

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COMMONWEALTH COURT OF CONCILIATION AND
ARBITRATION AND OTHERS;EX PARTE THE AUSTRALIAN PAPER MILLS EMPLOYEES'
UNION.

National Security — Industrial peace — “Industrial matter” — Existence — Mill employees—Membership of industrial organizations—Dispute between rival organizations—Award—Validity—Commonwealth Conciliation and Arbitration Act 1904-1934 (No. 13 of 1904—No. 54 of 1934), s. 4—National Security (Industrial Peace) Regulations (S.R. 1940 No. 290—1943 No. 40), regs. 5, 10, 13 (a).

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SYDNEY,
Aug. 20.

MELBOURNE,
Oct. 21.

Rich,
Starke and
Williams JJ.

A company employed at its works members of the Australian Workers' Union (A.W.U.) and members of the Australian Paper Mills Employees' Union (A.P.M.E.U.). For some time officials of the A.P.M.E.U. had canvassed employees at the works to induce them to cease being members of the A.W.U. and to become members of the A.P.M.E.U., and they tried to induce the company to recognize the right of the A.P.M.E.U. to represent the industrial interests of the company's employees in lieu of the A.W.U. This was resented by many employees who were members of the A.W.U. and they went on strike. Pursuant to reg. 10 of the *National Security (Industrial Peace) Regulations*, the company, and later, the A.W.U., notified the Deputy Registrar of the existence of the strike. In its notification the A.W.U. sought orders from the Court that that union be granted the right to protect the industrial interests of the company's employees at its works to the exclusion of the A.P.M.E.U. and that the A.P.M.E.U. and any person on its behalf be forbidden to continue to organize or further the interests of that union or any member thereof at the works or to induce any employee to cease to be a member of the A.W.U. The Court in an order recited the orders sought by the A.W.U. and declared that it was satisfied that the dispute was one proper to be dealt with in the interests of industrial peace and national security and that it had cognizance of the dispute pursuant to reg. 5 of the *Industrial Peace Regulations*. By clause 1 of the Court's award it

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was made a term and condition of employment of employees at the works that unless they were members thereof on a specified date they should not be or become members of the A.P.M.E.U.; and by clause 2 that union, its officials and members were forbidden to induce employees to become, or to admit them as members of that union. The award was made binding on the A.W.U., the A.P.M.E.U. and their members, and the company and its employees. Upon the return of an order nisi for prohibition on the ground that the award, order and declaration of the Court was made without jurisdiction, inasmuch as no industrial matters existed in respect of which such award, order and declaration could be made, but not raising the question of the constitutional validity of the *National Security (Industrial Peace) Regulations*,

Held:—

(1) By the whole Court, that the Commonwealth Court of Conciliation and Arbitration had jurisdiction under the *National Security (Industrial Peace) Regulations* to deal with the matter. *Per Rich and Williams JJ.*: A dispute between rival unions which affects the relation of employees and their employer is an "industrial dispute" within the meaning of the *Commonwealth Conciliation and Arbitration Act 1904-1934* and the *National Security (Industrial Peace) Regulations*. *Per Starke J.*: The Regulations, and the Act, confer jurisdiction in relation to inter-union disputes and clearly so if the disputes are fastened upon employers.

(2) By *Rich and Williams JJ.*, that if any part of the award was outside the ambit of the dispute it was validated by reg. 13 (a) of the Regulations. *Per Starke J.*: Clause 1 of the award had no relation to the industrial dispute or matter which was before the Court and was not validated by reg. 13 (a).

ORDER NISI for prohibition.

An application was made to the Full Court of the High Court by the Australian Paper Mills Employees' Union to make absolute an order nisi for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration, Judge *O'Mara*, one of the judges thereof, and the Australian Workers' Union prohibiting them and each of them from further proceeding upon or with respect to an award, order and declaration made by Judge *O'Mara* on 11th May 1943, upon the hearing of a reference under the provisions of reg. 10 of the *National Security (Industrial Peace) Regulations*, upon the ground that the said award, order and declaration was made without jurisdiction inasmuch as no industrial matters existed in respect of which such award, order and declaration could be made.

Australian Paper Manufacturers Ltd. had for some considerable time employed at its works at Matraville near Sydney members of the Australian Workers' Union and also members of the Australian Paper Mills Employees' Union. From August 1942 onwards officials of the latter union conducted a campaign amongst the

employees to induce members to resign from the Australian Workers' Union and to become members of the Australian Paper Mills Employees' Union, and by means of statements and pamphlets, which to some extent were alleged to be inaccurate and misleading, they prevailed upon new employees to become members of the Australian Paper Mills Employees' Union instead of the Australian Workers' Union. They also, from time to time, endeavoured to persuade the company to recognize the right of that union to represent the industrial interests of the company's employees in lieu of the Australian Workers' Union.

Employees who were members of the Australian Workers' Union resented these activities on the part of the officials of the Australian Paper Mills Employees' Union and on 2nd April 1943, putting into operation rule 107 of the Australian Workers' Union's registered rules, which provides that any member who finds himself working with a non-member must discontinue work, went on strike and remained on strike until 12th April 1943.

As soon as the strike commenced the company, purporting to act under reg. 10 of the *National Security (Industrial Peace) Regulations*, reported that fact to the secretary of the Department of Labour and National Service and the Deputy Registrar.

