose and intention. The South Australian employers of non-unionists were included in order to use the jurisdiction, or the assumed jurisdiction, of the Court for the purpose of legislating by means of an award to cover the whole field of industrial relationship in that particular industry (see *Whybrow's Case* (3)). The conditions of apprenticeship contained in the award before the Court in *Long* v. *Chubbs Australian Co. Ltd.* (4) were incidental to the settlement of an actual dispute before the Arbitration Court. On that ground that decision can be reconciled with the decisions in *Whybrow's Case* (5), *Alderdice's Case* (6) and *Arnall's Case* (7). The matter for consideration in *Long* v. *Chubbs Australian Co. Ltd.* (4) was the entry of apprentices into the metal trade. The award now before the Court does not deal with the entry of non-unionists into the industry. There is no real dispute between the employees' organization and the employers

(1) (1925) 35 C.L.R. 528.
(2) (1910) 11 C.L.R. 311.
(3) (1910) 11 C.L.R., at pp. 318, 321-323, 329, 336-338, 345.
(4) (1935) 53 C.L.R. 143.
(5) (1910) 11 C.L.R. 311.
(6) (1928) 41 C.L.R. 402.
(7) (1929) 43 C.L.R. 29

who do not employ any unionists. The question arises: Are those organizations genuinely interested in making claims for the benefit of non-unionists? The real and substantial desire on the part of those organizations is to have Commonwealth law prevail in the industrial field of their industry, to the total exclusion of State law, by force of sec. 109 of the Constitution. In these circumstances the Court should look at the real nature of the transaction. The State of South Australia is concerned to safeguard rights claimed by it under the Constitution to legislate with regard to domestic matters falling within the arbitral sphere (*Whybrow's Case* (1)). The inclusion of non-unionists within the scope of the award would, in effect, result in a common rule (*Alderdice's Case* (2)). There can only be a dispute with regard to matters in respect of which one party can ask and the other party can concede (*Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (3)).

J. A. Ferguson, for the Federated Ironworkers Association of Australia and The Electrical Trades Union of Australia. The views of the association and of the union are largely in accord with the arguments already addressed to the Court in this matter. In so far as awards of the Commonwealth Arbitration Court do not cover the field, the State law prevails. Frequently an organization is taken unwillingly to the Commonwealth Arbitration Court. If the Court holds that it is open to make a claim to cover not only members of the organizations who may be employed, but also any persons who may not be members of the claiming organization, or any employer in the particular dispute, it will enable the employers, by getting as many as possible into the organization or into the dispute of other employers, to cover the whole of the field in regard to all employees, whether unionist or non-unionist. The only class or field that cannot be covered is one which arises in the future, or one who has been overlooked in the collection of employers. If that contention be correct, then State arbitration must largely disappear. An award of this nature is prejudicial to the membership of unions. Non-unionists should not benefit from the efforts of

(1) (1910) 11 C.L.R., at p. 345. (2) (1928) 41 C.L.R., at pp. 408, 409.
(3) (1919) 27 C.L.R. 207.

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unionists. Under the *Commonwealth Conciliation and Arbitration Act* there is no power, irrespective of the Constitution, to deal with this matter in the way it was dealt with in the award. Any attempt to create a dispute with employers with respect to non-unionists is a departure from practice. There is not any justification in the Act for any such departure. No attempt was made, either directly or indirectly, in the Act to deal with the rights of persons who are not parties to the dispute. The Act shows, by express provisions, that the Legislature regarded the arbitral power *per se* as not including that power. There is a distinction between a dispute which affects members of an organization and one which affects persons who are not members of an organization. Apart from preference, the Act still has to be construed as if the "common rule" provision were in it. The common rule power is contained in sec. 38 (*f*) of the Act. It is directed to some of the matters which arise in this case. The common rule provision was discussed in *Master Retailers Association of New South Wales* v. *Shop Assistants Union of New South Wales* (1). After that decision it was apparent that there was not sufficient power in the Constitution to deal with situations which could have been dealt with otherwise than by common rule. Instead of proper steps being taken this circuitous attempt is being made to strain the operation of the arbitration power so as to take power now without any provision to bind the interests of non-unionists through the dispute with the employer. There is no such power either in the Act or in the Constitution.

O'Mara, for the Metal Trades Employers Association and other New South Wales employers. With regard to the first four claims referred to in the question reserved in the case stated, the claim for equal conditions of employment for unionists and non-unionists is within the ambit of the respective disputes. The matters claimed are within the scope of the Arbitration Court's powers as conferred upon that Court by secs. 23, 24 (2) and 38 (*b*) of the *Commonwealth Conciliation and Arbitration Act*. A claim that a non-unionist and a non-party should be paid the same wages and given the same conditions as a party comes within the definition of an "industrial

(1) (1904) 2 C.L.R. 94, at pp. 107, 111-113.

dispute." The definition of "industrial matters" was deliberately framed to include all possible matters. A claim by a union on an employer that he should not give worse conditions to non-unionists is an industrial matter apart from any definition. This case is indistinguishable from *Long* v. *Chubbs Australian Co. Ltd.* (1). That case is not to be distinguished on the ground that there is a specific power to deal with apprenticeship by reason of sec. 25c and a power to deal with persons of any particular age or sex. The words dealing with wages and hours in the definition of "industrial matters" are not less specific than the words there relied upon. The Legislature intended to cover the widest possible field in respect of employers and employees (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (2); *Arnall's Case* (3)). The matter of non-unionists being in a position in which they can be employed to the detriment of unionists is a matter unions are entitled to bring before the Court (*Alderdice's Case* (4)). There is nothing in sec. 24 inconsistent with the view that an award can be made binding in respect of non-parties. Employers' and employees' organizations may agree that non-unionists shall receive wages and conditions not less favourable than unionists. Non-observance would involve employers in a breach of the Act, even though non-unionists would be unable to enforce observance. It is a matter which one party is entitled to claim and the other party to grant; therefore it is capable of being made a term of an award (*Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (5)). The principle in *Hudson's Case* (6) is that the settlement of a dispute would be ineffective and possibly futile unless there was a power to bind successors.

[EVATT J. referred to *Australian Workers' Union* v. *Pastoralists' Federal Council* (7).]

The question before the Court in *R.* v. *Hibble*; *Ex parte Broken Hill Proprietary Co. Ltd.* (8) does not arise here. Sec. 40 is not an empowering section; it imposes limits upon the absolute powers which the Court might otherwise have found in the word "preference"

(1) (1935) 53 C.L.R. 143.
(2) (1923) 32 C.L.R. 413, at pp. 437, 439, 441, 453, 454.
(3) (1929) 43 C.L.R., at pp. 44-49.
(4) (1928) 41 C.L.R., at p. 428.
(5) (1919) 27 C.L.R., at pp. 212, 213.
(6) (1923) 32 C.L.R. 413.
(7) (1917) 23 C.L.R. 22.
(8) (1921) 29 C.L.R. 290.

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(*Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1)). A common rule established by conciliation is within the power, even though otherwise if established by arbitration (*Whybrow's Case* (2)). At the time a demand is made and the dispute exists it is immaterial whether that employer employs members of the organization or not (*Burwood Cinema Case* (3)).

Flannery K.C. (with him *Holmes*), for the Commonwealth, intervening by leave. The excerpt from the judgment of *Gavan Duffy* and *Starke* JJ. in *Alderdice's Case* (4), quoted by *Isaacs* J. in *Arnall's Case* (5), covers this case ; it is the correct law. Once the " class " is in the Arbitration Court the next question is : What is the subject matter of the dispute which the tribunal is called upon to settle ? That is ascertained in the first instance by determining whether the claim falls within sec. 4 or is excluded by other sections from falling within that section. Here there is a dispute *inter partes* with the parties present. No constitutional question was determined in *Alderdice's Case* (6), or in *Arnall's Case* (7), or in *Long* v. *Chubbs Australian Co. Ltd.* (8). It, however, was raised in the *Burwood Cinema Case* (9) and was determined in favour of the Commonwealth power and the provisions of the Arbitration Act. Sec. 29 specifies the parties who are bound by an award. The award is not affected, so far as the parties present in Court are concerned, by the fact that other people are not bound ; those people are eventually bound so long as the subject matter with which the award deals is an industrial matter within the meaning of sec. 4. If it is not an industrial matter they are not bound ; if it is, they are bound. The first portion of the definition of " industrial matters " is in its nature definitive but not exhaustive. The next portion is indicative in its express terms. Arbitration implies certain things and thereby excludes the method of the common rule. If, however, there be a proper dispute and all the persons concerned are before the Court, the award is a common rule in the sense that it applies to everyone concerned. No

(1) (1932) 47 C.L.R. 1.
(2) (1910) 11 C.L.R., at pp. 336, 337.
(3) (1925) 35 C.L.R. at pp. 535, 536.
(4) (1928) 41 C.L.R., at p. 435.
(5) (1929) 43 C.L.R., at p. 39.
(6) (1928) 41 C.L.R. 402.
(7) (1929) 43 C.L.R. 29.
(8) (1935) 53 C.L.R. 143.
(9) (1925) 35 C.L.R. 528.

objection can be taken to a common rule if established by permitted means. Everything which takes part so far as employment and non-employment are concerned is mentioned in the definitive portion of the definition of " industrial matters." It includes the exclusion and the regulation of non-unionists and other people not parties to the arbitration itself. The relationship between the parties in respect of the industry is defined, not by their contractual relations, if any, but by their general industrial relations having regard to the industry itself (*Burwood Cinema Case* (1)). What was here claimed from the employers was something to which they could agree and which subsequently became a matter of dispute. The matter is within the purview of the Arbitration Court. It is not prevented by the reasons put forward by the three Justices in *Alderdice's Case* (2) and *Arnall's Case* (3). So far as principle is concerned, *Long* v. *Chubbs Australian Co. Ltd.* (4) is good law and should be applied here. So far as sec. 24 is concerned, this matter can be the subject of an award.

Ligertwood K.C., in reply. A distinguishing feature in the award in *Long* v. *Chubbs Australian Co. Ltd.* (5) is a prohibition of the employment of minors ; it definitely comes within the preference principle. Decisions of the Court should be followed unless manifestly wrong. For this reason *Arnall's Case* (6), which for seven years has regulated the industrial relations of employers and employees, should be followed in this case. It is a departure from the conception of industrial arbitration to govern the relations of persons who are not parties to the industrial dispute. The point involved in this case goes far beyond the principle established in the *Burwood Cinema Case* (1).

