[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS; EX PARTE KIRSCH AND ANOTHER.

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MELBOURNE, *May* 12, 13, 17.

SYDNEY, *Aug.* 25.

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

Industrial Arbitration (Cth.)—Industrial dispute—Parties—Employees' organization—Log served by union claiming "unionization" of industry—Employers employing non-union labour only—Wages and conditions of employment of non-unionists—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *sec.* 19 (*b*), (*d*).

A log served by an organization of employees upon divers employers, some of whom employed no union labour, contained demands as to wages and conditions for employees and the dismissal of all non-unionists from employment. A dispute having been created by the failure of the employers to accede to the demands in the log, the organization filed a plaint in the Commonwealth Court of Conciliation and Arbitration and subsequently wrote to the employers indicating that it intended the demands in the log to apply to all employees, including non-unionists. A judge of the court, in referring the dispute into court, held that by reason of the subsequent conduct of the parties in correspondence and at conferences the dispute submitted by the plaint had so developed as to involve a dispute as to wages and conditions of non-unionists.

Held, by *Latham* C.J., *Rich* and *Starke* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that the original plaint related to claims for wages and conditions of unionists only, and that, as the only dispute of which the court had cognizance was that constituted by the plaint, the court had no power to deal with wages and conditions of non-unionists as a matter incidental to composing the dispute between the parties.

Metal Trades Employers' Association v. *Amalgamated Engineering Union*, (1935) 54 C.L.R. 387, discussed.

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ORDER NISI for prohibition.

The prosecutors, Rupert Vincent Kirsch and Beret Manufacturers Pty. Ltd., were employers in the felt-hat-manufacturing industry carrying on business in Victoria and were not bound by any existing award of the Arbitration Court. The prosecutors employed only persons who were not members of the Federated Felt Hatting Employees' Union. In December 1933 the union served a log on the employers in the industry in more than one State, including the prosecutors. Clause 33 of the log claimed in substance that all employees should become members of the claimant union, that it should be a condition of employment that they join and remain members of the union and that if any employee neglected to join the union or resigned from it he should be dismissed. A plaint was filed by the union on 16th February 1934 and was served on all the respondents thereto. Later, a letter was delivered to the prosecutors and other employers stating that the plaint provided for the payment of the same wages to, and for equal conditions for, all employees, whether unionists or not. Subsequently, various conferences between the parties were summoned and held. The prosecutors contended that the log, in so far as it was a demand for wages and conditions of labour, related only to members of the union, and that there had never been a dispute as to the wages and conditions of employment of non-unionists extending beyond the limits of one State or at all. The union contended, on the other hand, that the log included claims for wages and conditions of non-unionists and that the court obtained cognizance of the dispute in respect of non-unionists under the plaint, and that, in any event, such a dispute had developed since the plaint. An order referring the dispute into court was made by Chief Judge *Dethridge* on the ground that owing to the conduct of the parties since the plaint was filed the dispute had become one as to the wages and conditions of labour of non-unionists as well as of unionists.

The prosecutors obtained an order nisi for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration, Chief Judge *Dethridge* and the Federated Felt Hatting Employees' Union of Australasia.

Ellis and *T. W. Smith*, for the prosecutors. This proceeding arises out of a log served by the union more than five years ago. The question is whether the log which made demands on the respondents as to terms and conditions of work was binding on non-members of the union. The prosecutors twice contended that the log did not apply to non-members of the union, but some months after the log had been served the judge ordered a compulsory conference, and then the union claimed that the log covered non-union members as well as members of the union. Where demands have been reduced to writing and they do not raise a particular question, the court cannot go into that question (*Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1)). In the circumstances of this case a further statement of what the log required could not in law be sufficient to found a fresh demand. The prosecutors are entitled to stand on the Chief Judge's finding that neither the log nor the memorandum served by the union brought the dispute to their notice. When the union makes a request it has authority to speak for itself only, and when it makes demands it makes demands for its members and not for its members and others. Neither the log nor the memorandum covering it sufficiently brought to the employers' notice that that demand was meant to cover non-union as well as union employees. The reasonable way to read the log is that the union was trying to get work distributed among its own members and not that it was applying on behalf of its own members and on behalf of non-members of the union. The Arbitration Court will not permit the demands in a log being extended so as to cover matters not included therein. A dispute is limited to the specific demands served on the employers (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (2); *Federated Tanners and Leather Dressers Employees' Union of Australia* v. *Alderson & Co.* (3); *Federated Engine-drivers' and Firemen's Association of Australasia* v. *A1 Amalgamated* (4)). There was no dispute between the parties subsequently to the court obtaining cognizance of the matter, except as to what the log meant. There was nothing to show that there was any industrial dispute after

(1) (1935) 54 C.L.R. 387.
(2) (1910) 4 C.A.R. 89, at pp. 90, 91; (1912) 6 C.A.R. 6, at p. 14.
(3) (1914) 8 C.A.R. 145, at p. 159.
(4) (1924) 35 C.L.R. 349, at p. 354.

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the matter came into court. The Chief Judge says that in August 1934 the prosecutors were informed of what the log meant and therefore this is a dispute which was made clear to them at that time. It is, however, still the old dispute. Where the Arbitration Court proposes to decide a matter which is outside the ambit of the dispute the court is acting beyond both the constitutional power and the power given by the Arbitration Act. There is no suggestion that the Chief Judge was acting on any other material than the log served in 1933. The reference was made by the Chief Judge in 1938, and, if that reference included not only the original log but also new matters in dispute, that new dispute was not of an inter-State character. Where the parties or one of them puts its contentions into a formal log or document for the court, the court cannot look beyond that document. The log should be clear on its face, and, if there are ambiguities in it, the ordinary rules as to patent ambiguities should be applied; they cannot be resolved by the acts of one of the parties at a subsequent date. The log is put forward by the union as evidence of the points of disagreement. There is an onus on the party bringing the document into existence to make its terms clear to the other party. The court cannot go beyond the ambit of the dispute, which is determined by the log (*Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1)). The Chief Judge has acceded to these propositions up to a certain point, and the prosecutors are entitled to stand on that, but he misdirected himself as to the later evidence. The prosecutors are entitled to rely on part of the judgment and to complain only about the part that is claimed to be wrong (*Metal Trades Employers Association* v. *Amalgamated Engineering Union* (2)). In 1933 when the log was first served, before the last-named case, nobody believed that an award could be made applying to non-unionists; if the parties intended to raise such a point, it would normally have been placed in the forefront of the dispute.

Mulvany, for the respondent union. There are two preliminary matters. On 9th August, sixteen days before his opinion was

(1) (1935) 54 C.L.R. 387.

(2) (1935) 54 C.L.R., at pp. 413, 414.

delivered, the Chief Judge heard further argument and at the conclusion of it reserved judgment. The employers could then have considered the evidence contained in the affidavit. From 1934 this industry was engaged in the Arbitration Court and that occupied a great deal of time of the representatives of the union. The log in its terms does create a dispute within the ambit of which the matter of wages and conditions of non-unionists is included generally (*Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1)). The words "industrial code" when used in respect to employees of an industry mean that they should be applicable to everybody employed in the industry—unionists and non-unionists. The organization is attempting to benefit unionists and not to benefit non-unionists. Clause 7 of the log and other clauses show that the award should deal with all employees, whether unionists or non-unionists. This court should read the log as one in which the union is making the widest possible demands in the hope that something will be conceded to it and that non-unionists will be put on the same footing as unionists and will gain the same benefit in wages and conditions of work. It should not be assumed that the demands are made only on behalf of unionists. The actual state of the industry is relevant because this industry was commenced by Kirsch's introduction of new machinery. A person reading the log would read it as a demand that the award should apply to all persons employed in the industry. If not, one would expect the word "member" to be substituted for the word "employee" in the log. The Arbitration Court can deal in the award with the whole of the dispute that exists, even though part only of that dispute has been submitted to the court. The facts support either an actual or an intended or a future dispute (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (2)). By Act No. 7 of 1910, sec. 2, the definition of industrial dispute was amended so as to include any probable or threatened industrial dispute; sec. 16A was also added by the Act of 1910, as were secs. 38A and 38B. The effect of these changes is that it is competent for the court to deal with a

(1) (1935) 54 C.L.R., at pp. 389, 394.
(2) (1909) 8 C.L.R. 419, at pp. 429, 430, 449.

