[HIGH COURT OF AUSTRALIA.]

COLVIN . . . . . APPELLANT;
COMPLAINANT,

AND

BRADLEY BROTHERS PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

H. C. OF A. 1943.

SYDNEY, *Nov.* 26; *Dec.* 20.

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

Constitutional Law—Conflict between Federal and State laws—Dangerous machinery—Employment of females—Order under State law—Award of Commonwealth Court of Conciliation and Arbitration—Inconsistency—The Constitution (63 & 64 *Vict. c.* 12), *s.* 109—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934)—*Factories and Shops Act* 1912-1936 (*N.S.W.*) (*No.* 39 *of* 1912—*No.* 37 *of* 1936), *s.* 41.

An order made pursuant to s. 41 of the *Factories and Shops Act* 1912-1936 (N.S.W.) prohibited the employment of females on a milling machine, but by an award of the Commonwealth Court of Conciliation and Arbitration the employment of females on work which included work on a milling machine was permitted unless such work was declared by a Board of Reference to be unsuitable. There had been no such declaration by a Board of Reference.

Held that the order, in its application to persons covered by the award, was inconsistent with the award, and, therefore, by virtue of s. 109 of the Constitution, invalid.

STATED CASE.

In an information laid by William Cargill Colvin, an inspector under the *Factories and Shops Acts* 1912-1941 (N.S.W.), it was alleged that by an order dated 7th December 1937 the Minister for the time being administering the *Factories and Shops Act* 1912-1936 had in pursuance of s. 41 thereof prohibited on and from 1st January 1938 the employment in any factory of females in any work at or in connection with machinery, to wit a milling machine, described in the order as dangerous, in which the Minister considered it undesirable that they should be employed and that Bradley Bros. Pty. Ltd., the occupier of a factory within the meaning of the Act, situated at 133 Parramatta Road, Five Dock, New South Wales, was guilty of an offence against Part II. of the Act in that on 23rd October 1942

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there was in that factory a contravention of the order in that one Constance Louisa Burns, a female, was employed at or in connection with a milling machine.

Upon the hearing of the information oral evidence was not given but the following facts, *inter alia*, were admitted by the parties and accordingly were found by the magistrate to be established to his satisfaction :—that by an order dated 7th December 1937, published in the New South Wales Government *Gazette* of 17th December 1937, the Minister for the time being administering the *Factories and Shops Act* 1912 (N.S.W.), as amended, had, in pursuance of s. 41 of that Act, prohibited on and from 1st January 1938 the employment in any factory of females in any work at or in connection with machinery described in the order as dangerous, in which the Minister considered it undesirable that they should be employed ; that milling machinery was included in the schedule to the order ; that on 23rd October 1942, at a factory occupied by it within the meaning of the above-mentioned Act at 133 Parramatta Road, Five Dock, New South Wales, Bradley Bros. Pty. Ltd. employed the female named in the information at or in connection with a milling machine ; that Bradley Bros. Pty. Ltd. is a party bound by the Metal Trades Award being No. 4655 as varied by award No. 5057, made on 5th December 1941 and 17th August 1942 respectively, under the *Commonwealth Conciliation and Arbitration Act* 1904-1934 ; that the operating of a milling machine is work in an industry or calling covered by that award ; and that no declaration has been made by any Board of Reference regarding the employment of females on milling machines.

Section 41 of the *Factories and Shops Act* 1912-1936 (N.S.W.) provided : " The Minister may, by order published in the Gazette, prohibit the employment in any factory . . . at or in connection with any machinery described in such order as dangerous . . . of females in any work in which he considers it undesirable that they should be employed. Where in any factory there is a contravention of any such order, the occupier of the factory shall be deemed to be guilty of an offence against this Part of this Act."

