[HIGH COURT OF AUSTRALIA.]

TASMANIAN STEAMERS PROPRIETARY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

LANG . . . . . RESPONDENT.
COMPLAINANT,

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SYDNEY, *May* 4, 5.

MELBOURNE, *June* 6.

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

Constitutional Law—Legislative powers of States—Industrial arbitration—Federal award—Prescribed minimum rates of wages—"Cash wage"—State wages tax—Deduction—Award—State legislation—Consistency—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 109—*Special Income and Wages Tax (Management) Act* 1936 (*N.S.W.*) (*No.* 43 *of* 1936), *sec.* 18 (1) (*a*)—*Special Income and Wages Tax Act* 1936 (*N.S.W.*) (*No.* 44 *of* 1936).

Sec. 18 (1) (*a*) of the *Special Income and Wages Tax (Management) Act* 1936 (N.S.W.) provides that "every employer shall collect from his employees, by deduction or otherwise, tax in the amounts or at the rate or rates as may be fixed by any Act."

In pursuance of this provision an employer deducted from the wages of an employee the amount of tax fixed by the *Special Income and Wages Tax Act* 1936 (N.S.W.) and handed to the employee as the balance of the wages due to him an amount less than the "minimum rate of cash wage" prescribed by the relevant award of the Commonwealth Court of Conciliation and Arbitration.

Held, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Dixon* J. dissenting), that the provisions of sec. 18 (1) (*a*) of the *Special Income and Wages Tax (Management) Act* 1936 (N.S.W.) were not inconsistent with the award of the Commonwealth Court of Conciliation and Arbitration, and, therefore, were not invalid.

Nature of the obligation to pay wages under a Federal award and method of its discharge considered.

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CASE STATED.

In an information laid under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, by Vincent Lang of Mascot, New South Wales, marine cook and a member of the Marine Cooks', Bakers' and Butchers' Association of Australasia, it was alleged that Tasmanian Steamers Pty. Ltd., of Collins Street, Melbourne, Victoria, by failing to observe it, did commit a breach of an award made by the Commonwealth Court of Conciliation and Arbitration under the provisions of the above-mentioned Act on 24th June 1927, as varied, and still in force, and to which the association referred to above and the defendant were parties, in that "it did not on 30th October 1937 pay to the said Vincent Lang employed by it in the capacity of chief cook in full the minimum rates of wages prescribed by the award without any deduction therefrom excepting such as may be authorized by the said award contrary to the said award and contrary to the provisions of the said Act."

At the hearing before a magistrate the defendant pleaded "not guilty."

The following facts were admitted by the parties :—

1. The complainant, Vincent Lang, is and was at all material times hereto a financial member of the Marine Cooks', Bakers' and Butchers' Association of Australasia.

2. The Marine Cooks', Bakers' and Butchers' Association of Australasia is and was at all material times hereto an organization of employees duly registered as such under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

3. The defendant, Tasmanian Steamers Pty. Ltd., is a respondent to and bound by the provisions of the award of the Commonwealth Court of Conciliation and Arbitration made on 24th June 1927, in the matter of an industrial dispute in which the Marine Cooks', Bakers' and Butchers' Association of Australasia was the claimant and the Commonwealth Steamship Owners' Association and others were respondents.

4. The award is still in force.

5. The complainant was between 20th August 1937 and 30th October 1937 (both days inclusive) employed by the defendant in the capacity of chief cook on board the steamship *Wollongbar*.

6. The complainant entered into articles for the *Wollongbar* in Sydney on 20th August 1937, and was discharged in Sydney on 30th October 1937.

7. The *Wollongbar* left Sydney on 20th August 1937, for Melbourne, and arrived there two days later.

8. Between 22nd August 1937 and 28th October 1937 the *Wollongbar* was engaged in trade and commerce between Port Melbourne and the north-west ports of Tasmania (Burnie and Devonport).

9. On 28th October 1937 the *Wollongbar* left Melbourne for Sydney, where she arrived on 30th October 1937.

10. The minimum amount which the complainant was entitled to be paid under the provisions of the above-mentioned award in respect of the services performed by him as such chief cook was £65 15s. 10d., made up as follows :—

		£ s. d.	£ s. d.
Aug. 20, 1937 to Oct. 30, 1937	2 months and 11 days at £21 5s. per month ..	60 15 10	
	Payment in lieu of leave not taken—5 days at £1 per day	5 0 0	
			65 15 10

11. The complainant suffered the deductions and was paid the following amounts on account of wages so earned :—

		£ s. d.	£ s. d.
Aug. 20, 1937	One-half engagement fee ..	0 1 0	
Sept. 1, ,,	Advance made in Melbourne on account wages earned	8 10 0	
Oct. 1, ,,	Advance made in Melbourne on account wages earned	21 5 0	
,, 30, ,,	One-half discharge fee ..	0 1 0	
,, ,, ,,	Amount paid in Sydney on discharge	34 12 10	
			64 9 10
			£1 6 0

The said amount of £1 6s. was collected by deduction by the defendant under the provisions of Act No. 43 of 1936 (*Special Income*

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and Wages Tax (Management) Act) and Act No. 44 of 1936 (*Special Income and Wages Tax Act*) (*N.S.W.*).

12. The account of wages delivered to the complainant on being discharged from the said steamship on 30th October 1937 showed that from the total earnings of £65 15s. 10d. as set forth in par. 10 hereof, there had been deducted for half engagement and discharge fees, cash advances, stores, &c., the sum of £20 17s., leaving a balance of £35 18s. 10d.

13. The sum of £34 12s. 10d. was paid to the complainant in the presence of the Superintendent of Mercantile Marine at the Mercantile Marine Office in Sydney on 30th October 1937.

14. On the discharge of the complainant on 30th October 1937, the complainant signed the release contained on page 17, line 124, of the said articles in the presence of the Superintendent of Mercantile Marine, whose initials appear in the articles opposite the signature of the complainant.

15. The sum of £1 6s. above referred to is a proper amount to be collected by the defendant by deduction or otherwise under the provisions of Act No. 43 of 1936 and Act No. 44 of 1936, if any deduction is proper.

16. The defendant, Tasmanian Steamers Pty. Ltd., is and was at all material times hereto a duly incorporated company liable to sue and be sued in its said corporate name.

17. For the purpose of this case it is admitted that the complainant is at all material times and has been a person other than a company whose usual or principal place of abode is in New South Wales.

Material clauses in the award, as varied, were as follows:— "1. Together with keep on the vessel to be provided at the employer's expense, the minimum rate of cash wage per calendar month to be paid for work done on and after the 1st day of July 1937 to an employee of one of the classes in the following Table 'A' shall comprise the amount of the adjustable needs basic wage rate constituent provided in such table, the amount of the additional wage rate (if any) assigned to the employee's class in such table, and the amount of the constant addition mentioned in clause 1A hereof." (The informant was an employee of one of the classes in Table "A".) "33. (2) Where a seaman, whose service terminates

by reason of the wreck or loss of the ship, has been engaged by the run, he shall be entitled to the wages to which he would have been entitled on the termination of the run, subject to all just deductions. 34. This award is based on existing customs and practices not inconsistent with any of the provisions of this award."