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. The Commonwealth Court of Conciliation and Arbitration has jurisdiction to settle industrial disputes by an award (*Commonwealth Conciliation and Arbitration Act* 1904-1934, secs. 18, 19, 24 (2)). Sec. 4 of the Act provides that " industrial

(1) (1925) 35 C.L.R. 528.
(2) (1928) 41 C.L.R. 402.
(3) (1929) 43 C.L.R. 29.
(4) (1935) 53 C.L.R. 143.
(5) (1935) 53 C.L.R., at p. 145.
(6) (1929) 43 C.L.R. 29.

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dispute" means "an industrial dispute extending beyond the limits of any one State and includes—(i.) any dispute as to industrial matters." The same section provides that "industrial matters" includes (*inter alia*) "all matters relating to work . . . wages . . . rights, or duties of employers or employees . . . the relations of employers and employees . . . the employment . . . of persons . . . being or not being members of any organization . . . and all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." The terms of employment of persons in industry constitute an industrial matter and there may be an industrial dispute as to such terms between such persons and their own employers.

The first question which arises in this matter is whether there may be an industrial dispute between employees (A) and employers (B) as to terms of employment of other employees (C) in the same industry in which employees (A) are engaged in cases where none of the employees (A) are themselves employed by some or even by any of the employers (B).

A dispute exists only between the disputants. Generally and naturally it relates to their mutual industrial relations. But there is no reason why it should not relate to the industrial relations between one set of the disputants and third persons. In actual experience preference to unionists is an industrial matter which is a common source of industrial disputes between unionists and their employers. In such disputes the contention of the disputants essentially relates to the employment or non-employment by one set of disputants of third persons who are not parties to the dispute. Such a matter is of great industrial importance alike to unionists and non-unionists (as well as to employers), but only unionists, in the case supposed, are parties to the dispute on the side of the employees. There does not appear to be any reason in principle for denying that the terms upon which non-unionists may be employed may be as much the subject matter of an industrial dispute as the question whether non-unionists shall be employed at all.

Unionists may be concerned and apprehensive with respect to any matters which may affect the terms upon which their employers can afford to employ them. If other employers are at liberty to employ non-unionists at lower rates of wages, the competitive efficiency of employers employing unionists may be seriously prejudiced, and the continued employment of the unionists may be jeopardized. Employers of unionists may take the same view. It is to be expected that the opinions of those engaged in industry will vary upon this subject. Some will regard it as a matter of principle, others as a matter of interest. Divergence of views is well illustrated in this very case. Four unions have definitely claimed that employers should give to non-unionists the same conditions as to unionists, while two unions have appeared before the Court to oppose that claim. Employers in New South Wales, Victoria and Tasmania argued in the same way as the four unions mentioned, while employers in South Australia supported the arguments of the two opposing unions. The question of the terms upon which non-unionists may be employed can hardly be denied to be industrial in character, and it is obvious that it may become the subject of a dispute—between employers and employees, or between employers and employers, or between employees and employees.

The question which arises cannot however be decided merely by determining that the subject matter of the claim made may be the subject of an industrial dispute. The Act authorizes the settlement of industrial disputes only by conciliation or by arbitration. Conciliation may bring about an agreement: arbitration may result in an award. An agreement between two persons may produce an effect upon third persons, but it can impose duties or confer rights only upon those who make the agreement. Similarly an award may produce an effect upon third persons, but it can directly affect the legal relations only of those who were parties to the arbitration proceedings of which it is the result. In industrial arbitration the conception of "parties" is extended by a doctrine of representation which is in itself associated with the idea of "industrial disputes." Industrial disputes are essentially group contests—there is always an industrial group on at least one side.

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A claim of an individual employee against his employer is not in itself an industrial dispute. If it professes to be based upon an existing right (as, for example, a contract of employment, or an award (see *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (1)) such a claim may give rise to litigation in the civil Courts—but it is not an industrial dispute. If a claim is made by an individual employee for some improvement in his pay or conditions of employment, the refusal of the claim by his employer may result in a personal dispute, but this in itself would not be an industrial dispute. One necessary element of an industrial dispute, as distinguished from other disputes, is the circumstance that a demand is made by or upon a group of employers or employees. Thus an industrial organization is engaged in such a dispute when it makes what may be called an industrial demand on behalf of its members, present and future. In a forensic sense the organization is the party to the dispute, though it asks for nothing for itself as an organization. In another sense, the existing members of the organization are the parties to the dispute. The object of the dispute is to obtain rights for them or to cause them to become subject to obligations. The future members of the organization, though not in existence as such, are also regarded as represented in the dispute by the organization (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (2)).

The conception of industrial arbitration is closely similar in these respects to that of an industrial dispute. The parties to the proceedings always include some group which makes or resists a demand for an award which will impose duties or confer rights upon or in relation to the members of the group. This conception underlies the provision in sec. 29 of the Act that members of an organization shall be bound by an award, though they have not individually taken any part in the arbitration proceedings. Any statement that an industrial award binds only disputants who are parties to the arbitration proceedings must be understood in the extended sense which has been illustrated by what has just been said. It is unnecessary to give any further illustration of the principle that even the strictly legal effect of an industrial award

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

(2) (1925) 35 C.L.R. 528.

extends beyond the area of the rights and duties of those natural persons or juristic persons (including industrial organizations) which are the "litigants" in the arbitration. This result follows from the actual fact that an industrial dispute necessarily involves the idea of a demand made by or upon a group of employers or employees.

These considerations do not affect the principle that the Commonwealth Court of Conciliation and Arbitration cannot impose duties or confer rights upon persons who are neither parties to, nor represented in any manner in, the dispute or the arbitration proceedings.

It does not, however, follow that an industrial award, by imposing duties upon such parties (which are owed only to other such parties), cannot affect the possible employment of third persons who are not such parties in any sense. It is true that the procedural provisions of the Act limit the legal effect of an award to persons who either directly are, or by reason of representation are regarded as being, such parties. But the terms of an award may prevent the creation of specified legal relations between a party and third persons. An obvious example is found in the admitted proposition that an award may grant preference to unionists. So far as the award creates legal relations between persons, it affects only the parties to the dispute and to the proceedings. But it prevents the lawful employment of non-unionists and therefore prohibits the creation of a contract of employment between employers and non-unionists, even though the latter were not parties to or heard in the arbitration proceedings.

The power to grant preference to unionists is not found in sec. 40. That section assumes the existence of such a power and prescribes conditions affecting its exercise. The power is to be found in the definitions of industrial dispute and industrial matters, and in the sections which give the Court jurisdiction to settle such disputes by the method of arbitration.

If it is admitted (as is the case) that an award may entirely prohibit the employment of non-unionists, though they are not parties to any dispute or to any arbitration proceedings, it is difficult to see why an award should not contain a provision prohibiting

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the employment of non-unionists except upon industrial terms and conditions specified in the award. Such an award would not confer rights upon non-unionists, but it would impose duties upon employers and a breach of such duties would be an offence under the Act (see secs. 38 (*d*), 44, 49).

It is contended, however, that the Court is precluded by previous decisions from adopting this view. It has already been shown that the principle suggested does not conflict with the decisions which declare that only the parties to a dispute and to arbitration proceedings can be bound by or acquire rights under an award. It has also been shown that a claim by a union that employers shall not be allowed to prejudice or to diminish the employment of unionists is a claim as to an industrial matter which, if resisted, may bring about an industrial dispute. But it is urged that the Court has already decided the crucial question in the case of *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1), followed and applied in *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2). In *Alderdice's Case* (3) *Gavan Duffy* and *Starke* JJ., with whom the Chief Justice (Sir *Adrian Knox*) agreed, said:—"It is not necessary to determine what jurisdiction might be given to the Court under the terms of the Constitution, because clear words would be necessary in the Arbitration Act to endow the Court with powers and authority to specify the duty of employers to employees who are not parties to the industrial dispute before the Court, nor members of nor represented by the organization making the claim. Nowhere in the Act are any such words to be found: always the power is to settle some dispute in which the parties are more or less defined or capable of definition (cf. secs. 16, 18, 19, 19B, 23, 24, 26, 27, 29, 32, 37, 38 (*i*), (*j*), (*p*), (*s*), 38B and 48), and to make orders and awards with respect to the reciprocal duties and obligations of the parties appearing or represented in that dispute. The power in the Court to grant preference of employment to unionists in no wise conflicts with this view: that is a power to prescribe the rights and duties of the actual disputants as between

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1928) 41 C.L.R., at p. 435.

themselves, though it may also be detrimental to the interests of others." The other three members of the Court decided the case upon other grounds. The same learned Justices re-affirmed this statement as to the law in *Arnall's Case* (1), where *Rich* and *Dixon* JJ. concurred in the decision of the Court, stating that it would be "a futile proceeding for us to investigate for ourselves a question so recently considered by our colleagues, and to form our opinion when we have their decision to which they now adhere and which must govern this case. It would, in any event, be undesirable for us to take such a course, and it is made no less undesirable by the consideration that if we did arrive at an opinion upon the meaning of the statute opposed to that of our colleagues, a thing we do not suggest as likely, we should then be faced with the formidable constitutional question whether, so interpreted, the Act was within the power of Parliament."

In *Long* v. *Chubbs Australian Co. Ltd.* (2) the question arose whether an award could validly provide that non-unionist minors (not parties to any dispute and not represented in the arbitration proceedings) should not be engaged in certain specified occupations unless they were employed under contracts of apprenticeship framed in accordance with the award. It was held by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., who constituted the Court for the hearing of the case, that, the engagement of minors being a matter within the ambit of the relevant industrial dispute, the provision in the award was valid; the award created, in relation to industrial matters, rights and duties which were enforceable and performable by the parties to the award. The Court examined the decision in *Alderdice's Case* (3) and, after citing the passage already quoted from the judgment in that case, said :—"We think the passage we have quoted impliedly concedes that, where the material interests of one set of disputants are directly affected by the relations which the other set habitually enters into with strangers to the dispute, an award may regulate their entry into these relations, at any rate if it assumes to do no more than confer rights and impose duties upon the disputants and, in the case of organizations, their present and future

(1) (1929) 43 C.L.R., at p. 52. (2) (1935) 53 C.L.R. 143.
(3) (1928) 41 C.L.R. 402.