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dispute that existed before the filing of the plaint, provided the dispute actually existed. The court acquired cognizance of the dispute in February 1934, and that was an actual dispute. The log claims a forty-hour week, no piece-work, and preference to unionists. These claims raise a dispute as to non-unionists. This leaves the Arbitration Court at large to make an award for none but unionists. If the court did not acquire cognizance of the dispute in March 1934, the court has in fact created a dispute by virtue of the plaint of February 1934, either unamended or as a result of an amendment made in 1936.

LATHAM C.J. The court is prepared to decide the question of aw on the evidence now before the court, if the court finds that by deciding this matter on the question of law it can decide the whole matter. If, on the other hand, the court finds it is unable to decide the whole matter, then permission will be given to the parties to adduce evidence, and, if the parties do so, it will have to be relevant evidence and not argumentative matter. The two questions that the court is prepared to decide on the material now before it are these, first, whether the plaint of 1934 gives jurisdiction to the Court of Conciliation and Arbitration to make an award requiring employers to give to non-unionists the same wages and conditions of employment as to unionists. The second question of law is whether, if the plaint does not give jurisdiction and if subsequently an inter-State dispute affecting wages and general conditions of employment arose, that dispute has been submitted to the court so as to give it jurisdiction to make such an award.

Mulvany. On the second point, sec. 19 (*d*) should be interpreted as relating, not to the industrial dispute at the time when the compulsory conference is held, but to the dispute existing when the order under sec. 19 (*d*) is made. The conference brought to the cognizance of the court the inter-State character of the dispute. There is no difficulty in amending the plaint so as to make it coincide with the real dispute. Without an amendment of the plaint being made at all, for the purpose of preventing industrial disputes it is competent under sec. 38B for the Arbitration Court to deal with the industrial

dispute actually existing. The dispute is not capable of growth after the court obtained cognizance of it in 1938.

[LATHAM C.J. referred to *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1).]

T. W. Smith, in reply. The first question is whether sec. 98 gives jurisdiction to make such an award as the Chief Judge indicated his intention to make. The plaint in question merely refers to the court the dispute disclosed in the log, and therefore the plaint gives cognizance to the court of that dispute only. Had there been any dispute beyond the terms of the log, the log would have crystallized the dispute. In construing the log one should adopt the criterion applied in the *Metal Trades Case* (2) by *Rich* and *Evatt* JJ., that one should construe the demands which directly and not merely indirectly affect the union members. At the time of the claim it was generally believed that non-unionists would not be included, and the log should be construed accordingly. The term " industrial code " simply means that the document is sent to individual employers, and the term is intended to explain to the individual recipient that the log is being served on all employers and that it is to be filed and have the force of law. Secondly, as to matters arising out of the plaint. A new dispute may have been obtained under sec. 19 (*b*). The only conference that was held was held to obtain cognizance of the plaint, and on the true construction of sec. 19 (*b*) the dispute of which the court may obtain cognizance is that as to which the conference has been called. There is no reference under sec. 19 (*b*). All the Chief Judge did was to intimate that he had decided to allow the arbitration jurisdiction to continue, conciliation having failed. Questions may arise as to the power of amendment, but there has not been any amendment at all. The liberty to amend was insufficient to allow the amendment suggested. One cannot even by amendment give the court cognizance of a new scheme.

Cur. adv. vult.

(1) (1913) 16 C.L.R. 591.

(2) (1935) 54 C.L.R. 387.

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Aug. 25.

The following written judgments were delivered :—

LATHAM C.J. This is the return of an order nisi for prohibition directed to the Commonwealth Court of Conciliation and Arbitration, the Chief Judge of the court, and the Federated Felt Hatting Employees' Union of Australasia, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The object of the proceedings is to restrain the Arbitration Court from making any award binding the prosecutors with respect to the wages, hours or working conditions of any of their employees who are not members of the respondent union.

The prosecutors are certain employers in the felt-hat-manufacturing industry who carry on business in Victoria. The businesses controlled by these employers have been established in recent years, and the employers have not yet been bound by an award of the court. They have made a practice of employing non-unionists at, it is said, lower rates of wages and under inferior conditions as compared with the wages and conditions upon which unionists were and are employed under the award applying to other employers in the industry.

It is contended for the prosecutors that there was not, at any relevant time, any dispute between them and the union which extended beyond a single State and which related to the payment of equal wages, &c., to non-unionists and to unionists. The prosecutors further contend that, if there was at any time such a dispute, the Arbitration Court has not obtained cognizance of it under the Act, and that therefore the court has no jurisdiction to deal with it.

The jurisdiction of the Arbitration Court is purely statutory. It depends upon the terms of the *Commonwealth Conciliation and Arbitration Act*. In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (1), it was decided that it was a condition of the jurisdiction of the Arbitration Court not only that there should be a dispute extending beyond the limits of any one State, but also that the court should obtain cognizance of the dispute in accordance with the provisions of the Act. "This . . . is a condition of jurisdiction: the dispute must not only exist but must be submitted to the court" (2). In this case the

(1) (1909) 8 C.L.R. 419. (2) (1909) 8 C.L.R., at p. 439; see also pp. 449 and 455.

dispute in question is alleged as an actual dispute, and not as a threatened or impending dispute or probable dispute. If the court did not have cognizance of the alleged dispute, then the court has no jurisdiction to deal with it by way of arbitration even if it exists.

The *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 19, provides that the court shall have cognizance of four classes of disputes. The relevant classes are those referred to in pars. *b* and *d* of the section. They are: (*b*) "All industrial disputes which are submitted to the court by an organization, or by an association registered for the time being as an organization, by plaint"; (*d*) "All industrial disputes as to which a judge or a conciliation commissioner appointed under section eighteen C of this Act has summoned a conference under section sixteen A of this Act, and as to which no agreement has been reached, and which a judge or the commissioner has thereupon referred to the court."

The contention of the union is that an inter-State industrial dispute as to the wages &c. of non-unionists employed by the prosecutors came into existence in December 1933, when a log of demands was served upon the employers in the industry in more than one State (including the employers in Victoria to whom special reference has been made, who, in turn, include the prosecutors), and that the neglect or refusal to accede to the demands of the log created an inter-State dispute on these matters. The union further contends that the court obtained cognizance of the dispute in two ways—first, by a plaint which was filed by the organization on 16th February 1934, and which was then served upon all the respondents to the plaint. This dispute was identified in the records of the court as No. 98 of 1934, and the court obtained cognizance of it under sec. 19 (*b*). Secondly, the union contends that the court obtained cognizance of an inter-State dispute affecting the wages &c. of non-unionists by reference into court by the Chief Judge under sec. 19 (*d*).

After the plaint was filed and served the learned judge summoned a conference of the parties to the alleged dispute under sec. 16A of the Act. The conference was held on 24th May and on later dates. It was summoned with respect to dispute No. 98 of 1934. There was much delay, owing to various causes. The prosecutors contended at the conference that there never had been a dispute

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as to the wages &c. of non-unionists extending beyond the limits of any one State. Their main contention was that there never had been a dispute on those matters at all. The union contended at the conference that the dispute submitted by plaint related (*inter alia*) to those matters. The union further contended that at least a dispute as to these matters had developed since the plaint and that the court had power to deal with that dispute. When the adjourned conferences had reached their termination, the Chief Judge stated that the only thing he could do was to refer the dispute into court. This was done in March 1938. The prosecutors, on the other hand, contended that at that time, though the union was then undoubtedly in dispute with them as to these matters, that dispute did not extend beyond the limits of Victoria, where the prosecutors and those in similar positions to them carried on business. By March 1938 all matters between other parties had been adjusted and an award had been made with respect to them.