The order referred to in the information as having been made in pursuance of s. 41 was, so far as material to this report, in the following terms : " I, John Montgomery Dunningham . . . being the Minister for the time being administering the " *Factories and Shops Act* 1912-1936 " . . . do by this my Order prohibit the employment in any factory . . . of females in any work at or in connection with the dangerous machinery described in the Schedule hereto, it being my opinion that it is undesirable that such persons should be so employed, subject to the exceptions indicated.

Provided that this Order shall not apply to females of or over the age of eighteen years employed at or in connection with any machine in respect of which the occupier of the factory has obtained a permit in writing from the Minister, subject to such conditions as may be prescribed in such permit. This Order shall take effect on and from the 1st January, 1938."

Milling machinery was one of the items included in the schedule.

There was not any evidence either of the age of the female referred to in the information or of whether a permit in respect of the particular milling machine had been obtained in terms of the proviso in the order.

Award No. 4655 provides, so far as material, as follows: " 5. (*a*) Nothing in this clause shall . . . be taken as authorizing the employment of females upon work upon which they were not permitted to be employed at the date of this award . . . (*f*) The provisions of State Acts and Regulations limiting weights to be lifted or carried by juniors shall apply as if incorporated in this award . . . 21. (1) (*n*) Employers shall comply with all relevant requirements of State Acts and Regulations relating to the guarding of machinery and the installation and maintenance of dust extracting appliances . . . (*p*) In each workshop, and at other places where employees are regularly employed, the employer shall provide and continuously maintain at a place or places reasonably accessible to all employees an efficient First Aid Outfit. Provided that this subclause shall not apply to any employer who, pursuant to any other award or determination or any State Act or Regulations, provides an efficient First Aid Outfit . . . 32. (2) Nothing in clause 5 (*f*) or in clause 21 (1) (*n*) and (*p*) shall affect the operation of any State law or be deemed to be inconsistent with any such law."

Award No. 4655, so far as material to this report, was varied by award No. 5057 by deleting sub-clause *a* of clause 5 and inserting in lieu thereof the following: " (*a*) (i) Subject to this award and to the *National Security Act* 1939-1940 and the Regulations made thereunder an employer may employ females on work in the industries and callings covered by this award except on such work as shall be declared by a special Board of Reference to be unsuitable for female employees."

The information was dismissed.

From that decision the informant appealed to the High Court by way of case stated.

The question for the opinion of the Court was whether the magistrate's determination acquitting the defendant was erroneous in point of law.

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Holmes (for *Black* on active service) (*Barwick* K.C. for *Wallace* K.C. on military duties with him), for the appellant. A question under s. 109 of the Constitution is involved as in *Hume* v. *Palmer* (1)—See also *Grayndler* v. *Cunich* (2). Clause 5 (*a*) (i) inserted by award No. 5057 into award No. 4655 does not produce an inconsistency. It does not evince or evidence that intention to displace State legislation which is necessary for it to prevail over State legislation by virtue of s. 109 of the Constitution. As a matter of construction the clause may be able to operate as additional to or supplementary to the State legislation or it may be designed to deal with the matter of whether females should be employed in particular occupations rather than the matter dealt with under the State legislation, that is, whether females should be employed at dangerous machines. It is conceded : (i) that a State Act, or anything having the force of State law, whether antecedent or subsequent to a valid Federal award, is inoperative to the extent to which it is inconsistent therewith (*Clyde Engineering Co. Ltd.* v. *Cowburn* (3) ; *Ex parte McLean* (4)) ; (ii) that the regulation of the employment of females including the conditions under which, and the machines at which, they may be employed is an industrial matter and, if the subject of dispute, may be the subject of an award ; and (iii) that by virtue of reg. 6 (2) of the *National Security* (*Industrial Peace*) *Regulations*, no question arises as to whether there was originally any dispute with respect to the employment of females in the way it is dealt with in the award. In other words, the ambit of the original dispute does not come into the question of the interpretation of this award. The award does not deal with the term " machinery " ; it relates to occupations rather than to machines. The award provides not that females may be employed at milling machines but that they may be employed at a particular task. The effect of the alteration to the award was to give an extended permission to employ females in the industry. Prior to that provision in the award females were not allowed to be employed generally in the industry. That award had and has regard to the continued existence of State laws, including those concerning general matters of social welfare. It does not evidence a clear intention to displace the State law (*Ex parte McLean* (5) ; *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (6)), and at no point does the award come into conflict with the State law.