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members " (1). The Court then repeated what was said in *Arnall's Case* (2) with respect to the binding force of *Alderdice's Case* (3). As to *Arnall's Case* (4) itself the Court says :—" *Arnall's Case* (4) itself is somewhat nearer to the present because it concerned improvers. But we do not think that we are called upon to consider that decision, because we think that in any view apprenticeship is a matter with which the Court of Conciliation and Arbitration may deal. It is desirable, however, to point out that the decision of that case is by three Justices in a Court of six " (1).

These authorities, in my opinion, leave it open for the Court to decide that the Arbitration Act authorizes the making of an award which, being limited to the ambit of an industrial dispute, and conferring rights and imposing duties only upon the parties (understood in the extended sense explained) to the dispute and to the arbitration proceedings, prohibits one set of disputants from entering into industrial relations with strangers save and except upon specified terms. In my opinion the Court should now so decide.

This analysis of the matter answers the objections based upon the Constitution, sec. 51 (xxxv.). Such an award deals with an industrial dispute, and the award, regarded (as it should and must be regarded) as conferring rights and imposing duties only upon " parties," is the result of arbitration as defined in previous decisions of this Court.

It has been argued before us that the question which arises is concluded by the decision in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (5). In that case it was held that the provisions of the Act which purport to authorize the Commonwealth Court of Conciliation and Arbitration to declare and to establish a common rule were *ultra vires* the Parliament of the Commonwealth and invalid. The ground of that decision, however, is to be found in the principle that an award, whether made for the purpose of preventing or for the purpose of settling an industrial dispute, could not bind others than the disputants. Accordingly it was determined that an award could not extend beyond the area of the dispute so as to regulate the whole of an industry irrespective

(1) (1935) 53 C.L.R., at p. 151.
(2) (1929) 43 C.L.R., at p. 52.
(3) (1928) 41 C.L.R. 402.
(4) (1929) 43 C.L.R. 29.
(5) (1910) 11 C.L.R. 311.

of the extent of the dispute. But it was not denied that the award could deal with the whole subject matter of the industrial dispute. That subject matter may include a controversy as to the industrial relations of disputants with strangers to the dispute. If so, there is nothing in the principles upon which *Whybrow's Case* (1) was decided which prevents the making of an award dealing with that controversy (cf. *George Hudson Ltd.* v. *Australian Timber Workers' Union* (2)). These considerations provide a reply to the objection that the proposed award would be legislative rather than arbitral in character.

It has been urged, as an *argumentum ab inconvenienti* in support of the contention that the Act does not contemplate an award being made which deals with the relations of disputants to persons who are not disputants, that great confusion will arise if such awards are made. Unionists doing identical work may, it is pointed out, in some cases belong to either of two or possibly more unions, but as long as awards deal with the relation of employers to unionists and not with the relation of employers to non-unionists, it is possible to ascertain which award applies in any given case. It is urged that, if awards in general are framed upon the model of the proposed award in this case, it will sometimes be impossible for an employer to know to which award he should refer in order to ascertain the terms upon which he could lawfully employ a non-unionist. The difficulty is a real one, but its existence or possible existence cannot be decisive of the legal questions raised. The risk of such confusion arising and the desirability, indeed the necessity, of preventing it, will doubtless be present to the mind of the Arbitration Court. The matter is in the hands of the Court, which will doubtless take pains to prevent more than one award being so expressed as to be applicable in any given case for the purpose of defining terms upon which any non-members of organizations can be employed. It is to be presumed that, before any such award is made, the Court will ascertain the relevant facts and that the terms of the award will be framed in the manner which the Court considers proper in each case. The employers cited are, of course, entitled to be heard, and the powers of the Court under sec. 25 of the Act are sufficiently wide to enable

(1) (1910) 11 C.L.R. 311.

(2) (1923) 32 C.L.R., at p. 439.

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the Court to make such inquiries and hear such representations as it may think just in relation to the interests of any non-unionists affected, even though they are not parties to the dispute with which the Court is dealing in a particular case.

Before applying these principles to the particular case which is before the Court it is perhaps advisable to restate definitely the proposition that the Arbitration Court has jurisdiction to deal directly with the actual matters which constitute the substance of an industrial dispute—that is, the actual industrial claims made by one side and refused by the other side. When the Court so deals directly with such a claim actually made, by granting or refusing it, the question decides itself as to whether the relevant provision in the award is "relevant to the dispute" or "fairly incident to composing the difference between the parties" or "incidental" to the dispute or "within the ambit of the dispute" or "beyond the ambit of the dispute." These phrases are taken from the reasons for judgment in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1). The members of the Court differed in opinion as to the ambit of the dispute, or the area of the controversy, in the case then before the Court, but all accepted the general proposition that the Court could by its award deal with industrial matters which were within such ambit.

The dispute with which the Arbitration Court can deal and to which it is limited is the actual industrial dispute of which it has cognizance. The acts of the parties determine the ambit of the dispute. The fact that the Arbitration Court or this Court may consider an industrial claim to be unimportant or trifling or unwise has no bearing upon the actual content of the dispute or upon the jurisdiction of the Arbitration Court to deal with that claim in an award. The Arbitration Court may, because it considers that a claim, though actually made, is not important or really significant, decline to include in an award any provision with respect to it. But if, for reasons satisfactory to the Arbitration Court, such a claim is granted in the award, there can, in my opinion, be no valid objection, upon the ground of jurisdiction, to the Arbitration Court

(1) (1931) 45 C.L.R., at pp. 417 (*Gavan Duffy* C.J. and *Starke* J.), 421 (*Rich* J.), 428 (*Dixon* J.), 435 (*Evatt* J.), and 448 (*McTiernan* J.).

making such an award. The award in such a case would deal directly with an actual part of the dispute. The question of whether such a provision is appropriate for the settlement of the dispute is a question for determination by the Arbitration Court alone. I am of opinion, for the reasons stated, that the Arbitration Court has jurisdiction to make an award as to the terms of employment of non-unionists by employers between whom and a union a dispute relating to that subject in fact exists, whether or not those employers employ any unionists. The wisdom and propriety of such an award being entirely a matter for the discretion of the Arbitration Court, I now proceed to what I regard as the only further question, namely, whether in this case there was evidence that a dispute relating to that subject in fact existed between any and which of the unions and employers.

This is a case stated by the Commonwealth Court of Conciliation and Arbitration under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 for the opinion of the High Court. The questions arise in the matter of industrial disputes between the Metal Trades Employers Association and its members and other employers in the engineering and metal trades industries on the one hand, and a number of industrial organizations of employees on the other hand. The employers' claim contained the following clause:—"Clause 20.—This award shall come into operation on the first day of November, 1933, and shall remain in operation for a period of five years and shall be binding upon the claimant persons, firms and companies whose names are set out in the schedule annexed hereto and their employees members of the organizations of employees whose names are set out in the schedule annexed hereto." Claims made by the Amalgamated Engineering Union, the Australasian Society of Engineers, the Blacksmiths Society of Australasia, and the Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia, asked that the employers grant "to your employees" or "to your employees whether members of the union or not" certain wages and working conditions. In the case of the Federated Moulders (Metals) Union of Australia the claims were headed:—"General Log of Wages and Conditions of Employment:—1. Wages.—The minimum rate of

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pay to be paid by any respondent to employees shall be as follows:—" [Here follows a table of classifications of employees and marginal rates claimed for such classifications respectively.] The claims when served were accompanied by a letter from the union in the following terms, so far as is now relevant: "I am directed by the Federal Council of the above union to respectfully request you to grant to them improvements in the working conditions as contained in the log of wages and working conditions enclosed herewith." The claims made by the Electrical Trades Union of Australia, the Sheet Metal Workers Industrial Union of Australia and the Federated Iron Workers Association of Australia did not refer to wages &c. of persons who were not members of the unions. Employers in South Australia were served with the claims of the first five mentioned unions, but, except for what is stated to be a "limited extent, if at all," they are not themselves claimants in any industrial dispute pending in the Arbitration Court. Certain employer respondents in South Australia had not at any relevant time employed any member of the claimant organizations. Counsel for a large number of employers in the State of South Australia, parties to the said dispute, objected that the Court had no jurisdiction to make an award binding upon employers in respect of employees not members of the organization or organizations by which claims had been served upon such employers. This contention was supported in the Court also by the State of South Australia (intervening) and the Federated Iron Workers Association and the Electrical Trades Union. Other unions concerned were not represented upon the hearing of the case stated. The contrary view was supported by the Metal Trades Employers Association and the Commonwealth (intervening). Employers in the States of New South Wales, Victoria and Tasmania consented to an award being made so as to be binding upon employers as to employees whether members of the unions or not.

The question which is submitted for the opinion of the High Court is as follows:—"Has the Commonwealth Court of Conciliation and Arbitration jurisdiction to prescribe that the said award in so far as it relates to matters raised in the claims of—(i) The Amalgamated Engineering Union; (ii) The Australasian Society of

Engineers; (iii) The Blacksmiths Society of Australasia; (iv) The Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia; (v) The Federated Moulders (Metals) Union of Australia; shall be binding in the State of South Australia upon employers in respect of employees not members of either of the said organizations of employees (*a*) where such employers do not at any material time employ members of the relevant organization of employees; (*b*) where such employers do employ members of the relevant organization of employees." In the case of the Moulders Union neither the employers nor the employees made any claim which brought into dispute the wages &c. of non-members of the union. The employers clearly made no such claim and the letter from the union stated that the Federal Council of Union requested " you to grant to them " improvements &c. The fair construction of this phrase limits it to a claim made in relation to improvements &c. for members of the union. In the case of the matters raised in the claims of the Moulders Union the question should accordingly be answered in the negative. In the case of the other four unions mentioned in the questions, the rates of pay, working conditions &c. of non-members of the respective unions were matters in dispute between the parties, and, for the reasons stated in the earlier part of this judgment, the answers should be in the affirmative.

The question in my opinion should be answered in the following manner:—As to matters raised in the claims of (i) The Amalgamated Engineering Union; (ii) The Australasian Society of Engineers; (iii) The Blacksmiths Society of Australasia; (iv) The Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia, in case (*a*): Yes; in case (*b*): Yes. As to matters raised in the claims of (v) The Federated Moulders (Metals) Union of Australia, in case (*a*): No; in case (*b*): No.

RICH AND EVATT JJ. This is a case stated under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act*, which enables the Arbitration Court, as to any question of law arising in proceedings before it, to seek the opinion of the High Court.

