[HIGH COURT OF AUSTRALIA.]

THE SEAMEN'S UNION OF AUSTRALASIA APPLICANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS } RESPONDENTS.

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SYDNEY, 1935, *Dec.* 6.

MELBOURNE, 1936, *Mar.* 6.

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

Industrial Arbitration (Cth.)—Award—Validity—Seamen—"Waterside workers"—Penal provisions in award—Prohibition of acts tending to prevent, delay or hinder departure, working or use of ships—Transport Workers Act 1928-1929 (*No.* 37 *of* 1928—*No.* 3 *of* 1929), *secs.* 2*, 13*—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 16, 38 (*c*), 38B, 58BA.

An award made by the Commonwealth Court of Conciliation and Arbitration in respect of the seamen's industry provided that if waterside workers were not available for handling cargo or bunkering operations members of the seamen's union employed on the ship or ships concerned might be required to do the work at certain wage rates specified in the award.

Held, that this provision was not inconsistent with the provisions of the *Transport Workers Act* 1928-1929.

A log of demands made upon the seamen's union by a shipowners' association contained a claim that the union and its members should agree to abandon job control, and that they should not take or encourage direct action for the purpose of settling disputes or grievances or on any other account. The demands were not agreed to and an award was subsequently made by the Commonwealth Court of Conciliation and Arbitration. Provisions in the award prohibited the

* The *Transport Workers Act* 1928-1929 provides:—By sec. 2, that "'waterside worker' means a transport worker who offers or is engaged for work in the loading or unloading of ships as to cargo, coal, or oil fuel (whether for bunkers or not) . . . but does not include (except as otherwise declared by the Minister by notice in the *Gazette*)—(*a*) the members of the crew of a ship on the ship's articles," and, by sec. 13, that "no person shall engage as a waterside worker for work on a wharf . . . or ship at any port to which this Part applies unless that person is the holder of a licence issued to him under this Part to engage as a waterside worker in respect of that port which licence is still in force."

union and the individual employees from doing anything which would tend to prevent, delay or hinder the departure, running or working or using of ships, and the employees from leaving or refusing to accept employment or inciting others to do so, when the purpose of doing so was that of enforcing any demand concerning a matter expressly provided for in the award. Penalties were provided for each breach.

Held, by *Latham* C.J., *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the repeal by the *Commonwealth Conciliation and Arbitration Act* 1930 of provisions imposing penalties upon, and otherwise relating to, strikes and lock-outs did not have the effect of preventing the Commonwealth Court of Conciliation and Arbitration from including in an award provisions for penalties relating to such matters. That Court had jurisdiction to include the above-mentioned provisions in its award.

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

A log of claims served by the Commonwealth Steamship Owners' Association and other steamship owners upon the Seamen's Union of Australasia contained a claim as follows :—

"26. Union's obligations.—The union on behalf of itself its officers and members, its branches and their officers and members, undertakes, promises and agrees to the following :—To man all vessels belonging to or chartered by members of the association as soon as required to do so by the respective owners. To abandon all and every form of job control. To abandon the roster system, and not to interfere with the free selection and engagement of crews or individual members of crews, but to assist in every way the officers of such vessels or officials of members of the association in obtaining without delay a sufficient number of suitable men for selection for engagement. Not to take, directly or indirectly, nor in any way to countenance, incite, encourage or aid any member or members of the union to take any action which would prevent or hinder the proper manning of such vessels or delay or impede the due sailing or progress of the voyage of any such vessels. In the event of suitable members of the union not being available for vacancies in the complement of any such vessel not to oppose such measures affecting the manning of the vessel as may be necessary to secure its continued running, provided that members of the union who offer for engagement are not unreasonably rejected. Not to take nor to countenance directly or indirectly nor to incite, aid, or

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encourage any taking of direct action to settle disputes or grievances or on any other account. Not to declare black or otherwise to boycott any such vessels or any cargo carried thereon or goods which have been received by a member of the association for carriage thereon, but to submit all disputes or grievances for settlement and determination as hereinafter provided. To assist members of the association generally in securing the peaceful continuity of the shipping services and the prompt departure of all vessels at the times fixed for their respective sailings, and to take effective measures with that object. As a guarantee for the effectual carrying out of the undertaking hereinbefore mentioned the union further undertakes to pay to the association for the owner of the vessel concerned the sum of £100 in the case of the union and £10 in the case of an individual member of the union by way of compensation on each and every occasion that a vessel is delayed or held up by reason of breach of the union's said undertaking or owing to any act or misconduct on the part of any member of the union."

The claims were rejected by the union and the resultant industrial dispute came before the Commonwealth Court of Conciliation and Arbitration for settlement. On 8th November 1935, Chief Judge *Dethridge* made an award which was expressed to remain in force until the end of the year 1938. Clause 19 of the award provided, by sub-clause 1, that "employees shall not be required to handle cargo or to engage in bunkering operations in port if waterside workers are available present and willing to do the work at the rates prevailing at the port for waterside workers," and, by sub-clause 2, that "if waterside workers are not so available present and willing employees may be required to handle cargo or engage in bunkering operations in port and shall be paid therefor an additional wage." Clause 77, which was headed "Stopping or hindering work on ship," provided as follows:—"(1) No employee, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, shall in connection with the work to be done by him or by any other employee for any such employer in the course of employment covered by this award, do or omit to do, or incite or encourage any other employee to do or omit to do anything so as to tend to

prevent or delay or hinder the departing or running or working or using of any ship. The maximum penalty for each breach of this sub-clause is ten pounds. (2) The union shall not, for the purpose of enforcing any demand concerning any matter expressly provided for in this award upon any employer whatsoever who is a party to this award, order or incite or encourage any of its members or permit any of its officers to do or omit to do anything in connection with the work to be done by any employee in the course of employment covered by this award so as to tend to prevent or delay or hinder the departing or running or working or using of any ship. The maximum penalty for each breach of this sub-clause is fixed at one hundred pounds." Clause 78, which was headed "Concerted hindrance of employment," was as follows :—"(1) No employee, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, shall incite another employee to leave the employment of any employer covered by this award or to refuse to accept employment with any such employer. (2) No employee, acting in combination with any other employee covered by this award, shall, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, leave the employment of any employer covered by this award or refuse to accept employment with any such employer. (3) The union shall not order or incite nor permit any of its officers to order or incite any of its members to commit a breach of either of the next two preceding sub-clauses. The maximum penalty for each breach of either sub-clause (1) or sub-clause (2) of this clause is fixed at ten pounds and for each breach of sub-clause (3) of this clause is fixed at one hundred pounds." "Employee" was defined in the award as meaning a member of the union who is employed, or seeks or is sought to be employed, by one of the persons or bodies set out in the schedule, in the work on or about a ship provided for in the award. The "persons or bodies set out in the schedule" consisted of the Commonwealth Steamship Owners' Association, the members of that association, and other owners of steamships. They were made respondents to a summons taken out by the union under sec. 21AA

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of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, for a decision by the High Court on the question whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction in making the award to include therein clauses 19 (2), 77 and 78. In support of its application the union alleged (*a*) that clauses 77 and 78 were beyond the ambit of the industrial dispute, (*b*) that those clauses were inconsistent with the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and (*c*) that clause 19 (2) was inconsistent with the provisions of the *Transport Workers Act* 1928-1929 and the regulations made thereunder.