Weston K.C. (with him *Ashburner*), for the respondent. Clause 5 (*a*) (i) of the award and the order of the Minister under the State

(1) (1926) 38 C.L.R. 441.
(2) (1939) 62 C.L.R. 573.
(3) (1926) 37 C.L.R. 466.
(4) (1930) 43 C.L.R. 472.
(5) (1930) 43 C.L.R., at pp. 479, 483.
(6) (1942) 66 C.L.R. 557, at pp. 574, 584, 590, 591, 599.

Act deal with precisely the same matter, that is, the matter of females operating a milling machine. In determining the question now before the Court consideration should not be given to the purpose of the State Parliament or the Minister, or of the award-making authority, nor should the question be solved by having regard to what may or may not happen. If a conflict does occur the fact that the award and the State law pursue different objectives is immaterial. There is not any provision in the award preserving the operation of State law, or of orders made thereunder by the Minister.

Cur. adv. vult.

Dec. 20.

The following written judgments were delivered :—

LATHAM C.J. This is a case stated by a stipendiary magistrate under the *Justices Act* 1902-1940 (N.S.W.), s. 101. The respondent company was charged with an offence under s. 41 of the *Factories and Shops Act* 1912-1936 (N.S.W.). Section 41 is in the following terms :—" The Minister may, by order published in the Gazette, prohibit the employment in any factory, or class of factory, at or in connection with any machinery described in such order as dangerous, of males under the age of sixteen years or of females in any work in which he considers it undesirable that they should be employed. Where in any factory there is a contravention of any such order, the occupier of the factory shall be deemed to be guilty of an offence against this Part of this Act."

By an order made under this section, the Minister administering the Act made on 7th December 1937 an order prohibiting on and from 1st January 1938 the employment in any factory of females at any work at or in connection with certain specified machinery, including a milling machine which was described in the order as dangerous, such work being work in which he considered it undesirable that females should be employed. The order was subject to a proviso that the order should not apply to cases in which the occupier of a factory obtained a permit from the Minister. The company employed in a factory at Sydney a female at or in connection with a milling machine without obtaining any permit from the Minister. The company is a party bound by an award made by the Commonwealth Court of Conciliation and Arbitration No. 4655 of 5th December 1941, which was varied by award No. 5057 of 17th August 1942. These awards apply to certain metal trades. The latter award included a provision varying award No. 4655 " By deleting sub-clause (*a*) of clause 5 and by inserting in lieu thereof the following :—(*a*) (i) Subject to this award and to the

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National Security Act 1939-1940 and the Regulations made thereunder an employer may employ females on work in the industries and callings covered by this award except on such work as shall be declared by a special Board of Reference to be unsuitable for female employees." Further provisions provided for the constitution of the special Board of Reference. Sub-clause *a* of clause 5 of award No. 4655 provided that nothing in clause 5 (which was headed "Females and Unapprenticed Male Juniors") should be taken as authorizing the employment of females upon work upon which they were not permitted to be employed at the date of the award. This is the clause which was deleted by the later award No. 5057. It was admitted before the magistrate that the operating of a milling machine was work in an industry or calling covered by award No. 5057, and that no declaration had been made by any Board of Reference declaring such work to be unsuitable for female employees.

An earlier award, No. 4404, contained a provision that adult female labour might be employed in certain specified work in which they were employed at the time of the making of the award. This work related to manufacturing and assembling small parts of certain electrical and other machinery and work which was already being done by females in the sheet metal, enamelling and canister-making industry, and in core-making.