No formal order referring the dispute into court had been made when the argument in this matter began before the High Court. But an order was taken out after the argument had concluded, and this order was at a later stage duly included in the materials before this court. The order is headed with the same numerical reference as the plaint No. 98 of 1934. It recites that " the above-mentioned industrial dispute " was submitted to the court pursuant to sec. 19 (*b*) of the Act by plaint filed in February 1934, that a conference was summoned for the purpose of settling the dispute, that the conference resulted in the settlement of the dispute by way of award as between the claimant and some of the respondents but that no agreement was reached as to the dispute as between the claimant and other named respondents (which other respondents include the two prosecutors). The order then, in pursuance of sec. 16A and of any other powers under the Act, refers to the court " the said dispute as between the said claimant " (the union) " and the said other respondents." It is, therefore, now clear that the dispute referred into court by the learned Chief Judge is the same dispute as that in respect of which the compulsory conference was summoned under sec. 16A, i.e., the dispute already submitted by plaint. As the court has jurisdiction to deal only with disputes of which it has cognizance, it is accordingly

unnecessary to extend any inquiry beyond the date of the filing of the plaint, when the court obtained cognizance of the dispute. The later order of March 1938 deals only with the same dispute as that submitted to the court by the plaint. If (as is suggested by the union as an alternative argument), a new inter-State dispute as to wages &c. of non-unionists did develop after the date of the plaint, or if the dispute which existed in December 1933 and also in February 1934 developed so as to include a dispute as to those matters, those facts are immaterial for the purpose of these proceedings, because the court has not obtained cognizance of any such new dispute or of any such developed dispute.

The learned Chief Judge, after hearing argument in conference, said that he was of opinion that the dispute submitted by the plaint, though not at the time of submission (February 1934) a dispute as to the wages &c. of non-unionists, had become such a dispute by reason of the subsequent conduct of the parties in the years 1934 and 1935. It had become such a dispute "by instalments": employers, including the prosecutors in this matter, had become aware in August 1934 that the claim made in December 1933 by the log of demands was intended to cover wages &c. of non-unionists, and, therefore, a dispute on these matters "based on the original log" had at least then been created and could be dealt with by the court. The references made by the Chief Judge to the conduct of the parties in 1934 and 1935 relate to statements made or contentions put forward in a letter of August 1934 and at the conferences from time to time. The union contended at the conferences that it had intended the log of December 1933 to apply to wages &c. of non-unionists. In August 1934 the union wrote a letter to what may be called the dissentient Victorian employers (including the prosecutors), enclosing with the letter a copy of a letter written to their employees. The letter to the employees informed these non-unionist employees that a plaint (No. 98 of 1934) had been served upon all employers in the industry in three States, including the employers of the non-unionists to whom the letter was sent. The letter included this statement: "This plaint (which is for the benefit of our members only) provides (*inter alia*) (*a*) payment of same wages

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and equal conditions to all employees whether unionists or non-unionists; (*b*) preference of employment to unionists."

This letter therefore contended that the original plaint had claimed payment of the same wages &c. to non-unionists as to unionists. The validity of this contention depends upon the terms of the plaint itself. The letter shows that, whether the suggested interpretation of the original plaint is correct or not, at least in August 1934 the union desired that the same wages &c. should be given to non-unionists as to unionists. The affidavits show that the prosecutors were not prepared to accede to any such proposal. But, for reasons already stated, the Arbitration Court has no jurisdiction to deal with any dispute evidenced by these facts unless it existed in February 1934 and was submitted by the plaint of that date.

Upon this proceeding this court must reach its own decision as to the facts (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1)). The procedure by way of prohibition is not an appeal from any decision of the Arbitration Court. It is a proceeding in original jurisdiction (*R.* v. *Commonwealth Court of Conciliation and Arbitration* (*The Tramways Case*) [*No.* 1] (2)).

The dispute of which the court has cognizance is that submitted by the plaint of February 1934. Whatever dispute may have existed in fact, the only dispute that reached the court was that which was first submitted by plaint and later also referred into court by the order of March 1938. The plaint identifies the dispute in the following way:—It states that "the union is in dispute with respondents to the plaint on the following matters": then follows a long list of matters which are dealt with in detail in the body of the plaint. The plaint then states that the union makes the claims set out in eighty-three clauses which are reproduced verbatim from the log. When the log was served, a letter accompanied it which described the log as being a log of wages and conditions of work to be submitted by the union to the employers engaged in the industry throughout the Commonwealth for adoption to govern the employment of employees in the industry as an industrial code for a period of five years. The letter also stated that, failing agreement,

(1) (1930) 42 C.L.R. 527, at p. 556. (2) (1914) 18 C.L.R. 54.

the union would obtain an award in accordance with the log as a code of employment in the industry for a period of five years.

It is common ground that in 1933 the prosecutors were employing non-unionists and that they were paying them rates of wages lower than award rates. The union objected to this practice, which was evidently to the disadvantage of employers who did pay award rates and also of the unionist employees of such employers. The log was served for the purpose of creating a dispute so as to give the court jurisdiction to deal with this problem. After consideration of the position, the union determined to make the claims which were set out in the log and, if those claims were refused, to take the matter to the court in order to obtain an award. As I have already said, the body of the plaint is identical with the terms of the log. Evidence has been placed before the court relating to controversies between the parties before the log was served. In my opinion this evidence cannot be used either for the purpose of limiting or for the purpose of extending the dispute which arose from the demand for and refusal of the claims in the log. The claimant union chose to make and to submit to the court just those claims and no others. The very object of action by formal demand (i.e., a log) and plaint, is to define and to identify the matters in dispute. This is a well-understood practice. It affords the maximum liberty to a party to frame its claims as it thinks proper, so that the party upon whom the claims are made will know what the matters are in respect to which the jurisdiction of the court is invoked. Where, as in this case, procedure is by plaint, the only dispute of which the court obtains cognizance, and the only dispute with which it can deal by virtue of the plaint, is the dispute defined in the plaint. So, also, when a dispute which a party has chosen to identify and specify by a log or a plaint is referred into court under sec. 19 (*d*) of the Act, the court can, by virtue of this order of reference, deal only with the dispute so identified and specified. Therefore, the question for decision in this case reduces itself, in the first instance, to a question of the interpretation of the log as repeated or embodied in the plaint.

The question is whether the log makes demands as to wages &c. of non-unionists. The log is a demand by a union of employees.

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Prima facie it would be expected that such a demand would relate to the wages and conditions of employment of those employees; but it is clear that a union may be interested and concerned in the wages &c. of non-unionists in the same industry, and accordingly there is no *a priori* impossibility in a union making a demand in relation to non-unionists, though not on behalf of them. It was held in the *Metal Trades Case* (1) that the Arbitration Court has jurisdiction to make an award upon such a matter.

The log and the plaint refer in many clauses to employees in general terms. In other clauses reference is made to members of the union. In clause 2 a demand for rates of wages for certain employees is limited to members of the union. This limitation is, however, said to have been made by a clerical error in copying from an old log or award, and, at the request of the union, the Chief Judge directed that the words of limitation to members of the union should be struck out from the clause in the plaint. As the demand for wages and many other clauses refer to employees in general terms, it is argued that the decision in the *Metal Trades Case* (1) requires the court to hold in this case that the demands made related to both unionists and non-unionists. In that case demands for wages &c. for employees generally were interpreted as applying to all employees, including non-unionists. The case was decided upon the terms of written demands made by the various unions concerned. Except in one instance (the Moulders' Union) there was nothing in the documents considered in that case which required or suggested any limitation upon the generality of the demands. In the present case, however, the log and the plaint embodying the log contain clauses which raise questions of interpretation which did not arise in the *Metal Trades Case* (1).

