[HIGH COURT OF AUSTRALIA.]

HARRISON . . . . . APPLICANT;

AND

GOODLAND AND ANOTHER . . . . RESPONDENTS.

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SYDNEY, *Dec.* 5.

MELBOURNE, *Dec.* 22.

Latham C.J., Starke and Dixon JJ.

Commonwealth Court of Conciliation and Arbitration—Orders not to be challenged in courts other than High Court—Order interpreting award and ordering compliance—Conviction for breach of order—Appeal to High Court against conviction—Challenge to validity of order in High Court on such appeal—Binding effect of order—Representation of organizations by their members—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *ss.* 25, 29, 31 (1), 38 (*c*), (*da*), (*o*), (*u*), 44.

The Commonwealth Court of Conciliation and Arbitration made an order in proceedings in which an employer and a registered organization of boilermakers were parties interpreting an award pursuant to s. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and, pursuant to s. 38 (*da*), ordering boilermakers employed by the employer to comply with the award. H., who was a member of the organization and a boilermaker employed by the company, was convicted for a default in compliance with the order. In an appeal to the High Court H. sought to challenge the validity of the order, relying for the purpose on the exception in favour of the High Court in s. 31 of the *Commonwealth Conciliation and Arbitration Act.*

Held, that the exception does not enable the validity of a subsisting order of the Commonwealth Court of Conciliation and Arbitration to be challenged in the High Court in an appeal against a conviction for a default in compliance with the order.

Held, further, by *Latham* C.J. and *Starke* J., that the order applied to H. who was represented in the proceedings in which it was made by the organization of which he was a member. *Per Dixon* J.: To contend that H. was not bound by the relevant part of the order was inconsistent with its terms, and, therefore, to challenge it or call it in question.

ORDER NISI for prohibition.

By an order made on 6th October 1944, the Commonwealth Court of Conciliation and Arbitration, Judge *O'Mara*, upon a reference to

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it in the matter of an industrial matter in which Broken Hill Pty. Co. Ltd., the Boilermakers' Society of Australia and the Federated Ironworkers' Association of Australia were concerned, upon its own motion and in the exercise of the powers and authorities conferred on it by the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and not otherwise ordered and declared (*a*) that upon its true construction it was a term of the Metal Trades Award, made by that Court on 5th December 1941, Serial No. 5508, that (i) the Broken Hill Pty. Co. Ltd. was bound thereby as to classifications and as to rates prescribed by clauses 2-5 and 7, and (ii) members of the Boilermakers' Society of Australia who were classified and paid in accordance with a specified provision of the award were bound thereby to perform or assist in performing any kind of work usually performed by a boilermaker; (*b*) that it had been proved to the satisfaction of the Court that boilermakers employed by the company had not observed a term of the award in that when directed by the company so to do they did fail:—(i) to make and assist in the making of templates, and (ii) on material which was intended to be or had been cut on a certain type of machine to perform or assist in performing work of a kind usually performed by a boilermaker. The Court ordered, pursuant to s. 38 (*da*) of the Act, boilermakers employed by the company to comply with the said term of the award and to do, pursuant to the order and in accordance with such directions as might be given by the company, the work referred to above. The Court further ordered that any such boilermaker as referred to above who after 9th October 1944 refused, neglected, or failed to comply with any such direction as above mentioned should be guilty of a breach of the order and for each such refusal should be liable to a penalty not exceeding £10.

Upon a complaint laid by Kenny Arnot Goodland, an industrial officer employed by Broken Hill Pty. Co. Ltd., Edward Scott Harrison was convicted on 7th November 1944 by a stipendiary magistrate that on 16th October 1944, at Newcastle, New South Wales, he, then being a boilermaker employed by the above-mentioned company at its steel works at Newcastle and being a member of the Boilermakers' Society of Australia, an organization registered under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and bound by an order made under that Act on the said 6th October 1944 by his Honour Judge *O'Mara*, a Judge of the Commonwealth Court of Conciliation and Arbitration, in the matter, *inter alia*, of an industrial matter in which the said company and the Boilermakers' Society of Australia and the Federated Ironworkers' Association of Australia were concerned and to which order

the said company was a party, was given a direction by the company to make a template and did refuse to comply with the direction contrary to the said Act and order.