On 9th April 1943 the Australian Workers' Union forwarded to the two officers referred to above a document in the following terms : —“ In the matter of *National Security (Industrial Peace) Regulations* And in the matter of a notification under Regulation 10 thereof and a request for an order—The Australian Workers' Union, an Organization, hereby notifies the Deputy Registrar of the existence of an industrial matter which has led and is likely to continue to lead to a stoppage of work at the works of Australian Paper Manufacturers Limited, Matraville, New South Wales, and requests the Deputy Registrar to refer the matter to the Court in order that the Court may be moved to order that—(1) The Australian Workers' Union shall have the right to protect the industrial interests of employees of Australian Paper Manufacturers Limited at its works at Matraville, New South Wales, to the exclusion of the Australian Paper Mills Employees' Union ; and (2) The Australian Paper Mills Employees' Union, its officials, agents and members, and each of them, shall not do anything intended or calculated or likely to lead towards organizing or furthering in any way the interests of the said union or any member or members thereof at the said works, nor shall it nor they nor any of them do anything intended or calculated or likely to induce employees at the said works from becoming or ceasing to remain members of the Australian Workers' Union And to further order as the Court sees fit.”

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The Deputy Registrar referred the matter to the Commonwealth Court of Conciliation and Arbitration.

To get over any technical difficulties on the score of it not being within reg. 10 of the *Industrial Peace Regulations*, Judge O'Mara said he was satisfied that the dispute between the Australian Workers' Union and the Australian Paper Mills Employees' Union, as to the organization of employees in the matter of union membership at the works of Australian Paper Manufacturers Ltd. at Matraville, was a dispute about which the Court was satisfied that it was one proper to be dealt with in the interests of industrial peace and national security. He therefore held, pursuant to reg. 5 of the *Industrial Peace Regulations*, that the Court had cognizance to deal with such a dispute and, without prejudice to any position the Australian Workers' Union had under the notification that had been lodged, he allowed it to make the application which had been submitted as an application in that suit.

The efforts at the company's works at Matraville of officials of the Australian Paper Mills Employees' Union to obtain members for that union at the expense of membership of the Australian Workers' Union were discussed in a judgment delivered by Judge O'Mara on 18th December 1942 in other proceedings which came before him.

After hearing evidence on this application Judge O'Mara, in the course of his judgment delivered on 11th May 1943, said that having considered the facts of this case the Court was satisfied that the matter referred to in the notification was the subject of an industrial dispute between the Australian Workers' Union and Australian Paper Manufacturers Ltd. on the one hand and the Australian Paper Mills Employees' Union on the other and that it was a dispute proper to be dealt with in the interests of industrial peace and national security. His Honour said that the dispute in effect was one as to whether, as a condition of employment at the company's works at Matraville, an employee if he was to belong to a union should belong to one or other of two organizations. It was a matter relating to "being or not being members of any organization": See "industrial matter," s. 4, *Commonwealth Conciliation and Arbitration Act* 1904-1934. Apart, however, from any definition his Honour was prepared to hold that a dispute which, as this one did, arose out of the relationship of employer and employee and which paralysed the industrial activities of a large establishment was an industrial matter. If it were not then there was a woeful deficiency in our system of compulsory industrial arbitration.

Judge O'Mara made an award in the following terms:—"Award, order and declare—1. (a) It is a term and condition of employment

of employees at the works of Australian Paper Manufacturers Limited at Matraville New South Wales that they shall not be or become members of the Australian Paper Mills Employees' Union (hereinafter referred to as the union) an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. (b) Any employee employed at the said works who becomes or attempts or seeks to become a member of the union shall be deemed to have committed a breach of this award and shall be liable to a penalty not exceeding ten pounds (£10). (c) This clause shall not apply to employees who were members of the union on 14th May 1943. (2) The union, its officers and members and each of them shall not—(i) advise, encourage, induce or incite any employee employed at the works of Australian Paper Manufacturers Limited at Matraville New South Wales to be or become a member of the union or (ii) admit or attempt to admit or do anything in the way of admitting any such employee as aforesaid as a member of the union. The penalty for breach of this term of the award in the case of the organization shall not exceed twenty pounds (£20) and in the case of an officer or member shall not exceed ten pounds (£10). (3) This award shall apply to and be binding upon—(i) the Australian Workers' Union and its members; (ii) the Australian Paper Mills Employees' Union and its members; and (iii) Australian Paper Manufacturers Limited and its employees employed at its works at Matraville New South Wales. (4) This award shall come into operation on 14th May 1943 and shall subject to s. 29 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 remain in force until 14th May 1944. Leave is reserved to the parties hereto to apply with respect to this award."

Further facts and the relevant regulations are set forth in the judgments hereunder.

Leave to intervene was granted to Australian Paper Manufacturers Ltd.