The important questions are:—What demands, if any, did the union make as to non-unionists? In particular, did the union demand that they should be paid the same wages and given the same conditions as unionists?

Clause 33 of the log (and plaint) is of the first importance in this connection. The clause is as follows:—

"From and after the coming into operation of any agreement or award based upon this log, all persons joining the service of any

(1) (1935) 54 C.L.R. 387.

employer shall within one month of their so joining become members of the claimant union subject as hereinafter mentioned and it shall be a condition of employment of all employees that they shall join the claimant union and that they shall remain members of the union. If any employee joining the service shall neglect to become a member of the said union within the time specified he shall be dismissed. If any person who has already joined the union or who shall pursuant to the provisions of this paragraph join the said union shall voluntarily resign from the union he shall be liable to dismissal and shall receive a notification from the employer that he is liable and unless he rejoins the union within one week from the date of such notice he shall be dismissed. This clause shall cease to operate as regards any employee whose application for membership is refused by the union."

This clause goes beyond preference to unionists. It asks for dismissal of all non-unionists. (No question arises at the present stage as to the power of the court to make an award of this character.) The object of the demand is to obtain what is called complete unionization of the industry. This is one way of dealing with difficulties created by underpayment &c. of non-unionists by employers who compete with others who pay full wages to members of unions. It is the way of exclusion of non-unionists from work in the industry. Another way of dealing with the same problem is to compel all employers to pay the full rate of wages and to give the same conditions to all employees, whether members of a union or not. The distinction between the two methods of attempting to solve the problem is plain. They represent radically different industrial policies. Clause 33 shows a definite adoption of the policy of exclusion of non-unionists. I agree with the opinion of the Chief Judge that the original log and plaint would not convey to the mind of a reader the idea that what the union wanted was equal wages and conditions throughout the industry for unionists and non-unionists.

Another important clause in the log and plaint (clause 48) strongly supports the view that the claims for wages &c. related only to members of the union. The union is throughout, naturally enough, taken to be the representative of the employees, and several clauses

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refer to objection by the union, consent of the union, agreement by the union, &c. Such provisions would probably be included in an industrial demand whether or not it was intended to apply also to non-unionists. But it is difficult to understand the inclusion of such a clause as clause 48 if all the demands for wages &c. were intended to apply to non-unionists. That clause deals with the important question of disputes or questions arising under the award as to " wages or piece-work prices or rates for work whether old or new or working conditions." The clause provides for the setting up of a board to deal with these matters, containing representatives of the union and of the employer concerned. But these provisions apply in terms only to disputes or questions as to wages &c. of " members of the union." No provision whatever is proposed for settling such disputes in the case of non-unionists. Such a clause is quite natural and in order if the award is to deal only with unionists and if only unionists are to be employed in the industry and governed by the award ; but, if non-unionists are to be employed at the same wages and on the same conditions as unionists, the non-applicability of such a provision to non-unionists would clearly open the door to a continuance of the very evils which the creation of a dispute was intended to prevent. In the case of unionists, not only could the employer be prosecuted for a breach of the award, but facts could be ascertained and a decision (final and conclusive according to clause 48) could be obtained by reference to a board containing representatives of the union. In the case of non-unionists, this procedure would be inapplicable and the only remedy would be by prosecution for breach of the award under the Act. The special provision which is plainly intended to enable the union to secure the observance of the award would be inapplicable in the very cases where such a provision would most obviously be needed. It is perhaps credible, but it is surely very improbable, that the union intended to bring about so strange a result. If, however, the demands made for wages &c. were intended to apply only to unionists, and if it was intended that the difficulties which existed were to be dealt with by excluding non-unionists from the industry in accordance with clause 33, then clause 48 becomes a fully intelligible and natural provision.

These considerations lead me to the conclusion that the dispute which was submitted to the court by plaint in February 1933 and the same dispute as referred to the court in March 1938 was not a dispute relating to the wages, hours, conditions of work &c. of non-unionists.

But it was further argued for the union that, even if the demand actually made by the union was a demand for exclusion of non-unionists from the industry and not a demand for equal wages &c. for unionists and non-unionists, this demand represented only one method of dealing with an existing problem, and that the Arbitration Court was not limited, in dealing with this problem, to dealing with it in the way indicated or asked for in the demand of the union. The court could settle the dispute by an award which applied any provision which was fairly incidental to composing the difference between the parties (*Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1); *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2), quoted in the *Metal Trades Case* (3) (where the word "not" has been mistakenly omitted before "beyond the ambit of the dispute"). Reference was also made to sec. 38B of the *Commonwealth Conciliation and Arbitration Act*, which provides that the court shall not be limited to the specific relief claimed or the demands made by the parties in the course of the dispute, but may include in the award any matter or thing which the court thinks necessary or expedient for the purpose of settling the dispute. It is therefore argued that, the problem being a problem arising from the underpayment of non-unionists, the court may deal with this problem by awarding equal wages &c. for unionists and non-unionists, though the award made was a demand for the dismissal of non-unionists.

In considering this argument it is, I think, important to distinguish between an industrial problem and an industrial dispute. An industrial problem is not the same thing as an industrial dispute. Such a problem may or may not involve or lead to an industrial dispute. Neither the Constitution, sec. 51 (xxxv.), nor the Conciliation and Arbitration Act relates to industrial problems as such.

(1) (1935) 53 C.L.R. 90. (2) (1931) 45 C.L.R. 409.
(3) (1935) 54 C.L.R., at p. 410.

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A common concern about an existing problem does not in itself amount to a dispute. An uncommunicated desire that a problem should be solved in a particular way does not amount to a dispute. The Act does not permit parties to say to the court:—"Here is an industrial problem. We are not in dispute about it, but we ask you to find a solution and to put the solution into an award." An arbitration cannot take place except between opposing parties. Those parties must be in a relationship of dispute *inter se* about some industrial matter, and it is with that matter as involved in the dispute that the court can deal. In dealing with it, I agree, the court is not limited to simply granting or refusing what is asked by one side or the other. But the court cannot make an award dealing with a matter which is not in dispute. See, as a recent example of the application of this principle, *Australian Tramways Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1). If there is a dispute as to whether, and only as to whether, the minimum wage for certain work should be, say, £5 or more per week, the court cannot (because there is a dispute about wages) make an award for less than £5 per week as such minimum wage. If there is a dispute only as to the payment of higher wages to foremen, the court cannot, in dealing with that dispute, alter the wages of other workers, even if the court is of opinion that the real problem consists in the relation between the wages of the two classes of workers and that the problem can be better solved by lowering the wages of the other workers than by raising the wages of the foremen. It would be inconsistent with many decisions of this court to hold that, because such disputes relate to the subject of wages, the court can award any rate of wages whatever for any employees who are employed in the industry, though the only matters as to which disputes have arisen are limited to particular rates of wages or to a particular class of employees. The court is not a general supervisor of industry. By reason of the character of the legislative power conferred on the Commonwealth Parliament by sec. 51 (xxxv.) the functions of the court are limited to dealing with certain industrial disputes. If there is no dispute as to a particular subject matter, the court cannot deal with that subject matter.

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

In some cases there may be difficulty in deciding whether a particular provision proposed to be included in an award is a provision which may fairly be regarded as incidental to the settlement of a dispute as to a particular matter, or whether it is a provision relating to a different subject matter. But in the present case, it appears to me, there is a radical difference between, on the one hand, providing for equal wages &c. for unionists and non-unionists and, on the other hand, expelling non-unionists from the industry. A dispute with respect to the latter subject cannot form the foundation of an award dealing with the former subject. Thus, in the present case, it is not within the power of the court to deal as it may think proper with the problem of underpayment of non-unionists (however desirable it might be thought to be that the court should have such a power). The only power of the court is a power to deal with the dispute shown to exist between the parties, namely, the dispute as to whether non-unionists should or should not be obliged to choose between becoming unionists and leaving their employment and as to the other matters referred to in the other clauses of the plaint.