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It appears from the case that Judge *Beeby* had cognizance of a number of industrial disputes in the metal trades throughout Australia, and that, in relation to each dispute, a question as to the Court's jurisdiction has been raised by certain employers in the State of South Australia.

The question of jurisdiction, as asked by Judge *Beeby*, is as follows:—"Has the Commonwealth Court of Conciliation and Arbitration jurisdiction to prescribe that the said award in so far as it relates to matters raised in the claims of—(i) The Amalgamated Engineering Union; (ii) The Australasian Society of Engineers; (iii) The Blacksmiths Society of Australasia; (iv) The Federated Society of Boilermakers Iron Shipbuilders and Structural Iron and Steel Workers of Australia; (iv) The Federated Moulders (Metals) Union of Australia—shall be binding in the State of South Australia upon employers in respect of employees not members of either of the said organizations of employees (*a*) where such employers do not at any material time employ members of the relevant organization of employees; (*b*) where such employers do employ members of the relevant organization of employees."

It is to be noted that, in the case of the first four of the five organizations of employees specified in the above question, each organization, in making demands upon the employers throughout Australia, including employers in South Australia, also demanded that the wages and working conditions specified in the log should apply to "all persons employed by" the employer. The fair intendment of the demand is that each organization was insisting that improved wages and working conditions should be granted by the specified employer to all his employees, whether such employees were members of the organization or not. Such demand was made in express terms in the case of the fourth organization referred to in the question, viz., The Federated Society of Boilermakers. In the case of the fifth organization mentioned, viz., The Federated Moulders Union, the log of demands cannot fairly be construed as containing a demand upon the specified employers that the wages and conditions asked for in the log should be granted to those who were not members of the union, for, prima facie, demands by registered organizations, whether of employees or employers, should be

construed as being made only in the direct interests of those who are, or may become, members thereof.

The question asked by Judge *Beeby* relates to "jurisdiction" in a general way. It is clear that the jurisdiction of the Arbitration Court to prescribe in the manner set out in the question may be defeated on several grounds. One possible ground for denying jurisdiction is the absence of any real or genuine dispute as to whether the specified employers should concede to non-unionists the wages and industrial conditions demanded by the organizations. Under certain circumstances, it might be proved that neither the organization nor its members really desired that the demand for uniformity should be acceded to. But such a question of reality of dispute, usually one of fact, not law, does not arise for our consideration on the present case, where it is expressly said that "the existence of industrial disputes extending beyond the limits of any one State on all matters raised in the said claims was not denied by any party represented before the Court." Indeed, the whole framework of the case is clearly intended to exclude any debate as to whether that part of the log of demands which requires of the employers that they should concede the wages and conditions to non-unionists has been genuinely advanced. If so, such demand, having been refused, is necessarily a part of the subject matter of dispute between the parties.

It is now apparent that two questions of law emerge for our consideration in answering the one question of jurisdiction. The first question is whether the five logs of demands made by the respective organizations of employees, and in relation to which the disputes came into existence, included a demand that the employers who were served with the log should apply to non-unionists employed by them the same wages and conditions as were demanded in the case of unionists. This question has already been discussed. It is plain from a consideration of the five logs that, in the case of the four organizations first mentioned in the question asked, the logs, and therefore the industrial disputes, extended so as to cover such a demand, whereas, in the case of the fifth organization, the log did not so extend. This conclusion makes a negative answer necessary in the case of the claims made by the Moulders' Union, because, if a registered organization desires that specified wages and conditions

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should be applied in a trade or an industry as a standard generally, and not merely for its own members, it should be expected to make its demands in sufficiently wide terms to secure that result; and, in the absence of a log sufficiently comprehensive for such a purpose, the Arbitration Court has no jurisdiction to include a clause in its award compelling employers to apply to non-unionists the unionist standard of wages and conditions.

In relation, however, to the claims of the first four organizations specified in the question, the second question of law arises. It is of general importance, because it involves a reconsideration of the principles applied by three of the six Justices who decided what is known as *Alderdice's Case* (1). Owing to the differences of opinion revealed in that case, the question should be considered anew.

The question may be posited as follows:—Where a genuine industrial dispute extending beyond the limits of one State has arisen following upon demands made by (A) a registered organization of employees, the membership of which covers an industry, craft or portion thereof, upon (B) specified employers or a registered organization of employers engaged in or covering the same industry, craft or portion thereof, the demands, including a demand that (C) the specified employers or the members of the registered organization of employers should accord to non-members of the organization of employees the same wages and conditions as are being demanded in relation to members of the organization, does the Constitution or the *Commonwealth Conciliation and Arbitration Act* preclude the Arbitration Court from settling that portion of the industrial dispute which is represented by the demand (C)?

First, let us refer to the constitutional power. By sec. 51 (xxxv.) of the Constitution, the Parliament is empowered to legislate in relation to arbitration for the settlement of industrial disputes extending beyond the limits of one State. The only question which can be raised in relation to the constitutional power to settle such a dispute as has been defined above is whether what is, *ex hypothesi*, a dispute between employers and employees in an industry ceases to be "industrial" merely because the employees require that the employers shall observe certain wages and conditions

(1) (1928) 41 C.L.R. 402.

in the employment not only of employees, parties to the dispute, but of employees who are not parties to the dispute, but are employed in the same industry. The practical interest of unionist employees in making such a demand is obvious. It is not made from motives of altruism, but for two important reasons of material interest. In the first place, if the employer is allowed to employ non-unionists at lower wages than in the case of unionists, there will be a direct inducement to the employer to employ the cheaper class of labour, and to dispense with, or not engage at all, the services of unionists. In the second place, the economic result of differing standards of wages for employees engaged in similar work in the same trade or industry is a powerful tendency towards the general adoption of the lower standard, because, under modern conditions of easy communication between all parts of industry, the tendency of the wages standard is to reach the lower level. Both these results of a lower wage for non-unionists are, or may be, disastrous to the union and its members, and may tend to produce great dissatisfaction and discontent. It is difficult to see why, in insisting upon the one standard throughout the industry, the unionists are not precipitating a dispute which is essentially "industrial" in character. The demand of the unionists may be considered unreasonable by an arbitrator, but the only question for our consideration is whether the demand, being genuinely made and refused, is part of the industrial dispute. If it is, an arbitrator may either grant it in whole or in part, or refuse it altogether. If the dispute is not "industrial," what kind of dispute is it? It is not a dispute as to social, political, religious, moral, business, literary, artistic, scientific, domestic, or sporting matters. It arises from demands by an organization of employees in an industry upon employers in the same industry. It relates to what is to be done by such employers in reference to other employees doing similar work in the same industry. It has come into existence because the unionists either will, or suppose that they will, be adversely affected if their union wage standard is not adhered to by all the employers upon whom they are making their demands. Whether such a dispute is wise or unwise in genesis, it is, in all respects, "industrial" in nature and character. Instances of similar disputes may be found in the

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history of trade unionism, and some are conveniently collected in *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1), in the judgment of *Isaacs* and *Rich* JJ. An illustration of an industrial dispute between a union and an association of employers, which was settled by an award containing a clause of equality of pay for unionists and non-unionists employed together is referred to in *Trolly, Draymen and Carters Union of Sydney and Suburbs* v. *Master Carriers Association of New South Wales* (2). Similar illustrations could be multiplied indefinitely.

Nor does the fact that the demand made by the unionists extends to the case of employers who do not employ unionists at all, prevent the creation of an industrial dispute upon the subject matter of the terms and conditions which should be observed by such employers in employing such non-unionists. In such cases, the union has an equally direct concern in removing the obstacles to the employment of its own members and to the maintenance and protection of the union standard of wages, even although the removal of such obstacle by the granting of the demand will incidentally benefit persons, non-unionists, who are not parties to the dispute, but the terms of whose employment by their employers (parties to the dispute) is the *subject matter* of the industrial dispute. In this respect the present case is *a fortiori* to that of *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (3), because there the industrial dispute in question related to what was to be done, not immediately, but in the future, in respect of those employees who might subsequently be members of the claimant organization. In the present case the dispute between the organization and those employers in South Australia who do not employ members of the organization, is as to the present conduct of such employers, not their future conduct, and the demand is made because the organization desires to avoid the present and immediate harm, both material and economic, to its members, if the employers in question will not observe the union standard of wages and conditions.

In such a case as we are considering at the moment—that of employers who do not employ members of the union—it is obvious,

(1) (1919) 27 C.L.R., at pp. 212-214. (2) (1905) 2 C.L.R. 509, at p. 510.
(3) (1925) 35 C.L.R. 528.

indeed admitted, that an "industrial dispute" may arise if the union demands preference of employment for its members or that all the non-unionists shall be dismissed, and only unionists employed. If such a demand were refused, an industrial dispute would be created as to the subject matter mentioned, even although the terms of the *Commonwealth Conciliation and Arbitration Act* may preclude the Court from making an award in the absolute terms of the demand mentioned. And the instance of preference to unionists shows clearly that the subject matter of a demand may create an industrial dispute between the union and employers who, by accident or design, employ non-unionists only. If it is closely examined, the demand in the present case is a less stringent demand than that of preference to unionists. The practice of the Commonwealth Arbitration Court seems to have been not to give preference to unionists except in special cases. Knowing this, a union may well be disposed to say:—"We are aware that we are unlikely to persuade the employers to grant preference to our members. But we shall at least demand this, that industrial conditions which are operating as a permanent discrimination *against* our members shall be terminated. The lower non-unionist standard of wages and conditions so operates that, in many cases, it is impossible for our members to be employed at all, and the lower standard also threatens the existence of the higher union standard. We shall insist upon these employers abandoning the lower non-union standard."

Such a demand may be regarded as unreasonable, but the only question is whether the union can be regarded as asserting it in the interests of its members. In whose interests is it made if not in the interests of the union and its members?

It should therefore be held that the Constitution does not preclude the Court from settling that part of an industrial dispute, otherwise within its jurisdiction, which relates to a demand that specified employers shall pay, to non-unionists as well as unionists, the wages set out in the log.

The next question is whether the *Commonwealth Conciliation and Arbitration Act* itself has provided for the exclusion of such a matter from the jurisdiction of the Court so that the Court cannot proceed to settle such portion, and such portion only, of an industrial dispute.

