[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN COAL AND SHALE EMPLOYEES FEDERATION . . . } APPLICANT;

AND

ABERFIELD COAL MINING COMPANY LIMITED AND OTHERS . . . } RESPONDENTS.

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SYDNEY, *Aug.* 14, 17, 18.

MELBOURNE, *Oct.* 9.

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

Regulations—Expressed to take effect before notification—Acts Interpretation Act 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *sec.* 48—*National Security* (*Industrial Peace*) *Regulations* (*S.R.* 1940 *No.* 290—1941 *No.* 300), *reg.* 16AA.*

High Court—Jurisdiction—Prohibition—Regulation taking away right to prohibition—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (*v.*)—*National Security* (*Coal Mining Industry Employment*) *Regulations* (*S.R.* 1941 *No.* 25—1941 *No.* 299), *reg.* 17*—*National Security* (*Industrial Peace*) *Regulations* (*S.R.* 1940 *No.* 290—1941 *No.* 300), *reg.* 16AA.*

National Security—Industrial dispute—Cognizance by Conciliation Commissioner—Direction by Minister—National Security (*Industrial Peace*) *Regulations* (*S.R.* 1940 *No.* 290—1941 *No.* 300), *reg.* 16*—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 18C, 21AA, 31A (1) (*c*).

Constitutional Law—Defence—Industrial disputes—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*vi.*), (*xxxv.*)—*National Security* (*Industrial Peace*) *Regulations* (*S.R.* 1940, *No.* 290—1941 *No.* 300), *regs.* 4, 6, 9, 13, 16,* 16AA*—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *sec.* 46 (*b*).

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that reg. 16AA of the *National Security* (*Industrial Peace*) *Regulations*, although it prejudicially affects rights existing at the date of its notification, is not "expressed to take effect from a date before the date of notification" within the meaning of sec. 48 of the *Acts Interpretation Act* 1901-1941.

* The *National Security* (*Industrial Peace*) *Regulations* (Statutory Rules 1940 No. 290, as amended), made under the *National Security Act* 1939-1940, provide as follows:—Reg. 16: "Where the Minister is of the opinion that for the Court or a Conciliation Commissioner to obtain cognizance of an industrial dispute in any other manner prescribed by the Act or by these Regulations might result in a delay that would be prejudicial to the interests of industrial peace, he may direct a Conciliation Commissioner forthwith to hear and determine the industrial dispute and the Conciliation Commissioner shall thereupon have cognizance of the industrial dispute." Reg. 16AA (added by Statutory Rules 1941 No. 300): "(1) An award or order made, or a decision given, whether before or after the commencement of this regulation, by a Conciliation Commissioner in pursuance of a direction under the last preceding regulation to hear and determine an industrial dispute in relation to the Coal Mining Industry or the Shale Mining Industry shall have effect as if it were an award or order of the Central Reference Board under the

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Held, by the whole Court, that reg. 17 of the *National Security* (*Coal Mining Industry Employment*) *Regulations* cannot affect the jurisdiction of the High Court to grant prohibition under sec. 75 (v.) of the Constitution. Effect of reg. 17 considered.

The extent to which jurisdiction may be conferred upon a Conciliation Commissioner under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations*, and the limitations upon the powers of a Commissioner in exercising that jurisdiction, discussed.

Per Latham C.J., *McTiernan* and *Williams* JJ.: Even if regs. 16 and 16AA of the *National Security* (*Industrial Peace*) *Regulations* should not be supportable under the Constitution sec. 51 (vi.), sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 preserves their validity in their application to an inter-State industrial dispute.

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

In a summons taken out by the Australian Coal and Shale Employees Federation under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 the questions for decision were:—(1) Whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to entertain the application made by certain mining companies for, or power to grant, a certificate pursuant to rule 9 (*a*) of Part XIIA. of the Rules of that Court that the matter in respect of which they proposed to appeal was likely to affect the public interest. (2) Whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to entertain an appeal from the order and determination of Donald Morrison, Conciliation Commissioner, dated 5th December 1941 and made in industrial disputes

National Security (*Coal Mining Industry Employment*) *Regulations* . . . and regulations 17 and 18 of those Regulations applied thereto or in respect thereof. (2) No such award, order, or decision shall be varied or set aside, and no award, order determination or decision inconsistent with the first-mentioned award, order, or decision, shall be made by any tribunal or authority except in pursuance of an application or reference made to the tribunal or authority with the consent of the Minister."

The *National Security* (*Coal Mining Industry Employment*) *Regulations* (Statutory Rules 1941 No. 25, as amended), made under the *National Security Act* 1939-1940, provide as follows:—Reg. 17 (substituted by Statutory Rules 1941 No. 281): "An award, order or determination of the Central Reference Board or a decision of a Local Reference Board shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever." Reg. 18 (substituted by Statutory Rules 1941 No. 281): "During the currency of any award or order made by the Central Reference Board or by any Local Reference Board under these Regulations, no award or order made by the Court or by any tribunal having jurisdiction in industrial matters in the Coal Mining Industry dealing with the same subject-matter and inconsistent with the award or order made by the Central Reference Board or Local Reference Board (except an award, order or decision made under these Regulations) shall be effective: Provided that nothing in this regulation shall make ineffective any award or order made by a Conciliation Commissioner in pursuance of a direction given, whether before or after the commencement of this regulation, by the Minister under regulation 16 of the *National Security* (*Industrial Peace*) *Regulations* to hear and determine an industrial dispute in relation to the Coal Mining Industry."

submitted to him by the Minister for Labour and National Service on 25th November 1941, whereto the parties to the summons, amongst others, were parties, (*a*) in the absence of the consent of the Minister for Labour and National Service to the institution of the appeal, or (*b*) at all. (3) Whether the Commonwealth Court of Conciliation and Arbitration had power to vary or set aside the order and determination so made by the Conciliation Commissioner, or to make any award, order, determination or decision inconsistent with the said order and determination so made by him, (*a*) except in pursuance of an application or reference made to that Court with the consent of the Minister for Labour and National Service, or (*b*) at all. (4) Whether in the events which had happened the Commonwealth Court of Conciliation and Arbitration had jurisdiction or power (*a*) to entertain an appeal pursuant to the notice of appeal which had been given by the respondents to the summons from the order and determination by the Conciliation Commissioner, dated 5th December 1941 and made in disputes submitted to him by the Minister for Labour and National Service as set forth above, or (*b*) upon such appeal to vary or set aside that order and determination or to make any award, order, determination or decision inconsistent therewith.

The respondents to the summons, who were also the applicants for the certificate, were Aberfield Coal Mining Co. Ltd., Ayrfield Collieries Pty. Ltd., Fassifern Collieries Pty. Ltd., Maitland Main Collieries Pty. Ltd., Maitland Extended Collieries Pty. Ltd., R. W. Miller & Co. Pty. Ltd., Millfield Coal Mining Co. Pty. Ltd., North Wallarah Colliery Pty. Ltd., Pacific Coal Co. Pty. Ltd., Andrew Sneddon Pty. Ltd. and Stockton Borehole Collieries Ltd.

On 25th November 1941 there was in existence an inter-State award of the Commonwealth Court of Conciliation and Arbitration, binding upon the applicant and the respondents. This award was in the first instance made on 8th October 1939. It was varied and consolidated on 8th October 1940, and subsequently further varied in 1940 and 1941. The prescribed term for the duration of the award was one year from the beginning of the first pay period to commence in August 1940. The award contained certain clauses relating to annual leave which were varied by the Court from time to time, the latest variation being that made on 14th November 1941. These clauses dealt with the amount of annual leave on pay to which the miners would become entitled, and provided for forfeiture or reductions of the periods of such leave when they stayed away from work or took part in a strike or participated in certain other interruptions of work.

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On 25th November 1941, Donald Morrison, a Conciliation Commissioner appointed under the *Commonwealth Conciliation and Arbitration Act*, received a direction from the Minister for Labour and National Service under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations* forthwith to hear and determine the industrial disputes with respect to annual leave between the Australian Coal and Shale Employees Federation and certain other unions and employers in New South Wales, Victoria, Queensland and Tasmania engaged in the coal mining industry.

Upon receipt of the direction the Commissioner advised the parties affected and interested that he would deal with the question of annual leave at a hearing to commence in Sydney on 26th November 1941.

Applications were then lodged by the unions affected to delete completely certain sub-clauses which provided for such forfeiture and deductions from the annual leave provisions of the award. The matter came on for hearing before the Commissioner at the end of November and the beginning of December 1941. He heard statements on behalf of the employees and evidence on behalf of the employers, and on 5th December 1941, made an order stated in its terms to be made "pursuant to a direction under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations*." The order provided that the award should be varied by deleting the sub-clauses relating to forfeiture and deductions. The order further provided that "the foregoing variations shall come into operation as from the first day of the first pay period which commenced in December 1939."

On 10th December 1941 an affidavit was filed on behalf of the respondents in the Commonwealth Court of Conciliation and Arbitration stating that these companies desired to appeal against the Commissioner's decision on a number of grounds, and asking that the Court should grant to the companies a certificate under sec. 31A (1) (*c*) of the *Commonwealth Conciliation and Arbitration Act* that the matter in respect of which they proposed to appeal was a condition of employment which in the opinion of the Court was likely to affect the public interest. The application was set down to be heard on 19th December 1941, but on 17th December the hearing was adjourned, by consent, to a date to be fixed.

On 16th December 1941 there was notified in the *Gazette* reg. 16AA of the *National Security* (*Industrial Peace*) *Regulations*.

The application for a certificate came on for hearing on 11th May 1942, before the Chief Judge and two other Judges of the Court, when judgment was reserved. On 23rd June 1942, when judgment

was delivered, the application was granted. The Court certified that the Commissioner's order was an order within sec. 31A (1) (*c*), and held that reg. 16AA was void because it contravened sec. 48 (2) of the *Acts Interpretation Act* 1901-1937.

The summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was referred by *Williams* J. to the Full Court of the High Court.

Leave was given to the Commonwealth to intervene.

Further facts and the terms or effect of the relevant statutes and regulations, in so far as they are not set out in the footnote, *supra*, appear sufficiently in the judgments hereunder.

Barwick K.C. (with him *Sugerman*), for the applicant. Under reg. 18 of the *Coal Mining Industry Employment Regulations* the award made by the Conciliation Commissioner in pursuance of the direction by the Minister under reg. 16 of the *Industrial Peace Regulations* is paramount within its area. Reg. 16AA of the *Industrial Peace Regulations* is not expressed to take effect from a date prior to the date of notification. This regulation is very different from a regulation which fixes a date earlier than the date of notification for commencement. An illustration of a different type of regulation is to be found in *Broadcasting Co. of Australia Pty. Ltd.* v. *The Commonwealth* (1). The areas covered by reg. 16AA and such a regulation are substantially different. There is a distinction between affecting proceedings with sterility as from a previous date and stultifying them as from the date of commencement. An appeal not concluded by judgment can be stultified. This would not infringe the provisions of sec. 48 (2) of the *Acts Interpretation Act* 1901-1941 : see *Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (2). Under sec. 48 (2) regulations may be made to commence at an earlier date, provided that intervening rights be not prejudicially affected. Notwithstanding sec. 48 (2) a regulation may prevent the future exercise of existing rights, but it cannot destroy such rights as from an earlier date. Reg. 16AA is valid. The continuity of production and the finality of proceedings relating to industrial disputes are matters related to the defence power. Since *Farey* v. *Burvett* (3) the community has become more complex and the methods of waging warfare have become more extensive. It cannot be said that an industrial dispute is impossible of effect upon the structure of the defence effort. Question 3 (*a*) need not be answered. All the other questions should be answered in the negative.

(1) (1935) 52 C.L.R. 52, at pp. 60, 67. (2) (1917) 24 C.L.R. 28.
(3) (1916) 21 C.L.R. 433.

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Mitchell K.C. (with him *Dignam*), for the Commonwealth, intervening. The legislature has not endeavoured merely to regulate industrial disputes under placitum xxxv. of sec. 51 of the Constitution. It has purported to control all industrial disputes irrespective of placitum xxxv. The regulations now under consideration do not depend on that placitum for their validity. The fact that a matter has been covered by an award does not obviate the right or power to make an industrial dispute in relation to it (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (1)). So, applying those observations to reg. 16 of the *Industrial Peace Regulations*, if there is a dispute in fact and if there are difficulties under the Act in bringing a dispute within the cognizance of the Court, then if it is a dispute of such a character that it might result in delay prejudicial to industrial peace the Minister may direct a Conciliation Commissioner to hear and determine the matter by making an award. The scope of the matters intended to be so referred to a Conciliation Commissioner is shown in regs. 9 and 11. *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2) is merely an authority for the proposition that there was an industrial dispute and that the Court was precluded from dealing with it. That position is now met by reg. 16. The provision in reg. 16AA that an award, order or decision of a Conciliation Commissioner shall have effect as if it were an award or order of the Central Reference Board shows that the intention was to give the Conciliation Commissioner power to exercise jurisdiction over matters with which he could not otherwise deal. That regulation has not been expressed to take effect at a date prior to the date of notification. The matter is governed by sub-sec. 1 of sec. 48 of the *Acts Interpretation Act* 1901-1941 and not by sub-sec. 2 of that section. The regulation operates upon existing things and future matters. No other construction would give effect to the language of sec. 48 (2). The result is that as from 16th December 1941 there shall be no right of appeal from the relevant awards; the regulation operates to destroy that right as from that date. The manner and procedure in which Conciliation Commissioners obtain power to hear and determine industrial disputes is shown in secs. 19, 23 and 24 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. Allocation as between the Court and the Conciliation Commissioners is left to be arranged as a matter of administration. Reg. 16 was intended to give to the Conciliation Commissioners a jurisdiction or cognizance which overrode, and was intended to be able to override, a decision of the Court upon

(1) (1919) 27 C.L.R. 72, at pp. 82, 87, 94, 96.

(2) (1920) 28 C.L.R. 209.

the same subject matter. An award of the Court is no bar to an order the Conciliation Commissioner may see fit to make. There is no right of appeal, either with or without the consent of the Minister. The right of appeal did not exist, because it was a condition precedent to the right of appeal that leave to appeal should first be obtained. Under the Act there is no general appeal from an order by a Conciliation Commissioner, but only a limited appeal under sec. 31A. Questions 1, 2 (*a*), (*b*), 3 (*b*) and 4 should be answered in the negative. Reg. 16 is within the defence power. That power extends to all powers which may aid the successful prosecution of the war (*Farey* v. *Burvett* (1); *Andrews* v. *Howell* (2); *South Australia* v. *The Commonwealth* (3)).

Maughan K.C. (with him *Ashburner*), for the respondents. The judgment of the Arbitration Court is correct. It depends upon the interpretation to be given to sub-secs. 1 and 2 of sec. 48 of the *Acts Interpretation Act* 1901-1941. It does not follow that because the word "expressed" is used in sub-sec. 2 of sec. 48 the words "take effect" must be used in the regulations; the provisions of that sub-section cover cases in which the indirect result flows without using the words "take effect." If the effect of the regulation is that it takes effect by reason of its inherent provisions then it is expressed to take effect within the meaning of sub-sec. 2. There is no magic in the word "expressed" or the words "take effect" (*Metropolitan District Railway Co.* v. *Sharpe* (4)). Regard must be had to the substance of the regulation and not to the exact verbiage used. The intention of the legislature was that a regulation should not be expressed to take effect in such a way that it would destroy an existing right. The policy of the legislature is to restrict the delegate. The respondents' right of appeal has been prejudicially affected by reg. 16AA of the *Industrial Peace Regulations*. Reg. 17 of the *Coal Mining Industry Employment Regulations* forbids the taking of the initial step of challenging an award; it does not prohibit the hearing of the appeal. The proposed appellants had taken the first essential step for an appeal against the relevant award prior to the promulgation of reg. 16AA. The right of appeal thereupon became a vested right. A right of appeal is a substantive right in the nature of a right of property rather than a procedural right (*Colonial Sugar Refining Co. Ltd.* v. *Irving* (5)). That right cannot be taken away or destroyed by a regulation that comes

(1) (1916) 21 C.L.R., at pp. 453, 455, 456, 459.
(2) (1941) 65 C.L.R. 255, at p. 263.
(3) (1942) 65 C.L.R. 373, at pp. 431, 432, 437, 449-451, 467.
(4) (1880) 5 App. Cas. 425, at p. 441.
(5) (1905) A.C. 369, at p. 372.

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within sub-sec. 2 of sec. 48 of the *Acts Interpretation Act* 1901-1941 : See *Willmott* v. *Kaufline* (1). The draftsman cannot get rid of the effect of sec. 48 (2) by refraining from using such words as " taking effect " or " operating from " a specified date and yet making the regulation take effect. The powers conferred by sec. 51 of the Constitution are " on the same logical level " (*Farey* v. *Burvett* (2)) and should not be construed in such a way as to conflict with each other or with other powers conferred or limitations imposed by the Constitution. The *Industrial Peace Regulations*, as amended, are *ultra vires*. Those Regulations are not authorized by the defence power conferred by placitum vi. of sec. 51. The meaning of the defence power does not change, but its application may vary according to circumstances. It may have a wider operation in time of war. It can be invoked prior to hostilities or subsequent thereto (*Roche* v. *Kronheimer* (3)), but whatever its operation at any time, at all times there are two limitations to it, that is, (*a*) the law must be within the scope of the Constitution and not prohibited by other provisions of the Constitution, and (*b*) there must be some reasonable connection of cause and effect between the law that is made and the efficient defence of the country (*Farey* v. *Burvett* (4) ; *Andrews* v. *Howell* (5)). If a law lacks either of those characteristics it is void. Those characteristics are lacking in the *Industrial Peace Regulations*. Those Regulations are forbidden by placitum xxxv. of sec. 51 of the Constitution, e.g., reg. 4, in effect, eliminates from the *Commonwealth Conciliation and Arbitration Act* those words in it which were necessitated by the words in placitum xxxv. limiting industrial disputes to those extending beyond the limits of any one State. Regs. 6, 7, 9-11, 13, 15 and 17 would, *inter alia*, fall with reg. 4. *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.* (6) did not decide that there were not any implied prohibitions in the Constitution. The Regulations are *ultra vires* because they include intra-State disputes. Any code which covers every industrial dispute in Australia is not so connected with the defence of the country as to be within placitum vi. of sec. 51. There was not a new industrial dispute but a continuance of the old industrial dispute. In those circumstances the proper procedure was to apply for a variation of the award (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (7)). Reg. 16 was only directed to the elimination of delay. Reg. 16AA was promulgated twelve months after reg. 16

(1) (1909) 9 C.L.R. 36, at pp. 43-45.
(2) (1916) 21 C.L.R., at p. 457.
(3) (1921) 29 C.L.R. 329.
(4) (1916) 21 C.L.R., at pp. 440, 441.
(5) (1941) 65 C.L.R., at pp. 271, 272.
(6) (1920) 28 C.L.R. 1.
(7) (1919) 27 C.L.R., at pp. 79, 80, 86, 93.

and relates to a different subject matter; it has nothing to do with jurisdiction. Reg. 16 does not entitle the Minister to refer to a Conciliation Commissioner what is practically an order to review an award already made by the Court. Reg. 16AA is not valid legislation under the defence power. There is no nexus or connection between it and the defence of this country or the efficient prosecution of the war. Nor is there any connection whatever between regs. 17 and 18 of the *Coal Mining Industry Employment Regulations* and the prosecution of the war.

