

[HIGH COURT OF AUSTRALIA.]

COMMONWEALTH STEAMSHIP OWNERS' }  
 ASSOCIATION . . . . . } APPLICANT ;

AND

WATERSIDE WORKERS' FEDERATION OF }  
 AUSTRALIA . . . . . } RESPONDENT.

H. C. OF A. *Industrial Arbitration—Award of Commonwealth Court of Conciliation and Arbitration*  
 1946. —*Application to Court for variation—Jurisdiction—National security—Regula-*  
 { —*tions—Stevedoring Industry Commission empowered to determine conditions of*  
 MELBOURNE, *employment of workers affected by the award—Commonwealth Conciliation and*  
*Oct. 2. Arbitration Act 1904-1946 (No. 13 of 1904—No. 30 of 1946), s. 38 (o)—National*  
*Security (Shipping Co-ordination) Regulations (S.R. 1944 No. 86—1945 No. 204),*  
 Latham C.J., *reg. 63.\**  
 Starke, Dixon,  
 McTiernan and  
 Williams JJ.

*Held*, that reg. 63 of the *National Security (Shipping Co-ordination) Regulations* did not deprive the Commonwealth Court of Conciliation and Arbitration of its power under s. 38 (o) of the *Commonwealth Conciliation and Arbitration Act 1904-1946* to vary an award of the court determining the terms and conditions of employment for waterside work and in stevedoring operations ; the effect of the regulation was that the court could not make an effective variation which was inconsistent with an order made by the Stevedoring Industry Commission under the regulation, but otherwise its power under s. 38 (o) was unimpaired.

CASE STATED under the *Commonwealth Conciliation and Arbitration Act*.

The Commonwealth Steamship Owners' Association applied to the Commonwealth Court of Conciliation and Arbitration for a variation

\* This regulation provided :—“(1) Notwithstanding anything contained in any other law but subject to the next succeeding sub-regulation, the terms and conditions of employment for waterside work and in stevedoring operations shall be such as the ” Stevedoring Industry “ Commission, by order determines. (2) Except in so far as the

terms and conditions of employment for waterside work and in stevedoring operations are determined by the Commission under the last preceding sub-regulation, those terms and conditions shall not be affected by ” Part V. of the Regulations (which was the part containing reg. 63).



of clause 12 (i) of an award of the court which determined the terms and conditions of employment for waterside workers and in stevedoring operations. The respondent Federation, relying on reg. 63 of the *National Security (Shipping Co-ordination) Regulations*, objected that the court had no jurisdiction to entertain the application and, alternatively, could not grant the relief claimed. A case stated by Judge *Foster*, who constituted the court, for the opinion of the High Court stated the foregoing facts and also that the Stevedoring Industry Commission had not at any time made any order relating either directly or indirectly to the subject matter of clause 12 (i) of the award.

The following questions of law were stated by his Honour for the opinion of the High Court :—

- (1) Have I jurisdiction under the *Commonwealth Conciliation and Arbitration Act* 1904-1946, notwithstanding the provisions of the *National Security (Shipping Co-ordination) Regulations*, to entertain the aforesaid application for a variation of the said award ?
- (2) If I have such jurisdiction, am I precluded by the provisions of the said regulations from granting the relief sought by the applicants ?

*Reynolds* K.C. (with him *D. I. Menzies*), for the applicant. Question (1) should be answered in the affirmative and question (2) in the negative. Assuming reg. 63 to have been within the defence power while hostilities continued, that power does not support it now that hostilities have come to an end. It no longer has any force, and the jurisdiction of the court to vary the award depends entirely on s. 38 (o) of the Act. [He referred to *Andrews v. Howell* (1) ; *Australian Woollen Mills Ltd. v. The Commonwealth* (2) ; *Australian Textiles Pty. Ltd. v. The Commonwealth* (3).] Even if reg. 63 is in force, it does not affect the present case. It empowers the Stevedoring Industry Commission to make an order which would have the effect of varying the terms of the award and would put it beyond the power of the court to make any effective variation which was inconsistent with the order ; but the clear intent of the regulation is to preserve the existing state of affairs except to the extent to which it is altered by the Commission. The existing state of affairs means, for the purposes of the present case, the award plus the power of the court to vary it.

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(1) (1941) 65 C.L.R. 255, at p. 278.

(3) (1945) 71 C.L.R. 161.

(2) (1944) 69 C.L.R. 476.



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*Simon Isaacs*, for the respondent. Regulation 63 (1) limits the powers of the court by giving power to the commission. Regulation 63 (2) merely gives the commission a starting-off point; it preserves the existing terms and conditions of employment until the commission otherwise orders. It is to be noticed that it deals with "terms and conditions of employment," not with the powers of the court. It does not purport to preserve any powers of the court. It did not need to do so if, as is submitted, that matter was already disposed of by sub-reg. (1). The reasonable construction of sub-reg. (1) is that the powers of the court are superseded while the regulation remains in force. If not, it is curious that the regulation makes no specific provision with reference to those powers. The result is so unpractical that the court should not ascribe to the regulation an intention to produce that result unless it is clear that no other construction is reasonably open. It cannot be said at this stage that the regulation has ceased to have the support of the defence power. [He referred to *R. v. Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (1).]

*Reynolds* K.C., in reply.

The following judgments were delivered:—

LATHAM C.J. This is a case stated under s. 31 (2) of the *Commonwealth Conciliation and Arbitration Act*. An application has been made for the variation of a term in an award applying to the stevedoring industry. An award affecting that industry was made in 1936, and the Commonwealth Steamship Owners' Association has applied for a variation of clause 12 (i), relating to holidays. The point is taken by the Waterside Workers' Federation of Australia that the *National Security (Shipping Co-ordination) Regulations*, reg. 63, exclude the jurisdiction of the Arbitration Court to vary its award. The contention is that the effect of reg. 63 is, first, to preserve in operation the terms and conditions of the award except so far as varied under the power conferred by reg. 63 (1) on the Stevedoring Commission, and secondly, to exclude any action by the Court of Arbitration by varying the terms and conditions of that award.

In my opinion, the Regulations do not with sufficient clearness produce the second effect for which the respondent contends. It appears to me that the position is this. The application is made under s. 38 (o) of the *Arbitration Act* for a variation. If the application succeeds, a variation is made. If a variation is inconsistent with an order made by the Commission, it is ineffective. But, except in



so far as an order inconsistent with the award is made by the Commission, the award continues in operation and effect. In this way full effect can be given to both reg. 63 (1) and (2) and s. 38 (o) of the *Arbitration Act*. There is no clear exclusion of the jurisdiction of the court and, in my opinion, the full operation of the Act can stand together with the Regulations. Accordingly, in my opinion, the questions asked in the case should be answered :—(1) Yes. (2) No.

STARKE J. I agree.

DIXON J. I am not prepared to disagree.

McTIERNAN J. I agree.

WILLIAMS J. I agree.

*Questions answered :—(1) Yes. (2) No. Case remitted to his Honour Judge Foster. No order as to costs.*

Solicitors for the applicant, *Malleson, Stewart & Co.*  
Solicitor for the respondent, *J. Lazarus.*

E. F. H.

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