Evatt J. referred the summons into the Full Court, and it now came on for hearing.

Piddington K.C. (with him *De Baun*), for the applicant. Clauses 19 (2), 77 and 78 of the award are not within the ambit of the dispute. The award is very comprehensive. The matters "expressly provided for" in the award cover practically everything that could be provided for in any award. The words used in clauses 77 and 78 are generic. The prohibitions in those clauses apply, *inter alia*, to a demand by the union or an employee (*a*) that the award shall be observed, (*b*) for something in excess of the award but not forbidden by it, and (*c*) in connection with the bringing of a future industrial dispute. Clauses 77 and 78 constitute a code which extends further than any prohibition formerly on the statute book. It is a code that operates in one direction only. There is no equivalent prohibition of acts by the employers, nor is there any limitation of reasonableness and unreasonableness in the demands that may be given to an employee. The feature of those clauses is that they re-enact and extend the anti-strike provisions contained in secs. 6 and 6A of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, which, together with other material sections, were repealed by Act No. 43 of 1930. Some of the phrasing of the prohibitions in these clauses is drawn from the definition of "strike" contained in the 1904-1928 Act. The provision that the union "shall not . . . permit any of its officers" to do certain specified matters was doubtless inserted as a consequence of the decision in *Commonwealth*

Steamship Owners' Association v. *Federated Seamen's Union of Australasia* (1). "Job control" was discussed in that case (2). The Arbitration Court has no power to order the union to enter into an undertaking, promise or agreement in the form suggested in claim 26 in the employers' log of claims, and to make it a term of the award. It is not one of the forms of sanctions that are allowed to be imposed by the Arbitration Court. The employers did not ask that claim 26 be made a term of the award except in the form of an undertaking; in that form the Court has no jurisdiction. Clauses 77 and 78 of the award are provisions which do not merely exceed the ambit of the dispute; they are a wrongful assumption by the Arbitration Court of a power to legislate. The claim by the employers as to the proper manning and due sailing of the ships was limited to acts; it did not include "anything" which might "tend" to affect those matters. The clauses operate to prohibit demands which in themselves are quite proper and reasonable. Clause 19 of the award is outside the ambit of the dispute and also outside the jurisdiction of the Court. It is inconsistent with secs. 2 and 13 of the *Transport Workers Act* 1928-1929 and the regulations made under that Act. Seamen are not "waterside workers." The Arbitration Court has no power to order as a term of an award, as, in effect, it purports to do by clause 19 (2), that every seaman shall apply for a licence as a waterside worker.

Flannery K.C. (with him *O'Mara*), for all except two of the respondents.

Flannery K.C. (with him *Kingsley Newell*), for the respondent Broken Hill Pty. Co. Ltd.

Flannery K.C. The matters provided for in clauses 77 and 78 of the award are well within the claims made by the employers. Those claims may be regarded properly in the setting in which they appear, that is, in the Part which deals with disputes and stoppages of work. They are intended to relegate an employee to the Courts which are open to him, either under the award or under the powers of various

(1) (1923) 33 C.L.R. 297.

(2) (1923) 33 C.L.R., at pp. 304, 305.

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statutes, including the Arbitration Court. The primary meaning of the expression "for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award" is that in order to enforce a demand which bona fide is considered to be expressly provided for, employees are relegated to their special or ordinary legal remedies. If employees do not obtain what they are entitled to under the award they have their remedy but they are not entitled to do what is set forth in clause 78, that is, to act in concert; if they do so they are liable to the penalty provided. The words "undertake," "promise" and "agree" in claim 26, have a similar meaning. There is nothing in the form of the words which does not allow the Arbitration Court to give the full claim or any lesser claim on these particular matters. The whole subject matter is in dispute, and that matter is before the Arbitration Court. There was not any necessity for the employers to ask for a penalty. A special sanction was refused, but the matters asked for were granted, and the power then to fix the penalty is found in sec. 38 (*c*) of the *Commonwealth Conciliation and Arbitration Act*. The Arbitration Court has power under secs. 38 (*u*) and 38B to do all things deemed necessary or expedient. It is an established principle that the Court may include in an award any provision which is incidental to the carrying out of the award. Material powers are conferred by secs. 24 (2) and 38 of the Act (*Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1)). Apart altogether from the terms of the log of claims, the matter of sanctions is incidental to the terms of the award and the settlement of the dispute. There is no want of jurisdiction in the Court to make the provisions here made; whether by way of penalty or by any other method is a matter for the Court. Everything provided for in clauses 77 and 78 is included in the request in the log for an agreement not to engage in job control or direct action. Claim 26 presents no difficulty in being translated under an award to an order which affects the obligation not merely of the union but also of the individuals concerned. The provisions of sec. 58BA of the Act in no way limit the powers of the Court. The general and incidental powers of the

(1) (1932) 47 C.L.R. 1.

Court have long been recognized (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co.* (1); *Federated Millers and Mill Employees' Association of Australasia* v. *Butcher* (2)). The repeal of sec. 6A by the Act of 1930 in no way limits the general power of the Court. Clause 19 (2) is not inconsistent with the *Transport Workers Act* and the regulations thereunder. There is nothing in secs. 13 and 14 of that Act which prevents a seaman from performing the work of a waterside worker. A seaman does not engage to do the work; he is compelled to do it by law under certain conditions as a result of his having signed articles. A seaman is not prevented by the provisions of the *Transport Workers Act* from taking out a licence under that Act.

G. Lytton Wright, for the respondent James Patrick & Co. Ltd. The Arbitration Court had jurisdiction under sec. 38B of the *Commonwealth Conciliation and Arbitration Act* to include in its award the clauses in question.

Piddington K.C., in reply. The Act of 1930 completely altered the character of industrial arbitration. The control of strikes and lock-outs is a matter which is entirely different from the settlement of disputes. Apart from definite legislative provision the Commonwealth Court of Conciliation and Arbitration is not clothed with the right to impose any sanction it chooses to impose, whether by way of a penalty, an undertaking, or the giving of a bond. Provisions relating to the control of strikes and lock-outs formed part of the substantive law until the repeal of those provisions by the Act of 1930. Those special provisions are evidence that the Arbitration Court is not empowered by any incidental power to control strikes and lock-outs. In this connection the provisions of sec. 58BA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 have a significant bearing. Clauses 77 and 78 are an attempt to revive the strike provisions; to make them applicable where not formerly applicable, and to surmount the difficulty created by the decision in *Commonwealth Steamship Owners' Association* v. *Federated Seamen's Union of Australasia* (3). These matters did not form part of the

(1) (1909) 8 C.L.R. 419. (2) (1932) 47 C.L.R. 246.
(3) (1923) 33 C.L.R. 297.