Barwick K.C., in reply. There is no implied prohibition *qua* placitum xxxv. The settlement of industrial disputes, whether they be intra-State or inter-State, which prejudicially affect the defence of the country or the efficient prosecution of the war may be regulated under the defence power. Reg. 16 is severable: it can be read with regs. 2 and 3, and, if need be, it can be read down under sec. 46 of the *Acts Interpretation Act* 1901-1941 so as to refer to industrial disputes within the meaning of placitum xxxv., that is, inter-State industrial disputes. The question whether there is in fact a dispute does not arise on this application. It is not a factor for this Court that there should be a dispute before the Conciliation Commissioner. The question whether or not that dispute exists could not be submitted under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* to this Court. Answers are required only to certain questions brought before the Court under sec. 21AA which turn upon the validity of reg. 16AA (1). The Court has not a discretionary power to refuse to adjudicate upon those questions (*Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (1)). "Industrial dispute" means industrial dispute in fact cognizable by the Conciliation Commissioner from the fact of the reference, not from the motive of the reference. The old dispute remains notwithstanding the award (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (2)). An Act which affects existing rights is not necessarily a retrospective Act (*Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (3)). The word "expressed" in sec. 48 (2) of the *Acts Interpretation Act* 1901-1941 means "stated", and does not mean "intended." The regulations take effect from the date of notification.

Mitchell K.C., by leave. Dissatisfaction with the terms of a current award might constitute a dispute (*Federated Gas Employees'*

(1) (1924) 34 C.L.R. 457. (2) (1919) 27 C.L.R. 72.
(3) (1917) 24 C.L.R., at pp. 31-33.

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Industrial Union v. *Metropolitan Gas Co. Ltd.* (1)), but the court has no jurisdiction under the *Commonwealth Conciliation and Arbitration Act* to deal with it as a dispute (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2)). Reg. 16 entitles the Minister to refer a dispute consisting of dissatisfaction with the terms of a current award.

Maughan K.C. *Ince's Case* (3) decides that the Court has not a discretionary power to refuse to adjudicate upon a matter which it has jurisdiction to determine. In this case, however, there is no dispute ; therefore the proper course for the Court to take is to refuse to answer the questions on the ground that it has no jurisdiction because there is no dispute. It was not open for the respondents to apply for a prohibition (*Ex parte Motions and Prohibitions* (4)).

Cur. adv. vult.

Oct. 9.

The following written judgments were delivered :—

LATHAM C.J. Questions asked in summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 referred to the Full Court.

Conciliation Commissioners are officers attached to the Commonwealth Court of Conciliation and Arbitration. They are appointed under sec. 18C of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and they possess the powers and exercise the functions which the Act gives to them. The *National Security* (*Industrial Peace*) *Regulations* (Statutory Rules 1940 No. 290—subsequently amended) have been made under sec. 5 of the *National Security Act* 1939-1940. Reg. 16 of these Regulations is as follows :—" Where the Minister is of the opinion that for the Court or a Conciliation Commissioner to obtain cognizance of an industrial dispute in any other manner prescribed by the Act or by these Regulations might result in a delay that would be prejudicial to the interests of industrial peace, he may direct a Conciliation Commissioner forthwith to hear and determine the industrial dispute and the Conciliation Commissioner shall thereupon have cognizance of the industrial dispute."

This regulation applies only where the Minister is of opinion that delay would result from the Court or a Commissioner obtaining cognizance of an industrial dispute in any other manner than under the regulation. It is clear therefore that it does not apply to any dispute of which the Court already has cognizance. The effect of

(1) (1919) 27 C.L.R., at p. 82.
(2) (1920) 28 C.L.R., at pp. 255, 256
(3) (1924) 34 C.L.R. 457.
(4) (1916) 21 C.L.R. 669.

the regulation, when it is applied, is to give a Commissioner cognizance of an industrial dispute so that he can hear and determine it. The application of the *Arbitration Act* depends upon the Court or a Commissioner having cognizance of disputes. There must be such cognizance before powers under the Act become operative—see, e.g., secs. 19, 23, 38.

In December 1939 the Arbitration Court made an award relating to the coal industry. The award contained provisions for annual leave for employees, with penalty deductions from such leave in the case of employees who refused to work or were absent from work. The award contained the following clause: "This award shall remain in operation for one year from the beginning of the first pay period to commence in August 1940 or until further order."

There is no evidence that any further order has been made, and therefore the former of the two alternative periods is that which applies. Thus a period ending in August 1941 must be taken to be the period "specified in the award" for which it continues in force under sec. 28 (1) of the *Commonwealth Conciliation and Arbitration Act*.

The employees were dissatisfied with the penalty provisions making deductions from annual leave and desired that they be deleted from the award.

On 25th November 1941, the Minister, acting under reg. 16, gave a direction to a Conciliation Commissioner to hear and determine the "industrial disputes with respect to annual leave" between the parties, employers' and employees' organizations, which are the parties to the application now before the court.

The Commissioner summoned the parties before him, heard statements on behalf of the employees and evidence on behalf of the employers, and on 5th December 1941 made an order stated in its terms to be made "pursuant to a direction under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations*." The order provided that the award should be varied by deleting the penalty provisions mentioned. The order further provided that: "The foregoing variations shall come into operation as from the first day of the first pay period which commenced in December 1939."

The *Commonwealth Conciliation and Arbitration Act*, sec. 31A, gives a right of appeal to the Chief Judge and at least two other Judges of the Arbitration Court against any provision in an award or order of a Conciliation Commissioner affecting any condition of employment which in the opinion of the Court is likely to affect the public interest. The appeal must be made in the manner and within the time prescribed by rules of the Arbitration Court (sec.

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31A (2)). Sec. 31A (4) provides that an award or order of a Commissioner shall not, except by consent of all the parties, have effect until after the expiration of twenty-one days from the making thereof. The employers' organization took steps to obtain a certificate that the provisions relating to annual leave affected a condition of employment which was likely to affect the public interest. On 12th December 1941 the Industrial Registrar issued a notification that the application for a certificate would be heard on 19th December.

On 16th December reg. 16AA was added to the *Industrial Peace Regulations* by statutory rule 300. It is in the following terms:— "(1) An award or order made, or a decision given, whether before or after the commencement of this regulation, by a Conciliation Commissioner in pursuance of a direction under the last preceding regulation to hear and determine an industrial dispute in relation to the Coal Mining Industry or the Shale Mining Industry shall have effect as if it were an award or order of the Central Reference Board under the *National Security* (*Coal Mining Industry Employment*) *Regulations* (Statutory Rules 1941, No. 25, as amended for the time being) and regulations 17 and 18 of those Regulations applied thereto or in respect thereof. (2) No such award, order, or decision shall be varied or set aside, and no award, order, determination or decision inconsistent with the firstmentioned award, order or decision, shall be made by any tribunal or authority except in pursuance of an application or reference made to the tribunal or authority with the consent of the Minister."

The award or order of the Commissioner in this case was made in pursuance of a direction under reg. 16 (which must be "the last preceding regulation"). That direction was a direction to hear and determine industrial disputes in relation to the coal mining industry. Therefore, if reg. 16AA is valid, regs. 17 and 18 of the *National Security* (*Coal Mining Industry Employment*) *Regulations* applied to the award or order. Reg. 17 of those Regulations provides that: "An award, order or determination of the Central Reference Board or a decision of a Local Reference Board shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever."

Reg. 18 provides, *inter alia*, that "during the currency" of any such award or order no order made by the Court (i.e., the Arbitration Court) dealing with the same subject matter and inconsistent with the award or order shall be effective. Attention is called to the words "during the currency." If it is not possible to ascertain "the currency" of an award or order, reg. 18 cannot apply. In the present case the award or order of the Commissioner fixed no period during

which it is to remain in operation and there is no provision in the *Commonwealth Conciliation and Arbitration Act* or in any of the regulations which makes it possible to ascertain the currency of the award or order. Therefore reg. 18 of the *Coal Mining Industry Employment Regulations* is not applicable. But reg. 17 of those Regulations applies in terms to the award or order of the Commissioner, and so does reg. 16aa (2) of the *Industrial Peace Regulations*. The latter (which is later in date than reg. 17) must (I should think) be construed as limiting reg. 17. According to reg. 17 an award or order to which it applies cannot be challenged or called in question at all, and reg. 16aa (1) provides that reg. 17 shall apply to an order made pursuant to a direction given under reg. 16. But reg. 16aa (2) evidently contemplates that such an award or order may be varied or set aside if the Minister consents to the application to set it aside. The difficulty of reconciling these provisions does not present a problem in the present case, because the Minister has not consented to the application of the employers' organizations by way of appeal to have the award or order of the Commissioner varied or set aside.

The application for a certificate was adjourned by consent and was heard by the Full Court of the Arbitration Court on 11th May 1942. On 23rd June the Court gave judgment granting the certificate. It was held that reg. 16aa was invalid because it prejudicially affected a right (namely a right of appeal) which existed at the date of notification of the regulation and was therefore void and of no effect by reason of the *Acts Interpretation Act* 1901-1937, sec. 48 (2). The *National Security Act* 1939-1940, sec. 18, provides that regulations made under the Act shall have effect notwithstanding anything inconsistent therewith contained in any other Act &c., but "subject to the *Acts Interpretation Act* 1901-1937."

After the Arbitration Court held that the certificate should be granted, the employees' organizations took out a summons under sec. 21aa of the *Commonwealth Conciliation and Arbitration Act* asking whether the Arbitration Court had power (1) to entertain the application for a certificate or to grant it, or (2) to entertain the appeal, or (3) to vary or set aside the Commissioner's order, and in each of the two latter cases whether without or only with the consent of the Minister. The fourth question asked in the summons appears to me to restate the second and third questions. Upon the return of the summons my brother *Williams* referred the questions to the Full Court.