P. D. Phillips, for the applicant. There was not any industrial dispute before the Court below within the meaning of reg. 5 of the *National Security (Industrial Peace) Regulations*. The matter is not an industrial dispute within the meaning either of the *Commonwealth Conciliation and Arbitration Act* or of the Regulations. It is an inter-union matter and is not one between employer and employee. Further, there was not any industrial matter before the Court below, nor was there any evidence before that Court upon which it could find that there existed an industrial dispute. There was not any industrial matter in respect of which a dispute could arise and thus

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give the Court jurisdiction. On no grammatical construction of the phrase "being or not being members of an organization" in the definition of "industrial matters" in s. 4 of the Act, can it be said that that phrase is an industrial matter in itself and apart from its connection with employment, preferential employment or non-employment. The reference throughout that definition is clearly to the contract of employment between employer and employee. Reg. 10 does not extend the jurisdiction to preserve industrial peace. A right to protect an industrial interest is not a matter relating to work. Neither of the orders sought in the A.W.U.'s notification is an industrial matter. The dispute is between two unions; it is as to members and not as to work. It is a dispute as to jurisdiction of representation and not as to conditions of employment. The orders sought in that notification constitute an attempt to deal with a non-industrial matter by indirect means and do not come within the statutory jurisdiction of the Court. Being or not being members of an organization is not an industrial matter within the meaning of the statute; it is neither expressly nor impliedly referred to in the definition. The statute refers to employment, not to employment of persons being members or not being members of an organization. The dispute does not arise out of the relationship of employer and employee. The words "industrial dispute" must be interpreted in the light of the meaning those words had at the date of the passing of the Constitution. An industrial dispute connotes a dispute between employer and employee about the terms and conditions of the employment: See *Australian Tramway Employees Association v. Prahran and Malvern Tramway Trust* (1). Matters of the kind found by the Court are not matters capable of being the subject of an industrial dispute within the meaning of that expression in s. 51 (xxxv.) of the Constitution (*Australian Tramway Employees Association v. Prahran and Malvern Tramway Trust* (2); *Metropolitan Coal Co. of Sydney Ltd. v. Australian Coal and Shale Employees' Federation* (3); *Clancy v. Butchers' Shop Employees Union* (4)).

[STARKE J. referred to *Federated Clothing Trades of Australia v. Archer* (5) and *Australian Workers' Union v. Pastoralists' Federal Council of Australia* (6).]

The correct interpretation of an industrial matter is stated in *Archer's Case* (7). The view that everything is an industrial matter which can be conceded by the employer is too wide. This Court has

(1) (1913) 17 C.L.R. 680, at p. 693.

(2) (1913) 17 C.L.R., at pp. 712, 713.

(3) (1917) 24 C.L.R. 85, at p. 91.

(4) (1904) 1 C.L.R. 181, at p. 200.

(5) (1919) 27 C.L.R. 207, at p. 213.

(6) (1907) 1 C.A.R. 62, at p. 95.

(7) (1919) 27 C.L.R., at p. 211.

not assented to the proposition of *Higgins J.* in *Archer's Case* (1) that as employees can withhold labour by striking every strike becomes an industrial matter and, therefore, an industrial dispute (*Metropolitan Coal Co. of Sydney Ltd. v. Australian Coal and Shale Employees' Federation* (2); *Caledonian Collieries Ltd. v. A/asian Coal and Shale Employees' Federation* [No. 1] (3)). There must be a disagreement apart from merely withholding labour. The disagreement must be a disagreement between some persons who stand in some industrial relationship upon some matter which affects or arises out of industrial relationship. Although under s. 73 of the Act an agreement between two organizations might be designed for the prevention and settlement of an industrial dispute, it would not follow that the dispute was to be between two organizations. An agreement might facilitate the prevention or settlement of a dispute. The provision for making agreements does not throw any light on the necessary personnel of the disputants.

Barwick K.C. (with him *J. J. McKeon*), for the respondent Australian Workers' Union. Reg. 10 of the *Industrial Peace Regulations* does not call for the existence of a dispute; it calls only for the existence of an industrial matter. Reg. 13 removes the limitation of the Court's jurisdiction to the ambit of any dispute which might exist, and shows that now one does not have to consider whether the order is within the ambit of the particular matter or dispute which comes before the Court. The inference open on the evidence is that the Australian Workers' Union had requested the company not to employ any but members of that union. The company did not comply with that request, whereupon the members of the Australian Workers' Union refused to work for the company. That certainly was an industrial matter. The notification by the Australian Workers' Union does not purport to define the matter. It limits the notification to the existence of a matter and then seeks an opportunity to move the Court for orders which the Australian Workers' Union considered would be a way to remove the matter or settle it. Those orders were sought as suggestions by the Australian Workers' Union by means of which the matter might be determined. The Court below treated the notification by the company and the notification and application by the Australian Workers' Union as concurrent and made an order without prejudice to the application. The order is entitled under reg. 5 and reg. 10. The existence of an industrial matter was clearly established by the evidence. Under reg. 10 it

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(1) (1919) 27 C.L.R., at p. 215.

(2) (1917) 24 C.L.R. 85.

(3) (1930) 42 C.L.R. 527, at p. 552.

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is necessary only to state that an industrial matter exists : it is not necessary to specify or define the industrial matter so referred to. An application which in substance is a claim for preference, or the exclusion from the particular employment of the members of other unions, is an industrial matter. There was a dispute between the company and the members of the Australian Workers' Union as to whether the company would do anything more towards excluding from its employ persons who were not members of that union. On the form of the notifications and the application and on the facts as known to the Court below, but which, unfortunately, have not been included in the record before this Court, the industrial matter was the determination of the members of the Australian Workers' Union not to work with non-members. In fact there were three parties to the dispute, namely, the company, the Australian Workers' Union and the Australian Paper Mills Employees' Union. In any event there was a dispute between the company and the Australian Workers' Union on the one hand and a dispute between the company and the Australian Paper Mills Employees' Union on the other hand. The phrase "being or not being members of any organization" in the definition of "industrial matters" in s. 4 of the Act should be read as meaning "'industrial matters' includes all matters pertaining to the being or not being members of any organization."