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employers' log of claims and, therefore, are not within the ambit of the dispute. The mere fact that job control was referred to does not bring the matters within the ambit. In form clauses 77 and 78 (2) go beyond the demands for the observance of conditions laid down in the award. Seamen are disqualified by the *Transport Workers Act* from doing waterside workers' work without a licence, and they are not entitled to licences because they are not waterside workers within the meaning of the Act.

[*Latham* C.J. referred to *R.* v. *Mahony*; *Ex parte Johnson* (1).]

Cur. adv. vult.

1936, Mar. 6.

The following written judgments were delivered :—

LATHAM C.J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 for decision of questions of law arising in relation to an award made by the Commonwealth Court of Conciliation and Arbitration. The questions are whether the Court has jurisdiction in making the award to include therein clauses 19 (2), 77 and 78.

1. Clause 19 (2) provides in substance that if waterside workers are not available for unloading cargo or bunkering operations, employees (a term which includes seamen) may be required to handle cargo or engage in bunkering operations at certain wage rates which are specified in the award.

It is objected that this clause is inconsistent with the provisions of the *Transport Workers Act* 1928-1929 and the regulations under that Act.

The *Transport Workers Act* 1928-1929, sec. 13, provides that no person shall engage as a waterside worker on a wharf or ship at any port to which Part III. of the Act applies unless he is the holder of a current licence issued under Part III. This section applies to persons who engage as waterside workers. Sec. 2 of the Act, as enacted by the *Transport Workers Act* 1929, defines waterside worker as meaning a transport worker (defined in the same section) " who offers or is engaged for work in the loading or unloading of ships as to cargo, coal, or oil fuel (whether for bunkers or not), and

(1) (1931) 46 C.L.R. 131.

includes (except as otherwise declared by the Minister by notice in the *Gazette*) persons working in or alongside the ship in connection with the direction or checking of the work of other waterside workers, but does not include (except as otherwise declared by the Minister by notice in the *Gazette*)—(*a*) the members of the crew of a ship on the ship's articles." Sec. 4 provides that Part III. of the Act (which includes sec. 13) shall apply to waterside workers at ports specified by the Minister.

A seaman who enters into ship's articles engages as a seaman and not as a waterside worker as defined in the section. For this reason he does not, in my opinion, fall within the prohibition of sec. 13 and the corresponding provision applying to employers contained in sec. 14. The definition of waterside worker expressly excludes such seamen. Thus the members of the crew of a ship on the ship's articles may lawfully load or unload ships or be engaged in bunkering operations without licences under the *Transport Workers Act*, and there is no ground for alleging inconsistency between the award and the Act.

If, on the other hand, the *Transport Workers Act* on its true construction does not provide or permit that members of the crew of a ship on the ship's articles may load or unload ships &c. without a licence, then seamen are subject to the provisions of the Act including secs. 13 and 14. If this were the true view of the Act it would be necessary, but it would also be possible, for the seamen to obtain licences in order to place themselves in a position to comply with clause 19 (2) of the award. Thus again there would be no inconsistency between the award and the *Transport Workers Act*.

2. Clause 77 of the award is in the following terms :—" (1) No employee, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, shall in connection with the work to be done by him or by any other employee for any such employer in the course of employment covered by this award, do or omit to do, or incite or encourage any other employee to do or omit to do anything so as to tend to prevent or delay or hinder the departing or running or working or using of any ship. The maximum penalty for each breach of this sub-clause is ten pounds.

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(2) The union shall not, for the purpose of enforcing any demand concerning any matter expressly provided for in this award upon any employer whatsoever who is a party to this award, order or incite or encourage any of its members or permit any of its officers to do or to omit to do anything in connection with the work to be done by any employee in the course of employment covered by this award so as to tend to prevent or delay or hinder the departing or running or working or using of any ship. The maximum penalty for each breach of this sub-clause is fixed at one hundred pounds." Clause 78 is in the following terms:—"(1) No employee, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, shall incite another employee to leave the employment of any employer covered by this award or to refuse to accept employment with any such employer. (2) No employee, acting in combination with any other employee covered by this award, shall, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is a party to this award, leave the employment of any employer covered by this award or refuse to accept employment with any such employer. (3) The union shall not order or incite nor permit any of its officers to order or incite any of its members to commit a breach of either of the next two preceding sub-clauses. The maximum penalty for each breach of either sub-clause (1) or sub-clause (2) of this clause is fixed at ten pounds and for each breach of sub-clause (3) of this clause is fixed at one hundred pounds."

The first objection to these clauses is that they are inconsistent with the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The argument is based upon the facts that until 1930 the Act contained, particularly in secs. 6 and 6A, provisions penalizing or otherwise relating to lock-outs and strikes as defined in the Act, and that these provisions were repealed in 1930. It is argued that therefore the Arbitration Court cannot include in any of its awards any clause which imposes a penalty upon any act which would have fallen within the definition of strike or lock-out.

In the Act as it previously existed none of the relevant sections (i.e., the sections which were removed from the Act in 1930) were sections dealing with the power of the Arbitration Court to make awards. Secs. 6 and 6A, for example, did not deal with provisions in awards. They were substantive provisions imposing penalties upon certain strikes and lock-outs. The repeal of these sections, in my opinion, does not affect the power of the Arbitration Court in making awards. That power was not extended by these sections when they were in operation, and it is not diminished by their repeal.

In the second place it is objected that "clauses 77 and 78 are beyond the ambit of the industrial dispute in relation to which the award was made." I understand this objection to mean that these clauses deal with subject matters which were not in dispute between the parties.

At the outset it should be observed that there is no authority for the proposition that the Arbitration Court is bound to grant every claim that is made in the very terms in which it is made or (as the only alternative) to refuse the claim outright and to abstain from dealing in any manner with the subject matter of the claim. Sec. 38B of the *Commonwealth Conciliation and Arbitration Act* expressly provides that "in making an award or order, the Court or a Conciliation Commissioner shall not be restricted to the specific relief claimed by the parties to the industrial dispute, or to the demands made by the parties in the course of the dispute, but may include in the award or order any matter or thing which the Court or Commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further industrial disputes."

Thus the Arbitration Court is entrusted by the Legislature with the power and duty of dealing with the dispute in the manner best calculated in the judgment of the Court to settle that dispute or to prevent further disputes. This is a power which it may exercise "in making an award or order." The Court must deal with "the dispute," but it is not limited to dealing with it in the precise manner desired by one or other of the parties.