Upon the basis of the Regulations the applicant unions contend that the Full Court of the Arbitration Court has no jurisdiction to entertain an appeal from the award or order of the Commissioner.

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The respondents to the summons (the employers) have raised several objections to the validity of the regulations. Some of these objections have already been indicated. Another objection is that the whole of the regulations are invalid because they cannot be supported under sec. 51 (xxxv.) of the Constitution, which provides that the Commonwealth Parliament shall have power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The regulations extend the jurisdiction of the Arbitration Court beyond that which can be conferred upon it under any law passed under sec. 51 (xxxv.). Reg. 9 enables the Court to deal with actual or probable industrial unrest in the absence of an industrial dispute. Reg. 4 extends the jurisdiction of the Court to industrial disputes which do not extend beyond the limits of any one State. Reg. 13 (*b*) removes the limitation which confines the Arbitration Court to methods of conciliation and arbitration. Reg. 6 authorizes the making of a common rule, the jurisdiction of the Court not to be limited "by the ambit of the matters in dispute," while reg. 13 (*a*) provides that an award or order of the Court or of a Conciliation Commissioner shall not be invalidated by reason of its containing provisions relating to matters not within the ambit of the industrial dispute.

None of these provisions can be justified under sec. 51 (xxxv.) as authoritatively interpreted. It is argued for the respondents that therefore they cannot be justified at all—that sec. 51 (xxxv.) constitutes the only power of the Parliament to legislate with respect to industrial disputes and impliedly prohibits any legislation upon that subject which does not fall within sec. 51 (xxxv.), with the result that the regulations cannot, it is said be supported under the defence power. Further, it is separately argued that the regulations have no real connection with defence.

It does not appear to me to be necessary to decide these questions in the present case. There can be no doubt as to the validity of reg. 16 as applied to an inter-State industrial dispute—and it is not contended that the disputes with which the Commissioner dealt were not such disputes. Therefore the *Acts Interpretation Act* 1901-1937, sec. 46 (*b*), would, even if the objections mentioned were well-founded, preserve the validity of the regulation in its application to such disputes. Similar considerations apply, so far as those objections are concerned, to reg. 16AA.

If reg. 16AA of the *Industrial Peace Regulations* is valid, reg. 17 of the *Coal Mining Industry Regulations* applies to the award or order

of the Commissioner and prevents the Arbitration Court from entertaining any appeal from that award or order. Thus, if reg. 16AA is valid, the answers to the questions asked in the summons should (in the absence of any consent by the Minister to the appeal by the respondents) be in the negative. The objection to reg. 16AA which must now be considered is based upon sec. 48 (1) and (2) of the *Acts Interpretation Act* 1901-1937 which is as follows :—

" (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(*a*) shall be notified in the *Gazette* ;

(*b*) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified ; and

(*c*) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—

(*a*) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person ; and

(*b*) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification,

and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect."

In the first place, a right of appeal must be held to be a " right " within the meaning of the section : See *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1).

Next, the respondents had, when the regulation was notified in the *Gazette*, a right of appeal from the order of the Commissioner (*Commonwealth Conciliation and Arbitration Act*, sec. 31A). The regulation put an end to that right of appeal and accordingly prejudicially affected the right.

If sec. 48 (2) had simply provided that no regulation should be valid in so far as it prejudicially affected existing rights, the regulation would clearly be inoperative in relation to those rights.

(1) (1905) A.C. 369.

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But sec. 48 (2) does not so provide. It deals only with regulations "expressed to take effect from a date before the date of notification." The date of notification in this case was 16th December 1941. The regulation does not in terms purport to take effect as at any earlier date. It applies, it is true, to awards and orders made before 16th December 1941, but only as from 16th December. It does not either in form or in fact take effect, it does not produce any effect, at any date earlier than 16th December. It might have been expressed to take such an effect, as if, for example, it had provided that as from some earlier date no person should be deemed to have had a right of appeal from awards and orders. But it does not so provide.

Thus, in my opinion, though the regulation prejudicially affects rights existing at the date of notification of the regulation, it is not expressed to take effect before that date and it does not take effect before that date. The regulation is therefore not rendered invalid by sec. 48 (2) of the *Acts Interpretation Act*. The result is that the questions asked should be answered in the negative.

But, though the Arbitration Court (which is purely a statutory creation) may be controlled by such a provision as reg. 17, the position of the High Court is different. No statute or regulation can prevent this Court from exercising the powers conferred by the Constitution, sec. 75 (v.), under which the Court has original jurisdiction in any matter in which a writ of prohibition is sought against any officer of the Commonwealth (*The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1); *The Tramways Case* [*No.* 1] (2); *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees Federation* [*No.* 1] (3)). A Conciliation Commissioner appointed under sec. 18c of the *Commonwealth Conciliation and Arbitration Act* is an officer of the Commonwealth. Accordingly, if the order made by him is beyond the powers conferred upon him this Court may grant a writ of prohibition preventing any proceeding under the order.

No application for a writ of prohibition is before the Court, and if application for such a writ should be made the application should be dealt with upon the materials then placed before the Court. But it may be pointed out that the effect of a direction under reg. 16 is simply to give to a Commissioner cognizance of a dispute. He can then exercise in relation to the dispute such powers as the *Commonwealth Conciliation and Arbitration Act* confers upon him—but subject to any limitations placed upon those powers which define their nature and their scope. Thus, in making an award, he is bound by

(1) (1910) 11 C.L.R. 1.
(2) (1914) 18 C.L.R. 54.
(3) (1930) 42 C.L.R. 527, at pp. 556, 557.

the provisions of sec. 28 of the Act. He may make a new award in a new dispute if the "specified period" of the current award has expired (as in the present case) and this award may deal with matters covered by the current award (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (1)). But the award must specify a period for its own continuance not exceeding five years—it cannot be made so as to be of indefinite duration (*Commonwealth Conciliation and Arbitration Act*, sec. 28 (1)). In the present case the award of the Commissioner specifies no period for its duration. Further, only a limited retrospectivity can be given to an award, namely, to a date not earlier than the date upon which the Court first had cognizance of the dispute (sec. 28 (2) proviso). In this case the Court has not yet obtained cognizance of the dispute, and the Commissioner obtained cognizance of the dispute only on 25th November 1941. But his award is made retrospective to a date in 1939.

As a general proposition it may be added that, whatever may be the effect of reg. 17 in preventing certain proceedings by way of appeal &c., such a provision does not profess to give validity to an invalid award. Further, if a pretended award were so completely beyond any possible jurisdiction that it could not reasonably be said to be "an award" other questions would come up for consideration —such questions as were considered in *Baxter* v. *New South Wales Clickers' Association* (2).

The questions arising in relation to these matters are not concluded by the answers which I propose should be made to the questions asked in the summons. Notwithstanding these answers, any party will be at liberty if so advised to take further proceedings to test the validity of the award or order of the Commissioner.

The Minister has not given his consent to the appeal of the applicants to the Arbitration Court. This Court should not answer questions based upon the hypothesis that he has given such consent. The questions asked should be answered upon the basis of the facts as they actually exist. The questions asked in the summons should, in my opinion, be answered as follows :—(1) No. (2) The Commonwealth Court of Conciliation and Arbitration has no jurisdiction to entertain the appeal of the respondents from the said order and determination. (3) The said Court has no power in the proceedings before it to vary or set aside the said order and determination. (4) (*a*) and (*b*) No.

The applicants have succeeded upon the summons and should have their costs.

(1) (1919) 27 C.L.R. 72.

(2) (1909) 10 C.L.R. 114.

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RICH J.—As I understand that there is no difference in opinion between the members of the Bench in the conclusion that the respondents, on the facts as they at present appear, are entitled to make an application to this Court for a prohibition to issue under sec. 75 (v.) of the Constitution, I shall content myself by adhering to that opinion without repeating similar reasons for it. I shall, however, briefly state my reasons for thinking that the respondents are also entitled to proceed with their appeal to the Commonwealth Arbitration Court under sec. 31A (1) (*c*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. Reg. 16AA of the *National Security* (*Industrial Peace*) *Regulations* was notified in the *Gazette* on 16th December 1941. Before this date, viz., on 5th December 1941, the respondents had a right of appeal to the Arbitration Court, and one of the matters debated before us was whether the regulation was not invalidated by sec. 48 (2) of the *Acts Interpretation Act* 1901-1937. This sub-section was, I think, intended to enforce compliance with the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis* and to prescribe that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights (*Reid* v. *Reid* (1)). Legislation, whether by statute or regulation, if in accordance with this maxim would be based on sound and just principles. Does then reg. 16AA infringe this sub-section ? A regulation may take effect either from the date of notification or from a date specified in it (sec. 48, sub-sec. 1), but it must not have an operative effect from a date before the date of notification where rights existing at the date of notification would be prejudicially affected (sub-sec. 2). Now on 5th December 1941, a date before 16th December 1941, the date of notification, the respondents had a right of appeal as I have already mentioned, and reg. 16AA expresses or represents in words that it is both retrospective and prospective. It purports to " include an award or order made, or a decision given, whether before or after the commencement of the regulation." And it is expressed to take effect before the date of notification. Accordingly the right of appeal vested in the respondents at the date of notification was affected in a manner prejudicial to them, inasmuch as the regulation purports to defeat this right and to deprive the respondents of it (*Colonial Sugar Refining Co. Ltd.* v. *Irving* (2)). In construing a regulation one must consider on what it purports to operate and in what manner it operates. The limitation provided by sub-sec. 2 is that where existing rights are prejudicially affected a regulation shall not be expressed to take effect before date of notification.