Cook, for the Australian Paper Manufacturers Ltd. (intervening). The company is involved in a dispute with its employees of which the Court below had cognizance. The history and facts of that dispute were known to the Court below when it made the award or order now under consideration. That Court was, under s. 25 of the Act, able to and doubtless did inform its mind thereof as it thought proper.

P. D. Phillips, in reply.

Cur. adv. vult.

Oct. 21.

The following written judgments were delivered :—

RICH AND WILLIAMS JJ. This is an application by the Australian Paper Mills Employees' Union to make absolute an order nisi for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration, his Honour Judge *O'Mara*, one of the judges thereof, and the Australian Workers' Union prohibiting them and each of them from further proceeding upon or with respect to an award, order and declaration made by his Honour Judge *O'Mara*

on 11th May 1943 upon the hearing of a reference under the provisions of reg. 10 of the *National Security (Industrial Peace) Regulations* upon the ground that the award, order and declaration was made without jurisdiction inasmuch as no industrial matters existed in respect to which such an award, order and declaration could be made.

The material facts are as follows :—For some time prior to the date of the award in question Australian Paper Manufacturers Ltd. had been employing at its works at Matraville, near Sydney, members of both the Australian Workers' Union and the Australian Paper Mills Employees' Union. Officials of the latter union commenced to canvass employees at the works to induce them to cease being members of the Australian Workers' Union and to become members of the Australian Paper Mills Employees' Union, and to interview the management of the company with a view to the company recognizing the right of that union to represent the industrial interests of employees of the company in lieu of the Australian Workers' Union. This caused resentment at the mills on the part of many employees who were members of the Australian Workers' Union. These employees invoked a rule of their union, usually left in abeyance, which prevented members of the Australian Workers' Union working alongside persons who were not members of that union, and went on strike. The strike lasted from 2nd to 12th April 1943.

Reg. 5 of the *National Security (Industrial Peace) Regulations* provides that in addition to the industrial disputes of which the Commonwealth Court of Conciliation and Arbitration has cognizance in pursuance of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, the Court shall also have cognizance of all industrial disputes (a) which the Court is satisfied are, or which the Minister certifies to the Court as being, proper to be dealt with in the interests of industrial peace and national security.

Reg. 10 provides :—“(1) Where any organization or employer is aware of the existence of any industrial matter which may lead to the occurrence of a strike, a stop-work meeting or any other interruption of work, he shall forthwith notify, in writing, the Secretary, Department of Labour and National Service at the Office of the Department in the State in which the matter arose, and the Registrar or a Deputy Registrar accordingly, and the Registrar or Deputy Registrar, as the case may be, shall refer the matter to the Court. (2) The Court shall thereupon hear and determine the industrial matter, or cause a Conciliation Commissioner or Board of Reference to hear and determine the matter, and the Court,

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Conciliation Commissioner or Board of Reference, as the case may be, notwithstanding that an industrial dispute affecting the matter does not exist, may hear and determine the matter in like manner as if it were an industrial dispute."

When the strike first commenced the company, purporting to act under reg. 10, reported the matter to the secretary of the Department of Labour and National Service and the Deputy Registrar. Subsequently, on 9th April, during the strike, the Australian Workers' Union, purporting to act under this regulation, also reported the matter to these two officers.

As the strike was settled quickly proceedings pursuant to the company's notification lapsed and the subsequent proceedings which took place were held in pursuance of the notifications by the Australian Workers' Union. The latter notification was in the following form :—" Notification under Regulation 10 of the *National Security (Industrial Peace) Regulations*. . . . The Australian Workers' Union, an Organization, hereby notifies the Deputy Registrar of the existence of an industrial matter which has led and is likely to continue to lead to a stoppage of work at the works of Australian Paper Manufacturers Limited, Matraville, New South Wales, and requests the Deputy Registrar to refer the matter to the Court in order that the Court may be moved to order that—(1) The Australian Workers' Union shall have the right to protect the industrial interest of employees of Australian Paper Manufacturers Limited at its works at Matraville, New South Wales, to the exclusion of the Australian Paper Mills Employees' Union; and (2) The Australian Paper Mills Employees' Union, its officials, agents and members, and each of them, shall not do anything intended or calculated or likely to lead towards organizing or furthering in any way the interests of the said union or any member or members thereof at the said works, nor shall it nor they nor any of them do anything intended or calculated or likely to induce employees at the said works from becoming or ceasing to remain members of the Australian Workers' Union. And to further order as the Court sees fit." The Deputy Registrar referred the matter to the Court.