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In *Alderdice's Case* (1) *Knox* C.J., *Gavan Duffy* and *Starke* JJ. expressed the view that the Act itself presents an obstacle to the exercise of such a jurisdiction by the Court. In that case it was said that " clear words would be necessary in the Arbitration Act to endow the Court with powers and authority to specify the duty of employers to employees who are not parties to the industrial dispute before the Court, nor members of nor represented by the organization making the claim " (2). With all respect, one would prefer to say that if what would ordinarily be regarded as an " industrial dispute " does include a dispute between employers and employees as to the observance by employers in the industry of the union standard of wages and conditions with respect to all persons employed, clear words in the Act should be discovered before it is determined that such part of an industrial dispute, *and such part alone*, cannot be dealt with by conciliation and arbitration, although gravely threatening the peace of an industry.

After stating the principle in the words quoted, the learned Justices proceed :—" Nowhere in the Act are any such words to be found : always the power is to settle some dispute in which the parties are more or less defined or capable of definition (cf. secs. 16, 18, 19, 19B, 23, 24, 26, 27, 29, 32, 37, 38 (*i*), (*j*), (*p*), (*s*), 38B and 48), and to make orders and awards with respect to the reciprocal duties and obligations of the parties appearing or represented in that dispute " (2).

Again we are unable to agree. All the sections of the Act referred to indicate, it is true, that the Court should endeavour to secure an agreement between the parties to the dispute and, if it fails to do so, should settle it. Of course this means as between the parties. The sections referred to are, in the main, not concerned with the *subject matter* of the dispute between the parties. But sec. 24 (2) makes it clear that what is called " the whole of the dispute," and not merely a part of it, must be settled. However, it is to sec. 4 of the Act that one has to turn in order to ascertain the legislative intent as to whether any *subject matter* of dispute is to be deemed excluded from the jurisdiction of the Court. When we turn to sec. 4 we find that " industrial dispute " includes any dispute as to

(1) (1928) 41 C.L.R., at pp. 411, 435. (2) (1928) 41 C.L.R., at p. 435.

"industrial matters." The latter phrase is defined in the widest possible terms. It includes all matters relating to wages and conditions of employment and non-employment, and indeed, "all matters pertaining to the relations of employers and employees." It is not possible so to confine or "read down" these sweeping words describing possible subject matters of dispute that they will not include the important question whether employees in the same industry should receive the same wages and conditions without discrimination or differentiation upon the ground of union membership. Such a matter is of great moment to the unions and its members, and, if it chooses to dispute upon the matter, the dispute is "industrial" in character.

As the Court is overruling the reasons of three of the Justices in *Alderdice's Case* (1), it is proper to refer to several other matters. The validity of that reasoning has long been subject to question. The reasons were not the *ratio decidendi* of the order made by the Court. The decision was pronounced in 1928, but, soon after, in 1929, it was apparent that no other Justice was prepared to accept the reasoning as decisive (*Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2)). Recently, the case of *Long* v. *Chubbs Australian Co. Ltd.* (3) showed that there is no inherent *constitutional* incapacity in the Arbitration Court to settle a dispute between a union and specified employers as to the conditions of apprentices employed by such employers, whether such apprentices are members of the union or not. In *Long's Case* (3) the Court found an express indication in the Act that such a dispute was included within its purview. But, if it is also included, as it must be, in the denotation of "industrial dispute" in sec. 51 (xxxv.) of the Constitution, it is strong evidence that, so long as a union has a real concern in the conditions under which other persons, not members of the union, are employed by employers in the industry, an industrial dispute may arise between the union and such employers as to such conditions, and it is nothing to the point that the result of the intervention of the authority which arbitrates upon such a dispute,

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1935) 53 C.L.R. 143.

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by awarding in favour of the union, will be to benefit persons who are not members of the union. From the point of view of the constitutional power, *Long's Case* (1) is analogous to the present.

Two other points may be mentioned. The first is the argument that the result of affirming jurisdiction in the Arbitration Court may be to enable that Court to impose its award as a "common rule" throughout the industry. But this is not so. The award, when made, will only bind parties to the dispute. It will neither bind, nor have any relation whatever to, employers not parties to the dispute. Nor will it bind in any way those employees who are not members of the organization, but who are employed by employers who are parties to the dispute. Indirectly, and as a result of the employer's complying with the award, non-unionist employees will, or may be, benefited, but they will be quite unable to enforce the award, the organization of employees being the only party able to do so. A second point was made that it would, or might, be difficult for an employer to ascertain whether a non-unionist employed by him should be employed upon the terms of one award or another. In a properly drawn series of awards no such difficulty should arise.

Finally, it should be stated that although the conclusion reached in this opinion has involved a reconsideration of the principles involved, the powerful judgment of *Isaacs* J. in *Alderdice's Case* (2) may itself be accepted as an accurate statement of the legal and constitutional position.

The questions in the case stated should be answered as follows:— (i) Yes, as to both (*a*) and (*b*). (ii) Yes, as to both (*a*) and (*b*). (iii) Yes, as to both (*a*) and (*b*). (iv) Yes, as to both (*a*) and (*b*). (v) No.

STARKE J. Case stated by a Judge of the Commonwealth Court of Conciliation and Arbitration pursuant to sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. Several organizations registered under the Act served upon employers in the States of New South Wales, Victoria, South Australia and Tasmania, what are called logs of wages and working conditions for all persons

(1) (1935) 53 C.L.R. 143.

(2) (1928) 41 C.L.R., at pp. 411-428.

employed by them in any branch of the industry mentioned in the logs, and in one case a covering letter served with the log specifically stated that the claim was made in respect of employees whether members of the organizations or not. The question stated is whether the Commonwealth Court of Conciliation and Arbitration has jurisdiction to make an award, in so far as it relates to matters raised by the claim, which shall be binding in the State of South Australia upon employers in respect of employees not members of any of the claimant organizations. Admittedly, twice in this Court has the question been decided in the negative (*Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1); *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2)). In *Long* v. *Chubbs Australian Co. Ltd.* (3) the Court did not depart, or at least ought not to have departed, from those decisions, though to my mind it is difficult to appreciate the distinction there made. But, some six years having gone by since those decisions were given, the whole matter is again agitated and re-argued.

My opinion is, as it always has been, that the Commonwealth Court of Conciliation and Arbitration has no power under its Act to regulate the rights and duties of an employer towards persons who are neither parties to a dispute nor members of an organization at the time of the dispute or subsequently. It is conceded that the Arbitration Court cannot make a common rule in any industry, despite the provision in sec. 38 (*f*) of the Act. It cannot regulate the conduct of industrial enterprises, but can only settle so much of an industrial dispute extending beyond a State as is not settled by agreement. It is the reciprocal legal or industrial relations of the parties within the ambit of the dispute that can be settled. But a provision that persons, who are not parties to the dispute, shall not be employed, or shall receive more or less wages, or be subject to more or less onerous conditions, than the parties to the dispute, is not settling the legal or industrial relations of the parties to the dispute; it is, in substance if not in form, regulating the conduct of industrial enterprises. No rights or duties are conferred or imposed upon any

(1) (1928) 41 C.L.R. 402. (2) (1929) 43 C.L.R. 29.
(3) (1935) 53 C.L.R. 143.

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person who is not a party to the dispute, and whether prejudiced or benefited, he is not heard upon the subject and cannot enforce any such provision. Yet such a provision, so it is contended, is an industrial matter within the meaning of sec. 4 of the *Commonwealth Conciliation and Arbitration Act*. I do not agree, and for the reasons given in *Alderdice's Case* (1) and in *Arnall's Case* (2), which it is useless further to elaborate. In my opinion, those cases were rightly decided, and the questions stated in the present case should all be answered in the negative.

DIXON J. This is a case stated by the Commonwealth Court of Conciliation and Arbitration for the opinion of the High Court under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

It appears from the facts stated that four registered organizations of employees, having members employed in what is called the metal trades industry, served upon employers, whose operations fell under that classification, logs of claims or demands for minimum wages and for conditions of employment which they demanded should "govern the wages and working conditions of all persons employed by a respondent in any branches of the industry named in the log." The Court of Conciliation and Arbitration took cognizance of disputes arising out of the logs, and no one appearing before it denied that industrial disputes existed extending beyond the limits of any one State on all matters raised by the claims. Among the employers served with logs were some carrying on operations in South Australia who employed no members of any of the four organizations of employees. These employers and some others carrying on operations in that State, who, however, did employ some members of one or more of those organizations, objected that the Court of Conciliation and Arbitration had no jurisdiction to make an award binding upon employers in respect of employees not members of the claimant organizations. The Court of Conciliation and Arbitration has made a single comprehensive award dealing with these and some other disputes, but it has not yet included in the operation of the award persons who are not members of any of

(1) (1928) 41 C.L.R. 402. (2) (1929) 43 C.L.R. 29.

the organizations. The case stated submits to this Court the question whether the Court of Conciliation and Arbitration has jurisdiction to prescribe that the award, in so far as it relates to matters raised in the claims of each of the four organizations of employees, shall be binding in the State of South Australia upon employers in respect of employees not members of such organizations. The question is also asked in relation to a fifth body, but it may be dismissed from consideration because that organization's claim did not extend to non-members.

In my opinion the Court of Conciliation and Arbitration has no jurisdiction to include the proposed provision in its award. My opinion is based upon the incapacity of the Court under the Constitution to make an industrial regulation unless it be appropriate for the settlement of an industrial dispute. I do not base it upon any limitation upon the power of the Court arising from the legislation enacted pursuant to the constitutional power. If, within the meaning of the Constitution, an industrial dispute could and did exist of such a nature as to call for an award restricting the freedom of disputants to employ strangers to the dispute upon what terms and conditions they pleased, I should be unable to find in the legislation anything to prevent the Court of Conciliation and Arbitration making such an award. It is right that I should state briefly why it is that I think in this respect the statute does not add to the restrictions upon the power of the Court of Conciliation and Arbitration arising from the nature of the constitutional power. But I shall first deal with the grounds upon which I have reached the conclusion that in the settlement of such a dispute as those described in the special case, it is beyond the power of that Court to make an award governing the relations which employers who do not employ members of the organization may establish with strangers to the dispute. It is, perhaps, desirable for me to say at once that I do not deny the possibility of a dispute ever arising of such a nature as to found an award requiring employers, parties to the dispute, to refrain from employing anyone, whether a member of the organization or not, except on specified terms. What I do deny is that such a dispute can arise between employers or organizations of employers, on the one hand, and employees or organizations

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of employees, on the other, who are not and have not been in any state of actual co-operation. It is one thing to say that an organization of employees may, by a paper demand, raise a dispute with employers, who do not employ its members, about the wages to be paid and the conditions to be afforded to any of its members they may in future employ. It is quite another to say that the organization may raise a dispute with them on the subject of wages and conditions upon which they may continue to employ their workmen, although they do not include members of the organization and the employers have never engaged a single member of the organization. It is one thing to say that an organization, whose members furnish the labour for an undertaking, may raise a dispute on the question whether the employers conducting the undertaking shall proceed to take into their works non-unionists at lower rates of pay and on less favourable conditions. It is quite another thing to say that an organization whose members furnish none of the labour for the undertaking may raise a dispute with those conducting it upon the wages and conditions enjoyed by the members of another organization which furnishes all the labour.