(1) (1886) 31 Ch. D. 402, at pp. 408, 409.

(2) (1905) A.C., at p. 372.

Accordingly I answer the questions submitted as follows:—(1) Yes. (2) and (2) (*a*) Yes. (3) and (3) (*a*) Yes. (4) (*a*) Yes.

Starke J. Summons under sec. 21aa of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 obtained by the Australasian Coal and Shale Employees Federation for the decision by this Court of certain questions relating to proceedings in the Commonwealth Court of Conciliation and Arbitration established by the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

In October 1940 the Arbitration Court consolidated certain awards and orders (Coal Miners) in an industrial dispute between the applicants here and J. & A. Brown and Abermain-Seaham Collieries Ltd. and others. In this consolidated award are set out various provisions in relation to annual leave to employees which need not be detailed. The award prescribes that it shall remain in operation for one year from the beginning of the first pay period to commenee in August 1940 or until further order, which does not conform with the provisions contained in sec. 28 (1) of the Act. But I suppose the award means that it shall remain in operation for a specified period of one year and continue in force until further order, which contemplates, I suppose, setting aside or varying the award or making a new award pursuant to the Act. It would seem desirable to follow more closely the provisions of the Act.

In January 1941, the Arbitration Court varied the terms of the award by deleting certain paragraphs relating to annual leave and inserting others in their place. In September 1940 the Arbitration Court also settled a final award (Colliery Mechanics) in proceedings between the Federated Mining Mechanics Association, the Amalgamated Engineering Union and the Blacksmiths' Society of Australasia and J. & A. Brown and Abermain Seaham Collieries Ltd. and others, which also contained provisions as to annual leave. This award came into operation as from the beginning of the first pay period to commence in August 1940 and prescribed that it should remain in operation for a period of twelve months or until further order. In September 1940 the Court also consolidated awards and orders relating to engine drivers. This award also contained provisions for annual leave. It came into operation as from the beginning of the first pay period to commence in August 1940 and prescribed that it should remain in operation for a period of twelve months or until further order.

In November 1941 the Minister of State for Labour and National Service, purporting to act under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations*, directed Donald Morrison, Conciliation

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Commissioner, forthwith to hear and determine the industrial disputes with respect to annual leave between the Australasian Coal and Shale Employees Federation, the Federated Engine-Drivers' and Firemen's Association of Australasia, the Amalgamated Engineering Union, the Federated Mining Mechanics' Association of Australasia, and the Blacksmiths' Society of Australasia and employers in the States of New South Wales, Victoria, Queensland, and Tasmania who are engaged in the coal-mining industry. In these proceedings the unions mentioned applied to delete various clauses in the awards already relating to annual leave.

The result was that on 5th December 1941, the Conciliation Commissioner ordered and determined that the various awards should be varied by deleting several clauses relating to annual leave and he directed that the variation should come into operation from the first day of the first pay period which commenced in December 1939. The provision for annual leave in the various awards commenced as from the first pay period in December 1939.

The employers affected by the award of the Conciliation Commissioner desired to appeal from this award, and about 10th December 1941 applied to the Commonwealth Conciliation and Arbitration Court pursuant to Part XIIA. rule 9 (*a*) of the Rules of that Court (Statutory Rules 1931 No. 71) for a certificate that the award of the Conciliation Commissioner was an order affecting the conditions of employment which in the opinion of the Court were likely to affect the public interest. On 23rd June 1942 the Court certified accordingly and on 27th June 1942 the employers gave notice of appeal to the Commonwealth Court of Conciliation and Arbitration against the award of the Conciliation Commissioner, and claimed its discharge.

On 14th July 1942 the Australasian Coal and Shale Employees Federation applied for and obtained from this Court a summons pursuant to sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* for the determination of several questions which are set forth in the summons. The main questions are whether the Arbitration Court had jurisdiction to grant the certificate already mentioned, and whether it has jurisdiction to entertain an appeal from the award of the Conciliation Commissioner. An order was made that the questions be argued before this Court, and they now fall for decision.

The *National Security* (*Industrial Peace*) *Regulations* are complementary to the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. The provisions of reg. 16 provide a new method whereby the Arbitration Court or a Conciliation Commissioner may obtain cognizance of an industrial dispute in order to

avoid delay that would be prejudicial to the interests of industrial peace. But it is to the Court established, and to Commissioners appointed, under the *Arbitration Act* that the regulation applies. Except in so far as the regulation extends or restricts the powers and authorities of the Court and the Commissioners under the Act those powers and authorities remain unaltered and undiminished.

The direction by the Minister in this case was made after the period specified in the awards, namely, one year or twelve months from the first pay period to commence in August 1940. Prima facie the Minister's direction to the Conciliation Commissioner in November 1941 to hear and determine the industrial dispute with respect to annual leave in the coal-mining industry must be taken to refer to disputes then existing which had not been settled by awards or, in other words, new disputes, or perhaps renewed disputes in relation to annual leave arising after the expiration of the specified period of one year mentioned in the awards. Otherwise cases decided under the *Commonwealth Conciliation and Arbitration Act* deny the jurisdiction of the Court and Conciliation Commissioners to deal with such awards otherwise than as prescribed by secs. 28 and 38 of the Act (*Gas Employees' Case* (1); *Waterside Workers' Case* (2)). And since those cases were decided the proviso to sec. 28 (2) of the Act has enacted that where in pursuance of the sub-section an award has continued in force after the period specified in the award any award made by the Court or a Conciliation Commissioner for the settlement of a new industrial dispute between the parties may if the Court or the Conciliation Commissioner so orders be made retrospective to a date not earlier than the date upon which the Court first had cognizance of the dispute. The Conciliation Commissioner's award, it will be remembered, came into operation as from the first day of the first pay period which commenced in December 1939. This provision is either struck by the proviso or by the decision of this Court in the *Waterside Workers' Case* (3) and would be the subject of appeal to the Arbitration Court under sec. 31A of the Act subject to a certificate of that Court pursuant to its Rules, Part XIIA., rule 9 (*a*), which has already been obtained.

But it is argued that the *National Security* (*Industrial Peace*) *Regulations* coupled with the *National Security* (*Coal Mining Industry Employment*) *Regulations* preclude such an appeal. By the *Industrial Peace Regulations*, reg. 16AA, it is provided that an award or order or decision given by a Conciliation Commissioner in pursuance of a direction given under reg. 16 by the Minister shall have effect

(1) (1919) 27 C.L.R. 72. (2) (1920) 28 C.L.R. 209.
(3) (1920) 28 C.L.R. 209.

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as if it were an award or order of the Central Reference Board under the *Coal Mining Industry Employment Regulations*, and regs. 17 and 18 of those Regulations applied thereto or in respect thereof.

Regs. 17 and 18 of those Regulations provide :—"17. An award, order or determination of the Central Reference Board . . . shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever. 18. During the currency of any award or order made by the Central Reference Board . . . under these Regulations, no award or order made by the Court or by any tribunal having jurisdiction in industrial matters in the Coal Mining Industry dealing with the same subject matter and inconsistent with the award or order made by the Central Reference Board . . . (except an award, order or decision made under these Regulations) shall be effective."

In my opinion, reg. 17 excludes any appeal whatever from any award or order of the Conciliation Commissioner in relation to industrial disputes referred to him under sec. 16 of the *Industrial Peace Regulations*. Effect can only be given to reg. 17 by treating the words, award, order or determination, as meaning acts in fact done by the tribunal in the supposed exercise of the powers entrusted to it. To confine the meaning of those words to acts done lawfully and within the jurisdiction of the tribunal ignores the clear, distinct and unmistakable intent of the regulation. Prohibition at common law was the appropriate remedy for restraining inferior Courts from exceeding their jurisdiction, and yet this remedy is withdrawn by the regulation : See *Baxter's Case* (1) ; *Morgan and Australian Workers' Union* v. *Rylands Bros. (Australia) Ltd.* (2) ; *Clancy* v. *Butchers' Shop Employees Union* (3) ; *Colonial Bank of Australasia* v. *Willan* (4).

The award of the Conciliation Commissioner was made in relation to an industrial matter referred to him by the Minister, in good faith, and in the supposed exercise of the powers entrusted to him. The contention that an award in excess of jurisdiction or contrary to some provision of the *Commonwealth Conciliation and Arbitration Act* is not an award within the meaning of reg. 17 ignores the language of the regulation and disregards the decisions of this Court.

Reg. 18 of the *Coal Mining Industry Employment Regulations* does not to my mind affect the matter. The objection to the award of the Conciliation Commissioner is not that it is inconsistent with the award of the Arbitration Court but that it is contrary to the

(1) (1909) 10 C.L.R. 114.
(2) (1927) 39 C.L.R. 517.
(3) (1904) 1 C.L.R. 181.
(4) (1874) L.R. 5 P.C. 417.

provisions of the *Commonwealth Conciliation and Arbitration Act*, as expressed in the proviso to sec. 28 (2), or as interpreted in the decisions of this Court.

But it is suggested that the award of the Conciliation Commissioner was not made under reg. 16 of the *Industrial Peace Regulations* but under the powers conferred by the *Commonwealth Conciliation and Arbitration Act*, secs. 18c (7), (8), (9), 28 (3) and 38. I am unable to agree with this suggestion. The order, though in form a variation of awards, was made in a proceeding directed by the Minister under reg. 16 and not otherwise. The specified periods of the industrial awards had expired and the award of the Conciliation Commissioner must be regarded as made in new or renewed industrial disputes. And the award itself expressly states that it was made upon application pursuant to a direction under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations*. It was in this manner that the Conciliation Commissioner became seized of the proceedings. In my opinion it is impossible in these circumstances to conclude that the parties treated the proceedings as being under the general jurisdiction given to the Conciliation Commissioner under the *Commonwealth Conciliation and Arbitration Act*, or to uphold an award upon any such view when it is expressly made pursuant to the special powers contained in reg. 16.