The magistrate determined that those facts supported the information. He accordingly convicted the defendant company, imposed a penalty of ten shillings and ordered it to pay the plaintiff's costs.

At the request of the defendant the magistrate stated a case, in which the above-mentioned facts were set forth, for the opinion of the High Court.

The question reserved for the opinion of the court was whether the magistrate's determination was erroneous in point of law.

Upon the matter being called on for hearing, the Commonwealth of Australia and the State of New South Wales applied to, and obtained from, the High Court, leave to intervene.

Dudley Williams K.C. (with him *W. Collins*), for the appellant. The effect of sec. 18 of the *Special Income and Wages Tax (Management) Act* 1936 (N.S.W.) is to constitute employers statutory agents of the Crown in right of New South Wales for the purpose of the collection of wages tax imposed by sec. 7 of that Act upon their employees. Failure by any employer so to collect renders him personally liable for the amount of the tax and also to other heavy penalties. The provisions of sec. 18 are not inconsistent with the provisions of sec. 30 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The State statute recognizes the amount of the wage determined by the award of the Commonwealth Court of Conciliation and Arbitration. The State legislature levied a tax on all wages, other than a few proper exceptions, irrespective of whether those wages were derived under awards of the State Arbitration Court, or of the Federal Arbitration Court, or otherwise. This it was competent for that legislature to do (*Forbes* v. *Attorney-General for Manitoba* (1)). The State statutory provisions are not inconsistent with the Federal award and do not deal with matters

(1) (1937) A.C. 260.

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covered by the award, as was the case in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1), which followed the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2). The tax was imposed generally, without any discrimination (*West* v. *Commissioner of Taxation* (*N.S.W.*) (3); *The Judges* v. *Attorney-General for Saskatchewan* (4)). It follows that, having the right to impose the tax, the State is entitled to provide adequate machinery for its collection and for that purpose it is immaterial whether the tax is collected before or after the wages are received by the employees concerned, that is to say, the State is entitled to tax at the source. The ultimate effect is the same. The Federal Arbitration Court by its award merely fixed the minimum amount of remuneration to which the appellant was entitled for services rendered by him (*Mallinson* v. *Scottish Australian Investment Co. Ltd.* (5)). By virtue of the award and of the performance of those services the appellant became indebted to the respondent in a certain sum for wages. There is nothing in the award which makes that debt exempt from any legal process to which it might become liable under the State law, e.g., the debt could be garnisheed under secs. 180-187 of the *Common Law Procedure Act* 1899 (N.S.W.). Sec. 18 of the *Special Income and Wages Tax* (*Management*) *Act* is itself equivalent to a garnishee provision. The word "cash" in the material part of the award is used merely in contradistinction to that part of the wages which is payable in kind. Not only does the State statute not interfere with the Federal award; it accepts the award and assesses on that basis. It does not reduce the award: it accepts the amount of wages there prescribed, imposes a tax upon it and provides a very ordinary form of machinery for the collection of the tax at the source. There is not any inconsistency between the State statute and the award.

Maughan K.C. (with him *McLelland*), for the respondent. The amount of tax deducted by the appellant from the respondent's wages reduced those wages to an amount below "the minimum rate of cash wage . . . to be paid" to the respondent as prescribed

(1) (1926) 37 C.L.R. 466.
(2) (1920) 28 C.L.R. 129.
(3) (1937) 56 C.L.R. 657.
(4) (1937) 53 T.L.R. 464.
(5) (1920) 28 C.L.R. 66, at p. 73.

by the award. This reveals an inconsistency between the State statute and the award, and an interference by the statute with the working of the award. That inconsistency renders the State statute invalid under sec. 109 of the Constitution. The words "pay," "paid" and "cash" used in the award show that the minimum rate of wages prescribed must be actually paid and paid in coin of the realm. The objective of the State legislature could have been attained by arranging for a provision to that end to be inserted in the award. It would be a matter affecting industrial relationship within the meaning of that expression as used in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1). Any State Act which interferes with the industrial relations between employers and employees governed by awards of the Federal Arbitration Court is inconsistent within the meaning of the *Commonwealth Conciliation and Arbitration Act.* The collecting of the tax in this way might create friction and cause an industrial dispute. Wages prescribed by the award cannot be regarded merely as a debt due by the employer to the employee against which the tax may be treated as a counterclaim. Even assuming that they are a debt, the debt is that of the employer, whereas the counterclaim is that of the State. The award was made prior to the imposition of the tax. The question whether a garnishee order is issuable under a State statute in respect of wages derived under a Federal award has never arisen. State statutory provisions purporting to authorize such an order would be invalid. A deduction is not payment; it is a denial of payment (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (2)).

E. M. Mitchell K.C. (with him *W. J. V. Windeyer*), for the State of New South Wales, intervening. The award, on its proper construction, does not provide that the wages shall be paid free from any deduction and, more particularly, it does not provide that the wages shall be paid free from deduction for taxation. Having regard to the date of the award and the date the legislation was enacted it is obvious that the matter of deducting a State tax from wages payable under the award was not a matter in dispute between the parties to the award, and the variations of the award must be

(1) (1926) 37 C.L.R. 466.

(2) (1929) 42 C.L.R. 452.

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within the ambit of the original dispute. The matter was not referred to at the time of the making of any of those variations, although the tax had then been in force for some time. The award itself provides that wages shall be paid "subject to all just deductions." The award is framed in language entirely different from the language used in the *Truck Act*. An award of the Commonwealth Court of Conciliation and Arbitration cannot run contrary to or be inconsistent with statutes of the Commonwealth legislature (*Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1)). Under sec. 26 of the *High Court Procedure Act* 1903-1933, the property of a judgment debtor, which includes wages due to him, may be garnisheed. Thus, rights of garnishee are exercisable in respect of wages payable under the award notwithstanding "the minimum rate of cash wage . . . to be paid." There is not any clear indication in the award that persons employed thereunder shall be immune from a form of tax which applies generally to all wage-earners in the community (*West* v. *Commissioner of Taxation* (*N.S.W.*) (2) ; *Clack* v. *Clack* (3)), and the court will not read such an implication into the award, especially as it is sought to establish that the appellant has committed a breach of the award, a criminal offence. The information is defective; the award does not contain the provisions therein suggested. At the date the award was made the *Navigation Act* provided that wages were to be paid subject to various specified deductions therefrom (See secs. 101, 105, 113, 115, 116 (4), 127 and 161). The award cannot supersede the statute. It, therefore, follows that the award should not be construed as meaning that wages thereunder were to be paid without any deductions whatsoever. The wage-earner under the award bears the tax and is the taxpayer (*Forbes* v. *Attorney-General for Manitoba* (4) ; *Lean* v. *Brady* (5) ; see also sec. 14 of the *Special Income and Wages Tax* (*Management*) *Act*). The deduction was made for the purpose of meeting a statutory obligation of the appellant; therefore the principle in the *Truck Act* has not been infringed (*Hewlett* v. *Allen* (6)).