The employers made a claim in very general terms that the union and its members should agree to abandon job control, and that

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they should not take or encourage direct action for the purpose of settling disputes or grievances or on any other account. The union and its members did not agree as asked, and there was a dispute as to these matters.

The claim was not limited by any reference to the purpose of the acts or omissions sought to be prevented. The clauses of the award, on the other hand, are limited by reference to the purpose of "enforcing any demand concerning any matter expressly provided for in this award." The claim positively asks that the union and its members should be required "to man all vessels . . . as soon as required to do so by the respective owners." The clauses in question impose the smaller obligation (in relation to the same subject matter) of not leaving employment and of not refusing employment offered subject in each case to the limitation already mentioned. The claim asks that the union and its members should "assist members of the association generally in securing the peaceful continuity of the shipping services and the prompt departure of all vessels at the times fixed for their respective sailings, and to take effective measures with that object." The Court did not grant this claim, but imposed prohibitions of acts or omissions, limited in the manner stated, which would "tend to prevent or delay or hinder the departing or running or working or using of any ship." A comparison of the claim with the challenged clauses in the award shows that the Court has granted something less than was claimed, but that what was awarded was included in the claim made by the employers and rejected by the employees. Accordingly, in my opinion, the Court, in making these provisions in its award, was dealing with the actual dispute between the parties and was acting within its jurisdiction.

In the claim which was made by the association, however, the following appeared:—"As a guarantee for the effectual carrying out of the undertaking hereinbefore mentioned the union further undertakes to pay to the association for the owner of the vessel concerned the sum of £50 by way of compensation on each and every occasion that a vessel is delayed or held up by reason of a breach of the union's said undertaking or owing to any act or misconduct on the part of any member of the union." The

Court did not grant this part of the claim but instead provided for penalties in the words appearing at the end of clauses 77 and 78. It is said that the association only claimed a civil remedy and that the Court has in the award imposed penalties as for offences. In my opinion, these provisions are authorized by sec. 38 (*c*) of the Act, under which the Court is empowered to fix maximum penalties for any breach of any term of an order or award, not exceeding one hundred pounds in the case of an organization or an employer, not being a member of an organization bound by the order or award, or ten pounds in the case of any individual member of an organization. The provisions to which the penalties are attached are clearly terms of the award, and sec. 38 (*c*) authorizes the Court to fix the penalties mentioned in the award.

Finally it is argued that the association asked only for an undertaking to be given by the union as to the matters mentioned, as distinct from the making of direct provisions in the award dealing with those matters. The claim made by the employers, however, asked that the union should "agree" to be bound in the manner set out in the claim. The union refused so to agree and the Court made an award dealing with the matters in question. There is nothing to distinguish this case in this respect from the ordinary case of a claim made by employers or employees that the other parties shall agree to be bound by certain conditions, and the normal making of an award in the absence of agreement.

The respondents, however, had a further reply to the objections raised. This reply was based upon the provisions of the Act which empower the Court to prevent and settle industrial disputes and to make its awards effective for such prevention and settlement. Such provisions are to be found (for example) in secs. 16, 18, 24 (2), 38 (*u*) and 38B. This argument is not founded upon any considerations as to the ambit of a dispute. It is based upon the general principle which, it is said, the Act recognizes, that the Arbitration Court is empowered, when an agreement has been reached by conciliation, or an award has been made after arbitration, to protect the agreement or award and to promote its efficacy by excluding other methods than conciliation and arbitration for dealing with matters which are in dispute between the parties. In 1917 it was

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held that the Commonwealth Parliament had power to penalize strikes and lock-outs because such legislation was incidental to the promotion and protection of the procedure by way of conciliation and arbitration for the prevention and settlement of industrial disputes: *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1); see, per *Isaacs* J. (2):—"If a party while bound to arbitrate attempts to decide the matter for himself, it is an inconsistent act, and is a breach of his obligation which binds him to abide by the decision of the disinterested third party. It substitutes 'might for right,' and insists on submission irrespective of justice." (See also *Waterside Workers' Federation of Australia* v. *Stewart* (3), *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (4), and *Walsh* v. *Sainsbury* (5).)

Prima facie, it is for the Court to determine what provisions are "necessary or expedient" in the award for "settling the dispute or preventing further industrial disputes." If a particular provision had no relation to this purpose—if (to take an extreme case) it did not deal with industrial matters at all—it would not be within the jurisdiction of the Court to impose obligations upon the parties with respect to such a matter. The provisions in question are, however, plainly directed to industrial matters which are definitely related to securing the actual and effective operation of the award for the purpose of governing the industrial relations of the parties. The necessity and wisdom of including such provisions in a particular award are left to the judgment of the Arbitration Court and not to the judgment of this Court. In my opinion, on this ground also, the Court had jurisdiction to include clauses 77 and 78 in the award.

RICH J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The object of the summons is to obtain a declaration that certain clauses in the award recently made by Chief Judge *Dethridge* are invalid. The first clause is clause 19 (2). That clause imposes on the crew of a ship the obligation of handling cargo at rates of pay prescribed if waterside

(1) (1917) 23 C.L.R. 226.
(2) (1917) 23 C.L.R., at p. 240.
(3) (1919) 27 C.L.R. 119.
(4) (1925) 35 C.L.R. 449.
(5) (1925) 36 C.L.R. 464.

workers are not available. It is attacked on the ground that the *Transport Workers Act* 1928-1929 prevents the crew of a ship from engaging in the work of loading and unloading cargo. The short answer is that it does not do so. The effect of sec. 13 and the definition clause is to exempt the crew of a ship on the ship's articles from the necessity of licensing. The next clauses attacked are clauses 77, 78. Those clauses are attempts to prohibit the seamen and the union preventing or delaying or hindering the departure, running or working or using of the ship or leaving or refusing to accept employment when the purpose of doing so is that of enforcing any demand concerning a matter expressly provided for in the award. It is unnecessary to set the provisions out in full. The first ground relied upon depends upon the ambit of the dispute. The dispute arose from claims made by the shipowners' organization upon the union. The claims included a demand for an undertaking or agreement that practices very like those covered by the award should not be resorted to. We had the benefit during the argument of a comparison by counsel between the things demanded and the things prohibited by the award. Counsel argued that they were so different when they were analysed that the award went outside the dispute. I cannot agree with this view. The provision made by the award although not actually that which was sought by the demand seems appropriate as an arbitral remedy for the settlement of the substantial dispute disclosed by the demand. It was then said that the repeal of sec. 2 (1) and Part II. of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 which was effected in 1930 indicated an intention on the part of the Legislature that the penalization of strikes and the like should cease. If this were so, the award which forbade strikes and fixed penalties pursuant to sec. 38 (*c*) would be repugnant to the policy of the Act as it now appeared. Sec. 58BA (*b*), (*c*), was also referred to as supporting the same inference with reference to the legislative intention. Of course the repeal of these provisions does show a change of legislative policy. It does show that the Legislature decided to remove from the law the provisions making strikes and lock-outs and the like offences. But I cannot find in the repeal any indication of intention that the powers of the Arbitration Court in settling an industrial