For the reasons stated I am of opinion that the court has no jurisdiction in the present case to make an award prescribing equal wages or conditions for unionists and non-unionists.

The order nisi should be made absolute.

RICH J. The first question raised by the application for prohibition is whether the log of demands delivered by the union in December 1933 claims wages and conditions for its own members or for all employees in the industry. Nowhere does it contain any clear statement extending its claims beyond the members of the union. It abounds with general words capable of indefinite application, and, relying upon these, counsel for the union contends that it should be construed as covering everybody—unionist or not. I cannot accept this view. I read the log as seeking wages and conditions for members of the union and claiming that no one but members of the union should be employed by the persons to whom the log is addressed. The next question is whether there is any larger dispute behind or beyond the log which would justify an award compelling employers to observe award wages and conditions

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in respect of non-unionists. There was a grievance or cause of complaint anterior to the log arising from the employment by certain Victorian manufacturers of non-unionists at less than award rates, but it did not amount to an industrial dispute extending beyond the State of Victoria. I think the log crystallized and made definite the claims of the union for the remedying of this grievance. Sec. 38B of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 enables the court to give relief although not claimed, but this section does not authorize an award outside the limits of the dispute, i.e., an award containing provisions of a different kind from anything contained in the demands of the parties. I do not propose to lay down any general proposition as to the limits within which the court may provide alternatives to the particular industrial regulations specified in a log. But in the present case I think that the union defined what it wanted in respect of this particular matter. What it wanted was compulsory unionism. I do not think it is open to the court to give it instead a provision extending the award to non-unionists in common with unionists. His Honour the Chief Judge considered that at a later date a dispute was, if I may use the expression, re-defined by the communings between the parties, most of which took place in the course of attempted conciliation. I am disposed to agree with him in the view that after the dispute was submitted by plaint the union made it clear to Mr. Kirsch, one of the prosecutors, that one of its principal aims was to prevent him paying less than award rates, and to that end it now sought an award applying to employees generally, including non-unionists. This seems to me a new dispute or a new item added to the old dispute. I do not quite see where, as such, it gets its inter-State character. Further, it does not seem to have been brought within the cognizance of the court. A compulsory conference was held, and ultimately, after many continuances, an order of reference was made in March of this year. But the order of reference is headed in the matter of the original dispute and does not seem to be intended to refer into court the new matter of dispute: even if by some doctrine of accretion it is considered part of the original dispute the order of reference identifies a dispute existing at a date before the accretion, i.e., the date of the plaint. I think we should concern

ourselves only with the proceedings under the plaint and with the only matter in respect of which the court claims to exercise jurisdiction, viz., the matter of the plaint. In that matter the court cannot, in my opinion, make an award in relation to Mr. Kirsch or the other prosecutor which is not limited in its application to members of the organization. I do not think we should concern ourselves with the question whether some other dispute can be raised in the future or has been already raised under which the court may make an award of the kind contemplated in the *Metal Trades Case* (1). It is sufficient that in the only matter in which the court asserts jurisdiction the dispute does not justify an award in that form.

I think the order nisi should be made absolute for a prohibition against making an award in respect of the prosecutors binding them to observe prescribed wages and conditions in the employment of non-members of the organization.

STARKE J. Order nisi for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration and the Chief Judge thereof to prohibit the court and the Chief Judge from making or further proceeding with the making of an award against the prosecutors, Rupert Vincent Kirsch and Beret Manufacturers Ltd., with respect to wages or hours or working conditions in proceedings relating to an industrial dispute submitted to the Commonwealth Court of Conciliation and Arbitration by plaint 1934 No. 98 and also referred into court by order dated 8th March 1938 (but drawn up after the issue of the order nisi for prohibition) and made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1930, sec. 19 (*d*).

The parties have displayed singularly little care in presenting to this court, in proper form, the materials upon which they rely and in preparing the transcript of the proceedings. Time was thus unnecessarily spent in ascertaining the facts and costs unnecessarily increased. But in the end the question at issue between the parties was whether the Arbitration Court had jurisdiction to make an award requiring the prosecutors and other employers in their position to pay to

(1) (1935) 54 C.L.R. 387.

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persons who are not members of the Federated Felt Hatting Employees' Union of Australia—the claimant union in the proceedings mentioned—the same wages or to give to them the same general conditions of employment as are paid or given to members of the claimant union, or, in short, whether the court has jurisdiction to award that the prosecutors pay non-unionists the same wages as unionists and observe towards them the same general conditions of employment as are prescribed for unionists.

A writ of prohibition, however, does not issue unless a court is acting without or in excess of its jurisdiction. The *Metal Trades Case* (1), with which I am unable to agree, though I must follow it, asserts the jurisdiction of the Arbitration Court to make an award governing the employment of all persons, whether members of the union or not, employed in the industry by a respondent to the arbitral proceedings. But it is a condition of the jurisdiction that an industrial dispute should exist extending beyond the limits of a State and that the subject matter of the dispute should relate to or include the wages and working conditions of non-unionists. Further, it is a condition of jurisdiction that the dispute should be submitted to the Arbitration Court in one of the methods prescribed by sec. 19 of the Act (*Broken Hill Pty. Co.'s Case* (2)). The evidence establishes that an industrial dispute extending beyond the limits of a State did exist between the parties to the proceedings mentioned in the order nisi. But the nature and extent of the dispute depends upon the construction of what is called a log of claims or demands prepared and submitted to the employers by the union. The correspondence and discussions between the union and various employers prior to the submission of the log are unimportant and, in my opinion, irrelevant, for the union in the log formulated its demands and by its submission to the court identified and made explicit the nature and extent of the dispute. It is said that this log, properly construed, makes no claim and therefore raises no dispute in respect of the wages and working conditions of non-unionists but only in relation to compulsory unionism. The Chief Justice has set out and discussed the various clauses at length, and he has reached the conclusion that the log does not claim nor make part

(1) (1935) 54 C.L.R. 387. (2) (1909) 8 C.L.R. 419.

of the industrial dispute wages and working conditions for non-unionists but only compulsory unionism. I do not feel called upon to set forth all those clauses again or to discuss them in detail. I have some misgiving whether the construction given to the log by the Chief Justice is correct and, even if it be correct, whether the provisions of sec. 38B of the Arbitration Act do not authorize the Arbitration Court to make an award with respect to the wages and working conditions of non-unionists. But my misgiving is not so strong that I definitely dissent from his opinion. Accordingly, I adopt it as the right construction of the log and of sec. 38B. At least that construction reaches the same conclusion as I myself should have reached in this case unencumbered by the decision of this court in the *Metal Trades Case* (1).

The Chief Judge of the Arbitration Court sustained the jurisdiction of his court by reference to the conduct of the parties to the dispute in 1934 and 1935 subsequently to the service of the log. As I follow his view, the union discussed its log with the employers, including the prosecutors, on the basis that the dispute related to non-unionists as well as to unionists. But the employers, and especially the prosecutors, did not agree with this view. If a document be ambiguous, a court of construction is justified in giving to it an interpretation which the parties have themselves acted upon.

But it is impossible that the interpretation placed upon a document by one of the parties to it can govern its interpretation or in any way control it. Apart from his approach to the interpretation of the log, the Chief Judge said that when the employers became aware that the log was intended to claim in respect of non-unionists they were bound to treat it as so claiming and that he knew of nothing to prevent an inter-State dispute being created by instalments, so as to speak, so long as the ultimate result is a dispute as to the same subject matter extending at the one time "beyond the limits of one State." It is true enough that an industrial dispute often extends in subject matter as it develops. But the court only acquires cognizance of disputes submitted to it in one of the methods required by sec. 19 of the Act, and it is over such disputes that it may exert jurisdiction. The only dispute submitted to the court,

(1) (1935) 54 C.L.R. 387.