(1) (1922) 30 C.L.R. 144.
(2) (1937) 56 C.L.R., at p. 673.
(3) (1935) 2 K.B. 109.
(4) (1937) A.C., at p. 269.
(5) (1937) 58 C.L.R. 328, at p. 339.
(6) (1894) A.C. 383, at pp. 389, 394.

[McTIERNAN J. referred to *Evans* v. *Gore* (1).]

The Federal Parliament does not directly guarantee any wage ; it has appointed a tribunal to determine the wages, in lieu of bargaining, by a decree of the court, which takes the place of the contract of the parties (*Mallinson* v. *Scottish Australian Investment Co. Ltd.* (2)). This does not impede the power of the State Parliament to exercise its taxing power in relation to wages determined by that method as in relation to wages determined by ordinary contractual agreement. The test enunciated in *Clyde Engineering Co. Ltd.* v. *Cowburn* (3), applied here, shows that the industrial relations are not destroyed or varied in the slightest degree. The general tax on wages is not inconsistent with the provisions of the award, or of the Federal statute (*The Judges* v. *Attorney-General for Saskatchewan* (4)). The test of what is and what is not an industrial matter was considered in *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (5) and *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (6).

Weston K.C. (with him *Sugerman*), for the Commonwealth of Australia, intervening. The award, including the variations thereof, properly construed, and the provisions of the *Special Income and Wages Tax (Management) Act*, are not inconsistent. Assuming that the award provided in terms what is equivalent to the *Truck Act*, that is, that wages shall be paid in legal tender into the hands of the employee, and assuming there had been the necessary antecedent dispute as to that, that would be a matter relating to wages and award, it would also be a matter relating to the privilege or right of an employee and a correlative duty of the employer. It is a matter which touches the employment and touches the business relations of the employer and employee (*Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (7)). These proceedings show that it must be regarded as an industrial matter. All the elements necessary to make it an industrial matter are present. It is competent for the Federal Parliament to authorize

(1) (1920) 253 U.S. 245 ; 64 Law. Ed. 887.
(2) (1920) 28 C.L.R. 66.
(3) (1926) 37 C.L.R. 466.
(4) (1937) 53 T.L.R. 464.
(5) (1913) 17 C.L.R. 680, at p. 704.
(6) (1919) 27 C.L.R. 207, at p. 212.
(7) (1913) 17 C.L.R., at p. 704.

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the Commonwealth Court of Conciliation and Arbitration, if it thought fit so to do, to include in its awards a provision exempting wages from taxation at the source. There is not any inconsistency and, if it were otherwise, there are two heads of power which support the award in the terms in which it has been promulgated.

Maughan K.C., by leave of the court. The distinction between a payment to an employee and a deduction by the employer was discussed by *Bowen* L.J. in *Hewlett* v. *Allen & Sons* (1), and it was also dealt with in *Williams* v. *North's Navigation Collieries* (1889) *Ltd.* (2). That distinction is in favour of the respondent. The fact that certain deductions are authorized by the award and the relevant Federal statutes does not make the State Parliament competent to impose deductions as it has sought to do in sec. 18 of the *Special Income and Wages Tax* (*Management*) *Act*. The deduction of tax as contemplated by sec. 18 is obviously an industrial matter. The expression " cash wage . . . to be paid " must be given its ordinary meaning, that is, that wages must be paid in full in cash.

Dudley Williams K.C., in reply. The word " cash " merely means money, as opposed to payment in kind. Deductions for statutory tax are usual and proper (*In re Loveless* ; *Farrer* v. *Loveless* (3) ; *Halsbury's Laws of England*, 1st ed., vol. 24, p. 501, par. 974, and the supplement thereto). The respondent is a resident of the State. In those circumstances the imposition by the State legislature of tax upon the respondent's wages, although earned outside the jurisdiction, is not contrary to the principles of private international law (*Blackwood* v. *The Queen* (4) ; *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (5)).

[LATHAM C.J. referred to *Commissioner of Stamps* (*Q.*) v. *Counsell* (6).]

The State Act is valid and is valid according to the principles of private international law. Payment under that Act, being the *lex loci*, would be a valid payment (*Adelaide Electric Supply Co.*

(1) (1892) 2 Q.B. 662, at p. 666.
(2) (1906) A.C. 136, at pp. 142, 145.
(3) (1918) 2 Ch. 1, at pp. 4, 6.
(4) (1882) 8 App. Cas. 82.
(5) (1933) A.C. 378, at p. 386.
(6) (1937) 57 C.L.R. 248.

Ltd. v. *Prudential Assurance Co. Ltd.* (1); *British and French Trust Corporation* v. *New Brunswick Railway Co.* (2)). The provisions of the *Truck Act* were not incorporated in the award. There is not any provision in the award that the amount of wage is to be paid into the hands of the employee in the current coin of the realm.

Cur. adv. vult.

June 6.

The following written judgments were delivered :—

LATHAM C.J. The appellant, Tasmanian Steamers Pty. Ltd., is bound by the provisions of an award of the Commonwealth Court of Conciliation and Arbitration, made on 24th June 1927, as varied from time to time. The respondent, Vincent Lang, the complainant in the court below, was at all material times a member of the Marine Cooks', Bakers' and Butchers' Association of Australasia, which is an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and is a party to the award. The respondent was employed by the appellant as chief cook on a steamship. The award contains the following provision : " Together with keep on the vessel to be provided at the employer's expense, the minimum rate of cash wage per calendar month to be paid for work done on and after 1st day of July 1937 " shall be as set out in the table of rates and wages. Under the award itself, apart from other considerations, the appellant was entitled to be paid upon his discharge a sum of £35 18s. The *Special Income and Wages Tax (Management) Act* 1936 (N.S.W.) provides for the collection of a tax payable upon income and wages, the rates of tax being fixed by the *Special Income and Wages Tax Act* 1936. Sec. 18 of the former Act provides that " every employer shall collect from his employees, by deduction or otherwise, tax in the amounts or at the rate or rates as may be fixed by any Act." In pursuance of this provision the employer deducted from the amount otherwise payable to the respondent employee the sum of £1 6s. It is common ground that this sum is the proper amount to be collected by the applicant by way of deduction if any deduction under the Acts mentioned is proper.

(1) (1934) A.C. 122. (2) (1937) 4 All E.R. 516.