These distinctions may serve to illustrate why it may be possible for an award to impose upon an employer a duty of the nature I have described if and when the settlement of an industrial dispute calls for such an arbitral provision. But this cannot happen unless an industrial dispute extending beyond the limits of any one State arises which requires for its settlement an award constraining employers to employ strangers to the dispute, either not at all, or upon equal conditions of pay and labour. Such an award can only be called for in cases in which the subject and nature of the dispute make the regulation of the relations between the employers in dispute and strangers to the dispute relevant thereto and appropriate for its settlement. But, if this occurs, all the conditions are fulfilled to bring the exercise of authority within the scope of the constitutional power. It is unnecessary to say in the present case whether such a thing may occur. The question for decision is whether it has occurred. But circumstances may be imagined giving rise to a dispute which would justify an award regulating the relations which an employer in dispute may establish with strangers to the

dispute. It is not difficult to conceive of a demand made upon their actual employers by a body of employees acting in concert insisting that they shall not take into their employment workmen who receive less wages or less favourable conditions of employment than they do. The causes of such a demand, no doubt, would include the fear that the maintenance of existing wages and conditions was threatened by the competition of non-unionists. But differential treatment of employees working side by side may provoke an unrest which is based on feelings more instinctive than reasoned but none the less real and intense. The difficulty lies not in acknowledging that such cases may arise but in defining them. At one extreme, it may appear to the Commonwealth Court of Conciliation and Arbitration to be imperative, in order to avert a dislocation of industry, that it should give effect to a demand on the part of the employees that some limit should be placed upon their then employer's liberty to engage non-unionists on such terms as he pleases. But it is evident that, at the other extreme, it may be no more than an expedient to overcome the want of power to make a common rule affecting employers who do not, as well as those who do, employ members of the disputant organization. This, in my opinion, cannot be done. It cannot be done for the reason that no industrial dispute could arise which would support an award prescribing the terms and conditions upon which employers, who never employ members of the disputant organization, may employ persons who are not members of that organization. An industrial dispute involves some disagreement between the co-operators in industry, whether individually, by groups, by classes, or by representation, and in such a case there is no co-operation. To me it seems something like a contradiction in terms to describe as an industrial dispute the failure to comply with a demand made by a body of employees upon an employer, who has never employed any of them, as to the terms and conditions upon which he shall employ strangers to them. No doubt the conception of industrial dispute has, under the influence of judicial decision, undergone a process of expansion or extension. But, in my opinion, no decision that has been given, and no principle that has been adopted so far, warrants such a consequence. A brief statement

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of the relevant steps in that development is a fitting preface to the reasons I shall give for deciding against the jurisdiction of the Court of Conciliation and Arbitration.

In *The Builders' Labourers' Case* (1) this Court relinquished the endeavour to find in the circumstance that a dispute has been raised by an organization for the purpose of obtaining an award a reason sufficient in itself for denying that the dispute is genuine. It also decided that a formal demand for improved conditions of pay and work, if refused, affords prima facie evidence of a dispute. From that time the formulation of claims by registered organizations of employers became a procedure recognized as sufficient to found the Court's jurisdiction to make an award unless some particular reason appeared for saying that there could not be, or was not, a dispute. The validity of the provisions in the Act dealing with the formation, registration and incorporation, of associations or organizations of employees and employers had been sustained in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (2) upon the ground that they are incidental to the power of preventing and settling industrial disputes by conciliation and arbitration. They were considered so incidental because the power could not be effectively exercised if individual employees only could be dealt with and if no continuing representatives of the employees existed who could arrive at a permanent settlement of the dispute by collective bargaining and be the means of securing obedience to an award when the Court settled it; see per *O'Connor* J. in the *Jumbunna Coal Mine Case* (3), whose judgment appears to be the source of many of the conceptions developed in the later decisions. The curious consequence has ensued that organizations, existing under a law upheld on the ground that their formation and registration conduced to the easier and more permanent settlement by conciliation and arbitration of disputes independently arising, have come to be the instruments for propounding the claims by which industrial disputes are created so that the Court of Conciliation and Arbitration may regulate wages and conditions of employment.

(1) (1914) 18 C.L.R. 224.
(2) (1908) 6 C.L.R. 309.
(3) (1908) 6 C.L.R., at p. 359.

The foundation of the system of creating such disputes by logs of demands is the doctrine that the essential quality of an industrial dispute is not the suspension of industrial relations but disagreement, difference, or dissidence. Thus this Court has said :—" It is . . . established that to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out, and a disturbance and dislocation of industry ; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement. It is only because this meaning of the words ' industrial dispute ' was adopted that the Court of Conciliation and Arbitration has been able to exercise the function of prescribing rates of wages and conditions of employment at the instance of organizations which have done little more than formulate and deliver logs of demands with which employers have not complied " (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1)). Conformably with the same doctrine, this Court has held that in making its awards the Court of Conciliation and Arbitration is confined to the subject matter of the dispute and cannot include in the award any term or provision which is inappropriate, or irrelevant, to the settlement of the questions at issue between the disputants (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (2) ; *Australian Workers' Union* v. *Graziers' Association of New South Wales* (3) ; *Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (4)). For some time it was considered that, when an award is made, a dispute must then exist between definite employers and definite employees, being members of the organization which purported to represent them (*Holyman's Case* (5)). But the Act provided, in effect, that, given a dispute settled by award, all persons who during the currency of the award were or became members of the organization obtaining it were bound by the award and were entitled to enforce the award (secs. 29 (*d*) and 44 (1), (2) (*c*)). Moreover, the Act also provided that, upon the disposition or

(1) (1930) 42 C.L.R. 527, at pp. 552, 553.
(2) (1931) 45 C.L.R. 409.
(3) (1932) 47 C.L.R. 22.
(4) (1935) 53 C.L.R. 90.
(5) (1914) 18 C.L.R. 273.

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devolution of the business of an employer bound by an award, the employer succeeding to it should also be bound (sec.29 (*ba*)). The validity of these provisions might have been sustained, perhaps, as incidental to the permanent settlement of an industrial dispute, although such a dispute was confined to defined and presently ascertainable parties. In the beginning, *O'Connor* J. said that "if the . . . power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen. Further, that the representative body must have some permanent existence, irrespective of the change in personnel of its members from time to time which is always going on" (*Jumbunna Coal Mine Case* (1)). When the Court came to decide upon the validity of the provision extending the obligation of an award to the successors in business of a disputant, *Higgins* J. upheld it upon this ground alone (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (2)). But *Isaacs* J. took wider ground. He said:—"The very nature of an 'industrial dispute,' as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen or which might arise if the demand were not acceded to and observed *for a period really indefinite.* The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants, not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class. . . . *If Parliament therefore chooses to include 'successors,' it may*" (3). This doctrine naturally led to the decision that an industrial dispute might arise out of a demand upon an employer by an organization none of whose members he employed (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (4)). The demand was for a minimum wage and for working

(1) (1908) 6 C.L.R., at p. 360.
(2) (1923) 32 C.L.R., at p. 452.
(3) (1923) 32 C.L.R., at p. 441.
(4) (1925) 35 C.L.R. 528.

conditions for members of the organization, and did not require the employers to give the same wages and conditions to non-members. But there appears to have been a claim for preference to unionists, although this is noticed expressly only in the judgment of *Powers* J. (1). The reasons given by the majority of the Court for overruling the contrary decision in *Holyman's Case* (2) and deciding that an industrial dispute might arise out of the demand by the organization upon employers who employed none of its members deny that any present relation of employer and employee need exist between the disputants and that an organization is merely an agent for its members. An independent capacity to dispute is ascribed to the organization as an association of employees because it represents a class, not a definite series of individuals; a class the members of which constantly change, and because the nexus or relationship between the employer and the association is the industry or calling. The judgment of *Starke* J. begins with the following statement:— "Industrial disputes are, as a rule, collective disputes. They may arise between two sets of workmen, as in the case of demarcation or discipline disputes. Or, as is more common, between employers or a class of employers on the one side and a large aggregation of workmen on the other. In the latter case the dispute often relates to the terms on which future employment shall be given, not only to men then employed, but to all men who may subsequently be engaged in the trade or calling in which the dispute has arisen. Thus the dispute may be whether preference shall be given by those employing a certain class of labour to the members, present and future, of some association of employees, or whether all members of that association, present and future, shall, if employed, have the benefit of better terms and conditions, and so forth" (3). The decision contemplates nothing but advantages to members of the organization. If and when employed they will receive the minimum wage and enjoy the conditions prescribed. In these respects the obligation of an award is contingent on the employer engaging members. Whether preference to unionists may be awarded against an employer who has never employed any members of the

(1) (1925) 35 C.L.R., at p. 542. (2) (1914) 18 C.L.R. 273.
(3) (1925) 35 C.L.R., at p. 548.