The matter first came before his Honour Judge O'Mara on 26th and 27th April 1943. Both unions and the company were represented at the hearing. His Honour made the following order :—" Whereas there exists an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act 1904-1934* as amended by the *National Security (Industrial Peace) Regulations* between the Australian Workers' Union an organization of employees registered under the said Act and Australian Paper Manufacturers Limited

of the one part and the Australian Paper Mills Employees' Union an organization also registered as aforesaid of the other part as to the following matters that is to say whether—(a) The Australian Workers' Union shall have the right to protect the industrial interest of employees of Australian Paper Manufacturers Limited at its works at Matraville, New South Wales, to the exclusion of the Australian Paper Mills Employees' Union; and whether—(b) The Australian Paper Mills Employees' Union, its officials, agents and members, and each of them, shall not do anything intended or calculated or likely to lead towards organizing or furthering in any way the interests of the said Union or any member or members thereof at the said works, or anything intended or calculated or likely to induce employees at the said works from becoming or ceasing to remain members of the Australian Workers' Union. Now therefore the Court doth hereby declare that it is satisfied that the dispute is one proper to be dealt with in the interests of industrial peace and national security and that it has cognizance of the dispute pursuant to reg. 5 of the *National Security (Industrial Peace) Regulations*."

On 11th May 1943 his Honour made an award in the following terms:—"Award order and declare:—1. (a) It is a term and condition of employment of employees at the works of Australian Paper Manufacturers Limited at Matraville New South Wales that they shall not be or become members of the Australian Paper Mills Employees' Union (hereinafter referred to as the union) an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. (b) Any employee employed at the said works who becomes or attempts or seeks to become a member of the union shall be deemed to have committed a breach of this award and shall be liable to a penalty not exceeding ten pounds (£10). (c) This clause shall not apply to employees who were members of the union on 14th May 1943. 2. The union, its officers and members and each of them shall not—(i) advise, encourage, induce or incite any employee employed at the works of Australian Paper Manufacturers Limited at Matraville New South Wales to be or become a member of the union or (ii) admit or attempt to admit or do anything in the way of admitting any such employee as aforesaid as a member of the union. The penalty for breach of this term of this award in the case of the organization shall not exceed twenty pounds (£20) and in the case of an officer or member shall not exceed ten pounds (£10). 3. This award shall apply to and be binding upon—(i) The Australian Workers' Union and its members; (ii) The Australian Paper Mills Employees' Union

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and its members ; and (iii) Australian Paper Manufacturers Limited and its employees employed at its works at Matraville New South Wales. 4. This award shall come into operation on 14th May 1943 and shall subject to s. 29 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 remain in force until 14th May 1944. Leave is reserved to the parties hereto to apply with respect to this award."

It is this award which the applicant now challenges. On the hearing of the application Mr. *Phillips*, who appeared for the applicant, at first sought leave to amend the order nisi, and to add other grounds to that mentioned in the order nisi, but eventually withdrew his amendments and relied on that ground alone.

Reg. 2 of the *National Security (Industrial Peace) Regulations* provides :—" (1) In these Regulations, unless the contrary intention appears—'the Act' means the *Commonwealth Conciliation and Arbitration Act* 1904-1934 ; 'The Minister' means the Minister for Labour and National Service. (2) Expressions used in these Regulations shall, unless the contrary intention appears, have the same meaning as in the Act."

Reg. 3 provides that the *Commonwealth Conciliation and Arbitration Act* 1904-1934 shall be construed as if the provisions of these Regulations were incorporated in the Act as amendments thereof.

Reg. 4 provides that : " So long as these Regulations continue in force, the provisions of the Act shall be applied and construed as if from the definition of ' industrial disputes ' in section 4 the words ' extending beyond the limits of any one State ' were omitted, and the jurisdiction of the Court shall be extended accordingly."

An industrial matter in the Regulations therefore has the same meaning as in the Act (*R. v. Commonwealth Court of Conciliation and Arbitration ; Ex parte Victoria* (1)). The Act, s. 4, contains a definition of industrial matters. It includes all matters pertaining to the employment, preferential employment, dismissal, or non-employment of persons who are members of any organization, association, or body, and any matter as to the demarcation of functions of any employees or classes of employees, and any claim arising under an industrial agreement. The same section also provides that an industrial dispute shall include any dispute as to industrial matters. Having made an order under reg. 5 his Honour had power to deal with the matter both under that regulation and under reg. 10. But his Honour's jurisdiction under both regulations depended upon the existence of an industrial matter within the meaning of the Act.

Mr. *Barwick* for the Australian Workers' Union contended that the industrial matter which was notified to the Deputy Registrar both by the company and the Australian Workers' Union was the refusal of the members of that union to work with members of the Australian Paper Mills Employees' Union, and that the orders that were asked for in the notification by the Australian Workers' Union did not define the industrial matter as to which there was a dispute but merely indicated the views of that union as to the terms on which the dispute should be settled. The notification by the company, which is not in evidence, may have defined the industrial matter in this way. But the notification by the Australian Workers' Union does not define any industrial matters except by reference to the relief claimed, so that the only industrial matter that was expressly referred to his Honour by that union would appear to have been the subject matter of the orders asked for in the notification, and it is evident that his Honour proceeded on that basis, because in the order of 27th April 1943 he referred to the dispute as being one between the company and the Australian Workers' Union of the one part and the Australian Paper Mills Employees' Union of the other part and to the matters in dispute as being the subject matter of the orders. For the purposes of this application, therefore, the industrial matters with respect to which his Honour was exercising jurisdiction under the two regulations must, in our opinion, be deemed to have been the claims of the Australian Workers' Union as defined by these orders.