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The appellant was charged with an offence under sec. 44 of the *Commonwealth Conciliation and Arbitration Act*. This section provides that where any person bound by an award has committed any breach or non-observance of the award a penalty may be imposed by the courts specified in the section. The alleged breach of the award as stated in the information was that the appellant failed to observe the award in that it did not on 30th October 1937 pay the said Vincent Lang employed by it in the capacity of chief cook in full the minimum rate of wages prescribed by the said award without any deduction therefrom excepting such as may be authorized by the said award contrary to the said award and contrary to the said Act. The stipendiary magistrate convicted the company and imposed a penalty of ten shillings. Under sec. 101 of the *Justices Act* 1902 the magistrate has stated a case for the opinion of this court asking whether his determination was erroneous in point of law.

The amount payable to the respondent was payable to him under an award of the Commonwealth Court of Conciliation and Arbitration. That award was made under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. It was not disputed that income tax or other similar tax could lawfully be imposed upon the income of persons who received wages the amount of which was fixed by an award of the court (Cf. *West* v. *Commissioner of Taxation (N.S.W.)* (1)).

The New South Wales statute in the present case, however, purports to authorize the employer to deduct the amount of tax before the wages are paid to the employee. It was successfully argued for the respondent in the court below that sec. 18 of the State Act was invalid because, in effect, it reduced the wages ordered to be paid by the Federal award and was therefore inconsistent with the Federal award. If this were the case then the State law to the extent of the inconsistency would be invalid (Commonwealth Constitution, sec. 109 ; *Clyde Engineering Co. Ltd.* v. *Cowburn* (2)).

Prima facie, the State Parliament can, subject only to certain express limitations contained in the Federal Constitution, impose any tax upon persons who are subject to its legislative power. In

(1) (1937) 56 C.L.R. 657.

(2) (1926) 37 C.L.R. 466.

this case the respondent was a resident of New South Wales, the contract of employment was made in New South Wales, and the payment of money and deduction of money as in discharge of the obligations under the contract were made in New South Wales. The Federal Constitution contains certain express provisions which limit the powers of a State Parliament to impose taxation. Sec. 90 prevents any State Parliament from imposing any duty of customs or excise, and sec. 114 prevents a State from imposing any tax on property of any kind belonging to the Commonwealth. There are no other express limitations of the State taxing power contained in the Constitution, except in so far as sec. 112 limits inspection charges.

The award in this case says nothing about taxation. It is unnecessary to consider in this case questions which would arise if a Federal industrial award professed to exempt any persons from State taxation in respect of wages. The award simply prescribes that a certain minimum rate of cash wages shall be paid. The precise question which arises in this case, can, in my opinion, be stated in the following form : " Can it be said that the minimum rate of cash wages to be paid in accordance with a Federal award has been paid when portion of the wage has been applied by the employer towards the discharge of a liability created by a State Act ? " If the money had been paid in full in cash, the cash would have been legal tender by virtue of the provisions of the Federal *Coinage Act* 1909, sec. 5, which provides that a tender of payment of money if made in proper coins shall be legal tender. If the money had been paid in Australian notes, the notes would have been legal tender by virtue of the *Commonwealth Bank Act* 1911-1932. It is the common law operating in conjunction with these Federal statutory provisions which brings about the result that a debt owing under a contract is discharged by payment in current coins or in Australian notes. If the payment had been made by cheque accepted by the employee the obligation would have been discharged by virtue of the principles of the common law relating to contract and not by reason of any provision contained in any Federal statute or award. These considerations show, in my opinion, that it is impossible to place the obligations created by

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a Federal award in a special class as being obligations which in some manner can be discharged only in accordance with Federal law.

The *Commonwealth Conciliation and Arbitration Act*, sec. 49A, provides that an employee entitled to the benefit of an award may sue for wages in a court of competent jurisdiction. This section regards the obligation to pay wages under an award as an obligation which can be enforced in an ordinary way—in the same way as in the case of any other obligation to pay wages. Prima facie, therefore, any defence applicable to an ordinary claim for wages would be open to the employer when he was so sued. One defence would be actual payment. Another defence would be tender. These defences depend upon the common law. Another defence would be payment to the agent of the employee, or payment to a person to whom the debt has been assigned. These defences (except as to the definition of legal tender) would also depend upon law other than that contained in any Federal enactment. So also if the amount due for wages had been garnisheed under the provisions of a State statute, there appears to be no reason to doubt that the employer, when sued by the employee for wages affected by the garnishee order, would have a good defence. In the case of an assignment and in the case of garnishee proceedings, the employee does not actually receive the moneys representing the wages into his own hands, but he receives the full benefit of those moneys under the common law or the statutory law of a State.

The contention that the provisions of the New South Wales statute are invalid depends in part upon the view that the obligation created by a Federal award is something *sui generis* and something quite outside the domain of any law which can be described as State law. In my opinion, it is impossible to accept such a proposition. Apart from the matters to which I have already referred, it is, I think, important to realize that a Federal award does not *in itself* create an obligation binding any person to pay any wages to anybody. The operation of the award in the case of any particular person depends upon a contract of employment made between that person and an employer (*Mallinson* v. *Scottish Australian Investment Co. Ltd.* (1)). That contract is enforceable, not because the Federal

(1) (1920) 28 C.L.R., at p. 73.

award or any Federal law enacts that contracts shall be enforceable, but entirely by reason of the common law. If it were possible to imagine the destruction of the whole of the common law without the provision of any statutory substitute, no employee could sue for any wages, whether under a Federal award or otherwise. Accordingly, in my opinion, it is a wrong approach to the present case to begin by supposing that, prima facie, obligations created by a Federal award cannot be affected by any law other than Federal law.

But these general considerations are not conclusive of the particular question which has to be determined. Though the provisions of the State Act are not completely explicit on the point, there appears to be no reasonable room for doubt that the employee is subject to an obligation to pay the tax imposed by the State statute. The employer is authorized by sec. 18 of the Act to deduct the amount of tax from the wages payable. The attack upon the section is based particularly upon the fact that the section, it is said, reduces the amount of wages payable by preventing the employee from ever receiving the prescribed amount. It is admitted that, if he once receives the money, it can be taxed in his hands, but it is said that the method adopted by the Act really amounts to a reduction of the wages prescribed by the Federal award and is, therefore, inconsistent with that award.

In the first place it is a relevant consideration that the State Act does not deal with wages paid under a Federal award, except in so far as it deals with all wages. If the Act were not a general undiscriminatory taxing Act applying to all wages, but were limited to wages paid under Federal awards, the question would arise whether such legislation is within the power of the State Parliament. As at present advised, I am of opinion that it would not be valid State legislation (See *West* v. *Commissioner of Taxation* (*N.S.W.*) (1)). But it is not necessary to consider this question in the present case. The Act is in fact a general taxing Act, applicable to all wages, and it cannot be said to be an Act dealing with wages paid under Federal awards in any greater sense than a State Act dealing generally with disorderly behaviour can be said to be an Act dealing

(1) (1937) 56 C.L.R., at pp. 668, 669.