From that decision Harrison, by virtue of s. 39 (2) (*b*) of the *Judiciary Act* 1903-1940, appealed to the High Court by way of statutory prohibition under s. 112 and s. 115 of the *Justices Act* 1902-1940 (N.S.W.) on the grounds: (1) that on its true construction the award did not create the offence charged in the information and summons thereon; (2) that the conviction and order were bad in law; (3) that the order of Judge *O'Mara* assuming to interpret the award was (*a*) bad in law, (*b*) open to attack in the High Court under the provisions of s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, and (*c*) ought not to have been made and should not be given effect to; and (4) that on the true construction of the award neither Broken Hill Pty. Co. Ltd. nor the applicant was bound by the material terms of the award.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

There was not any appearance by or on behalf of the respondent magistrate.

Isaacs (with him *Lewis*), for the applicant. Although by virtue of s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 the order made by the Commonwealth Court of Conciliation and Arbitration could not be challenged in the proceedings before the magistrate it is competent to challenge that order upon an appeal to this Court against the decision of the magistrate in those proceedings: See *Jacka* v. *Lewis* (1). The whole basis of those proceedings was whether the order was valid and whether the summons disclosed an offence. It is open to this Court to find that the decision of the Judge of the Commonwealth Court of Conciliation and Arbitration, being one purely of construction and interpretation, was wrong in law, and, therefore, that the order is invalid. By his decision the Judge purported to decide the rights of certain parties, therefore his decision was not merely arbitral but was judicial and can be challenged in this Court if by appropriate proceedings the matter comes before it. The present proceedings are appropriate proceedings. An appeal to this Court lies as of right from the decision of the magistrate exercising Federal jurisdiction, and upon that appeal coming before this Court every matter upon which the magistrate's decision depends is examinable. The interpretation placed upon the award by the Judge in his order

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does violence to the exemption provisions of clause 29 of the award. The industrial organization and its members are bound only if the employer is bound. The requirement to observe the award is a mutual obligation. If one is exempt from observance of certain provisions therein then all are exempt in respect of those provisions. In the circumstances Broken Hill Pty. Co. Ltd. is not bound by the award to observe the terms as to rates of pay; therefore no reciprocal obligation on the part of the employees to carry out directions of the company arises under the award.

Taylor K.C. (with him *Carson*), for the respondent Goodland. The question whether this respondent is bound by the Judge's order is not raised in the grounds for this application nor was it argued or considered in the Court below. There is a complete exemption in respect of persons whose classifications appear in the State award but, as regards those whose classifications do not appear in the State award, there is only partial exemption. The definition of boilermaker in the Metal Trades Award as meaning a tradesman who is "required", *inter alia*, to make templates shows that boilermakers bound by the award must make templates when so required by their employer. The award imposes an obligation upon the boilermakers to make templates if and when required: See *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Brick Co. Ltd.* (1), *In re Iron and Steel Works Employees* (*Australian Iron & Steel Ltd.*) *Award* (*No.* 2) (2), and *In re Steel Works Employees* (*Broken Hill Pty. Co. Ltd.*) *Award* (*No.* 6) (3).

[STARKE J. referred to *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (4).]

So far as that case is concerned it is not disputed that the relationship of master and servant conferred on the employee the right to remuneration, but the award in this case does much more than determine remuneration. With the interpretation included in the order there is an obligation on the part of the employee to work and also to work overtime when so instructed. The obligation to work arises not only by reason of the contract but also by reason of the award which is the very basis of the contract. The order made by the Judge bound the magistrate and it also binds this Court upon an appeal against the decision of the magistrate. The matter comes before this Court upon an appeal by way of an application for prohibition under s. 112 of the *Justices Act* 1902-1940 (N.S.W.) and, under s. 115 of that Act, the only question for the Court to determine is whether the conviction can be supported. The Judge

(1) (1942) 46 C.A.R. 397.
(2) (1943) A.R. (N.S.W.) 462.
(3) (1943) A.R. (N.S.W.) 486.
(4) (1920) 28 C.L.R. 66, at p. 73.