Mr. *Phillips* contended that, to be an industrial matter, the dispute must be between employers and employees and must be connected with the relation of employer and employee, so that an attempt on the part of one union to recruit members at the expense of another is not an industrial matter. No doubt a dispute as to an industrial matter is usually a dispute between employers and employees. But the definition of industrial matters in the Act clearly contemplates demarcation disputes between members of unions; and, as industrial agreements can be entered into between unions (s. 73), disputes as to claims arising under industrial agreements could also occur between unions. The words "industrial dispute" cannot have a wider meaning in the Act than in the Constitution, but there is nothing to show that these disputes between rival unions were not regarded in popular language as industrial disputes at the date of the Constitution. Examples of disputes of that character prior to that date are given in the joint judgment of *Isaacs* and *Rich JJ.* in *Archer's Case* (1). But the dispute must be one which "touches the 'employment'" (per *Isaacs* and *Rich JJ.* in

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(1) (1919) 27 C.L.R., at pp. 213, 214.

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Australian Tramway Employees Association v. Prahran and Malvern Tramway Trust (The Badge Case (1)), so that if the beginning and end of the present dispute was that one union was attempting to recruit members at the expense of another union irrespective of where the prospective members were employed there would be considerable substance in the application. But, under s. 25 of the Act, the Commonwealth Court of Conciliation and Arbitration in exercising its duties or powers must act according to the substantial merits of the case and may inform its mind on any matter in such manner as it thinks just. In exercising his duties and powers under the section, his Honour was aware that the recruiting campaign of the Australian Paper Mills Employees' Union was confined to employees at the company's mills, that it was being waged upon the basis that the officials of the Australian Workers' Union had not been diligent to obtain proper industrial conditions for these employees, that it had aroused bitterness between groups of these employees and had caused members of the Australian Workers' Union to refuse to work with employees who were not members of that union, that there had been a strike, and that it was this stoppage of work which had caused the matter to be first notified to the Deputy Registrar and referred to the Court under reg. 10.

The expression, "the right to protect the industrial interests of employees of the company at its works at Matraville," which occurs in the notification of 9th April and in his Honour's order of 27th April refers, in our opinion, to those industrial matters with respect to which a trade union can engage in collective bargaining on behalf of its members and with respect to which it can represent its members in proceedings under the Act or Regulations. In other words the expression refers to industrial matters as defined by the Act. That his Honour understood this to be the meaning of the expression is apparent from the statement in his judgment of 18th December 1942 that the charge that the Australian Workers' Union had neglected the interests of its members at the company's mills was not sustained. Such a right of representation plainly depended upon the employees at the mills being members of the union that claimed to represent them. This was recognized by the Australian Paper Mills Employees' Union, which commenced to canvass the members of the Australian Workers' Union at the mills in order to induce them to become members of the applicant union, so that the officials of that union could claim that it ought to represent the industrial interests of the employees at the mills because they were members of that union. It was not, therefore, a mere rivalry in gross between

two unions. Taking into account all the circumstances of which his Honour had knowledge, it was, in our opinion, a real dispute in fact pertaining, at least with respect to the refusal of the members of the Australian Workers' Union to work alongside members of the Australian Paper Mills Employees' Union, to the terms and conditions of employment in a particular factory, affecting the employers and employees and the work that was being done there, which was capable of being settled by an award which could be made to bind the employers and employees working there (*Archer's Case* (1)). Such disputes should not be limited by any artificial criteria (*R. v. Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of A/asia* ; *Ex parte William Holyman & Sons Ltd.* (2)).

Counsel for the applicant union confined his argument to the sole contention that no industrial matter existed in respect of which a dispute could arise which would give the Court jurisdiction. In the event of this question being decided against the applicant union, he did not raise the further contention that the award was invalid in whole or in part because it contained matters not within the ambit of the industrial dispute. If counsel had raised this contention he would have been met by reg. 13 (a), which 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. Although this sub-regulation is expressed in the widest terms it must be subject to some limitations. For instance, the provisions to which it refers would at least have to relate to industrial matters and be such that they could properly be embodied in an award of the Court or an order of a Conciliation Commissioner in the exercise of the powers conferred upon them respectively by the Act and Regulations. It is sufficient to say that in the present case we are of opinion that if any part of the award of 11th May 1943 is outside the ambit of the dispute, and we must not be taken to hold that there is any such part, the sub-regulation is wide enough to validate that part.

For these reasons we consider that the application to make the rule nisi absolute should be refused with costs.

STARKE J. Order nisi to Commonwealth Court of Conciliation and Arbitration, Judge O'Mara, one of the judges thereof, and the Australian Workers' Union to show cause why an order, award and declaration of the Court made on 11th May 1943 should not be prohibited upon the ground that the same was made without jurisdiction

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(1) (1919) 27 C.L.R., at p. 212.

(2) (1914) 18 C.L.R. 273, at p. 285.

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inasmuch as no industrial matters existed in respect of which such an award, order or declaration could be made. The order nisi is founded upon the provisions of s. 75 of the Constitution.