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with disorderly behaviour by persons employed by the Commonwealth. Such an Act would apply to such persons, but it would not be an Act which selected some relation of a person to the Commonwealth as the basis of the legislation. Thus, in my opinion, it cannot be said that the State Act is an Act which deals with a subject which is beyond the sphere of State legislative power so as to be invalid as a whole.

In the second place, the question is whether the employer has paid to the employee the wages prescribed by the award. I am of opinion, for reasons which I have indicated at the beginning of this judgment, that the employee in the present case has been paid in full. The amount of £1 6s. which has been applied in payment of the tax for which he was liable, has been applied for his benefit, and this application is *pro tanto* a discharge of his employer's obligation according to State law. The obligation is one of debt. The award does not purport to limit the methods by which that debt may be discharged. The matter is left to the common law and to any relevant statute. It is really sufficient for the decision of this case to say that the award, in its relevant provisions, creates a debt, which can be discharged in the same way as any other debt. The State taxation Acts do not deal with or affect in any way the creation of the debt. They enable an employer to discharge his debt to the employee by satisfying a debt owed by the employee to the State. The award does not deal with that subject—it operates in the creation of the debt, leaving the law, including all relevant State law, to determine how that debt may be discharged. Thus, in my opinion, there is no inconsistency between the award and sec. 18—they deal with different subjects.

Some argument was based upon the word " cash " in the phrase " minimum cash wage ", and it was contended that the award was intended to provide that wages should be paid in actual coin, or at least, in money. The reasoning which I have already stated appears to me to answer this contention. The award creates only a debt (an obligation to pay a fixed sum of money) which can be discharged in the same way as in the case of any other debt. The word " cash " is introduced into the award for the purpose of distinguishing

between the employer's obligation to provide at his own expense "keep on the vessel" and the obligation to pay a money wage.

In the third place, the section which is attacked relates to the method of collecting a tax which (it is not really disputed) can be validly imposed. Similar legislation was considered by the Privy Council in *Forbes* v. *Attorney-General for Manitoba* (1). In that case a Special Income Tax Act of Manitoba, which contained a provision similar to sec. 18, was held to be valid. See sec. 4 of the Act as set out in the report (2). Their Lordships said :—"The following sections which provide for the deduction of the amount of the tax by the employer before he pays over his employee's wages are mere machinery, and machinery of a very familiar type in income tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A taxpayer is said either to pay or to bear income tax according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer and on him the burden of the tax is imposed" (3). These observations are applicable to the present case. Therefore, in my opinion, if a general State tax on wages is valid (and this, as I have said, is not disputed) the State Parliament can lawfully provide this particular machinery for collection of the tax by the employer on behalf of the State.

Sec. 2 (2) (*c*) of the Act provides that assessable income shall include income from wages derived while on the high seas by officers, seamen and others employed on ships who are residents and on New South Wales articles. The respondent was a resident of New South Wales and was on New South Wales articles. The wages were earned on the high seas on voyages between Victoria and Tasmania. Some discussion took place during the argument upon the appeal as to the power of the State Parliament to enact the provision mentioned. The employer, who paid the wages in New South Wales, and the employee, who received wages in Sydney, were within the region (both as to locality and as to persons) in which the Parliament of New South Wales can exercise legislative jurisdiction, and I can see no reason, therefore, why sec. 18 of the New South Wales Act should not be applicable in this case.

(1) (1937) A.C. 260. (2) (1937) A.C., at p. 266.
(3) (1937) A.C., at p. 269.

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Therefore, I am of opinion that the appellant performed its obligation under the Federal award, so far as the sum of £1 6s. was concerned, when it deducted that sum from the wages payable to the respondent in accordance with the provisions of the State *Special Income and Wages Tax (Management) Act* 1936, sec. 18, and that, therefore, the appellant was not guilty of an offence under the *Commonwealth Conciliation and Arbitration Act.*

The question in the case should be answered by declaring that the appellant was wrongfully convicted, and the conviction should be set aside.

RICH J. I have had the advantage of reading the judgments of the Chief Justice and *McTiernan* J. In a question of a kind which always presents difficulties the burden of proof is upon those seeking to invalidate State law, and I am not prepared to dissent from the conclusion that that burden is not discharged.

STARKE J. A complaint was laid before a justice of the peace in New South Wales that the appellant committed a breach of an award of the Commonwealth Court of Conciliation and Arbitration in that it did not pay in full to the respondent, who was employed by it, the minimum wages prescribed by the award. It was heard before a stipendiary magistrate, who convicted the appellant but stated a case for the opinion of this court, which is a method of appeal (See *Justices Act* 1902-1909 (N.S.W.), Part V.; High Court Rules, Part II., *Appeal Rules*, sec. IV.).

The evidence established that the appellant collected by way of deduction from the minimum wages payable to the respondent under the award the wages tax imposed by the *Special Income and Wages Tax (Management) Act*, 1936 No. 43; 1937 No. 13, and the *Special Income and Wages Tax Act*, 1936 No. 44; 1937 No. 12, of New South Wales. These Acts impose a wages tax in respect of income from wages derived by every person and enact that every employer shall collect the tax from his employees by deduction or otherwise (Act 1936 No. 44, sec. 10; 1936 No. 43, secs. 7, 18). Income from wages includes income from wages derived while on the high seas by officers, seamen and others

employed on ships who are residents and on New South Wales articles (Act 1936 No. 43, sec. 7 ; sec. 2 (2) and see sec. 8 (1) (*k*)). The combined provisions of the Act 1936 No. 43, sec. 17, and the Act 1936 No. 41, sec. 256, make the tax a debt due to the King. In my opinion it is clear on these provisions that every person who derives income from wages is liable to wages tax, and that a duty is imposed upon the employer to collect it from his employees by way of deduction or otherwise.

The appellant was an incorporated company which apparently carried on its business in New South Wales and elsewhere in Australia, and it employed the respondent as a cook on the ship *Wollongbar* trading on the Australian coast. The respondent was a resident of New South Wales and on New South Wales ships' articles. The deduction was made in New South Wales from wages paid in fact in New South Wales. It was not suggested at the bar that the enactment of the wages-tax Acts was beyond the constitutional authority of the Parliament of New South Wales, or that the deduction from the respondent's wages did not fall within the words of those Acts. The only point raised at the bar was whether the wages-tax Acts were inconsistent with the award of the Commonwealth Court of Conciliation and Arbitration made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and to the extent of their inconsistency invalidated by reason of the Constitution, sec. 109. Some difficulties were suggested from the Bench if the deductions authorized by the Acts were made from wages outside the jurisdiction of New South Wales and the Acts of New South Wales were relied upon in other jurisdictions as a justification of the deductions. But the parties raised no such difficulties and they do not arise directly in the present case. It is advisable for this court to confine itself to the contention raised and leave these difficulties for solution if and when they actually arise. At all events I do not consider it necessary to discuss them.