All that remains for consideration is the decision of the Commonwealth Court of Conciliation and Arbitration that reg. 16AA of the *Industrial Peace Regulations*, incorporating regs. 17 and 18 of the *Coal Regulations*, is void and ineffective to the extent that it deprives the employers affected by the award of the Conciliation Commissioner of their right of appeal under sec. 31A of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

The *Acts Interpretation Act* 1937, which was proclaimed to commence on 11th October 1937, inserted the following provisions in the *Acts Interpretation Act* 1901-1937 :—" 48. (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—(*a*) shall be notified in the *Gazette* ; (*b*) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified ; . . . (2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect —(*a*) the rights of a person . . . existing at the date of notification, would be affected in a manner prejudicial to that person ; and (*b*) liabilities would be imposed on any person . . . in respect

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of anything done or omitted to be done before the date of notification, and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect."

The material dates affecting the operation of this provision are: —17th December 1940—*Industrial Peace Regulations* 1940 No. 290, reg. 16 notified in *Gazette*; 25th November 1941—Minister's direction under reg. 16; 3rd December 1941—*Coal Mining Industry Employment Regulations*, 1941 No. 281, regs. 17 and 18 notified in *Gazette*; 5th December 1941—Award of Conciliation Commissioner; 11th December 1941—Application of employers to Arbitration Court for certificate pursuant to Rules of Court, Part XIIA., rule 9 (*a*); 16th December 1941—*Industrial Peace Regulations*, 1941 No. 300, reg. 16AA notified in *Gazette*; 17th December 1941—Employers' application for certificate adjourned; 23rd June 1942—Certificate granted; 27th June 1942—Employers' notice of appeal to Arbitration Court; 14th July 1942—Summons obtained by applicants under sec. 21AA.

The *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 31A provides that an appeal shall lie to the Arbitration Court against any provision in any award of a Conciliation Commissioner affecting any condition of employment which in the opinion of the Court is likely to affect the public interest, and that any such appeal should be made in the manner prescribed by the Rules. And the Rules of Court already mentioned, Part XIIA., rule 9 (*a*) provided that an appeal should not be brought in respect of so much of an award or order of a Conciliation Commissioner as affects any condition of employment unless the party desiring to appeal first obtain from the Court a certificate that the matter in respect of which it is proposed to appeal is a condition of employment which in the opinion of the Court is likely to affect the public interest. It is contended that the operation of reg. 16AA of the *Industrial Peace Regulations* coupled with reg. 17 of the *Coal Mining Industry Employment Regulations* is to withdraw this right of appeal or affect it in a manner prejudicial to the applicant and other employers. Reg. 16AA is not expressed, in so many words, to take effect from a date before the date of notification of the regulation, that is, on 3rd December 1941. But it applies to every award or order made or decision given whether before or after the commencement of the regulation. Accordingly it is contended that the regulation coupled with reg. 17 of the *Coal Mining Regulations* operates, if valid, to preclude the right of the applicant and other employers to appeal in this case from the award of the Conciliation Commissioner which was given on 5th December 1941, and before

reg. 16AA was notified in the *Gazette* on 16th December 1941. The applicant, though the employers' notice of appeal was not given until 27th June 1942, claims that its right of appeal accrued upon the award being made and was put in motion by its application for a certificate on 11th December 1941. The right of appeal given by sec. 31A of the *Commonwealth Conciliation and Arbitration Act* is regulated, no doubt, by the Rules of Court, Part XIIA., rule 9 (*a*), already mentioned, but the right of appeal is given by the Act. It is a substantive right and not a mere matter of procedure (*Colonial Sugar Refining Co. Ltd.* v. *Irving* (1); *Newell* v. *The King* (2)). The regulation is so expressed that it acts retrospectively as well as prospectively in respect of awards, orders, or decisions made or given by the Conciliation Commissioner, and this is so because the regulation is expressed to take effect upon awards and orders made before its commencement or the date of its notification. Still the regulation is not expressed to take effect from a date before its notification. No doubt it operates retrospectively, that is, upon awards made before the date of notification. But it did not take effect or come into force as a regulation or law until the date of notification. It may be, that the purpose of sec. 48 was to prohibit the retrospective operation of regulations, but if so the words of the section have failed to express the necessary intention. There is nothing in the section which prohibits the making of regulations having a retrospective or retro-active operation; all that is prohibited is giving them effect in certain cases as regulations before notification. Consequently, in my opinion, reg. 16AA is not obnoxious to the provisions of sec. 48 of the *Acts Interpretation Act* 1901-1937.

A contention that reg. 16 was also void is, I think, untenable. The case of *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.* (3) makes it clear that, where no prior award has been made, the Arbitration Court or a Conciliation Commissioner may make retrospective orders in respect of matters within the ambit of a dispute. But in cases in which an award has continued in force pursuant to sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act*, then the Arbitration Court and the Conciliation Commissioner may only make orders retrospective to a date not earlier than the date upon which the Court first had cognizance of that dispute. Reg. 16 has the same meaning and effect. Consequently the rights of no person existing at the date of its notification are by anything contained in the regulation affected in a manner prejudicial to him. Even though

(1) (1905) A.C. 369.
(2) (1936) 55 C.L.R. 707.
(3) (1920) 28 C.L.R. 1.

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the Conciliation Commissioner failed to observe the proviso to sec. 28 (2), still the ordinary remedy of appeal to the Arbitration Court is taken away, and so is common-law prohibition. But this would not exclude the right to prohibition pursuant to sec. 75 of the Constitution in appropriate cases, for Parliament has no power to take away that constitutional right. And it may be in any case that the award of the Conciliation Commissioner is unenforceable in legal proceedings because of its illegality. But that would not debar an appeal if otherwise an appeal to the Arbitration Court were open to the applicant: See *Russell* v. *Bates* (1); *Crane* v. *Public Prosecutor* (2).

The Chief Justice will announce the answers to the questions stated.

McTIERNAN J. I agree with the answers which the Chief Justice has given to the questions, and with his Honour's reasons.

WILLIAMS J. The circumstances under which this matter has come before this Court under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 21AA, are as follows :—

The applicants are the Australian Coal and Shale Employees Federation and certain other organizations of employees working in the coal-mining industry in New South Wales, Tasmania and Victoria, and the respondents are the Aberfield Coal Mining Co. Ltd. and certain other companies which own coal mines in the district of Newcastle.

On 25th November 1941, there was in existence an inter-State award of the Commonwealth Court of Conciliation and Arbitration binding upon the applicants and the respondents. This award was in the first instance made on 8th October 1939. It was then varied and consolidated on 8th October 1940, and subsequently further varied in 1940 and 1941. The prescribed term for the duration of the award was one year from the beginning of the first pay period to commence in August 1940. The award contained certain clauses relating to annual leave which were varied by the Court from time to time, the latest variation being that made on 14th November 1941. These clauses dealt with the amount of annual leave on pay to which miners would become entitled, and provided for forfeiture or reductions of the periods of such leave when they stayed away from work or took part in a strike or participated in certain other interruptions of work.

On 25th November 1941, Mr. Donald Morrison, a Conciliation Commissioner of the Commonwealth Court of Conciliation and

(1) (1927) 40 C.L.R. 209.

(2) (1921) 2 A.C. 299, at p. 323.

Arbitration, received a direction from the Minister of Labour and National Service under reg. 16 of the *National Security* (*Industrial Peace*) *Regulations* hereinafter referred to, forthwith to hear and determine the industrial disputes with respect to annual leave between the Australian Coal and Shale Employees Federation and certain other unions and employers in the States of New South Wales, Victoria, Queensland and Tasmania engaged in the coal-mining industry.

Upon receipt of this direction Mr. Morrison advised the parties affected and interested that he would deal with the question of annual leave at a hearing to commence in Sydney on 26th November 1941. Applications were then lodged by the unions affected to delete completely the sub-clauses which provided for such forfeiture and reductions. The matter came on for hearing before Mr. Morrison at the end of November and the beginning of December 1941. On 5th December 1941 he ordered and determined that the award should be varied in the States of New South Wales and Tasmania by deleting from clause 10, sub-clauses J (i), (ii) and (iii) and L (i) and (ii) and in the State of Victoria by deleting from clause 21, sub-clauses J (i), (ii) and (iii) and L (i) and (ii), these variations to come into operation as from the first day of the first pay period which commenced in December 1939. The effect of the order was to delete retrospectively for two years from the award all the penalties for absenteeism and interruptions of work originally inserted in the award, and to disregard the numerous variations made by the Court itself from time to time. These variations were substantial, but fell far short of total abolition.

On 10th December 1941 an affidavit was filed by Henry Gregory Forster on behalf of the respondents in the Commonwealth Court of Conciliation and Arbitration stating that these companies desired to appeal against Mr. Morrison's decision on a number of grounds, and asking that the Court should grant to the companies he represented a certificate under sec. 31A (1) (*c*) of the *Commonwealth Conciliation and Arbitration Act* that the matter in respect to which they proposed to appeal was a condition of employment which in the opinion of the Court was likely to affect the public interest. The application was set down to be heard on 19th December 1941, but, on 17th December, the hearing was adjourned to a day to be fixed. On 11th May 1942 the matter came on for hearing before the Chief Judge and two other Judges of the Court, when judgment was reserved. On 23rd June 1942 judgment was delivered, the application was granted, and the Court certified that Mr. Morrison's order was an order within sec. 31A (1) (*c*). At the hearing the unions

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took the objection that the certificate ought not to be granted, because any right of appeal which the companies might otherwise have had from the order had been destroyed by reg. 16AA of the *National Security* (*Industrial Peace*) *Regulations*. If the Court had considered that this objection was sound, it would no doubt have refused to grant the certificate, but it held that the regulation was void because it contravened sec. 48 (2) of the *Acts Interpretation Act* 1901-1937, to which all regulations passed under the *National Security Act* 1939-1940 are made subject by sec. 18 of that Act.