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dispute should in any way be restricted. If a dispute existed on such matters as job control the Arbitration Court might well be expected to prohibit them by an award.. I see nothing in the change of policy to show that the Court's powers in this respect were to be limited. The deleted portions were general legislative prohibitions separated from the sections which delimit the jurisdiction of the Court. Such provisions are unaffected by any express enactment and I can find nothing in the statute as it stands supporting a restriction. If the repeal of the old prohibition of strikes and lock-outs evidences a legislative policy against the imposition of any similar prohibition by the award of the Court in the course of settling a dispute all I can say is that the Legislature has stopped short of expressing its policy in any legislative form.

I answer the question submitted that the Court had jurisdiction to include in the award clauses 19 (2), 77 and 78.

STARKE J. Summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The question is whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to include certain clauses, namely, 19 (2), 77, and 78, in an award made on 8th November 1935. These clauses are detailed in the judgment of the Chief Justice, and it is unnecessary for me to repeat them.

The *Transport Workers Act* 1928-1929 provides that no person shall engage as a waterside worker for work on a wharf &c. unless that person is the holder of a licence, issued to him under the Act, to engage as a waterside worker. A waterside worker means a transport worker who offers or is engaged for work in the loading or unloading of ships, but does not include the members of the crew of a ship on the ship's articles (sec. 2). The clause 19 (2), it is contended, requires a seaman on the ship's articles to engage as a waterside worker for work on a wharf &c. without a licence, contrary to the provisions of the Act. The Act itself, in the exclusion of seamen on ship's articles from the definition of waterside worker, makes it lawful for them to engage in loading and unloading ships and bunkering operations without a licence. Moreover, clause 19 (2) does not require any seaman to engage as a waterside worker :

it simply requires him, as a seaman, to do certain work customarily done by waterside workers if they are not available, present, and willing to do the work. A seaman required to handle cargo or engage in bunkering operations in accordance with the provisions of clause 19 (2) of the award is not engaged as a waterside worker in handling the cargo or in bunkering operations. If, contrary to my view, he were so engaging, there is nothing in clause 19 (2) which requires him to work without a licence, and nothing in the Act which prevents him from obtaining a licence. Consequently clause 19 (2) does not contravene any provision of the *Transport Workers Act*.

Clauses 77 and 78 were objected to on the ground of want of jurisdiction. In 1930 various provisions of the *Commonwealth Conciliation and Arbitration Act* prohibiting lock-outs and strikes in relation to industrial disputes were repealed. It followed, according to the argument, that any provision in an award which prohibited acts of the same nature must necessarily exceed the jurisdiction of the Arbitration Court. But the sections referred to created offences, and neither gave jurisdiction to nor withheld it from the Arbitration Court. Their repeal did not affect whatever jurisdiction the Arbitration Court possessed under the Act. Further, it was argued that the clauses are beyond the ambit of the industrial dispute the subject matter of the award. The Arbitration Court, however, has jurisdiction to prevent and settle disputes, and may include in the award or order any matter or thing which the Court thinks necessary for the purpose of preventing or settling the dispute or preventing further industrial disputes (Act, secs. 16, 38B). In this provision ample authority is conferred upon the Court to make its awards effective, and to do all things incident thereto or reasonably necessary or proper for that purpose. The jurisdiction to prohibit acts frustrating an award or rendering or tending to render it ineffective cannot therefore be denied to the Arbitration Court. The Court in the present case has prohibited the doing or omitting of anything which tends to prevent or delay or hinder the departing or running or working or using of any ships for the purpose of enforcing demands concerning any matter expressly provided for in the award. Some difficulties may arise in construing the words " any matter expressly

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provided for in the award," but those difficulties do not in this case require discussion or determination. The prohibitions are simply as to matters expressly provided for in the award ; they have relation to the award and nothing but the award ; they operate to protect the award, make it effective, and prevent its frustration. Such prohibitions are within the jurisdiction of the Arbitration Court. It was also contended that clauses 77 and 78 are within the ambit of an express claim made by the employers in the dispute submitted to the Arbitration Court. But I do not find it necessary to consider this question. The award certainly departs from the claim made, but that may be covered by the provisions of sec. 38B of the Act, despite the decision in the case of *Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1).

The question raised by the summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* should be decided as follows : That the Commonwealth Court of Conciliation and Arbitration had jurisdiction in making the award to include therein clauses 19 (2), 77 and 78.

DIXON J. Two objections are made to the validity of clauses 77 and 78 of the award made on 8th November 1935. It is said that to attempt, as these clauses do, to forbid employees and their organizations to relinquish work or to refuse employment as a means of enforcing a demand in relation to employment is contrary to the policy disclosed by the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and, therefore, repugnant to the statute and outside the power of the Court.

The clauses in the award forbid no acts unless done for the purpose of enforcing a demand concerning a matter which is expressly provided for in the award. I take that to mean a matter regulated by the award. The award intends to conclude the parties on subjects in dispute which it determines and to that end forbids resort to refusal or relinquishment of work as a means of obtaining something more than is provided by the award. The contention that the inclusion of such a term in the award is contrary to the

(1) (1935) 53 C.L.R. 90.

policy of the Act depends upon the amendments made by Act No. 43 of 1930. These amendments, among other things, excised from the Act all the provisions which operated to make punishable anything in the nature of a strike or lock-out, and to give the remedy of mandamus or injunction to compel compliance with the award or to restrain its breach or the continuance of any contravention of the Act. It deleted the first of the chief objects set out in sec. 2, namely, to prevent lock-outs and strikes in relation to industrial disputes. It repealed the definitions of lock-out and strike. It repealed the provisions which made lock-outs or strikes on account of an industrial dispute or against an award offences (secs. 6 and 6A). It also put an end to the provision which exposed organizations to penalties if for the purpose of enforcing compliance with demands, they incited their members to refuse to offer, in the case of employers, or to accept, in the case of employees, employment (sec. 8). It abolished process against the property of organizations and mandatory orders (see secs. 47 and 48). It repealed the provisions imposing penalties upon incitements to commit breaches of the Act or of awards or upon counselling or procuring offences against the Act (secs. 86D and 87). On the other hand, it introduced sec. 58BA, which makes it punishable for an officer or committee-man of an organization during the currency of an award to encourage a member to refrain from accepting employment or offering for work, or working, in accordance with the award. These amendments clearly indicate an abandonment by the Legislature of the policy of forbidding under penalty strikes and lock-outs and similar acts. They may be said to indicate too that the Legislature considered that the only acts of that character which should be statutory offences under Federal law operating of its own force should be those described in sec. 58BA. But, conceding so much, I am unable to see why this implies any intention to limit the jurisdiction which, as the result of an industrial dispute, the Court of Conciliation and Arbitration might possess to forbid by award acts of a like nature by the disputants or by members of the disputant organizations. The suppression by direct legislative enactment of strikes and analogous acts is an altogether different thing from an attempt to restrain them by the terms of an arbitral award. The first was done by