The award of the Commonwealth Court of Conciliation and Arbitration provided that, together with keep on the vessel to be provided at the employer's expense, a minimum rate of cash wage should be paid per calendar month by the appellant and others to the respondent and other members of the Marine Cooks', Bakers' and Butchers'

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Association of Australasia employed by them, and provision was made for the adjustment of wages according to certain tables.

It is contended that the wages-tax Acts of New South Wales, especially the provision that every employer shall collect wages tax from his employees by deduction or otherwise, are inconsistent with the award and, particularly, the minimum cash wage provision of that award, which was made under the Federal law (*Clyde Engineering Co. Ltd.* v. *Cowburn* (1); *H. V. McKay Pty. Ltd.* v. *Hunt* (2); *Ex parte McLean* (3)). But the wages-tax Acts do not interfere with the Commonwealth Act and the award made pursuant to it. They do not lay any special or discriminatory tax upon wages payable under Commonwealth law. All they provide is that recipients of wages shall be amenable to the wages tax in like manner as all other citizens. The cases are decisive that such a law is not inconsistent with a law of the Commonwealth (*Webb* v. *Outrim* (4); *Forbes* v. *Attorney-General for Manitoba* (5); *The Judges* v. *Attorney-General for Saskatchewan* (6); *West* v. *Commissioner of Taxation (N.S.W.)* (7)).

The only distinction suggested during the argument was that the award directed a minimum rate of cash wage to be paid. The award, it should be mentioned, provides for keep on a vessel as well as a cash wage. The cash wage regulates the minimum money wage payable by the employer, but it is wholly unconnected with the levying of taxes thereon. Further, the provision that the employer shall collect the tax from his employee by deduction or otherwise is "mere machinery and machinery of a very familiar type in income-tax legislation." If the wages tax be, as it is, within the competence of the State of New South Wales, then the use of the familiar machinery cannot transcend the power or be in conflict any more than the tax itself with the Commonwealth law.

The question stated should be answered in the affirmative.

DIXON J. This is an appeal from a summary conviction by a court exercising Federal jurisdiction. The conviction imposed a

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 308.
(3) (1930) 43 C.L.R. 472.
(4) (1907) A.C. 81.
(5) (1937) A.C. 260.
(6) (1937) 53 T.L.R. 464.
(7) (1937) 56 C.L.R. 657.

penalty under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The proceeding was one taken under Federal law for the enforcement of Federal law by the imposition of the sanctions prescribed by Federal law. The information alleged that the defendant being a person bound by an award of the Commonwealth Court of Conciliation and Arbitration had committed a breach of the award. The breach relied upon by the informant was a failure to pay to an employee the full amount of the wages prescribed by the award.

The defendant had no answer, except that, acting under the authority of State law, it had deducted the amount short paid from the wages otherwise payable under the award for the purpose of paying over to the State the amount so deducted. It could not be denied that independently of the operation of the State statute a breach of the award would have been committed. To my mind this can only mean that a justification is sought in the provisions of a State statute for an omission otherwise amounting to a breach of a law of the Commonwealth. I should have thought that of its own force and authority no law of the State could have such an operation. If the Federal law prescribes a course of conduct which it defines, it is hard to see how a State law can be consistent with the Federal if the State law *proprio vigore* authorizes a failure to pursue the defined course of conduct.

But a statute or an instrument, such as an award, made under statute, instead of stating for itself exactly what must be done to fulfil its commands, may rely for the complete definition of the conduct it prescribes upon some standard or test to be found elsewhere. It is possible for Federal law in this way to refer to the provisions of State law, as affording the criterion or standard of what amounts to compliance with the Federal instrument. In such a case the tenor of the obligation imposed by Federal law is ascertained by reference to conditions arising under State law. State law does not operate of its own independent force and authority to make that lawful which otherwise would be contrary to Federal law. The effect which it produces is attributable to the reliance which the Federal provision places upon it. The sufficiency of the answer made by the defendant must, I think, depend upon the

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possibility of regarding payment of the prescribed minimum wage as an obligation which Federal law has treated in this manner. Unless the Commonwealth Act and award have so left the discharge of the employer's obligation to the regulation of State law that, according to the tenor of the Federal obligation, a deduction made in pursuance of a State fiscal provision is equivalent to what the Federal instrument calls payment, I am unable to see how the State law authorizing and requiring a deduction from wages can be consistent with a Federal law commanding payment of wages.

We are not dealing with a case where the inconsistency of the State law arises only from the complete and exclusive operation as an industrial regulation which an award obtains from the *Commonwealth Conciliation and Arbitration Act* according to the doctrine established by the decisions of this court. Of this description were *H. V. McKay Pty. Ltd.* v. *Hunt* (1), *Ex parte McLean* (2) and, perhaps, *Clyde Engineering Co. Ltd.* v. *Cowburn* (3); cf. *Hume* v. *Palmer* (4). We are here dealing with a case in which, for the settlement of some dispute, a wage has been fixed as that below which the employer may not go and a duty has been placed upon him to pay it, a public duty enforceable by penal sanctions. The relevance of State law is to the actual performance of the duty. It assumes to qualify the duty arising under a Federal law, and to make what otherwise would be a breach, no breach. The apparent conflict is, therefore, direct, and does not depend only upon the presence or absence of an intention that the Federal regulation of industry shall be complete and exclusive in its application to the subjects it covers.

The State law under consideration is contained in two New South Wales Acts of 1936 which respectively impose special income and wages tax and provide for its collection (Nos. 43 and 44 of 1936). Wages tax is imposed immediately upon wages earned. No discrimination is made according to the source from which the right to wages proceeds. Without reference to the question whether the wages are secured by a Federal award or a State award or simply by a contract of service, they are uniformly taxed. But it is not an

(1) (1926) 38 C.L.R. 308.
(2) (1930) 43 C.L.R. 472.
(3) (1926) 37 C.L.R. 466.
(4) (1926) 38 C.L.R. 441.

income tax, a tax upon a person calculated by reference to his net income and payable out of his general resources. It is calculated upon the amount of the employee's wages and obtained by deduction from the wages before he receives them. The employer must collect the tax from his employees by deduction or otherwise. He must keep records of all payments made by him to his employees, and he is directly liable to the Crown for the amount of the tax payable upon the amount of the wages. He is not simply accountable for the moneys which " by deduction or otherwise " he has collected. It is evident that the wages tax may be regarded indifferently as a tax upon employers calculated upon wages paid with a right and duty to recoup themselves by deduction from wages, or as a tax upon employees, calculated upon wages, compulsorily collected by deduction by employers from wages paid. The statute does not clearly impose upon the employee a liability to the Crown, if the tax upon his wages is not deducted by his employer and is not paid to the Crown ; but I think that an intention to impose such a liability is sufficiently disclosed. By its form and expression the statute gives the tax the second of the two complexions mentioned, and similar legislation has been regarded in the same way by the Privy Council and upheld as direct taxation upon the employee (*Forbes* v. *Attorney-General for Manitoba* (1)). But the distinction is not, I think, material to the question whether the State law is consistent with the Federal. For this must be judged upon what the State law does and not upon the description which may be applied to it, or the classification among taxes to which it may be referred. What it does is to intercept part of the wage otherwise payable and absolve the employer from making payment to his employee in any other form.