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organization is a matter the Justices do not discuss, but it would appear that *Isaacs*, *Powers* and *Starke* JJ. considered that it might be so awarded. I do not think, however, that they can be taken so to have decided and certainly there is no decision of the Court to that effect. But, in any event, the question in the present case is a different one. It is not whether for its own members present and future the organization can raise a dispute by demanding benefits consisting of preference in employment and of a minimum wage and conditions of work if and when employed. It is whether, independently of the employment of any of its members, the organization can dispute with an employer in reference to the terms and conditions upon which he will employ strangers; in other words, whether the organization can obtain an award which imposes upon an employer who employs none of its members an immediate obligation to pay his employees a prescribed rate and to afford them specified conditions. To sustain an award in reference to the treatment of employees who are neither parties to a dispute nor members of an organization which is a party, it must appear relevant to, and appropriate for, the settlement of a dispute. Its relevance and appropriateness cannot be found in the preservation of an existing state of co-operation or in the removal of a cause of apprehension among employees. Because no co-operation and no employment exists in the case of the organization. The only "relationship" between the organization and such employers appears to be that its members are, or may be, qualified to do work which is performed in the course of operations carried on by the employers. I am unable to see how a sufficient dispute can arise out of a demand by such an organization. The connection which this fact establishes between the organization and the employer is notional only and must rest in supposed mutual interests, not in co-operation. In degree it will vary greatly according to the nature of the labour which the employer needs and that which the organization supplies, and, also, with locality and other circumstances. If an employer relies on skilled labour of which there is a restricted supply controlled by the organization, or if there is a restricted market controlled by the employer for labour of the class represented by the organization, the connection in interest may be practical, at any rate, if there are members of the organization

available at the place where the employer's undertaking is carried on. On the other hand, the organization may relate to a calling or pursuit which plays an insignificant part in the operations of the employer. The employment of one carpenter, one blacksmith, one electrician, one caretaker, or watchman, in an undertaking concerned with altogether different industries, can hardly give organizations relating to those crafts or pursuits a title to raise disputes by demanding in each case that the one employee, although not a member, shall be paid a specified wage. Again, an organization, with no members in a particular State or city and no branch there, can have but a remote interest in the terms and conditions which members of another organization enjoy there. Suppose an association of little more than a hundred members all situated in one State makes demands throughout Australia upon employers in the industry. Or suppose such an association makes demands in two States upon employers in an industry governed by industrial regulations obtained by other organizations. In such cases the interest is intangible. But, in any case, the interest lies at best, not in any actual industrial relationship, but in a hope, or perhaps expectation, of establishing one. I am unable to adopt the view that, because members of an organization may be qualified to perform functions in the course of the operations carried on by an employer who in fact employs none of its members, a sufficient dispute can arise out of a demand by the organization with reference to the employment of strangers to the organization by an employer who is a stranger to it and to its members.

The disagreement as to industrial matters which is essential to a dispute involves some relation between the parties that calls for a state of agreement or accord between them. When there is a likelihood of an employer engaging members of an organization, the terms and conditions upon which he shall do so is a question that may require settlement. The contingency gives a foundation for a demand and refusal; at any rate so much is involved in the decision in the *Burwood Cinema Case* (1). But, when the subject is the terms and conditions of employment of non-members of an organization, it is difficult to see what basis there can be for difference,

(1) (1925) 35 C.L.R. 528.

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disagreement, or dissidence, unless some circumstances exist which make agreement or accord between the organization and the employer a condition necessary or desirable for the normal conduct of some industrial operation.

So far from the case stated disclosing any circumstances calling for or making relevant an award regulating the conditions of employment of persons not being members of the organization by the employers in Adelaide, nothing but the most artificial and fictional elements for such a dispute appear. There is nothing but the bare request that the log shall govern the wages and working conditions of all persons employed in any branches of the named industry. Even in the case of employers who have in their employment members of the claimant organization, such a bare demand appears to me in itself to be insufficient evidence of jurisdiction to make an award regulating the employer's relations with third parties. The employer's relations with non-members become a legitimate subject of award only in so far as such a regulation fairly arises out of, or is incidental to, the settlement of the mutual industrial relations of the members of the organization and of the employers in dispute. A general request, such as that contained in the log, does not in itself satisfy this requirement. The circumstances of the particular case may connect it with the subsisting industrial relations. But, as it stands, it is a mere general request for what may be called a common rule wherever the log is served; a request which, so far as appears, may be independent of any situation which has arisen out of the employment of members of the organization.

On these grounds I would answer the questions in the case stated as follows:—In relation to each of the organizations mentioned, the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to prescribe that the award shall be binding in the State of South Australia upon employers in respect of employees not members of any such organizations where such employers do not employ members of the relevant organization. The facts stated do not show that it has any jurisdiction to do so where such employers do employ members of the relevant organization.

But, apart altogether from the reasons I have given, there is the independent contention that upon its proper interpretation the

Commonwealth Conciliation and Arbitration Act 1904-1934 confines the awards, and the authority, of the Court, to regulating the conduct towards one another of the disputants or those represented by them, and in such a way that the employment of strangers to the dispute and the disputants cannot be made the subject of arbitral control. On the hearing of the special case this in substance was the first objection made at the Bar to an affirmative answer to the question submitted. In the view I have taken it is, in strictness, unnecessary for me to express my opinion upon it, but I think that it is desirable that I should do so. The objection is based upon the opinion adopted by *Knox* C.J., *Gavan Duffy* J., as he then was, and *Starke* J. in the case of *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1) and reiterated by those learned Judges in *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (2). That opinion is expressed in the former case in the following passage :—" It is not necessary to determine what jurisdiction might be given to the Court under the terms of the Constitution, because clear words would be necessary in the Arbitration Act to endow the Court with powers and authority to specify the duty of employers to employees who are not parties to the industrial dispute before the Court, nor members of nor represented by the organization making the claim. Nowhere in the Act are any such words to be found : always the power is to settle some dispute in which the parties are more or less defined or capable of definition (cf. secs. 16, 18, 19, 19B, 23, 24, 26, 27, 29, 32, 37, 38 (*i*), (*j*), (*p*), (*s*), 38B and 48), and to make orders and awards with respect to the reciprocal duties and obligations of the parties appearing or represented in that dispute. The power in the Court to grant preference of employment to unionists in no wise conflicts with this view : that is a power to prescribe the rights and duties of the actual disputants as between themselves, though it may also be detrimental to the interests of others " (3).

In the latter case their Honors said that further consideration of the matter had confirmed them in the view and a request by counsel to be allowed to argue the question was refused. The Court

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1928) 41 C.L.R., at p. 435.

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was composed of six members, but, as the Chief Justice's opinion would prevail in the event of the other three Judges forming a contrary view, no purpose could be served by hearing an argument upon the question unless one or more of the three Justices who had adopted the opinion was prepared to reconsider it. *Isaacs* J., who was a member of the Bench, expressed his disagreement with it, but *Rich* J. and myself, who were the other members, gave no opinion about the matter. We did, however, point out that, having regard to the constitution of the Court in the earlier case (1) and to the grounds given for the decision by the other members, the reasons of *Knox* C.J., *Gavan Duffy* and *Starke* JJ. could not be said to be the *ratio decidendi* of the order made by the Court. In stating that we refrained from investigating for ourselves the correctness of their Honors' interpretation of the statute because as their opinion must in any event prevail it would be futile to do so, we gave as an additional reason the fact that upon the contrary interpretation of the *Commonwealth Conciliation and Arbitration Act* we should be faced with the formidable constitutional question whether, so interpreted, the Act was within the power of Parliament. But, having now considered the question, I have come to the clear opinion that the contrary interpretation of the Act is correct. I do not mean that the Act contains anything which gives to any person, who is neither himself a party to the dispute nor a member of an organization which is a party, any private right to the enjoyment of any benefit under an award settling the dispute. But if the dispute is of such a character that, in the judgment of the Court of Conciliation and Arbitration, an award is called for imposing upon a party to the dispute duties the fulfilment of which involves a benefit to such a person, there is, in my opinion, nothing in the statute disabling the Court from so awarding and no presumption against giving to the general words, by which its power to settle disputes within its cognizance and to determine them by award is conferred, an operation wide enough to enable it to do so. Suppose employees in two States ceased work for the purpose of enforcing an objection to a practice on the part of their actual employers of taking into their service persons whose labour is obtainable at rates

(1) (1928) 41 C.L.R. 402.

or upon terms or conditions which the employees regard as subversive or destructive of those which otherwise are enjoyed in the industry. The subject of the dispute would be, I think, an industrial matter within the natural meaning of that expression. But, further, the words "industrial matters" are defined to *include* a lengthy list of particular matters many of which would in themselves cover it. There is nothing to restrict the subjects of disputes which fall within the jurisdiction given by sec. 18 and within the cognizance of the Court under sec. 19. If the Court considered that to settle such a dispute it was desirable to require the employers to discontinue the practice and to give all employees the same or similar rates of pay and terms and conditions of employment, its statutory powers are wide enough to make an award doing so. It may well be that persons who are not members of the organization disputing and who did not themselves dispute would obtain no rights under the award and could not enforce any of the duties it imposed. The reason for the award would be to compose the difference between the disputants, and it would be an award "with respect to reciprocal duties and obligations of the parties appearing or represented in that dispute." But one of the reciprocal duties would be to employ strangers only on the same terms as those parties. The question is entirely one of statutory construction. It relates to the limitations thought to be imposed by the Act of Parliament upon the powers of the Commonwealth Court of Conciliation and Arbitration. Those limitations were ascribed to an implied intention either discoverable in the frame of the legislation or to be presumed. They were in no way attributed to the nature or ambit of the legislative power. In *Long* v. *Chubbs Australian Co. Ltd.* (1) the Court saw in the statute positive indications that it contemplated the regulation of apprenticeship by the Commonwealth Court of Conciliation and Arbitration. Accordingly, because the view expressed by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (2) was based upon an implication or presumption of statutory interpretation, the Court thought that, quite consistently with that view, it might decide that in the special case of apprentices the supposed statutory obstacle was negatived, without considering whether it existed in other cases. But, in my opinion, there is no

(1) (1935) 53 C.L.R. 143.

(2) (1928) 41 C.L.R. 402.

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such obstacle discoverable in the legislation. I, therefore, do not base my conclusion upon the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, but upon the limitations arising from sec. 51 (xxxv.) of the Constitution.

McTIERNAN J. Demands were severally made by a number of the organizations of employees whose names are in the title of the case, upon the employers in the industries in which their members were working, to grant all their employees in such industries respectively, whether members of the organization making the demand or not, specified wages and conditions of employment. In some cases a demand was made by an organization on employers who did not have, and at no material time have had, any members of the organization in their employment. In other cases the employers had in their employment both members and non-members of the organization making the demand. The question arises, whether the Commonwealth Court of Conciliation and Arbitration, in proceedings which have ensued following upon the non-compliance of the employers with these demands, can by award impose an obligation upon employers in either or both of the last above-mentioned classes to pay the rate of wages and grant the conditions prescribed by the award, to employees who are not members of any of the organizations respectively making the demands. All the organizations, and all the employers, but not the non-unionists, are parties to the proceedings in the Court of Conciliation and Arbitration. Its jurisdiction is limited to the prevention and settlement, pursuant to the *Commonwealth Conciliation and Arbitration Act*, of all " industrial disputes " (sec. 18). An " industrial dispute " means an industrial dispute extending beyond the limits of any one State, and includes, *inter alia*, any dispute as to " industrial matters " (sec. 4). No point is made that there was not an inter-State dispute. The definition of " industrial matters " is also in sec. 4.