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creating offences which might be committed independently of any exercise of authority by the Court. In one case, that of the old sec. 6, the offence depended on the existence of an industrial dispute; in another, that of the old sec. 6A, upon the existence of an award. Given these facts, whether the Court of Conciliation and Arbitration did or did not consider that the parties should be restrained by penalty from refusing to give or accept work, the law operated to create the offence. But a restraint by award can arise only from an exercise of the arbitrator's authority to determine a dispute which from its nature makes appropriate such an award. It extends no further than the parties and those they represent. The arbitrator can do no more than make it a term of the award. It is not the arbitrator but the Act that makes it an offence to contravene a term of an award. Sec. 44 provides the maximum penalties, but sec. 38 (*c*) in effect enables the arbitrator to reduce them. A statutory limitation upon the power otherwise exercisable by the Court of Conciliation and Arbitration can arise only from some express provision or from necessary implication. Before the repeal of the provision penalizing strikes an argument might, perhaps, have been advanced that they exhaustively stated the acts of that nature which the Legislature considered deserving of penal restraint. A contention that this positive enactment implied a negative limitation upon the power of the Court of Conciliation and Arbitration by its award to forbid other acts of a like nature seems to me to have more reason than an argument that, because of the repeal of the provisions, the jurisdiction of the Court was impliedly restricted. But I think the truth is that the jurisdiction of the Court and the direct prohibition of strikes are two different things and from the manner in which the Legislature has dealt with one of them no necessary implication arises as to the other.

The second ground upon which clauses 77 and 78 are attacked is that they go beyond the dispute. An analysis of the log of demands upon which this contention depends leaves, in my opinion, but little support for it. The shipowners who delivered the log asked for an undertaking or agreement which, although it did not cover precisely the same ground as the terms of the award, was directed to the same end. The term introduced into the award is, I think,

a remedy relevant and appropriate to the settlement of such dispute. After *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1) and *Walsh* v. *Sainsbury* (2), which impliedly recognized the validity of such clauses, it is, I think, too late to deny the possibility of an industrial dispute arising in the settlement of which the Court might validly award such terms as clauses 77 and 78.

The validity of clause 19 (2) of the award was also impugned. The ground relied upon was that, having regard to the definition of "waterside worker" in the *Transport Workers Act* 1928-1929, compliance with this provision was rendered impossible by sec. 13 of that Act. The contention is, I think, clearly ill-founded and is probably due to a misapprehension as to the meaning of those provisions. They operate to permit a member of the crew of a ship on the ship's articles to do work in the loading or unloading of his ship although he is not licensed as a waterside worker.

In my opinion the question in the summons should be answered: Yes.

EVATT AND MCTIERNAN JJ. This summons raises the question whether the Commonwealth arbitrator had jurisdiction to insert three clauses in the seamen's award of November 8th, 1935.

The minor objection taken is to clause 19 (2). It provides that, in certain circumstances, where waterside workers are not available and willing to do the work at the prevailing rate, members of the seamen's union may be required to perform certain waterside labour. The dislike to the clause is easily understood, having regard to the possibility of a strike or lock-out in the waterside industry. But it is not suggested that the clause is outside the ambit of the dispute settled by the award. The legal objection raised is that the *Transport Workers Act* 1928-1929, Part III., sets up a system under which licences are required before persons may lawfully engage or be engaged as waterside workers, and that this results in an inconsistency between the award and the Act, so that the award must give way. But there is no inconsistency between the award and the Act. It is unnecessary to decide whether a seaman bound

(1) (1925) 35 C.L.R. 462. (2) (1925) 36 C.L.R. 464.

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by the present award is required to become licenced as a waterside worker before he can lawfully perform the waterside work described in the award. Even assuming that such a requirement exists, there is nothing in the award which attempts to dispense with the requirement. The argument on this part of the case should fail.

But a second question of great importance also arises concerning the validity of clauses 77 and 78 of the award ; which, in form and substance alike, are without precedent in the history of Commonwealth arbitration. Clause 77 provides as follows :—

> "No employee, for the purpose of enforcing any demand concerning any matter which is expressly provided for in this award upon any employer whatsoever who is party to this award, shall in connection with the work to be done by him or by any other employee for any such employer in the course of the employment covered by this award, do or omit to do, or incite or encourage any other employee to do or omit to do, anything so as to tend to prevent or delay or hinder the departing or running or working or using of any ship."

Confused as the expression of this clause is, it seeks to penalize every employee whenever (1) the employee is endeavouring to enforce a demand on an employer relating to any matter expressly dealt with in the award, (2) his act is connected with work to be done by the employee himself or by any other employee for the same employer, and (3) the employee is himself acting, or is encouraging any other employee to act, in such a way that there is a " tendency " to interfere with the working or using of the ship.

This clause is drafted in the widest possible terms. Let us take one example. Clause 5 of the award fixes the minimum wages for a unionist to whom the penal sanction of clause 77 is addressed. Is action by the unionist directed to enforcing an actual wage which is higher than the prescribed minimum penalized by clause 77 ? The answer must be, Yes. It is true that the only express provision is that for a minimum wage, not for an actual wage. But if this defence were raised on a prosecution under clause 77, the answer would be that " This is a stoppage connected with wages ; and wages is a matter or subject expressly dealt with in the award."

The irony of such a clause as 77 is that the founder of the Commonwealth arbitration system, the late Mr. Justice *Higgins*, for many years engaged himself in combating the argument that the principle

of the minimum wage could result in the adoption of compulsory labour and the disappearance of the workers' freedom. Mr. Justice *Higgins* said in 1919 :—

> "It would, of course, be an astounding position if, while the employer remains free to give or to refuse employment at the minimum rate, the employee were bound to take employment at that rate. The employer has the formidable power of refusing to give work to any particular man, the power even to put an end to all his own business operations ; why should not the employee be free to refuse to take work ? A minimum rate is in effect a restraint upon the employer ; a maximum rate would be in effect a restraint upon an employee. The Act gives power to prescribe a minimum rate, and the object of that power would be defeated if a man who thinks that his services are worth more than the minimum rate were not free to hold out for a higher rate " (*A New Province for Law and Order*, pp. 44, 45).