Pursuant to the *National Security (Industrial Peace) Regulations* the Australian Workers' Union, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, notified the Deputy Registrar of the Court in writing pursuant to the provisions of reg. 10 of the existence of an industrial dispute which had led to a stoppage of work at the works of Australian Paper Manufacturers Ltd., and the Deputy Registrar referred the matter to the Commonwealth Court of Conciliation and Arbitration. The notice did not specifically set forth the dispute, but the order sought was that:—(1) The Australian Workers' Union shall have the right to protect the industrial interest of employees of Australian Paper Manufacturers Ltd. at its works at Matraville, New South Wales, to the exclusion of the Australian Paper Mills Employees' Union; and (2) the Australian Paper Mills Employees' Union, its officials, agents and members, and each of them, shall not do anything intended or calculated or likely to lead towards organizing or furthering in any way the interests of the said union or any member or members thereof at the said works, nor shall it nor they nor any of them do anything intended or calculated or likely to induce employees at the said works from becoming or ceasing to remain members of the Australian Workers' Union.

The Australian Paper Mills Employees' Union was also an organization registered under the *Commonwealth Conciliation and Arbitration Act*. The matter so referred came on for hearing before the Commonwealth Court of Conciliation and Arbitration on 26th and 27th April 1943, when representatives of two unions appeared and also Australian Paper Manufacturers Ltd. The representative of the Australian Workers' Union announced that he appeared for the New South Wales branch of the union, which the trial judge ruled had no standing, but he said the notification before him had been given by the organization registered as the Australian Workers' Union. But for greater caution the trial judge himself made an order pursuant to reg. 5 as follows:—"Whereas there exists an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 as amended by the *National Security (Industrial Peace) Regulations* between the Australian Workers' Union an organization of employees registered under the said Act and Australian Paper Manufacturers Ltd. of the one part and the Australian Paper Mills Employees' Union an organization also registered as aforesaid of the other part as to the following

matters that is to say whether—(a) The Australian Workers' Union shall have the right to protect the industrial interest of employees of Australian Paper Manufacturers Ltd. at its works at Matraville, New South Wales, to the exclusion of the Australian Paper Mills Employees' Union; and whether—(b) The Australian Paper Mills Employees' Union its officials, agents and members, and each of them, shall not do anything intended or calculated or likely to lead towards organizing or furthering in any way the interests of the said union or any member or members thereof at the said works, or anything intended or calculated or likely to induce employees at the said works from becoming or ceasing to remain members of the Australian Workers' Union." And the Court declared that it was satisfied that the dispute was proper to be dealt with in the interests of industrial peace and national security and that it had cognizance of the dispute pursuant to reg. 5 of the *National Security (Industrial Peace) Regulations*.

The terms of the dispute stated in this order are precisely the same as the order sought by the notification to the Deputy Registrar already mentioned. A suggestion was made at the Bar that the industrial dispute mentioned in the notification related to a strike of members of the Australian Workers' Union at the works of Australian Paper Manufacturers Ltd. and their refusal to work with the members of the Australian Paper Mills Employees' Union. But the strike was the consequence of the industrial dispute (if any), and not the industrial dispute itself, which lay in the disagreement of the parties: See *Caledonian Collieries Ltd. v. A/asian Coal and Shale Employees' Federation* (1). And the terms of the order of the judge make it clear that the industrial dispute set forth in that order is identical with the industrial dispute alleged in the notification to the Deputy Registrar. The dispute was an inter-union dispute, though in the judge's order the Australian Workers' Union and the employers, Australian Paper Manufacturers Ltd., are described as a party of the one part to the dispute. The employers, Australian Paper Manufacturers Ltd., supported the Australian Workers' Union in its claim against the Australian Paper Mills Employees' Union, but itself made no claim and had no dispute with the Australian Paper Mills Employees' Union.

The award, order and declaration made by the Court and which it is now sought to prohibit was, so far as material, as follows:—
 "1. (a) It is a term and condition of employment of employees at the works of Australian Paper Manufacturers Ltd. at Matraville New South Wales that they shall not be or become members of the

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Australian Paper Mills Employees' Union (hereafter referred to as the union) an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. (b) Any employee employed at the said works who becomes or attempts or seeks to become a member of the union shall be deemed to have committed a breach of this award and shall be liable to a penalty not exceeding ten pounds. (c) This clause shall not apply to employees who were members of the union on 14th May 1943. 2. The union, its officers and members and each of them shall not— (i) advise, encourage, induce or incite any employee employed at the works of Australian Paper Manufacturers Ltd. at Matraville New South Wales to be or become a member of the union or (ii) admit or attempt to admit or do anything in the way of admitting any such employee as aforesaid as a member of the union. The penalty for breach of this term of this award in the case of the organization shall not exceed twenty pounds and in the case of an officer or member shall not exceed ten pounds. 3. This award shall apply to and be binding upon—(i) The Australian Workers' Union and its members ; (ii) The Australian Paper Mills Employees' Union and its members ; and (iii) Australian Paper Manufacturers Ltd. and its employees employed at its works at Matraville, New South Wales. 4. This award shall come into operation on 14th May 1943 and shall subject to s. 29 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 remain in force until 14th May 1944. Leave is reserved to the parties hereto to apply with respect to this award."

Several objections were taken to the award :—

1. That the *Commonwealth Conciliation and Arbitration Act* and the *National Security (Industrial Peace) Regulations* do not authorize the Court or other industrial authority to deal with industrial disputes or matters between unions or inter-union disputes, but only with industrial matters touching the relationship of employers and employees and work governed by that relationship.