The award in numerous clauses prescribes payment of the wages which it fixes. It does not expressly define what it means by payment. It so happens that the particular award in question, which affects marine cooks, bakers and butchers falling under the *Navigation Act* 1912-1935, does contain provisions and expressions from which it may be gathered that actual payment in money was generally intended. But I do not base my opinion upon these special

(1) (1937) A.C., at p. 269.

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considerations. I base it upon the fact that I can find nothing either in the *Commonwealth Conciliation and Arbitration Act*, in the award made under it, or in general reasoning, which would supply any foundation for inferring an intention to leave to State law the determination of what, besides performance, should be a sufficient discharge of the obligation to pay the minimum wage. I advisedly say " besides performance." For I am unable to regard the process directed by the State enactments as amounting to a fulfilment or performance of an obligation to pay wages. An extinguishment, discharge, or satisfaction it may be. But no reasonable latitude of interpretation of the obligation to pay the employee could, in my opinion, justify the including under the head of payment the compulsory withholding of part of the amount payable in order to answer the purposes of the State. It may be conceded that, when the award commands that a minimum wage should be paid, it is employing in the word " pay " an expression which, while it has no fixed legal import, has according to context and subject matter received meanings the application and effect of which are settled by legal rules, or, at all events, by legal rulings. Some of these are considered in *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1), particularly by *Rich* J. (2), and the law is stated in the *Encyclopedia of the Laws of England*, 1st ed., vol. 9, at p. 547, under " Payment." Thus, in a sense, it may be true that the interpretation of the obligation to pay minimum wages depends upon the general law. But that means no more than that the content of the duty or the tenor of the obligation is ascertained according to the general law which defines the meaning and application of terms. It does not mean that the award or the Federal law remits to the legislature of the State the determination of what shall, and what shall not afford a discharge from the liability arising under the award.

It is unnecessary to say that, in prescribing a minimum rate of wages to be paid by employers to their employees, the award proceeds according to the common course of industrial regulation. As appears upon the face of the award, elaborate provisions are made for the purpose of maintaining a basic wage which, in spite of changes

(1) (1929) 42 C.L.R. 452.

(2) (1929) 42 C.L.R., at pp. 477, 478.

in the cost of necessaries, will give the equivalent of the established standard of living. The minimum rates for the various grades and classes of employment are then fixed by appropriate increases upon the basic wage. Overtime is prescribed. As to the time when payments are to be made, a distinction is made between ordinary wages and overtime, but the former are to be paid at regular intervals. The whole plan appears to me to import an intention to secure to the employees actual enjoyment of a remuneration fixed at an amount at least sufficient to meet what are considered to be their necessities. The expression in the award of this method of wage regulation appears to me to correspond to its essential character and both involve much more than a mere fixation of rates of wages in the abstract. The notion that all that is intended is to establish or fix minimum rates and to leave untouched the question of securing their actual enjoyment appears to me at variance with both the text and policy of the award. The purpose of securing actual enjoyment of the prescribed wage is sufficiently carried out if the wage is "paid."

The Commonwealth statute makes penal any breach or non-observance of an award, and this affords ample means of enforcing the duty to "pay" the prescribed wages. This court decided in *Mallinson's Case* (1) that a consequence of the statutory duty to observe an award enforceable by penal sanction was that the employer became the employee's debtor in respect of the prescribed wages. Sec. 49A of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 now gives express effect to this implication and authorizes the employee to recover the wages thus "becoming due to him" in any court of competent jurisdiction, always subject to a limitation of time. No doubt as a result of secs. 79 and 80 of the *Judiciary Act* 1903-1937, this civil remedy may be answered by any defence available under State law which is applicable and is consistent with Federal law. Under this head, set-off may be open. But the civil remedy is, so to speak, but a by-product of the provisions securing payment of the minimum wage. Thus no limitation upon the scope and operation of those provisions can be inferred from the incidents which may belong to the civil remedy by reason of secs.

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

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79 and 80 of the Federal *Judiciary Act*. Such a deduction would mean an inversion of the reasoning by which the civil remedy was evolved. According to my conception of the combined operation of the *Commonwealth Conciliation and Arbitration Act* and the award, they prescribe what is considered to be an adequate wage for the purpose of securing its receipt and enjoyment, and to that end impose a duty of a public nature upon employers to give to the employees the actual benefit of the prescribed wage by an act amounting to what it calls " payment."

There is, I think, no need to refine upon the question whether the voluntary acceptance by an employee of this or that thing as the equivalent to money would constitute a payment, or the further question whether an agreement to extinguish a cross-indebtedness by a settlement of accounts would do so. Nor do I think that it is anything to the purpose to discuss how far the general common law which governs the determination of the meaning of the terms employed in a Federal instrument, such as an award, may properly be called State law. It is enough that it applies either because the common law is the law of the land, or because secs. 79 and 80 of the *Judiciary Act* say so. These are matters which appear to me to be beside the point. For they affect only the niceties of the definition of the precise measure of obligation set up by the award under Federal law. In my opinion, the State law is inconsistent with the Federal law for reasons which are independent of such matters. The one law, in effect, says that the employee shall receive for his own use a sum of money. The other says that he shall not receive the full amount. This simple statement does not appear to me to be answered by the contention that what the State law has done may be analysed into steps, each one of which by itself might not be inconsistent with what is prescribed under Federal law. It is said with truth that the Parliament of the State may impose a direct tax upon a citizen, notwithstanding that he is an employee entitled to the benefit of a Federal award. The next step is the assertion, which may not command immediate assent, namely, that the amount of the tax may be measured by reference to the wages received, notwithstanding that wages payable under Federal awards are included, if there be no discrimination. The third step is that

State law may provide that one debt may be attached to satisfy another, and that wages due and unpaid may be attached by Federal process for this purpose, notwithstanding that they arise under a Federal award. Whether the second or third steps are right or wrong may be said to depend in some degree upon the intention ascribed to Federal awards. But to assume the correctness of each step alone does not appear to me to give any foundation for the conclusion that, Federal law having made it the duty of the employers to give the employee the full benefit of the prescribed wages by paying them, State law may, nevertheless, make it the employers' duty always to withhold part of the prescribed wages, and pay that part over to the fiscal authorities of the State.