Later, in the year 1926, Mr. Justice *Higgins* said :—

> "I want now to guard against the impression that compulsory arbitration means wage slavery. The system does not involve that the employee is compelled by law to take work under the conditions which the Court fixes. The award does not compel an employer to give work to any man ; nor does it compel any employee to take work offered to him. There is not the slightest tendency towards that which Mr. Hilaire Belloc fears, 'a Servile State.' Any man who thinks that he is not being offered as much as he is entitled to, or in proper conditions, is as free as ever he was to refuse the employment offered ; he is as free as ever he was to sell his time and labour for the highest price he can get. The fixing of a minimum rate is a restraint on the employer, not the employee. Just as Parliament prescribes by law minimum conditions as to ventilation, as to sanitation, as to safety from machinery—conditions which are prescribed whether the industry be prosperous or not—and whether industries as a whole are prosperous or not—so the Court fixes minimum conditions as to wages. The Court in its function of settling and preventing industrial disputes, finds it necessary to make regulations safeguarding the use of human life for the purposes of gain ; for human life is the most precious asset in the world " (*Industrial Arbitration*, p. 12).

It will be observed that the " astounding position " described by *Higgins* J. has been actually laid down in clause 77. Not only does clause 77 penalize action taken for the purpose of obtaining a wage higher than the " minimum " ; it penalizes direct action taken for the purpose of compelling the employer to pay the minimum in cases where he refuses to do so. By clause 77 (2), the union commits an offence if it orders or encourages its members, or directs any of its officers, to do or omit to do anything which is penalized by clause 77 (1) in the case of the individual employee.

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Far-reaching as clause 77 is, clause 78 goes further. Clause 78 (1) penalizes every employee who, for the purpose of enforcing a demand on any matter expressly provided for in the award, incites any other employee either to leave the employment or "to refuse to accept employment with any such employer." The refusal to accept employment may be eminently reasonable on the part of the employees refusing, but an offence is imputed to every employee who is endeavouring to secure such refusal for the purpose of enforcing any demand upon any award questions. Clause 78 (2) penalizes an employee who, acting in combination with other employees for the purpose of enforcing a similar demand, leaves the employment of any employer or refuses to accept employment with such employer. Here, again, the refusal may be reasonable. None the less, penalties may be imposed if the purpose of the demand is to enforce a demand concerning any matters expressly provided for in the award. Clause 78 (3) prohibits the union from ordering or permitting any of its officers to order or permit breaches of clause 78 (1) and 78 (2).

It will be seen from an analysis of the two clauses that both of them aim at the suppression of any and every stoppage of work or boycott of an employer by employees if the purpose of the action is to enforce any demand whatsoever as to any matter which is expressly provided for in the award. The demand may be merely that the terms of the award should be complied with by the employer. The demand may be an attempt to vary the wages and conditions directly prescribed by the award. The demand may have led to a new dispute, perhaps inter-State in character, perhaps not. No such demands may be enforced, even although the Court has no jurisdiction to determine the disputes they create. The duration of the award is three years, but after that period an award is continued in force by virtue of sec. 28 of the Act. Having regard to clauses 77 and 78, how will it be possible either for the union or the employees to enforce any such future demand without penalties being incurred on a wholesale scale ?

The clauses mean in substance this, that however reasonable or lawful the demands of the employees may be, and however unreasonable or unlawful the refusals of the employers to comply may be, the union and its members may not, under any circumstances

whatever, attempt to enforce their demand if the effect of their action is a " tendency " to delay the working or running of a ship. They may not hold a " stop-work " meeting if it means an hour's delay; and above all, they must, even after discharge, hold themselves ready and willing to work on unreasonable conditions in the sense that they cannot lawfully refrain from offering to work until the conditions are improved. This is the adoption of the principle of compulsory labour, the employees being tied to the vessels and the industry for an indefinite period. If they dislike the award, or even if they like it and the employers break it, the same compulsion remains.

In examining whether the law permits such a state of affairs it has to be noted that the employer still reserves an absolute right to tie up the ship or lock out his employees for the purpose of enforcing any demand that he may care to make, whether it relates to matters expressed in the award or to any other matters. In the *Metropolitan Gas Co.'s Case* (1) the prosecutor contended that an offence against sec. 6A of the statute (which penalized strikes against an award, and which was repealed in 1930) was constituted if unionists struck against an employer who was not bound by the award and was, therefore, at liberty to lock out the unionists. Of this *Isaacs* and *Rich* JJ. said: " The first thing that impresses the mind when faced with that contention is the utter one-sideness of the position " (2). And they added: " To impute to the Legislature an intention so obviously unfair would require language of the most intractable character." Precisely the same argument was characterized by *Isaacs* J. in *Walsh* v. *Sainsbury* as " not only one-sided and therefore unjust—it is absurd on the face of it. So inherently unjust and absurd a rule is not to be attributed to Parliament unless it uses words that are too clear to avoid the accusation " (3).

The " one-sidedness," " injustice " and " obvious unfairness " of the provisions of clauses 77 and 78 lie in the fact that they are unaccompanied by any sanctions directed against employers in the like case. *Isaacs* and *Rich* JJ. thought that Parliament should not even be " accused " of laying down so " inherently unjust and absurd " a rule.

(1) (1925) 35 C.L.R. 449. (2) (1925) 35 C.L.R., at p. 455.
(3) (1925) 36 C.L.R., at p. 479.

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The question arises, what is the legal authority for the inclusion of the two clauses ?

It is said that, in the log of demands served by the organization of employers upon the union, clause 26 of the " log " contained a demand which was " something like " or " near enough to " clauses 77 and 78 of the award, and, as the union did not accept the " log," there was a dispute about (*inter alia*) clause 26.

Clause 26 was headed " Union's Obligations." As a matter of construction it is reasonably clear that the obligation was that of the union alone, for the clause commences with the narration that the union on behalf of its officers and members &c. " undertakes, promises and agrees " to acts and forbearances specified. At the end of the clause it was also said : " As a guarantee for the effectual carrying out of the undertaking hereinbefore mentioned the union further undertakes to pay to the association for the owner of the vessel concerned the sum of £50 by way of compensation on each and every occasion that a vessel is delayed or held up by reason of a breach of the union's said undertaking or owing to any act or misconduct on the part of any member of the union."

It appears that clause 26 has been extracted from some prior agreement between the union and the association of employers, which included an undertaking or promise in the terms of clause 26. Clauses 30 and 31 of the " log " are also drafted upon the assumption that they will obtain inclusion in some form of agreement. In these circumstances, it is contended that clauses 77 and 78 of the award did not depart, to any substantial extent at any rate, from the subject matter of clause 26 of the log.