had jurisdiction to make the order under sub-ss. (*da*) and (*u*) of s. 38 of the *Commonwealth Conciliation and Arbitration Act*. An interpretation as made by the Judge is an arbitral function and not a judicial function (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1); *Pickard* v. *John Heine & Son Ltd.* (2)). Whether the order by way of interpretation is arbitral or judicial it is binding on this Court unless challenged in appropriate proceedings (*Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (3) (not overruled on this point); *Amalgamated Clothing and Allied Trades Union of Australia* v. *D. E. Arnall & Sons*; *In re American Dry Cleaning Co.* (4)). An award of the Commonwealth Court of Conciliation and Arbitration is, by virtue of s. 29 (*d*) of the Act, binding on all members of organizations bound by the award: See also s. 25 and sub-ss. (*b*), (*da*) and (*u*) of s. 38 of the Act. There is nothing which requires that the individual members of the industrial organization shall be present before the Court. It is not disputed that on the true construction of the Judge's order it was the intention to bind boilermakers who were in the employ of the company to do certain things. In the circumstances the applicant was bound by the order within the meaning of s. 44 of the Act.

Isaacs, in reply. Although the power of interpretation may be exercised either arbitrally or judicially, the order itself shows that it was made in exercise of the judicial power (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (5)). It was not decided in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Brick Co. Ltd.* (6) that failure to attend rendered the employee liable under s. 44 of the Act for a breach of the award.

Cur. adv. vult.

Dec. 22.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal by way of statutory prohibition under the *Justices Act* 1902-1940 (N.S.W.) from a conviction of Edward Scott Harrison by a court exercising Federal jurisdiction—*Judiciary Act* 1903-1940, s. 39 (2) (*b*).

Harrison was convicted upon the following charge:—"For that on the 16th day of October 1944 at Newcastle in the said State the

(1) (1924) 34 C.L.R. 482, at pp. 528, 529.
(2) (1924) 35 C.L.R. 1, at pp. 6, 7.
(3) (1928) 41 C.L.R. 402, at pp. 434, 435.
(4) (1929) 43 C.L.R. 29, at p. 50.
(5) (1924) 34 C.L.R., at p. 529.
(6) (1942) 46 C.A.R. 397.

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Applicant then being a boilermaker employed by the Broken Hill Proprietary Company Limited at its steel works at Newcastle aforesaid and being a member of the Boilermakers' Society of Australia an organisation registered under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and bound by an order made under the said Act on the said 6th day of October 1944 by his Honour Judge *O'Mara* a Judge of the Commonwealth Court of Conciliation and Arbitration in the matter *inter alia* of an industrial matter in which the said Company and the Boilermakers' Society of Australia and the Federated Ironworkers' Association of Australia were concerned and to which said order the said Company was a party was given a direction by the Company to make a template and did refuse to comply with the direction contrary to the said Act."

The *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 44, makes it an offence for any person bound by an order or award to commit any breach or non-observance of any term of the order or award. Section 38 (*da*) provides that the Court of Conciliation and Arbitration shall, as regards every industrial dispute of which it has cognizance, have power to order compliance with any term of an order or award proved to the satisfaction of the Court to have been broken or not observed. Section 38 (*o*) provides that the Arbitration Court shall have power to give an interpretation of any term of an existing award.

By an order made on 6th October his Honour Judge *O'Mara*, a judge of the Arbitration Court, interpreted the Metal Trades Award, Serial No. 5508, by declaring that upon its true construction it was a term of the award that the Broken Hill Pty. Co. Ltd. was bound thereby as to classifications and as to rates prescribed by clauses 2, 3, 4, 5 and 7, and that members of the Boilermakers' Society of Australia who were classified and paid in accordance with a particular provision of the award were bound thereby to perform or assist in performing any kind of work usually performed by a boilermaker.

The order declared that it had been proved to the satisfaction of the Court that "boilermakers employed by the said company have not observed a term of the said award in that when directed by the said Company so to do they did fail (i) to make and assist in the making of templates . . .".