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whether by the plaint or by the order of reference already mentioned, was that formulated by the log. The Chief Judge's conclusion that a dispute developed after the service of the log so as to cover non-unionists may be accepted, but still it was the dispute formulated in the log that was submitted to the court in the manner required by law and not the developed or extended dispute. I agree with the Chief Justice on this aspect of the case.

It follows that a writ of prohibition should issue in some form to the Arbitration Court, but it must be strictly limited. The jurisdiction of the Arbitration Court extends to all matters within the dispute formulated by the log. Thus, the court may prescribe for unionists now or hereafter in the employ of the prosecutors (*Burwood Cinema Case* (1)). Assuming that the Constitution and the Arbitration Act give jurisdiction to the Arbitration Court to award compulsory unionism, upon which I express no opinion, then I see no reason why the court should not exercise its discretion upon the dispute raised by clause 33 of the log, that is, the claim for compulsory unionism, and make such award upon that subject matter as it thinks necessary or expedient for the purposes of settling the dispute. Again, if *Long* v. *Chubbs Australian Co. Ltd.* (2) is accurate, the jurisdiction of the Arbitration Court extends to the claims in respect of all apprentices employed by the prosecutors or other employers parties to the proceedings. The writ can therefore only prohibit the court from making any award prescribing wages and working conditions for non-unionists that are not formulated and within the claim and demands made by the log.

DIXON J. This is an application by two prosecutors for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration.

On 2nd November 1936 that court made an industrial award in relation to the industry of making felt hats. The award is the latest of a succession of Federal awards which have governed the industry since 1914. The prosecutors are manufacturers of felt hats who so far have not been bound by such an award. They and some other manufacturers who were not bound by prior awards carry on

(1) (1925) 35 C.L.R. 528. (2) (1935) 53 C.L.R. 143.

undertakings in Victoria which have been established during the last seven years or thereabouts. With one exception other manufacturers of felt hats in Australia were bound by the former award. The exception was a manufacturer in New South Wales, who, however, observed the wages and conditions prescribed by the award although not bound by it. The award made on 2nd November 1936 was expressed to bind employers named in a schedule covering, in effect, all the employers carrying on operations of importance in the industry except certain of the before-mentioned Victorian employers. The exception covered the prosecutors. By clause 76 of the award further consideration was reserved of the question of the application of the award to these employers, who were described as having been cited in one of two disputes with which the award professed to deal and were named specifically. Clause 78 of the award, which was made by consent and appears to represent an agreement between the claimant organization of employees and the employers bound by it, provides that it shall apply to all employees engaged in the making of felt hats in the employ of the employers named as bound. This means that, acting upon the decision of this court in *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1), the Commonwealth Court of Conciliation and Arbitration has imposed on employers bound by the award an obligation to pay the wages and afford the conditions which it prescribes, not only to members of the organization obtaining the award as a party to the dispute or disputes upon which it is founded, but also to all other employees, even though they do not become members of the organization.

The tenor of the writ sought by the prosecutors is to prohibit the Commonwealth Court of Conciliation and Arbitration from making or further proceeding with the making of any award against the prosecutors with respect to wages, hours, or working conditions. Doubtless the purpose of the application for the writ is to prevent the inclusion of the prosecutors among the parties bound by the award of 2nd November 1936, or the making of any award in relation to the prosecutors prescribing wages, hours and conditions which

(1) (1935) 54 C.L.R. 387.

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they would be bound to afford to their employees although not members of the claimant organization.

The dispute or disputes in reference to which the award has been made take its or their beginning in two logs of demand formulated as long ago as the end of the year 1933. On 29th November 1933 an employers' organization or association of which the prosecutors were not members served a log of wages and conditions upon the employees' organization, and, on 18th December 1933, or not long afterwards, the latter served upon the employers, including the prosecutors, a log of demands on behalf of the employees. As these logs dealt with the same subject matters, they, perhaps, constitute evidence of one and not of two industrial disputes (See *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1)). But this is not material to the present application.

A cause of difficulty which contributed to the formulation of the two logs consisted in the manner in which the manufacturing operations of the prosecutors and of other recently established felt-hat makers in Victoria were carried on. They employed non-union labour and, it is said, paid lower rates of wages and did not observe the same conditions as those prescribed by the Federal award, with the result that, under the pressure of their competition, manufacturers governed by the award felt the difficulty of maintaining the wages and conditions of the award and the employees' organization felt aggrieved by the loss of a field of employment and the creation of a danger to the wages and conditions enjoyed under the award.

It appears that the chief of the two prosecutors had established a manufacturing business in the year 1931. Up to that time the labour of the industry had been supplied by unionists. The new undertaking of the prosecutor, however, arose, it seems, out of the components of an importing organization that had been shattered by one of the prohibitions upon importations to which the difficulties of the times gave rise. Those employees who came over from the former enterprise were not unionists. It is true that some members of the employees' organization were employed for a time. But, in consequence of some trouble or dispute, of which the nature, genesis, progress and result are the subject of contradictory accounts, their

(1) (1931) 45 C.L.R. 409, at pp. 422, 423, 426, 439, 448.

employment in the factory ended on 10th October 1932, and, since that date, no members of the organization have been employed by either of the prosecutors.

The employers bound by the then existing award, the claimant organization of employees and the prosecutors, when the logs of demand were framed, appear to have been all very much alive to the consequences of the prosecutors and other Victorian manufacturers carrying on operations without observing award wages and conditions. The log of the employers proposed wages and conditions for all their employees, *scil.*, regardless of their membership of the employees' organization. But from its very nature it could affect only the undertakings of employers from whom it emanated.

In replying to the log delivered by the association of these employers, the secretary of the employees' organization set out the evils said to flow from the employment by employers not bound by the award of non-union labour at lower rates and upon less favourable conditions. He described them as the really serious matters of dispute in the industry of which both employers so bound and his organization complained, and said that in spite of an expectation that these employers would propose a remedy their log failed to disclose any scheme or proposal dealing with the difficulty. After referring by name to the more important of the prosecutors, he said that the employees' log had been framed and was in course of transmission by post to all the employers, including those employing non-unionists. This letter was sent only to the representative of the employers bound by the then existing award. Needless to say, it was not sent to the prosecutors.

The log, which was sent to all the employers, was framed upon precedent. At that time logs of demand were framed, more often than not, according to the view of the law upon which *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1) was decided. It was conceived by many to be useless to demand that employers who employed no members of a claimant organization should pay their non-unionist employees the rates claimed, even if it should be thought that it was to the advantage of an organization of employees that equal wages and conditions should be enjoyed by unionists and non-unionists.

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

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The meaning and effect of the log served by the claimant organization of employees on the employers on 18th December 1933 was discussed at length upon the hearing of the present application. As a document it does not appear to me to mean that the claimants were thereby demanding that the wages and conditions specified should be afforded to unionists and non-unionists alike. I should feel little hesitation in reading it as demanding wages and conditions for members of the organization and as having no relation to other wages and conditions. But, at the same time, it plainly requires that none but members of the organization should be employed by the persons to whom the demand is directed and that, if any of their employees fails to join the organization, he should be dismissed.

The foundation of the application for a writ of prohibition is the absence from the log of a demand that all employees, that is, non-unionists as well as unionists, shall receive the minimum wages and enjoy the conditions claimed. I agree that the log fails to make such a demand, but that carries the prosecutors one step only. Under the decisions of this court, we must adopt the view that an industrial dispute should be considered to have arisen from the failure of the employers to concede the demands made upon them by the log, that, as the demands were addressed to employers in more than one State possessing a sufficient industrial community of interest, the dispute extended beyond the limits of one State, and that the prosecutors are parties to the dispute. Indeed I do not think that so much was denied. But the prosecutors do question the nature of the disagreement or issue between the parties upon which the Commonwealth Court of Conciliation and Arbitration may arbitrate and the kind of award that can be made. The contention on the part of the prosecutors is that, as the demands in the employees' log for wages and conditions do not extend to non-unionists, the disagreement or issue is confined to the wages and conditions to be enjoyed by members of the organization and that no award can be made directing the prosecutors to pay prescribed wages or afford specified conditions to employees who are not for the time being members of the organization.