Having regard to the observations of *Isaacs* and *Rich* JJ. already quoted, and to the serious interference with liberty which results from the operation of clauses in restraint of strikes, lock-outs, or combined boycott of employer or employee, we think that the doctrine of " ambit " or " relevance " should be applied with strictness to demands which include such clauses, particularly where they proceed from parties who originate the industrial dispute. A certain amount of looseness may characterize some industrial demands, but if employers are so anxious to prevent strikes and boycotts that they are prepared to create an industrial dispute about the employees'

right to strike or boycott, it is just and reasonable that they should be prepared to specify with precision the particular restraints they desire to impose, and that they should be bound by such specifications of demands.

In our opinion clause 26 cannot, and should not, be read in such a way that clauses 77 and 78 of the award are "relevant" to it. Clause 26 asks that the union shall agree to do certain things and not to do certain things, and provides precisely what compensation shall be paid by the union in the event of the undertaking not being observed by the union or its members. It is quite unreasonable to separate the guarantee or sanction which ends clause 26 and gives a meaning to all of it, from the earlier provisions of it. The sanction consists of civil compensation for damage caused by breach of the proposed contract. Read as a whole the demand was that the union should agree to pay compensation to the owner concerned upon the happening of the events described in clause 26. The penal consequences which flow from clauses 77 and 78 of the award are entirely different in character and operation from the sanction which alone was suggested by the employers, and also apply to events, and impose duties which are quite distinct from those described in clause 26.

We are therefore of opinion that clauses 77 and 78 are void, because they cannot be regarded as having been made in settlement of the dispute between the parties. If this is so, no provision in the Act, such as sec. 38B, can give efficacy to the clauses, because the doctrine of ambit is constitutional in origin and means that the arbitration authorized by the Constitution must be directed to the settlement of the subject matter of the "industrial dispute."

But we are also of opinion that clauses 77 and 78 are invalid on other grounds. In *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1) the penal provisions then appearing as sec. 6 (1) of the Act (against doing anything in the nature of a lock-out or strike) were deemed within the *legislative* power of the Parliament of the Commonwealth. The gist of the decision of the Court was that, as the "end" or object of the constitutional power was to settle industrial disputes, the arbitrator could not perform his function as effectively as was

(1) (1917) 23 C.L.R. 226.

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desired unless Parliament prevented the parties to the dispute from resorting to "extremities" (i.e., strike or lock-out) pending the arbitrator's decision. But that decision in no way supports the suggestion that the Arbitration Court may itself suppress and punish strikes and lock-outs. Indeed, the reasoning implied in *Stemp's Case* (1) is that the arbitrator needs the help of Parliament because he cannot help himself.

It was definitely held by this Court in *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (2) that

> "it is equally well 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 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."

The essence of a strike or lock-out is not the demands which may precede or accompany it, but the temporary dislocation of all industrial relationship between the parties to the dispute. A strike or a lock-out is not an industrial dispute, still less a demand by a party to an industrial dispute. *It is a means to an end, that end being the winning of an industrial dispute.* A demand that parties shall not strike or lock-out is not a demand for a variation or maintenance of industrial conditions, but a demand that, in the attempt to vary or maintain such conditions, economic pressure shall not be used. Such a demand is no more a subject of industrial dispute than a demand that the opposing party shall not use violence or intimidation or defamation or propaganda or political action. We think that, although Parliament itself may lawfully prohibit some or all of such means of winning industrial disputes, it is absurd to say that the arbitrator can do so merely because one of the parties asks the other to agree to disarm himself and, after the inevitable non-compliance, says to the arbitrator: "Now you can order disarmament; because there is a dispute about it—*de omnibus disputandum est.*"

Nowhere in the Act as drastically amended in 1930 is any power expressly given to the Arbitration Court to include in its award the

(1) (1917) 23 C.L.R. 226.

(2) (1930) 42 C.L.R. 527, at p. 552.

prohibition of strikes or lock-outs. Further, in the Act in the form it possessed up to 1928 there were provisions (contained in Part II.) dealing with the prohibition of strikes and lock-outs. At that time also, the first " chief object " of the Act was to prevent lock-outs and strikes in relation to industrial disputes.

But that part of the Act has been entirely obliterated as a result of the 1930 amendments, one of which deleted from the list of " chief objects " the prohibition of strikes and lock-outs. The result is that, on the very face of the present Act, one passes from Part I. to Part III., so that the Court is practically compelled to inform itself as to the history of the prior legislation. Moreover, by the Act of 1930, sec. 58BA was included, directed towards the punishment of an officer of an organization for conduct which might be regarded as leading to strikes. In our view, the proper conclusion is that this last section is the sole penal provision in the Arbitration Act which can be used for the purpose of the repression of strikes. It is not only a reasonable, but a necessary, inference to be drawn from the history of the legislation that Parliament, having removed the undesirable penal provisions from the Act, did not stultify itself by allowing an arbitrator to include in his awards provisions of the same general character or tendency.

We are therefore of opinion, first, that it is impossible to hold that the Arbitration Court has power to include in its awards provisions penalizing acts in the nature of lock-outs or strikes, merely because it thinks it expedient or necessary to do so ; and, second, that, even if it were held that the subject matter of the present clauses 77 and 78 had been made a matter of express dispute between the parties, the Court has no authority to include such clauses as part of the settlement of the industrial dispute. There is nothing in the definition of " industrial matters " which suggests the possibility that the act of striking or locking out, or the claim to do such an act, may be regarded as " industrial matters " susceptible of being covered by clauses in an award. A close perusal of Acts of Parliament *in pari materia* with the Commonwealth Act shows that the Legislatures have seldom contemplated the inclusion in awards themselves of penal provisions against strikes or lock-outs. The course of legislation indicates that

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Evatt J. McTiernan J.

where such provisions are considered proper the Legislature itself has acted instead of allowing an arbitration tribunal to trench upon such a vital matter of general public policy. We think that this observation is of force in the interpretation of the Commonwealth Act. The amendments made in 1930 cannot be ignored. It is true that there may be pointed out in awards in one or two industries made *before* the amendment of 1930, clauses which purported to prohibit acts in the nature of a strike. But no decision of this Court was ever given upon the power of the arbitrator to act in this way and, in any case, the far-reaching alteration of the Act in 1930 has entirely altered the situation.

For these reasons we are of opinion that clauses 77 and 78 are both void, that their inclusion does not invalidate the rest of the award, and that a declaration should be made accordingly.

Question answered—Yes: the Commonwealth Court of Conciliation and Arbitration had jurisdiction to include in its award clauses 19 (2), 77 *and* 78. *No order as to costs.*

Solicitors for the applicant, *Sullivan Brothers.*

Solicitors for the respondents, *Norton, Smith & Co.*; *A. Rankin & Co.*, Newcastle; *Dawson, Waldron, Edwards & Nicholls.*

J. B.