The order then proceeded, pursuant to s. 38 (*da*) of the Act, to order that "boilermakers employed by the said company" should comply with the term of the said award which had been proved to the satisfaction of the Court not to have been observed, and that they should, pursuant to the order, and in accordance with such

directions as might be given by the company, make or assist in the making of templates. The order also fixed a maximum penalty of £10 in the case of any such boilermaker as aforesaid who, after a specified date, refused, neglected or failed to comply with any such direction as aforesaid: See *Arbitration Act*, s. 38 (*c*), which gives power to fix penalties for any breach or non-observance of an order or award, subject to specified limits.

Argument upon the appeal proceeded upon the basis that the order directed members of the Boilermakers' Society to work for the Broken Hill Pty. Co. Ltd., that is to say, upon the basis that the award was interpreted as not merely prescribing terms and conditions of employment for boilermakers and others who were in fact working for the company, but as directing that members of the Boilermakers' Society should work for the company whether they wished to do so or not. I do not so construe the order. The order is limited in terms to "boilermakers employed by the company" and what it does (apart from "interpreting" the award) is to specify the duties of boilermakers so employed as including, *inter alia*, the making of templates.

It is argued for the appellant, however, that the learned judge wrongly construed the award in holding that the company was bound by the award and in declaring that boilermakers employed by the company were bound, if directed, to make templates. The first question which arises is whether in this proceeding it is open to the appellant to challenge the order upon the ground that it is wrong, as in the case of an ordinary appeal.

There is no doubt that the Arbitration Court has power to interpret its awards (s. 38 (*o*)), and to order compliance with any term of an order or award proved to have been broken or not observed (s. 38 (*da*)) and to fix maximum penalties for non-compliance (s. 38 (*c*)). It therefore cannot be contended that the order of his Honour Judge *O'Mara* is a nullity. The argument for the appellant is that the order was wrong and that, although the magistrate who heard the charge could not allow the order to be challenged by reason of the provisions of s. 31 of the *Arbitration Act* (which I quote hereafter), no such restriction applies to the High Court, and the order can therefore be challenged in the High Court. *Jacka* v. *Lewis* (1) is relied upon for this proposition.

This proceeding is an appeal from the conviction by the magistrate and is not an appeal from the order of Judge *O'Mara*. The order, so far as it interpreted the award, was either judicial in character or

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arbitral in character (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1) and *Pickard* v. *John Heine & Son Ltd.* (2)). If the interpretation is to be regarded as a judicial interpretation, that is, as determining the true meaning of the award upon ordinary principles of construction, *Jacka* v. *Lewis* (3) is an authority that there is an appeal from the order to this Court. If, on the other hand, it is what has been called an arbitral interpretation, that is, a declaration of what the Court intended to bring about by the award, as distinct from construing the award according to its terms, there is no authority that such an appeal will lie. But, as I have already said, this proceeding is not an appeal from the order of Judge *O'Mara*.

The *Arbitration Act*, s. 31 (1), provides that :—" Except as in this Act provided, no award or order of the Court or a Conciliation Commissioner shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court other than the High Court on any account whatever."

In *Jacka* v. *Lewis* (3) it was held that this provision did not preclude an appeal to the High Court from an order made by the Arbitration Court in the exercise of its judicial power, although the view was expressed that possibly this result had been brought about by inadvertence. Section 31, however, does not confer any right of appeal. It is operative only to prevent challenge, appeal, review, &c. The right of appeal in the present case depends upon the provision of the *Judiciary Act* to which reference has been made, namely, s. 39 (2) (*b*). The Court before which the appellant was convicted was " a court other than the High Court " and therefore the magistrate rightly held that the order could not in any way be challenged or called in question before him. Therefore if the order applied to the appellant so as to bind him in relation to the company, the conviction was right, because it was admitted that the appellant was a boilermaker employed by the company ; that he had notice of the order ; that a direction had been given to him to make a template ; and that he had refused to obey the direction.