In the award No. 4655 there are clauses which expressly prohibit the employment of females in certain work in porcelain enamelling in New South Wales and Queensland only.

That award also included provisions in the following terms:—"Employers shall comply with all relevant requirements of State Acts and Regulations relating to the guarding of machinery and the installation and maintenance of dust extracting appliances." And, under the heading "Application of State Laws":—"The provisions of State Acts and Regulations limiting weights to be lifted or carried by juniors shall apply as if incorporated in this award."

It was contended for the defendant that the Minister's order prohibiting the employment of females on milling machines was inconsistent with the Commonwealth award, the effect of which was to permit the employment of females on such machines, and that therefore by virtue of s. 109 of the Commonwealth Constitution the Commonwealth award prevailed; that the order made under the State law was of no effect; so that the defendant was not guilty of the offence charged. The magistrate accepted that contention and has stated a special case by which the Court is asked to answer the question whether the determination acquitting the accused was erroneous in point of law.

The relevant clause of the award (No. 5057) which made the variation expressly permits an employer to employ females " subject to this award and to the *National Security Act* 1939-1940 and the Regulations made thereunder." Accordingly the variation was not made without regard to the application of provisions other than those expressly contained in the award.

The permission to employ females is a general permission to employ them on work in the industries and callings covered by the award, except on such work as should be declared by a special Board of Reference to be unsuitable for female employees. Thus, in the absence of a declaration by a Board of Reference, an employer, so far as the award was concerned, was at liberty to employ females on any work unless he was prevented from doing so by some other term of the award, or by the *National Security Act* and regulations made thereunder.

It was contended that the terms of the clause should be construed so as to preserve the operation of general State legislation directed towards the general health and well-being and safety of members of the community, including employees.

In my opinion there are two answers to this contention. In the first place the words used are not reasonably capable of being read as leaving room for the operation of State legislation generally. Express mention is made of the *National Security Act* and regulations thereunder and no mention is made of State legislation. State legislation is left to operate only " subject to this award." Secondly, express reference is made to certain State legislation relating to dangerous machinery, dust-extracting appliances, and the lifting of heavy weights. The operation of this legislation is expressly preserved. It is therefore difficult to argue that State legislation in general is preserved in operation. *Expressio unius exclusio alterius.*

The effect of the clause is to exclude the operation of provisions not contained in the award, the *National Security Act* and regulations thereunder which would prohibit the employment of females on particular work, and to allow such employment unless a Board of Reference declares it to be unsuitable for females.

It has been argued that the State legislation (the *Factories and Shops Act*) relates to general social conditions and is directed to community welfare, whereas the Commonwealth award is directed only to the relations between particular employers and employees in certain industries or callings. This may be the case, though the *Factories and Shops Act* in s. 41, as in other sections, deals specifically with the obligations of employers to employees. But, in my

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opinion, it cannot be said that where there is actual inconsistency between a State law and a Federal law or, as alleged in this case, between an order made under State law and an award made under Federal law, the fact that one law may from one point of view be placed within a particular legislative category (e.g., health or social conditions) and the other law may from another point of view be placed within another legislative category (e.g., industrial arbitration) prevents the application of s. 109 of the Constitution. The application of s. 109 does not depend upon any assignment of legislation to specific categories which are to be assumed on an *a priori* basis to be mutually exclusive. Section 109 applies wherever there is inconsistency between a State law and a Commonwealth law, or between orders or awards made under such laws. If the Commonwealth law is valid it prevails over any State law which is inconsistent with it, even though that State law may have been made as part of a legislative scheme which the Commonwealth Parliament could not have enacted in all its parts. For example, under a law with respect to customs the Commonwealth Parliament may deprive the owner of goods or the holder of a warehousekeeper's certificate of his rights in smuggled goods. The Parliaments of the States have general power to make laws with respect to the ownership of personal chattels and with respect to warehousekeepers' certificates. The Commonwealth Parliament has no such general power. But the State law on such matters may be inconsistent with a provision in a Federal *Customs Act*. If so, it is invalid under s. 109 of the Constitution, and it is immaterial that one law would, in a classification of Australian laws, be placed within a class of laws relating to property, and that the other law would be classified as a customs law.