The situation created by the award and the State Act is very different from that of the cases upholding State taxation of salaries or pensions paid by the Federal Government, or, in Canada, Provincial taxation of Dominion salaries and Dominion taxation of Provincial salaries. These cases are collected and discussed in *West* v. *Commissioner of Taxation (N.S.W.)* (1). Indeed, they lend point to the essential elements of the antinomy in the present case. The salary taxed was simply the remuneration of which the officer's services were considered worthy by the Government that paid him. The very thing sought in vain as a foundation for the claim for immunity in those cases may be supplied by the purpose and nature of the fixation of a basic wage and minimum wages in Australia. The salaries there in question differed in no way from other forms of income except that they were paid by a government for services rendered to it. The minimum wage, particularly the basic wage, is established by law as a means of determining an industrial dispute or disputes, and is part of an exhaustive or complete statement of the position of the parties. The basic wage is a conception evolved in the Arbitration Court and recognized by the *Commonwealth Conciliation and Arbitration Act* itself, e.g., in sec. 18A. The conception was considered in this court in *Australian Workers' Union* v. *Commonwealth Railways Commissioner* (2). It has been fixed "upon the principle that a reasonable living wage must be paid, sufficient to enable a normal man with a wife and three children to be maintained

(1) (1937) 56 C.L.R. 657.

(2) (1933) 49 C.L.R. 589.

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according to a suitable standard " (1). On the side of the Federal law, therefore, there exists, in the first place, a purpose wholly absent in such cases as *Forbes* v. *Attorney-General for Manitoba* (2). But it is interesting to notice that in " *The Judges* " *Case* (3) counsel laid hold of the word " fix " in secs. 91 (8) and 100 of the *British North America Act*, evidently in an unsuccessful attempt to establish that the authority of the legislature was to determine the measure of remuneration to be actually enjoyed by the judges. In the second place, the Federal law imposes an obligation or duty of payment the performance of which is a matter under the control of that law.

On the side of State law, there is an attempt, which in none of those cases was made in relation to the government paying the salary, to compel a deduction from the salary by way of subvention to the State revenues. This means a direct interception of the moneys payable, a modification or qualification of the legal duty to pay the moneys and an immediate impairment of the benefits intended to be secured.

In my opinion sec. 18 (1) (*a*) involves an inconsistency with Federal law and to that extent is invalid under sec. 109 of the Constitution. It, therefore, affords no answer to the information, and the defendant was rightly convicted.

I think that the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be allowed.

The appellant was charged with an offence under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The question which arose in the prosecution was whether the appellant was guilty of a breach or non-observance of a Federal award. The relevant award contained this clause : " Together with keep on the vessel to be provided at the employer's expense, the minimum rate of cash wage per calendar month to be paid for work done on and after the 1st day of July 1937 to an employee of one of the classes in the following Table ' A ' shall comprise the amount of the adjustable needs basic wage rate constituent provided in such table, the

(1) (1933) 49 C.L.R., at p. 597. (2) (1937) A.C. 260.
(3) (1937) 53 T.L.R. 464.

amount of the additional wage rate (if any) assigned to the employee's class in such table, and the amount of the constant addition mentioned in clause 1A hereof."

The breach of the award charged was in substance that the appellant had not paid to the respondent the minimum rate of cash wage prescribed to be paid for the work done by him.

If the result of making the deduction from the respondent's wages was that he was not paid according to the intendment of the award at the minimum rate therein mentioned, it would, in my opinion, be no answer to the above-mentioned charge for the appellant to say that it was bound to comply with sec. 18 (1) (*a*) of the *Special Income and Wages Tax* (*Management*) *Act* 1936 (N.S.W.). That result would show that the State Act and the award were inconsistent, and the appellant could not shelter under the State Act because it would be void to the extent of its inconsistency with the award (Constitution Act, sec. 109; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1); *Clyde Engineering Co. Ltd.* v. *Cowburn* (2); *Ex parte McLean* (3)).

The intention in the relevant clause of the award is to prescribe that the employees should be entitled to "keep" on the vessel and, in addition, to payment at not less than a specified rate of cash wage. The award is, however, silent about the mode whereby the liability incurred by an employer for work done at those specified rates of payment is to be discharged. It is unnecessary to discuss what provision the Commonwealth Court of Conciliation and Arbitration is competent to make with respect to the mode of discharging a liability for wages as they fall due. As the present Federal award has not prescribed a mode of discharging an employer's liability to pay the wages falling due at the minimum rates specified, no lawful method of discharge can be inconsistent with the award. It follows that if the appellant's liability for wages due to the respondent was lawfully and fully discharged, it is impossible to find that the appellant committed the breach or non-observance of the award which is alleged. The case, therefore, turns upon the question whether the deduction by the appellant of the sum due for wages tax was *pro tanto* a good discharge of the appellant's liability in respect of that sum. In my opinion it was. It is common ground among both parties and both interveners that taxation may be validly

(1) (1920) 28 C.L.R. 129.
(2) (1926) 37 C.L.R. 466.
(3) (1930) 43 C.L.R. 472.

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levied by State legislation on wages, including wages payable according to the rate prescribed by Federal awards. But it is contended that the State cannot collect such taxation, in this case the tax on the respondent's wages, by the method prescribed by sec. 18 (1) (*a*) of the Act, for the reason that he was entitled to be paid at a rate not less than that prescribed by the relevant Federal award. When the constitutional power of the State to tax the respondent's wages at all is admitted, this contention seems to depend upon form rather than substance. In the case of wages tax levied under the State Act now in question the employee who derives the wages in respect of which tax is payable is the taxpayer (*Lean* v. *Brady* (1)) and sec. 18 (1) (*a*) makes his employer the statutory agent of the commissioner to collect the tax. It is clear that the deduction which is made by the employer, as required by these provisions, of an amount for wages tax payable by the employee discharges the employer's liability to the employee for wages to the extent of the deduction. Assessable income under the Act is expressed to include "income from wages derived while on the high seas by officers, seamen and others employed on ships who are residents and on New South Wales articles" (sec. 2 (2) (*c*)). In the present case all these conditions existed and the respondent's wages were assessable to tax. In my opinion, the appellant fully discharged its liability to the respondent under sec. 18 (1) (*a*) by taking, as the statutory agent of the commissioner, so much from his wages for that period as was necessary to satisfy his liability as a taxpayer and by paying the balance to the respondent. Accordingly, the question in the stated case should be answered: Yes.

Appeal allowed with costs. Question answered: "*The said determination was erroneous in point of law.*" *Conviction and order for costs discharged. Information dismissed with costs.*

Solicitors for the appellant, *Creagh & Creagh.*

Solicitors for the respondent, *Sullivan Brothers.*

Solicitor for the State of New South Wales (intervening), *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the Commonwealth of Australia (intervening), *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.

(1) (1937) 58 C.L.R. 328.