But, even if the magistrate was precluded from considering the validity of the order of Judge *O'Mara*, it was still necessary for the prosecutor to show that the order applied to the appellant Harrison. It was made in a proceeding to which Broken Hill Pty. Co. Ltd. and the Boilermakers' Society were parties. The order was made against the union of which Harrison was proved to be a member, and applied

(1) (1924) 34 C.L.R., at pp. 528, 529, 543.
(2) (1924) 35 C.L.R., at pp. 6, 7.
(3) (1944) 68 C.L.R. 455.

to all boilermakers employed by the company, and Harrison was so employed. But the order does not name Harrison. Section 29 of the Act provides that an award of the Court shall bind all members of organizations bound by the award. But this section relates only to awards, and not to orders. The suggestion, therefore, is that there is no provision in the Act which enables the Court to make an order which will bind and impose obligations upon members (not individually named) of a class of persons, even though those persons are members of an organization which is bound by the award in relation to which the order is made, or which is bound by the order itself.

In my opinion this suggestion is satisfactorily met by reading certain specific provisions of the Act in the light of the general principle that the Act deals with employees principally through and as represented by their organizations. The *Arbitration Act* is concerned with the mutual duties of employers and employees. It deals with employers both individually and through or by reference to associations of employers. In the case of employees the awards of the Court deal only with organizations of employees and not with individual employees. Industrial jurisdiction is mainly exercised by making awards or orders in proceedings in which employees are represented by the unions to which they belong. Section 2 (VI.) of the Act states that one of the chief objects of the Act is to facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of the Act. Section 29, as already stated, provides that an award of the Court binds all members of organizations bound by the award. Under s. 24 agreements as to industrial disputes, when duly certified, have the same effect as an award, and therefore, by virtue of s. 29, they bind the members of any organization which is a party to such an agreement. Under s. 77 " industrial agreements " made by an organization are binding on the members of the organization.

Section 38 (*da*) enables the Court to order compliance with the terms of orders and awards. Under this provision the Court could order any person or organization bound by an award to comply with the award. An order that an employer should observe an award is an order for compliance with the award. So also is a similar order in relation to an organization. I can see no reason why an order that all the members of an organization should observe an award cannot properly be described as an order for compliance

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with the award. So also an order that identifiable members of an organization should observe an award, whether the identification is made by names or by description, is an order for compliance with the award, and is therefore authorized by s. 38 (*da*).

It is true as a general rule that in ordinary courts (in the absence of a representative order) a person is not bound by an order unless he is himself a party to the proceedings and is specifically and individually referred to in the order (*Templeton* v. *Leviathan Pty. Ltd.* (1)). But in the exercise of equitable jurisdiction it has for many years been the practice to grant an injunction, not only against a defendant, but also against his servants or agents (*Hodson* v. *Coppard* (2)), that is, against persons described but not named. The inclusion of servants and agents, without naming them, is not meaningless. They are persons against whom the injunction has been granted though not parties to the action, and they are in a different position from that of members of the public. They may be committed for breach of the injunction if they know that it has been granted. Members of the public (subject to the same condition of notice) may be committed, not for breach of the injunction, but for contempt of court in aiding and abetting a breach thereof: See *Lord Wellesley* v. *Earl of Mornington* (3) ; *Seaward* v. *Paterson* (4) ; *Kerr* on *Injunctions*, 6th ed. (1927), pp. 632, 674.

Further, I refer to s. 25 of the Act, which provides: " . . . in exercising any duties or powers under or by virtue of this Act, the Court or Conciliation Commissioner shall act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms . . .". In the present case an order has been made in proceedings against a registered organization of boilermakers purporting to bind boilermakers employed by the company. The appellant is a member of the organization and is a boilermaker employed by the company. There is no real room for doubt as to the meaning and application of the order. In my opinion the Court would be paying entirely unwarranted deference to legal forms and technicalities if it allowed the fact that Harrison, though clearly described, was not specifically named in the order, to deprive the order of effect, not only in relation to Harrison, but (by parity of reasoning) in relation to all the persons to whom it was plainly intended to apply.

I am therefore of opinion that all the objections taken on behalf of the appellant fail and that the appeal should be dismissed.

(1) (1921) 30 C.L.R. 34.
(2) (1860) 29 Beav. 4 [54 E.R. 525].
(3) (1848) 11 Beav. 180, 181 [50 E.R. 785, 786].
(4) (1897) 1 Ch. 545.