It may be contended that in cases under s. 92 of the Constitution it has been asked whether a State law is in its true nature a law which is a regulation of trade and commerce and that three Justices held in *Ex parte Nelson* [*No.* 1] (1) that if it were not such a law it did not infringe s. 92, which provides that trade, commerce and intercourse among the States shall be absolutely free. (*Hartley* v. *Walsh* (2), may be compared with this case.) But no question of inconsistency under s. 109 arose in *Ex parte Nelson* [*No.* 1] (3)—"In the present case there is no conflict or inconsistency." The questions which have arisen under s. 92 are whether a statute infringes the positive provision contained in that section. A statute infringes the provision if it answers a certain description—if it

(1) (1928) 42 C.L.R. 209 : see p. 218. (2) (1937) 57 C.L.R. 372.
(3) (1928) 42 C.L.R., at p. 217.

operates to interfere with the freedom of inter-State trade, commerce or intercourse (*Tasmania* v. *Victoria* (1))—and see *James* v. *The Commonwealth* (2). The question whether a statute falls within such a description is a different question from that which arises when, irrespective of any question of classification of statutes, it is necessary to decide whether one statute is inconsistent with another statute. Classification of statutes according to their true nature is, in my opinion, a matter that is irrelevant to any application of s. 109. For example, a State Stamp Act may be inconsistent with a Commonwealth Audit Act—*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (3); a State Stamp Act may also be inconsistent with a Commonwealth Act relating to the acquisition of property—*Commonwealth* v. *New South Wales* (4); a State Liquor Act may be inconsistent with a Commonwealth Electoral Act—*R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (5); a State Act relating to the employment of returned soldiers may be inconsistent with a Commonwealth award made in an inter-State industrial dispute—*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (6); a State Motor Car Act might be inconsistent with a Commonwealth defence regulation—*Pirrie* v. *McFarlane* (7). Thus the fact that the State *Factories and Shops Act* deals with shops and factories and various matters relating thereto and that it may be called social legislation has no significance in relation to the question whether that Act is inconsistent with an award made under a Federal Act dealing with industrial matters. In truth, in my opinion, both the State law and the Federal award in question deal with industrial matters in the general interests of the community, but I expressly do not base my opinion as to the possibility of inconsistency upon that ground.

It was argued that the clause in question was intended to extend the number of industries and callings in which females might lawfully be employed, and to provide that they might not be employed in any of the industries and callings covered by the award unless a Board declared that employment in such industries or callings was unsuitable for females. The argument is that the clause extends the scope of industries and callings in which females may be employed, but does not refer to particular work done by females in any industry or calling.

(1) (1935) 52 C.L.R. 157.
(2) (1936) A.C. 578, at p. 624; 55 C.L.R. 1, at pp. 52, 53.
(3) (1920) 28 C.L.R. 129, at p. 156.
(4) (1906) 3 C.L.R. 807, at pp. 815, 826.
(5) (1920) 28 C.L.R. 23.
(6) (1924) 34 C.L.R. 482.
(7) (1925) 36 C.L.R. 170.

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In my opinion the words of the clause are conclusive against this view. The provision is not that females may be employed in industries and callings, except in such industries and callings as shall be declared unsuitable. On the other hand, the provision is that an employer may employ females *on work* in industries and callings except *on such work* as shall be declared unsuitable.