The Commonwealth Court of Conciliation and Arbitration took cognizance of the dispute or disputes arising from the logs of the

employers and of the organization of the employees. A compulsory conference was summoned in relation to the employers' log, and the matter was referred to the court. The organization, in February 1934, submitted the dispute arising from its log to the court by a plaint making claims identical with those contained in the log. The plaint has, however, been amended with the object of removing one of the reasons for saying that the claims do not include the application of the relief sought to unionists and non-unionists alike. But we are not concerned with the sufficiency of the amended plaint; for the claims made in a plaint affect only procedure and do not go to jurisdiction, which depends on the existence and nature of the dispute and, perhaps, also on the proper steps having been taken to give cognizance (Cf. *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (1)).

On behalf of the organization the jurisdiction of the court is supported in the first instance upon the ground that, as the dispute stood when cognizance was taken in February 1934, it might have been settled by an award binding upon the prosecutors which obliged them to pay the minimum wages prescribed and observe the conditions provided by the award, whether their employees were or were not members of the organization. But the respondent organization maintained, in the second place, as an alternative, that as time wore on it became quite plain that the dispute between the organization and the employers, including the prosecutors, involved a demand that the prosecutors in common with all other employers should pay wages and afford conditions to their employees whether they did or did not employ unionists. Thus, if the court had not originally obtained the jurisdiction claimed, the jurisdiction had since arisen. Among other answers made to this contention, the prosecutors placed reliance upon the necessity of the court's having cognizance of, as well as jurisdiction over, a dispute and said that the growth of the subject matter of a dispute after the court had obtained cognizance was not within the contemplation of the Act. If the issues in dispute or the claims of a disputant underwent an enlargement after cognizance was taken, this meant, it was said, that there was a new dispute or a dispute having a new

(1) (1909) 8 C.L.R. 419.

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or different identity. Accordingly, cognizance must be obtained afresh.

Besides denying the validity of this contention, the organization retorted that in fact cognizance had been obtained afresh, because, as late as 8th March 1938, a compulsory conference had ended in an order of reference. The order was not drawn up until after the argument in this court; and, on its production, a further question arises out of its form, viz., What dispute having what ambit did the order refer into court? Was it the old dispute defined by the log or logs or that dispute as enlarged and amplified by the subsequent restatements of the desires of the organization and as defined by a judgment given by the Chief Judge in the meanwhile?

It seems strange that the jurisdiction of an industrial court should depend upon such questions, particularly a court which is to proceed without regard to technicalities or legal forms. They arise out of an interpretation of sec. 19 which makes cognizance a jurisdictional, and not a procedural, matter and also gives to a dispute over which cognizance is taken a fixity of character which precludes any change in the aims and demands of the disputants, except at the expense of a loss of identity. There is, I think, something to be said for the view that a distinction is drawn by the Act between jurisdiction and cognizance. In two cases cognizance is obtained by a determination or act which is not external to the court, viz., the certificate of its registrar and an order of reference by one of its judges, a consideration against treating cognizance as going to jurisdiction. It must be remembered that what can be examined under sec. 21AA is not necessarily a ground for prohibition. It may be that, notwithstanding the changes in the Act and the development of the conception of industrial dispute since the time when the *Broken Hill Pty. Co.'s Case* (1) was decided, we should apply the reasoning of that decision as to cognizance, but, even so, it is going much further to grant a prohibition, because, although there is both a dispute and an order of reference, the order of reference is so expressed that it describes the dispute as at a stage of its development or growth when the material question or issue had not been raised or defined.

(1) (1909) 8 C.L.R. 419.

These are considerations which I think should be mentioned. But I do not propose to enter further upon the matters arising out of the alternative ground taken by the organization of employees in support of the jurisdiction of the Court of Conciliation and Arbitration. For, notwithstanding the interpretation I give to the log of demands, it appears to me that the dispute as submitted by plaint in February 1934 was of such a nature as to enable the court, if it so chose, to make an award binding upon the prosecutors and requiring them to pay their non-unionist employees the prescribed minimum wages and to give them the advantage of the industrial conditions awarded. Such an award would, in my opinion, be relevant to the disagreement or dispute and legally appropriate for its settlement. I base this view upon two considerations. The first is the decision of the court in *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1). The second is my conception of the true nature of the dispute. The decision of the majority of the court in that case appears to me to involve two steps. The first of these steps was to establish that an industrial dispute may grow out of a demand by an organization upon employers who do not and never have employed any of its members requiring that they should employ no one, whether a member or not, except upon specified terms and conditions of employment. The second of the steps was to establish that an award may be made in settlement of such a dispute binding employers to observe specified terms and conditions with respect to their employees whether members of the organization or not.

For reasons which I gave I was unable to agree in the view taken by the majority, but the decision gave effect to a clear principle which was evidently intended to be of far-reaching operation, and I am not prepared to whittle it away or make refined distinctions in its application. The principle upon which the decision rests is that the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members

(1) (1935) 54 C.L.R. 387.

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and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists. Now, apart altogether from this development of the law, it has been well understood that, when a dispute in relation to any particular term of employment or condition of labour is before the court for settlement, the power of the court extends to the making of such award as appears apt and proper to determine the dispute and to give just relief from the substantial grievance from which it arises. In spite of the many unrealities which have attended the growth of the jurisdiction, the discretion of the court to provide that remedy which on investigation appears best calculated to achieve the chief purpose of the court, namely, the settlement of industrial disputes, has never been restricted by a requirement that it should rigidly adhere to one or other of the rival proposals or desires of the respective parties. This principle retains its place in the system and must be applied to the developed condition of the law. But the court cannot make an award except for the settlement of the actual dispute between the parties, and, therefore, it is beyond its jurisdiction to impose an obligation upon them or one of them that is not related to the disagreement or issues between them, that is, to the matter of the dispute. Many expressions have been used to describe the kind and the degree of connection which is necessary. It is sometimes said that the relief contained in the award must be relevant. Sometimes that it must be reasonably incidental to the settlement of the differences constituting the dispute. Sometimes that it must be appropriate to the settlement of the dispute; that is, the relief must have a rational or natural tendency to dispose of the question at issue. In applying a test of such a nature, it is important to understand the true character of the two things to be brought into comparison, the matter of the dispute and the provision proposed. To obtain a correct understanding of the matter in dispute, it is not enough to read the text of a log of demands without regard to any of the facts and circumstances out of which it arises. A log is not an instrument with a prescribed legal effect. It is nothing but a catalogue of claims supposed to represent the real desires of actual people.

In the circumstances of the present case the prosecutors, or those who considered it for them, would naturally understand the log as meaning that the organization desired to stop them from continuing to employ non-unionists upon less favourable terms than prescribed by the Federal award and to that end demanded that the prosecutors and other employers should employ no one but members of the organization and should dismiss any employee who failed to join it. In other words, the grievance complained of and the remedy claimed were plain enough to all parties. It seems difficult to deny that a dispute exists to which the prosecutors are parties and that it forms a sufficient foundation for an award which, after prescribing terms and conditions of employment, might, except for the possible effect of sec. 40 (1) (*a*), follow the course demanded and require the employment of unionists only. This consideration alone might be enough to warrant the refusal of a writ of prohibition. For it means that there is jurisdiction to make an award affecting the prosecutors. But it is open to this court to prohibit *quoad* a particular question. It is, therefore, desirable to decide whether it is within the power of the Court of Conciliation and Arbitration to make an award binding upon the prosecutors prescribing wages and conditions which they must observe in relation to all their employees, or, in other words, to bring the prosecutors under the operation of clause 78 of the award of 2nd November 1936 pursuant to the reservation made by clause 76. In my opinion such a power arises from the nature of the dispute. Claims for the exclusion of men who are not members of a particular organization or for preference to members may have different purposes and arise out of different grievances. The object may be to secure all the available employment for the existing members of the organization, which may have no thought of increasing its ranks. There may be two organizations, and the claim may arise out of their rivalry. Or the purpose may be to increase the membership of the claimant organization. In such cases to award that equal pay and conditions shall be given to employees who are not members may not be relevant to the settlement of the true dispute. But, in the present case, there can I think, be little doubt that for both sides the true significance of the demand for the dismissal of those who did not join the

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organization lay in the purpose which it would fulfil of establishing award rates and conditions throughout all factories and particularly in the factory of the prosecutors.