STARKE J. The appellant Harrison was convicted before a stipendiary magistrate sitting at the Newcastle Police Court that, being a boilermaker and a member of the Boilermakers' Society of Australia, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and bound by an order of that Court made in the matter of an industrial dispute with the Broken Hill Pty. Co. Ltd. to which the organization and the Federated Ironworkers' Association were parties, he refused to comply with a direction to make a template contrary to the Act and order.

The appellant has appealed to this Court by means of an order nisi for statutory prohibition pursuant to the Appeal Rules of this Court, Section IV., and the *Justices Act* 1902-1940 (N.S.W.).

The order of the Arbitration Court upon which the conviction is based declares that boilermakers employed by the Broken Hill Pty. Co. Ltd. had not observed a term of an award known as the Metal Trades Award in that when directed by the company they failed to make and assist in making templates and ordering pursuant to s. 38 (*da*) of the said Act that boilermakers of the company should comply with the said terms of the award. It was not suggested that the order of the Arbitration Court was beyond its jurisdiction or a nullity in the sense that it was null and void and of no effect, but it was contended that the construction placed upon the Metal Trades Award by the Arbitration Court was erroneous and contrary to its terms.

The material clauses of the order of the Arbitration Court appear to have been an exercise of the judicial power. And the order has not been challenged by way of appeal to this Court or in any other manner: See *Commonwealth Conciliation and Arbitration Act*, s. 31; *Jacka* v. *Lewis* (1). The order is not, as already stated, a nullity, but a subsisting order binding upon the parties thereto. It may be that the Arbitration Court placed an erroneous interpretation upon the Metal Trades Award, but that error cannot be corrected in the present proceeding, which is not an appeal from the order of the Arbitration Court but an appeal from a conviction based upon a contravention of a subsisting order of the Arbitration Court.

Next it was suggested that the appellant was not bound by the order, for he was neither a party to the proceedings nor given notice of them. There are some observations in *Cameron* v. *Cole* (2) which aid this view, but I think they rather misunderstand the sense in which the word " nullity " is used in the cases there cited.

In the present case the order of the Arbitration Court directs boilermakers in the employ of the Broken Hill Pty. Co. Ltd., of

(1) (1944) 68 C.L.R. 455.

(2) (1944) 68 C.L.R. 571, at p. 584.

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whom the appellant was one, to comply with the order, but the appellant was not named as a party to the proceedings before the Arbitration Court nor was he served with any notice thereof, though the organization of which he was a member was both a party to and appeared in the proceedings. And the *Arbitration Act*, s. 31, enacts that no award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question or be subject to prohibition mandamus or injunction, in any other court on any account whatever other than in the High Court, but that exception of the High Court cannot, as already stated, be applied in these proceedings to an order which has not been appealed and is a subsisting order. Again, the Act provides for organizations of employers and employees for the purposes thereof and the registration of such organizations: See *Arbitration Act*, ss. 55-72A. The organizations represent their members in arbitral proceedings and their members are bound by the awards of the Court (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1); Act, s. 29). And the Court may order compliance with any terms of an order and enjoin any organization or person from committing any contravention of the Act (See s. 38 (*da*) and (*e*)), waive any error, defect or irregularity whether in substance or in form (s. 38 (*q*)). And the Court is authorized to enforce its awards and orders (Act, ss. 44-50B).

The scheme of the Act, as it appears to me, is that organizations represent their members not only in arbitral but also in judicial proceedings. But it would, I should think, be quite wrong to enforce any penalty upon a member of any organization or any injunction against him unless he was served with or had due notice of the award or order sought to be enforced.

The order nisi should be discharged.

DIXON J. In my opinion the appellant cannot, upon this appeal, attack the order of which he desires to complain. It is an order made by the Commonwealth Court of Conciliation and Arbitration as under s. 38 of the *Commonwealth Conciliation and Arbitration Act*. The appellant was defendant to an information laid, as I understand it, under s. 44 of the Act. The charge was that, being a boilermaker employed by Broken Hill Pty. Co. Ltd. at its steel works at Newcastle, and being a member of the Boilermakers' Society of Australia, an organization registered under the Act, and bound by the order in question, he was given a direction by the company to make a template and did refuse to comply with the direction contrary to the Act and the order. Upon this information he was convicted by

(1) (1925) 35 C.L.R. 528.

a Court of Petty Sessions exercising Federal jurisdiction. He appeals from this conviction.