In this case there is an express prohibition by a State authority of the employment of females on a milling machine. There is an express permission by a Commonwealth authority to employ females on work which is admitted to include work on a milling machine unless such work is declared by a Board of Reference to be unsuitable. There has been no such declaration by a Board of Reference. Therefore there is an express prohibition by the State authority of that which is permitted by the Commonwealth authority. A Commonwealth arbitration award prevails over a State statute creating an offence if the State statute is inconsistent with the award (*Ex parte McLean* (1)). In this case there is, in my opinion, a clear inconsistency, and therefore the Commonwealth award prevails.

The decision of the magistrate was, in my opinion, right, and the question whether his determination acquitting the defendant was erroneous in point of law should be answered : No.

RICH J. I agree that the decision of the magistrate was right and that the question submitted should be answered in the negative, and the appeal dismissed with costs.

STARKE J. Appeal by way of case stated for the opinion of this Court pursuant to the *Judiciary Act* and the Rules of this Court : See *Hume* v. *Palmer* (2) ; *Troy* v. *Wrigglesworth* (3).

The *Factories and Shops Act* 1912-1936 of New South Wales provided by s. 41 that the Minister administering the Act might by order published in the *Gazette* prohibit the employment in any factory, or class of factory, at or in connection with any machinery described in such order as dangerous, of males under the age of sixteen years or of females in any work considered by him to be undesirable that they should be so employed. The Minister by an order made in 1937 published in the *Gazette* prohibited on and from 1st January 1938 the employment in any factory of females in any work at or in connection with milling machinery described in such order as dangerous and considered by him to be undesirable that they should

(1) (1930) 43 C.L.R. 472.
(2) (1926) 38 C.L.R. 441.
(3) (1919) 26 C.L.R. 305.

be employed. It is plain enough that this order was made under the sanction of the law of New South Wales for the protection of young men and females. But in 1942 an award was made by the Commonwealth Court of Conciliation and Arbitration which provided that subject to the award and to the *National Security Act* 1939-1940 and the regulations made thereunder an employer might employ females on work in the industries and callings covered by the award except on such work as should be declared by a special Board of Reference to be unsuitable for female employees.

Operating a milling machine is work in an industry or calling covered by this award. There is a provision in the award that employers shall comply with all relevant requirements of State Acts and regulations relating to the guarding of machinery, but there is no provision that employers shall observe the State legislation in New South Wales or any other State prohibiting the employment of females on work at or in connection with dangerous machinery. This award deals only with the industrial relations of the parties bound by it.

The respondent was prosecuted under the State Act for employing a female in work on a dangerous machine in which the Minister considered it undesirable that she should be so employed. The respondent fell within the term of the State Act and was also a party to the award of the Commonwealth Court of Conciliation and Arbitration and bound by its terms. The magistrate acquitted the respondent on the ground that the Commonwealth law prevailed.

The Constitution, s. 109, provides that when the law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. It was argued that the provisions of the State law operate irrespective of the relation of employer and employee and without regard to any industrial relation and were not therefore superseded by force of the provisions of the Constitution: See *Ex parte McLean* (1); *Stock Motor Ploughs Ltd.* v. *Forsyth* (2). But there is a direct collision between the two laws in the present case. The State law provides in effect that females shall not be employed in any factory on any work in connection with milling machinery which the Minister declares to be dangerous and unsuitable for their employment, whilst the Commonwealth law through the Federal award in effect permits employers parties to the award to employ females in any factory on any work in connection with milling machinery except on such work as a special Board should consider unsuitable for

(1) (1930) 43 C.L.R., at pp. 485, 486.
(2) (1932) 48 C.L.R. 128, at pp. 149, 150.

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female employees but subject to employers observing the requirements of State Acts relating to the guarding of machinery.

The result is that State law is inconsistent with the Federal law expressed in the arbitration award and is to that extent invalid. But perhaps in this case I may be permitted to regret that the law is as it is, for I view with misgiving the risk to which females are exposed in connection with dangerous machinery, even though there be provisions in State law requiring it to be guarded. It is anomalous that females who are not employed by persons parties to the Federal award should have the protection of the State law but that those employed by parties to that award should be deprived of that protection though the law was enacted by the State for the protection of females generally.