Counsel who challenged the jurisdiction of the Court to make the proposed award relied upon *Alderdice's Case* (1) and *Arnall's Case* (2); counsel who supported the jurisdiction of the Court relied upon *Long* v. *Chubbs Australian Co. Ltd.* (3). The view which

(1) (1928) 41 C.L.R. 402. (2) (1929) 43 C.L.R. 29.
(3) (1935) 53 C.L.R. 143.

prevailed in *Arnall's Case* (1) was founded on the following passage in the judgment of *Gavan Duffy* J. (as he then was) and *Starke* J. in *Alderdice's Case* (2) :—" It is not necessary to determine what jurisdiction might be given to the Court under the terms of the Constitution, because clear words would be necessary in the Arbitration Act to endow the Court with powers and authority to specify the duty of employers to employees who are not parties to the industrial dispute before the Court, nor members of nor represented by the organization making the claim." This judgment, with which *Knox* C.J. agreed (3), also declared :—" The power in the Court to grant preference of employment to unionists in no wise conflicts with this view : that is a power to prescribe the rights and duties of the actual disputants as between themselves, though it may also be detrimental to the interests of others " (2). In *Long* v. *Chubbs Australian Co. Ltd.* (4) it was held to be within the jurisdiction of the Court of Conciliation and Arbitration to prescribe by an award to which a union of employees and employers were parties that minors who were neither parties to the award nor members of the union should not be engaged by those employers in certain specified occupations, except subject to certain conditions. The authority of the Court of Conciliation and Arbitration to impose this obligation on employers who were parties to the award was found in the definition of industrial dispute and the reference to apprenticeship in sec. 25c. The part of the definition of industrial matters relied upon was as follows : " The employment . . . or non-employment . . . of persons of any particular . . . age, or being or not being members of any organization, association, or body." In *Long* v. *Chubbs Australian Co. Ltd.* (4) the Court therefore did not find it necessary to diverge from the principle laid down in *Alderdice's Case* (5) and adopted in *Arnall's Case* (1), because in the provisions of the Act to which it referred " clear words " may be found giving jurisdiction to impose the obligation upon employers with respect to apprentices who were neither parties to the proceedings nor members of the union.

(1) (1929) 43 C.L.R. 29.
(2) (1928) 41 C.L.R., at p. 435.
(3) (1928) 41 C.L.R., at p. 411.
(4) (1935) 53 C.L.R. 143.
(5) (1928) 41 C.L.R. 402.

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In the present case we have been invited to reconsider the principles laid down in *Alderdice's Case* (1) and *Arnall's Case* (2). I concur in the opinions of other members of the Court that the passage already quoted from *Alderdice's Case* (3), and which was the basis of the view which prevailed in *Arnall's Case* (2), too narrowly confines the jurisdiction vested by the statute in the Court of Conciliation and Arbitration. The true view of the extent of the jurisdiction conferred by Parliament on the Court is expressed in the judgment of *Isaacs* J. (as he then was) in *Arnall's Case* (4). In the *Burwood Cinema Case* (5) *Rich* J. took the view: "The Arbitration Court is limited in the first place by the statute, but the statute, both by its general scheme and its specific language, appears to me to deal with industrial disputes as coextensive with industrial disputes in the Constitution." Hence, if the Court of Conciliation and Arbitration has no jurisdiction to make an award binding the employers whose employees do not include any members of an organization making a demand, it is not because the provisions of the Act conferring jurisdiction are not wide enough to authorize the Court to make an award restricting the freedom of the employers to make contracts with persons who are neither parties to the proceedings nor members of an organization which is a party. But it is essential to the jurisdiction that the demand and refusal should have given rise to an industrial dispute. Now it is not every dispute between a union and a group of employers as to the minimum rate of wages which the employers should agree to pay persons who are not members of the union that the Court of Conciliation and Arbitration has jurisdiction to settle by award. For example, the refusal of a number of money-lenders to pay their clerks the rate of wages which an organization of shearers demanded should be paid, might produce a disagreement between these employers and the union on that question, but it would not be an industrial dispute which the Court of Conciliation and Arbitration has jurisdiction to settle. The demand does not touch or concern the interests of the members of

(1) (1928) 41 C.L.R. 402.
(2) (1929) 43 C.L.R. 29.
(3) (1928) 41 C.L.R., at p. 435.
(4) (1929) 43 C.L.R., at pp. 45, 46.
(5) (1925) 35 C.L.R., at p. 547.

the organization as employees. The dispute could not be said to arise out of an industrial relationship between the shearers' union and the money-lenders.

In the present case the demands, which were not complied with by the employers, were made by the union on behalf of employees in the same industrial occupation or calling as the non-unionist employees. The primary object of each union in making the demand was to obtain benefits for its members as employees in the industry in which they were working. In the *Burwood Cinema Case* (1) *Isaacs* J. stated the question which arose for decision in these terms :—" The question is whether, upon the true construction of the Constitution and the *Commonwealth Conciliation and Arbitration Act*, an employer who employs no union labour whatever can be a party to an ' industrial dispute ' with an organization of employees, or whether by simply refusing to employ a single unionist he can, so far as his industrial operations are concerned, entirely exclude the Federal power." The Court held that such an employer could be a party to an industrial dispute. In that case it does not appear that the organization did more than to demand of the employers that the rates and conditions should be granted to members of the organization. In my opinion it needs no extension of the principle in that case to answer the questions in the present case in the affirmative. For, as *Starke* J. said in the *Burwood Cinema Case* (2), "an industrial dispute is constituted, both historically and in point of fact, where a difference exists between workmen themselves, or perhaps between employers themselves, or between employers or classes of employers, and workmen engaged in some common industry or calling, concerning industrial conditions affecting a class so engaged and not merely affecting individual and definite members thereof. An industrial relationship, and not a contractual relationship, is all that is necessary to constitute an industrial dispute. The nexus is to be found in the industry or in the calling or avocation in which the participators are engaged." Again, *Isaacs* J. (as he then was) said :—" ' Industrial disputes ' certainly include conflicts of greater or less intensity among those co-operating in a given

(1) (1925) 35 C.L.R., at pp. 535, 536. (2) (1925) 35 C.L.R., at pp. 548, 549.

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industry with reference to the conditions of their co-operation. 'Co-operation' in the industry is not from the standpoint of the Constitution restricted to actual contractual relations. Every employer that enters the competitive field of the industry is co-operating to carry it on, in the broader sense in which the people of the Commonwealth are interested. That sense is national service and supply, the interruption of which is the evil dealt with in pl. XXXV. So also is every employee a co-operator in the same sense, for his labour is not to be looked on as a mere commodity, as if he were a machine, animate like the horse or inanimate like a steam-engine. The nexus of all the co-operators is the industry itself, irrespective of how its ownership or its operative arrangements are subdivided. If we confine our attention for the moment to disputes between employers and employed, we have to visualize the disputants respectively as portions of groups representing capital and labour. 'Employer' and 'employee' are terms which denote, not individuals contracting with each other whose industrial relations arise out of and are limited by their specific contracts, but membership of a group with which the individual has identified himself in relation to a given industry" (1).

Employers in an industry, whether they employ any member of a union of employees or not, are associated through the industry with the union and its members. This industrial relationship exists between those employers, their employees, the members of the union and their employers. The union and its members have an interest depending on their connection with the industry, in the settlement of the rate of wages and conditions of employment which should be provided for in the agreements of the employers, even those who employ only non-unionists, with all employees who exercise in the industry the trades and industrial avocations followed by members of the union. The interest of the unionists may properly give rise to a demand by them for specified rates and conditions to be granted to all employees, both unionists and non-unionists, so that the former will not be excluded from the industry or the latter preferred when employees are being engaged

(1) (1925) 35 C.L.R., at pp. 539, 540.

or discharged. The employers have an interest residing in their participation in the industry in the maintenance of their right to engage non-unionist employees on their own terms rather than on the terms demanded by the union whose members are employed in the industry. Employers who give the same rates of pay and conditions of employment to both unionists and non-unionists have a material industrial interest in the observance by other employers in the industry of a similar practice in case of employees following similar trades or industrial avocations. Refusal to comply with demands directed to the maintenance of these respective interests marks the outbreak of conflict between them, and shows that there is disagreement between union and employers or between employers and employers, as the case may be, as to which of these respective industrial interests should prevail or as to the terms upon which they should be reconciled. It follows that the disagreement is as to industrial matters and non-compliance with any such demand gives rise to an industrial dispute. This dispute relates to industrial matters and is an industrial dispute within the meaning of the Act. It follows that, for the settlement of that dispute, the Court of Conciliation and Arbitration may make an award imposing restrictions, which are appropriate and relevant to the settlement, upon the freedom of the employers to engage non-unionists upon any terms as to wages and conditions of employment which might otherwise be agreed between them. The award would not give any rights to the non-unionists: it would create duties in the employers, who do not employ any unionists, to the union and its members. An affirmative answer to the questions in the case neither involves a breach of the principle of arbitration as embodied in the Act, nor asserts any power in the Court to make a common rule (see *Long* v. *Chubbs Australian Co. Ltd.* (1)).

In the case of the Federated Moulders (Metals) Union of Australia, the claim is upon its fair construction limited to the members of the union. In this case the questions should be answered: No, but in all the other cases the answer to both questions should be: Yes.

(1) (1935) 53 C.L.R., at pp. 150, 151.

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Questions answered as follows:—(*i.*), (*ii.*), (*iii.*), (*iv.*)—*In case* (*a*): *Yes; In case* (*b*): *Yes.* (*v.*)—*In case* (*a*): *No; In case* (*b*): *No. No order as to costs.*

Solicitors for South Australian employers, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitor for the State of South Australia, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the Metal Trades Employers Association and other New South Wales employers, *Salwey & Primrose.*

Solicitors for the Federated Ironworkers' Association and the Electrical Trades Union, *Abram Landa & Co.*

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

J. B.