The appeal turns upon the efficacy of the order. For, if it is valid and effective according to its terms and binds the appellant, it is undeniable that the conviction must stand. Accordingly the appellant attacks the order of the Court of Conciliation and Arbitration as bad in law. In the Court of Petty Sessions he could not do this; for s. 31 of the Act says that, except as in the Act provided, no order of the Court of Conciliation and Arbitration shall, amongst other things, be challenged or called in question in any other court other than the High Court on any account whatever. But the appellant says that, by virtue of the exception expressed in the words "other than the High Court," he is entitled to attack the order once he gets into this Court and by whatever form of proceedings he gets here. Accordingly he says that he may attack it upon this appeal from the Court of Petty Sessions, notwithstanding that in the Court below he could not do so. No doubt the exception upon which he relies would allow him to attack the order of the Court of Conciliation and Arbitration if he had taken the appropriate proceedings for the purpose. It has recently been held that, apart from orders of the Court of Conciliation and Arbitration made in the exercise of the judicial power, as distinguished from the exercise of that Court's authority as an industrial arbitrator, an appeal does lie to this Court (*Jacka* v. *Lewis* (1)).

Some parts of the order under consideration appear to be judicial and, if it had been appealed against, its correctness might have been examined. Moreover, if there is any legal ground for attacking the order collaterally, it might have been done by summons under s. 21AA, or perhaps on a prerogative writ of prohibition. But no such proceedings were taken.

The exception in favour of the High Court cannot, in my opinion, operate to enable the appellant to support an appeal from a conviction for default in compliance with the order on the ground that the order is bad in law. It cannot do so because it is a ground which the Court appealed from could not entertain and in hearing and determining an appeal our duty is to consider the correctness of the decision below and to do whatever we think the Court appealed from ought to have done. In *Davies and Cody* v. *The King* (2) *Latham* C.J. stated the result of the cases thus :—" The only power of the court as a court of appeal is to consider and determine whether the judgment of the court appealed from was right upon the materials

(1) (1944) 68 C.L.R. 455.

(2) (1937) 57 C.L.R. 170, at p. 172.

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Dixon J.

before that court. This court, in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) laid down and explained the principles to which I have referred."

An appeal from a Court of Petty Sessions exercising Federal jurisdiction to this Court does not differ from other appeals under the Constitution, except that for convenience a form of proceedings under State law is employed: See *Wishart* v. *Fraser* (2), where in a passage which I shall not repeat I discussed the matter and collected the cases dealing with it.

On the simple ground that we cannot say that the Court below was wrong in giving effect to s. 31 just because s. 31 does not apply to this Court, I think that we cannot entertain on this proceeding any challenge of the order of the Court of Conciliation and Arbitration.

It occurred to me that perhaps it might be possible for the defendant-appellant, without in any way impugning the validity or efficacy of the order, to contend that he was not a person bound by it. But a closer examination of the order has satisfied me that it is not a course open to him. For, in terms, the order says that any boilermaker employed by the company who refuses, neglects, or fails to comply with a direction to make templates, shall be guilty of a breach of the order and liable to a penalty which it proceeds to fix.

The defendant-appellant was such a boilermaker, and to contend that he is not bound by that part of the order is inconsistent with its terms. To do so is, therefore, to challenge it, or call it in question.

For these reasons I think that we ought not to consider the correctness or validity of the order, or the question whether, having regard to the terms of s. 29, it can lawfully bind the defendant-appellant.

In my opinion the appeal should be dismissed and the order nisi discharged.

Appeal dismissed with costs. Order nisi discharged with costs.

Solicitor for the applicant, *J. B. Sweeney.*

Solicitor for the respondent Goodland, *Dawson, Waldron, Edwards and Nicholls.*

J. B.

(1) (1931) 46 C.L.R. 73, by *Rich* J. at p. 87, by *Dixon* J. at p. 108, and by *Evatt* J. at pp. 112, 113.

(2) (1941) 64 C.L.R. 470, at p. 480.