The appeal should be dismissed.

McTIERNAN J. I agree. The appeal should be dismissed. I have nothing to add.

WILLIAMS J. The defendant company was prosecuted for that on 23rd October 1942 in breach of an order made by the Minister under s. 41 of the *Factories and Shops Act* 1912-1936 (N.S.W.) it employed a named female at its factory near Sydney at or in connection with a milling machine.

Section 41 of the Act is in the following terms :—" The Minister may, by order published in the Gazette, prohibit the employment in any factory, or class of factory, at or in connection with any machinery described in such order as dangerous, of males under the age of sixteen years or of females in any work in which he considers it undesirable that they should be employed. Where in any factory there is a contravention of any such order, the occupier of the factory shall be deemed to be guilty of an offence against this Part of this Act."

The order under the section, which was made by the Minister on 7th December 1937 and became operative on 1st January 1938, so far as material, prohibited the employment in any factory of females in any work at or in connection with milling machines, but provided that the order should not apply to females of or over the age of eighteen years employed at or in connection with any machine in respect of which the occupier of the factory obtained a permit in writing from the Minister. An offence under the order was proved but the defendant successfully contended that it was entitled to employ females on this work under a provision of the

Metal Trades Award made by the Commonwealth Court of Conciliation and Arbitration on 5th December 1941 as varied by a further award made on 17th August 1942, and that this provision was inconsistent with the order within the meaning of s. 109 of the Constitution.

The award as varied provides that, subject to the award and to the *National Security Act* 1939-1940 and the regulations made thereunder, an employer may employ females on work in the industries and callings covered by the award (which include the work complained of) except on such work as shall be declared by a special Board of Reference to be unsuitable for female employees. It also contains the following provisions under the headings of " Application and Operation of State Laws " :—(1) Employers shall comply with all relevant requirements of State Acts and regulations relating to the guarding of machinery and the installation and maintenance of dust extracting appliances. (2) The provisions of State Acts and regulations limiting weights to be lifted or carried by juniors shall apply as if incorporated in this award. (3) In any State in which any statute relating to apprentices is now or hereafter in force . . . such statute . . . shall operate in such State provided that the provisions thereof are not inconsistent with this award.

The award is not of course a law of the Commonwealth, and the order is not a law of the State, but once the award is made its provisions become part of the law of the Commonwealth by virtue of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and in a similar manner the provisions of the order when made become part of the law of the State by virtue of the *Factories and Shops Act*. If therefore the award and the order are in conflict there can arise a condition of inconsistency between the law of the Commonwealth and the law of a State within the meaning of s. 109 of the Constitution.

The Minister's order prohibits the defendant from employing females on milling machines without his permission. The award permits the defendant to employ them on this work subject to the conditions therein specified, provided that it is not declared by a special Board of Reference to be unsuitable for female employees. No such declaration has been made, so that at the time of the alleged offence the defendant was permitted to employ females by the award and prohibited from employing them by the order. The permission and prohibition, both of which deal with the same subject matter, are therefore in direct collision. It is nothing to the point that if the defendant had applied to the Minister permission might have been granted and that in this way the defendant could

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have complied with both laws. There is no obligation to make such an application under the award. The award prescribes the whole of the conditions subject to which the permission is granted. It also prescribes the extent to which the rights and obligations which it creates are to be subject to State law. Within its ambit, therefore, the award completely occupies the legislative field and the order is inoperative in that field: See the cases collected in *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (1).

For these reasons I am of opinion that the magistrate came to a correct conclusion, that the question asked in the special case should be answered in the negative, and that the appeal should be dismissed.

Appeal dismissed with costs. Order of magistrate affirmed. Question in case answered: No.

Solicitor for the appellant, *A. H. O'Connor*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *J. Stuart Thom & Co.*

J. B.

(1) (1942) 66 C.L.R. 557.