On 14th July 1942 the applicants filed a summons in this Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 raising the following questions:—(1) Whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to entertain the application for, or power to grant the certificate pursuant to rule 9 of Part XIIA. of the Rules of the said Court. (2) Whether the Commonwealth Court of Conciliation and Arbitration has jurisdiction to entertain an appeal from the order and determination of Donald Morrison, Conciliation Commissioner, dated 5th December 1941, and made in industrial disputes submitted to him by the Minister for Labour and National Service on 25th November 1941 whereto the parties to the said summons, amongst others, were parties, (*a*) in the absence of the consent of the Minister for Labour and National Service to the institution of the said appeal, or (*b*) at all. (3) Whether the Commonwealth Court of Conciliation and Arbitration has power to vary or set aside the order and determination by Donald Morrison, Conciliation Commissioner, dated the said 5th December 1941 and made in disputes submitted to him by the Minister for Labour and National Service on 25th November 1941, whereto the parties to the said summons, amongst others, were parties, or to make any award, order, determination or decision inconsistent with the said order and determination of the said Donald Morrison, (*a*) except in pursuance of an application or reference made to the said Commonwealth Court of Conciliation and Arbitration with the consent of the Minister for Labour and National Service, or, (*b*) at all. (4) Whether in the events which have happened the Commonwealth Court of Conciliation and Arbitration has jurisdiction or power (*a*) to entertain an appeal pursuant to the notice of appeal which has been given by the respondents to the said summons from the order and determination by Donald Morrison, Conciliation Commissioner, dated 5th December 1941 and made in disputes submitted to him by the Minister for Labour and National Service on 25th November 1941 whereto the parties to the said summons, amongst others, were

parties, or (*b*) upon such appeal to vary or set aside the said order and determination or to make any award, order, determination or decision inconsistent therewith.

This summons came on for hearing before me on 20th July 1942, when I made an order, pursuant to sec. 18 of the *Judiciary Act* 1903-1940, directing that the questions asked in the summons be heard before the Full High Court and giving the Commonwealth leave to intervene.

Prior to the outbreak of the present hostilities the powers of the Commonwealth Court of Conciliation and Arbitration and the Conciliation Commissioners were regulated by the *Commonwealth Conciliation and Arbitration Act* 1904-1934. After the outbreak of hostilities certain regulations were made under the powers conferred by the *National Security Act* 1939-1940, of which I need only refer to the *National Security* (*Industrial Peace*) *Regulations*, which came into force in December 1940, and the *National Security* (*Coal Mining Industry Employment*) *Regulations*, which came into force in February 1941. Both these sets of regulations have been subsequently amended from time to time.

The Minister gave the direction to Mr. Morrison under reg. 16 of the *Industrial Peace Regulations*, which provides that where the Minister is of opinion that for the Court or a Conciliation Commissioner to obtain cognizance of an industrial dispute in any other manner prescribed by the Act or by these Regulations might result in a delay that would be prejudicial to the interests of industrial peace, he may direct a Conciliation Commissioner forthwith to hear and determine the industrial dispute and the Conciliation Commissioner shall thereupon have cognizance of the industrial dispute.

Reg. 16AA, which was notified in the *Gazette* on 16th December 1941, provides that—"(1) An award or order made, or a decision given, whether before or after the commencement of this regulation, by a Conciliation Commissioner in pursuance of a direction under the last preceding regulation to hear and determine an industrial dispute in relation to the Coal Mining Industry or the Shale Mining Industry shall have effect as if it were an award or order of the Central Reference Board under the *National Security* (*Coal Mining Industry Employment*) *Regulations* (Statutory Rules 1941, No. 25, as amended for the time being) and regulations 17 and 18 of those Regulations applied thereto or in respect thereof. (2) No such award, order, or decision shall be varied or set aside, and no award, order, determination, or decision inconsistent with the first-mentioned award, order or decision, shall be made by any tribunal or authority except in

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pursuance of an application or reference made to the tribunal or authority with the consent of the Minister."

This regulation was made after the date on which the respondents had instituted their appeal against Mr. Morrison's decision in the Commonwealth Court of Conciliation and Arbitration, but before the appeal had been heard and determined, and the questions asked in the summons filed in this Court relate to the propriety of that Court granting the certificate already mentioned if, as the appellants contend, the regulation has deprived the respondents of the right of appeal which they would otherwise have had under sec. 31A of the Act.

At a time when sec. 28 of the *Commonwealth Conciliation and Arbitration Act* included sub-secs. 1 and 2, but did not contain the present proviso to sub-sec. 2 or sub-sec. 3, this Court, in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (1) and *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2) held, for reasons which are fully elaborated in the judgments, that, during the period specified in the award (in this case one year), the dispute in respect of which the award was made, subject to the power to vary conferred upon the Court by sec. 38 (*o*), must be regarded as settled. The proviso to sub-sec. 2 and sub-sec. 3 were added to sec. 28 by the Act No. 31 of 1920, sec. 13. This proviso and sub-section were later amended by the Act No. 43 of 1930, sec. 21, to include the Conciliation Commissioners. Since 1930, therefore, the Court or a Conciliation Commissioner can, under sec. 28 (3), if satisfied that circumstances have arisen which affect the justice of any terms of an award, in the same or another proceeding set aside or vary any terms so affected. When the prescribed term of an award has expired, the award still continues to exist under sub-sec. 2, so that applications can still be made under sub-sec. 3 to set aside or vary its terms, or an application can be made for a new award in the same manner as if no award had ever been made. The methods by which the Court obtains cognizance of an industrial dispute are enumerated in sec. 19 of the Act.

Reg. 2 of the *Industrial Peace Regulations* provides that in these Regulations, unless the contrary intention appears, the Act means the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and that expressions used in these Regulations are, unless the contrary intention appears, to have the same effect as in the Act; reg. 3 that, subject to these Regulations, the Act and these Regulations shall so long as these Regulations continue in force, be construed as

(1) (1919) 27 C.L.R. 72.

(2) (1920) 28 C.L.R. 209.

if the provisions of these Regulations were incorporated in the Act as amendments thereof; reg. 4 that, so long as the Regulations continue in force, the provisions of the Act shall be applied and construed as if from the definition of industrial disputes in sec. 4 the words "extending beyond the limits of any one State" were omitted, and the jurisdiction of the Court shall be extended accordingly. Regs. 9, 10, 11 and 12 provide for the settlement of industrial unrest with respect to industrial matters although an industrial dispute with respect to these matters does not exist. No attempt is made in the Regulations to amend the provisions of sec. 28 of the Act.

As the prescribed period of the consolidated award of 8th October 1940 had expired prior to 25th November 1941, the way was open for disputes to arise in the coal industry which could be made the subject matter of a new award. The direction which the Minister gave Mr. Morrison lacked definiteness in that it did not specify the nature of the disputes with respect to annual leave which had arisen, but it is plain from his conduct that Mr. Morrison understood the direction to mean that the disputes related to the existing award.

In my opinion reg. 16 does not empower the Minister to direct a Conciliation Commissioner to vary an existing award under sec. 28 (3). It relates to disputes of which the Court or a Conciliation Commissioner has not already obtained cognizance, that is, to disputes in respect of which no award has been made or which have arisen after the expiry of the prescribed period of an existing award. The regulation is intended to provide a speedy method of giving a Conciliation Commissioner cognizance of an industrial dispute, so that in the case where, pursuant to one of the methods prescribed by sec. 19, the Court has already obtained cognizance of and determined a dispute by making an award the regulation would be inapplicable. As *Evatt* J. said in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1):—"The authority conferred by sec. 28 (3) may be exercised before or after the determination of the period specified in the award; but the exercise of the power is treated as distinct from the making of a new award in settlement of a new dispute. As a matter of construction, therefore, it is reasonably clear that the object of sec. 28 (3) is to enable the Court of Arbitration to exercise the power to set aside or vary only in relation to the industrial dispute, which is and may be called 'old' in that it is regarded as being 'settled' by the award but which is treated as still surviving, because such settlement may be revised and its terms altered."

In the case of the coal industry the Court had already obtained cognizance of the dispute the subject matter of the existing award

(1) (1931) 45 C.L.R. 409, at p. 440.

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in 1939. That dispute had been heard and determined and an award of the Court made in the manner prescribed by the Act. Although the prescribed period had expired the award continued to exist until further order under sec. 28 (2) of the Act. It was capable of variation, but only in accordance with sec. 28 (3) of the Act and only where circumstances had arisen which affected the justice of any of the original terms (*Australian Tramway and Motor Omnibus Employees Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (1)). The award was in this condition when the Minister gave his direction. If a new dispute had arisen since the expiry of the prescribed period, the Minister could have directed, and may have intended, Mr. Morrison to settle this new dispute by making a new award. But under sec. 28 of the Act such an award must have contained a prescribed period and could not have been made retrospective at the most beyond 25th November 1941. The application that the unions lodged with Mr. Morrison was to delete the clause in question from the annual leave provisions of the consolidated award as subsequently varied. Pursuant to the direction he had at the most authority to do this by making a new award retrospectively to 25th November 1941 and containing a prescribed term, but not to make a retrospective order varying the existing award.