From the point of view of the prosecutors, the demand meant that they should no longer be able to employ anybody to whom they might pay wages below those prescribed, or afford conditions less favourable than those specified in the award.

From the point of view of the claimant organization, it meant that, by insisting that all employees should seek membership, all might be brought under the operation of the industrial regulation or code sought.

In these circumstances, it is, I think, open to the Court of Conciliation and Arbitration to adopt the view that an award of the description which, under the decision of this court, is now allowable, is a form of relief appropriate to the settlement of the matter of the dispute between the parties, a dispute which I should describe as a disagreement or issue whether, for the purpose of preventing payment of lower wages and employment on less favourable conditions than those sought, all employees should be required to obtain the protection of the industrial code claimed by applying for membership of the organization, under pain of dismissal.

It is an important consideration that the course of events had given rise to a real cause of dissatisfaction, the nature and bearing of which was well understood by all parties. The demand for the exclusion of non-unionists was formulated as the means of establishing uniform terms of employment in the industry, and the resistance of the prosecutors was, or at all events in the state of the evidence must be taken to be, based upon a desire to avoid the application of the uniform code of regulations to their factory. It appears to me that for the purpose of settling such a matter a remedy differing from that formulated in the demand may be applied by the court, provided that it is directed to the same purpose. The view which I took in *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1) is no longer open. That view was, in effect, that there could be no basis for difference or disagreement amounting to an industrial dispute unless some circumstances existed which

(1) (1935) 54 C.L.R. 387.

made agreement or accord between the organization and the employer a condition necessary or desirable for the normal conduct of some industrial relation and that such circumstances were wanting when the employer did not employ members of the organization and the organization's demand was in relation to the terms of employment of persons remaining outside the organization. The ultimate reason why such a view was considered to be wrong is, I think, to be found in the interest of an organization in, so to speak, securing and maintaining standards or terms and conditions of employment for all so that they should not be lost to the members present and future whom it represents. It seems to me that, when the dispute is based upon this very interest and the precise demand is directed at the purpose of securing and maintaining standards for all employees and the refusal or failure to comply arises from the exactly contradictory interest and purpose of an employer, the relief by means of a uniform regulation for all employees comes within the ambit of relevancy to the dispute.

In my opinion the order nisi for prohibition should be discharged.

McTIERNAN J. The respondent organization of employees demanded of the prosecutors and other employers in the industry the rates of pay and conditions of employment specified in a log served on them in December 1933. The employers refused to comply with any of these demands. Thereupon an industrial dispute arose which the Court of Conciliation and Arbitration would have jurisdiction to settle by an award when it got cognizance of the dispute pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

The court duly obtained cognizance of the dispute, and all conditions were fulfilled to give it jurisdiction to make an award for the purposes of settling the dispute.

The question arises whether it has jurisdiction to make an award in the matter of that industrial dispute binding the prosecutors, who are averse to employing members of the respondent organization and have none of the members in their employment, with respect to the rates of pay and conditions to be paid and observed by them in the employment of workers in their factories. The log

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served by the respondent organization, fairly read, expressly says that the rates and conditions therein specified are demanded for the members of the organization. But the log included the following demand, which, in my opinion, should be read as having a necessary relation to the demand for minimum rates of wages and the other specified industrial conditions. Clause 33 of the log reads :—"From and after the coming into operation of any agreement or award based upon this log, all persons joining the service of any employer shall within one month of their so joining become members of the claimant union subject as hereinafter mentioned and it shall be a condition of employment of all employees that they shall join the claimant union and that they shall remain members of the union. If any employee joining the service shall neglect to become a member of the said union within the time specified he shall be dismissed. If any person who has already joined the union or who shall pursuant to the provisions of this paragraph join the said union shall voluntarily resign from the union he shall be liable to dismissal and shall receive a notification from the employer that he is liable and unless he rejoins the union within one week from the date of such notice he shall be dismissed. This clause shall cease to operate as regards any employee whose application for membership is refused by the union." The result of the satisfaction of this demand would be to unionize all factories in the industry. But it would be blinding oneself to realities to say that the sole object of the demand was to gratify the desire of the ardent unionist that every worker in the industry should be a fellow-unionist. At the time the log was served, it was believed that the Court of Conciliation and Arbitration did not have jurisdiction to bind employers to observe such conditions as it could prescribe in the employment of non-unionists. The desideratum of uniformity of conditions which is so essential to the industrial interests of unionists could not be secured directly by award. To award minimum rates and specified conditions to be observed in the employment of unionists would, however, be calculated to injure the unionists if the employers' complete freedom of contract in the employment of non-unionists was left unimpaired. But the desideratum of fixed rates and conditions for all employees could be secured, and the menace which the very fulfilment of the demand

for better wages and conditions for unionists would bring to the unionists could be averted if every employee were compelled to be a unionist. Every employee would then become entitled to union rates and conditions, and, if an award or industrial agreement were made for the industry, would have his employment governed by its conditions. The demand that employers should employ unionists only was, whatever its other objects, a roundabout method adopted by the union of securing that the interests of the unionists would not be jeopardized if the employers acceded to the demands which it made for its own members. The refusal of that demand, therefore, meant that the employers were determined to resist the introduction of uniform minimum rates and predetermined industrial conditions for all their employees. Reading the demand for such rates and conditions with the demand for the employment of unionists only, it is clear that the log was an intimation to the employers, and this intimation was indeed reinforced by the covering letter sent with the log, that the union was demanding compliance with the log as a code of employment for the industry. In rejecting the code, the employers precipitated, in the theory of the Federal law, an industrial dispute, which I think must be held to have included within its ambit the question whether all employers in the industry should observe fixed rates and conditions in the employment of all their workers, whether unionists or non-unionists. For the purpose of settling that dispute, the court is not limited to making an award in the terms of the demand for compulsory unionism, if it thought that this part of the dispute should be settled by an award. Its jurisdiction extends to the making of any award which is relevant to the dispute and appropriate to its settlement. Since the *Metal Trades Case* (1) has defined the jurisdiction of the court, it need not pursue the roundabout method of making an award in terms similar to the demand made by the respondent organization for compulsory unionism, for the purpose of settling the dispute whether non-unionists should remain outside a scale of rates and conditions to be imposed on the employers in order to secure peace in the industry. An award imposing the obligation on the employers to observe prescribed rates and conditions in the employment of non-unionists

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is a direct method of settling that dispute. It is both relevant to the dispute and appropriate to the settlement. The court, therefore, had jurisdiction to make the award sought to be prohibited.

The order nisi should, in my opinion, be discharged.

Order absolute with costs for a writ of prohibition prohibiting the Commonwealth Court of Conciliation and Arbitration and his Honour Chief Judge Dethridge from making or further proceeding with the making, in or in relation to any industrial dispute of which the said court had cognizance on or before 8th March 1938, *of any award against the prosecutors prescribing wages or hours or working conditions for any persons now or hereafter employed by the prosecutors who are not members of the Federated Felt Hatting Employees' Union of Australasia but so that the court is not prohibited from making any award as to claims and demands that are within the terms of the log being exhibit A to the affidavit of Rupert Vincent Kirsch sworn on the* 17*th day of March* 1938 *and filed herein.*

Solicitors for the prosecutors, *John W. Robertson & Ramsay.*
Solicitor for the respondent Union, *G. A. Rundle.*

H. D. W.