The terms of the *Commonwealth Conciliation and Arbitration Act* are so wide that this contention cannot be sustained. The Act provides that an industrial dispute means an industrial dispute extending beyond the limits of any one State and includes any dispute as to industrial matters. Industrial matters includes any matter as to the demarcation of functions of any employees or classes of employees and all matters pertaining to being or not being members of any organization, association or body and includes questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately

concerned and of society as a whole. And s. 65 entitles every organization to submit to the Court any industrial dispute in which it is interested and ss. 69 and 70 deal with disputes between an organization and its members. And according to *Metal Trades Employees Association v. Amalgamated Engineering Union* (1) it seems that an industrial disputant may fasten upon his opponent as an industrial dispute matters concerning the industrial relations of himself and third persons.

Disputes between industrial unions and in relation to industrial matters such as demarcation and discipline disputes are not unknown, and answer the general description of industrial disputes. It is, therefore, I think, impossible as a matter of construction to exclude inter-union disputes from the purview of the *Commonwealth Conciliation and Arbitration Act*, especially when it is recognized that they may be fastened upon employers as industrial disputes.

The *National Security (Industrial Peace) Regulations* provide that expressions used in the Regulations shall, unless the contrary intention appears, have the same meaning as in the Act and shall so long as the Regulations continue in force be construed as if the provisions of the Regulations were incorporated in the Act as amendments thereof: see regs. 2 and 3. But the provisions of the Act are to be applied and construed as if from the definition of industrial dispute in s. 4 of the *Commonwealth Conciliation and Arbitration Act*, the words "extending beyond the limits of any one State" were omitted, and the jurisdiction of the Court is extended accordingly: See reg. 4. So the words "industrial disputes" in reg. 5 and "industrial matter" in reg. 10 have the same meaning in those regulations as in the Act. Under reg. 10, however, jurisdiction is conferred in relation to any industrial matter which may lead to the occurrence of a strike, a stop-work meeting or other interruption of work, notwithstanding an industrial dispute affecting the matter does not exist. Therefore the Regulations, as well as the Act, confer jurisdiction in relation to inter-union disputes and matters and clearly so if the disputes are fastened upon employers.

2. That the award, order and declaration was without jurisdiction because it has no relation to the dispute or industrial matter that was before the Court.

The only dispute or matter that was before the Court is set out in the notification and the order dated 27th April 1943. It was, as already pointed out, an industrial dispute or industrial matter between two unions. And the judge himself said that the Court was asked "with a view to preventing further trouble" (that is,

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cessation of work) to make an order conferring exclusive rights of organization upon the Australian Workers' Union and prohibiting the Australian Paper Mills Employees' Union from functioning at the works. That is an accurate enough summary of the matters claimed in the notification and set forth in the order of 27th April 1943. Clause 1 of the award, however, has nothing to do with the organization of employees in the rival unions. The judge said he would not consider making an award conferring upon the Australian Workers' Union rights such as those claimed in par. *a* of the notification. But as he saw the case the dispute, in effect, was one whether as a condition of employment at the works of Australian Paper Manufacturers Ltd. at Matraville an employee if he was to belong to a union should belong to one or other of two organizations. It was a matter relating to being or not being members of any organization. And apart from any definition the judge held apparently that a dispute which paralysed the industrial activities of a large establishment such as the one before him arose out of the relationship of employer and employee.

This cannot be supported either as a conclusion of fact or of law. It is contrary to the facts as stated by the judge himself and the material before him. The question before him did not relate to terms and conditions of employment but to the organization of rival unions, whether the employees should be or become members of one or other of those unions. The award is not an "industry award" within the meaning of reg. 6 (2) of the *Industrial Peace Regulations*, but reg. 13 (*a*) provides that an award shall not be invalidated by reason of its containing provisions relating to matters not within the ambit of the industrial dispute. Clause 1, however, of the award has no relation whatever to the industrial dispute or matter that was before the Court. A new dispute or matter is stated or raised by the judge himself and an award made in respect of a dispute or matter that never existed and in any case was not before the Court. The provisions of reg. 13 (*a*) do not validate such a clause, but save other provisions that must otherwise have been destroyed. The Court is not by force of reg. 13 (*a*) given an uncontrolled authority to do as it pleases regardless of the disputes and matters before it and the contentions and claims of the parties.

Clause 1 of the award therefore is bad and ought to be prohibited.

Clause 2 of the award is within power. It has nothing to do with the terms and conditions of employment, and it is legitimate because it is appropriate and adapted to control the organization of the rival unions at the employer's works at Matraville.

3. The constitutional validity of the *Industrial Peace Regulations* is not raised by the order nisi for prohibition, and that question does not, therefore, fall for discussion.

In my judgment a writ of prohibition should go prohibiting the enforcement of clause 1 of the award: See *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Broken Hill Pty. Co. Ltd.* (1).

Order absolute refused.

Solicitor for the applicant, *Jack M. Lazarus.*

Solicitors for the respondent Australian Workers' Union, *J. J. Carroll, Cecil O'Dea & Co.*

Solicitors for Australian Paper Manufacturers Ltd. (intervening), *Minter, Simpson & Co.*

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(1) (1909) 8 C.L.R. 419, at pp. 443, 444, 459, 460.

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