In making the order Mr. Morrison was acting as an officer of the Commonwealth. Under the Constitution, sec. 75 (v.), this Court has original jurisdiction in all matters in which a writ of prohibition is sought against an officer of the Commonwealth. Reg. 16AA provides that Mr. Morrison's order shall have effect as if it were an order of the Central Reference Board under the *National Security* (*Coal Mining Industry Employment*) *Regulations*, and regs. 17 and 18 of these Regulations applied thereto. Reg. 17 provides that an order of the Central Reference Board shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court on any account whatever. At a time when sec. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* was in the same form as reg. 17, this Court held in *The Tramways Case* [*No.* 1] (2), that the sub-section, so far as it purported to take away from this Court the constitutional power to issue a prohibition in respect of an award or order of the Commonwealth Court of Conciliation and Arbitration, was invalid. Applying the principles of that case to reg. 17, it follows that the regulation must be equally invalid in so far as it purports to prevent this Court in a proper case exercising its constitutional right to issue

(1) (1935) 54 C.L.R. 470.

(2) (1914) 18 C.L.R. 54.

a prohibition in respect of the order of 5th December 1941. It would appear, therefore, that it is open to the respondents to attack the validity of the order by applying to this Court for a writ of prohibition under sec. 75 (v.), but until an application is made so that the whole of the relevant evidence can be given and the matter fully argued it would be wrong to express any finally concluded opinion on the probability of its success.

Under sec. 39 of the *Commonwealth Conciliation and Arbitration Act*, the Court or a Conciliation Commissioner may exercise any of its or his powers on its or his own motion or on the application of any party to the industrial dispute, or of any organization or person bound by the award of the Court or a Conciliation Commissioner; provided that no order or award shall be varied except on the application of an organization or person affected or aggrieved by the order or award or of the Attorney-General and upon notice being given in such manner as the Court or Conciliation Commissioner directs. The Act confers many concurrent powers on the judges of the Court and the Conciliation Commissioners, including the power to set aside or vary the terms of an existing award under sec. 28 (3), leaving it to the Court as a matter of internal administration to apportion the work between the judges and the commissioners; so that it is unlikely that Mr. Morrison, apart from the express direction of the Minister, would have attempted to assume control of an application to vary or set aside the terms of the coal award without the consent of the judge who was accustomed to deal with this industry. Under sec. 28 (3) of the Act Mr. Morrison had power to vary the existing award, so there was no want of jurisdiction in connection with the subject matter with which he was dealing. He heard the matter pursuant to a direction under reg. 16 and not pursuant to an application under sec. 39. This was an irregularity which the companies were capable of waiving (*Moore* v. *Gamgee* (1); *Shrager* v. *Basil Dighton Ltd.* (2); *Pringle* v. *Hales* (3); *Moore* v. *Attorney-General for Irish Free State* (4); *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (5)). But at present the respondents do not appear to have waived their right to object to Mr. Morrison exceeding any powers which he was entitled to exercise by virtue of the direction and to have thereby disentitled themselves to apply for a prohibition.

Alternatively the respondents can proceed with their appeal to the Commonwealth Court of Conciliation and Arbitration if they

(1) (1890) 25 Q.B.D. 244.
(2) (1924) 1 K.B. 274.
(3) (1925) 1 K.B. 573.
(4) (1935) A.C. 484, at p. 498.
(5) (1938) 59 C.L.R. 369.

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are not debarred from doing so by reg. 16AA because it is void under sec. 48 of the *Acts Interpretation Act* 1901-1937 to the extent to which it applies to awards and orders made before 16th December 1941. This section provides that:—"(1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—(*a*) shall be notified in the *Gazette*; (*b*) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and (*c*) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations. (2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—(*a*) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; and (*b*) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification, and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect."

The applicants submitted that reg. 16AA, on its true construction, did not affect any step which had been taken to institute the appeal prior to the date of notification, but merely prevented the further prosecution of the appeal after that date so that the regulation did not infringe sec. 48 (2). But, at the date of the notification of the regulation, the respondents had an existing substantive right of appeal which they were actively asserting (*Colonial Sugar Refining Co. Ltd.* v. *Irving* (1)). If the regulation had a prospective operation only, it would only take effect upon awards and orders made after 16th December 1941 (*The Queen* v. *Griffiths* (2); *In re Athlumney*; *Ex parte Wilson* (3)), and so would not deprive the respondents of their right of appeal in respect of an order made before that date. But the regulation has an express retrospective operation, because it expressly provides that an order made before its commencement shall have effect as if it were an award or order of the Central Reference Board made under the *Coal Mining Industry Employment Regulations* and regs. 17 and 18 of these Regulations applied thereto. In other words, the regulation provides that an award or order made before 16th December 1941 shall lose its quality of appealability. A right of appeal is a single substantive right and not an aggregation of

(1) (1905) A.C. 369.
(2) (1891) 2 Q.B. 145.
(3) (1898) 2 Q.B. 547.

rights consisting of rights to take each step necessary to have the appeal heard and determined. It is a vested right of which a litigant can only be deprived by altering the legal character of a past transaction. If a regulation deprives a litigant of such a right it is operative with regard to past time and to past circumstances and so has an antecedent or retrospective operation. In *Phillips* v. *Eyre* (1) *Willes* J., in delivering the judgment of the Court, cited a passage from the judgment of the Supreme Court of the United States in *Calder* v. *Bull* (2), in which the following sentence occurs: "Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the Statute of Limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective." In *Moon* v. *Durden* (3) *Platt* B. said: "A statute may have a retrospect to a time antecedent to that of its commencement. Thus, a statute which compels a covenantor to do an act, which before the passing of the statute he had covenanted not to do, or which forbids his doing an act, which he had before the passing of the statute covenanted to do, repeals the covenant." To adapt, with respect, the words of *Buckley* L.J. in *West* v. *Gwynne* (4), if an event has happened before the regulation is passed so that at the moment when the regulation comes into operation a right of appeal exists, an investigation whether the transaction is struck at by the regulation involves an investigation whether the regulation is retrospective. In order, therefore, to deprive the respondents of their right of appeal, reg. 16AA must operate upon that right from the date when the right first came into existence and so must take effect upon that right from 5th December 1941. It follows that the regulation is expressed to take effect with respect to Mr. Morrison's order from a date before the date of its notification. Sub-sec. 2, in my opinion, prevents regulations being passed which have a retrospective effect where, as here, the vested right of a person other than the Commonwealth or an authority of the Commonwealth, existing at the date of the notification, would be affected in a manner prejudicial to that person.

The applicants relied upon *Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (5), a decision of this Court given at a time when sec. 10 of the *Acts Interpretation Act* 1904, the provisions of which correspond to sec. 48 (1), was in force. The Court held that reg. 8C of the *War Precautions* (*Moratorium*) *Regulations*, which provided that

(1) (1870) L.R. 6 Q.B. 1, at p. 26.
(2) (1798) 3 U.S. 386, at p. 391 [1 Law. Ed. 648, at p. 650.]
(3) (1848) 2 Ex. 22, at pp. 27, 28 [154 E.R. 389, at p. 392.]
(4) (1911) 2 Ch. 1, at p. 12.
(5) (1917) 24 C.L.R. 28.

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any determination, decision, judgment, direction, order or assessment made or given by any court in any matter arising under the regulations should be final and conclusive and without appeal was retrospective so as to include any determination of the Supreme Court of a State made before 28th September 1917, the date on which the regulation was made. The only question discussed in the judgment was whether the regulation was intended to be retrospective so as to deprive the appellants of a right of appeal which existed on 28th September 1917. It was held that the regulation was intended to do so. The question was not raised whether under sec. 10 the regulation could only be made to have such an effect if the Act which authorized the making of the regulation so provided (*Broadcasting Co. of Australia Pty. Ltd.* v. *The Commonwealth* (1)). As it is clear that reg. 16AA was intended to have a retrospective operation, the case does not assist upon the question whether sec. 48 (2) avoids the regulation so far as it contains such a provision. But it does assist in that it shows that, in order to destroy the right of appeal, the regulation has to be construed as having a retrospective operation.

In my opinion the questions referred to this Court by the order made on 20th July 1942 should be answered as follows :—(1) Yes. (2) The Court has jurisdiction to do so in the absence of the consent of the Minister for Labour and National Service to the institution of the appeal. (3) The Court has this power irrespective of the event mentioned in 3 (*a*). (4) (*a*) Yes. (4) (*b*) Yes.

At the hearing Mr. *Maughan* raised certain constitutional objections to the validity of the *Industrial Peace Regulations* as a whole and to regs. 16 and 16AA in particular. His objection to the Regulations as a whole was based upon reg. 4, which deletes the words " extending beyond the limits of any one State " from the *Commonwealth Conciliation and Arbitration Act*, but I agree with the Chief Justice that it is unnecessary to determine whether the ambit of the defence power is wide enough to justify the Commonwealth Parliament enlarging the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to deal with every intra-State dispute, because the present application relates to an inter-State dispute, so that, whatever the position may be with respect to intra-State disputes, sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937 would preserve the validity of regs. 16 and 16AA with respect to inter-State disputes. Moreover these constitutional objections will still be open to the respondents if they apply to this Court for a prohibition, but will not arise if they proceed with the appeal to the Commonwealth Court of Conciliation and Arbitration on the merits. It

(1) (1935) 52 C.L.R., at p. 60.

does not appear to me, therefore, to be advisable to express any opinion upon them in the present proceedings.

LATHAM C.J. These answers should be read in conjunction with the reasons for judgment of all members of the Court, otherwise the answers may be misunderstood, and it will be seen that the reasons given by the various members of the Court recognize the possibility of further proceedings if the parties are so advised.

Questions answered as follows :—(1) *No.* (2) *The Commonwealth Court of Conciliation and Arbitration has no jurisdiction to entertain the appeal of the respondents from the said order and determination.* (3) *The said Court has no power in the proceedings before it to vary or set aside the said order and determination.* (4) (*a*) *and* (*b*) *No. Respondents to pay applicant's costs of summons.*

Solicitors for the applicant, *W. C. Taylor & Scott.*

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

Solicitor for the Commonwealth intervening, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

J. B.