Appl Herald-Sun TV Pty Ltd v ABT (1984) 57 ALR 309
Disod Saatchi & Saatchi Compton (Vic) Pty Ltd v ABT (1984) 56 ALR 640
Appl Lawrence, Re; Ex parte Goldbar Holdings (1993) 11 WAR 549

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

GALVIN AND ANOTHER;

Ex parte METAL TRADES EMPLOYERS' ASSOCIATION AND OTHERS.

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SYDNEY, *Mar.* 30, 31; *April* 1, 27.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Industrial Law (Cth.)—Standard hours of work—Alteration—Statutory power denied to conciliation commissioners—Award—Variation—Application to include daily tea-break — Jurisdiction of conciliation commissioner — "Industry" — "Standard"—Commonwealth Conciliation and Arbitration Act 1904-1947 (*No.* 13 *of* 1904—*No.* 10 *of* 1947), *ss.* 4, 13, 16, 25.

Section 13 of the *Commonwealth Conciliation and Arbitration Act* 1904-1947 provides: "A conciliation commissioner shall not be empowered to make an order or award altering:—(*a*) the standard hours of work in an industry, . . ."

Held that in the case of an award that prescribes a general rule as to hours of work in each day, the insertion of a new provision allowing a tea-break of fifteen minutes two hours after the usual starting time is an alteration of standard hours.

ORDER NISI FOR PROHIBITION.

On 21st March 1940 an award binding upon the Federated Ship Painters' and Dockers' Union, The Metal Trades Employers' Association, the Commonwealth Steamship Owners' Association, Burns, Philp & Co. Ltd. and others, was made by Judge *Beeby*, Chief Judge of the Commonwealth Court of Conciliation and Arbitration. The award, so far as material to this report, provided by clause 4 that the ordinary weekly working hours should be forty-four, to be worked in a five or five and one-half day week to suit the convenience of the employer, and "daily working hours" were prescribed in respect of New South Wales, Victoria, South Australia

and Queensland. Clause 5 related to meal hours and provided that in all ports the time for breakfast should be the hour preceding the usual starting time, and that the breakfast-break should not be taken "when men were required to commence work at 7 a.m. or after, and preceding the usual starting time". Dinner-time in New South Wales, Victoria and Queensland commenced at twelve noon, and in South Australia at 12.5 p.m., and lasted for an hour, fifty-five minutes and forty-five minutes in different places. In all ports an hour was allowed for tea commencing at 5 p.m. or 5.15 p.m., and also for supper between 11 p.m. and 1 a.m. Double pay was required to be paid for work during meal hours. Clause 6 provided (*a*) that when practicable accommodation should be provided for men to change their clothing, five minutes should be allowed for men to clean their hands at each break, and suitable material provided for the purpose; and (*b*) that men engaged in cleaning out oil tanks or bilges, when the work was of an exceptionally dirty nature, should be allowed a reasonable time to cleanse themselves and should be provided with hot water for that purpose. Clause 13 provided, *inter alia*, that men should present themselves for engagement at least ten minutes before the usual starting time, and, by clause 14, it was provided that employees should not be entitled to travelling time from the place of engagement to the usual place of work, but where men were required by the employer to travel they should be paid for actual travelling time at the rate fixed for the class of work at which they were engaged. All fares incurred were to be paid by the employer; and (*c*) inside a specified area at Melbourne, travelling time should be allowed and fares were payable by the employees, but outside that area travelling time of specified duration should be allowed to specified places and fares were payable by the employer.

In May 1946, the union issued a summons for an order varying the above-mentioned award in so far as it concerned standard hours of work. The application by the union was one of several applications made by various unions "for a reduction of the standard hours prescribed by awards from forty-four to forty per week." On 8th September 1947, the Full Court of the Commonwealth Court of Conciliation and Arbitration, by an order made as a result of what was described by the court as the *Standard Hours Inquiry* (Print No. 7703), varied the award by deleting clause 4 and inserting in lieu thereof the following:—"Working hours.—4. The ordinary weekly working hours shall be 40, to be worked in a five or a five and one-half day week to suit the convenience of the employer."

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A summons was issued by the union on 30th November 1948, requiring the respondents to the award to appear before the Commonwealth Court of Conciliation and Arbitration on 8th December 1948, to show cause why the award should not be varied by the insertion of a new provision that a break for fifteen minutes be allowed for a rest period for tea, such break to be allowed two hours after the usual starting time.

Upon being informed that the union's application was listed for hearing before John Michael Galvin, a conciliation commissioner appointed under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1947, the Metal Trades Employers' Association, the Commonwealth Steamship Owners' Association and Burns, Philp & Co. Ltd., on 6th December 1948, applied to *Williams* J. for, and were granted, an order directed to Galvin and the union to show cause why a writ of prohibition should not issue restraining them and each of them from proceeding further as against the prosecutors and/or any member of the Metal Trades Employers' Association with the hearing of the union's application, on the grounds :—(i) that the application if granted would alter the standard hours of work in the industry concerned ; (ii) that by s. 13 of the Act a conciliation commissioner was denied the power of altering the standard hours of work in an industry ; and (iii) that a conciliation commissioner had no jurisdiction to hear or deal with a claim which involved an alteration of the standard hours of work in an industry.

In an affidavit filed in support of the application for a writ of prohibition, the secretary of the Metal Trades Employers' Association stated that, having heard argument upon points of law arising under a claim by the union which was in substance the same as its present claim, the Commonwealth Court of Conciliation and Arbitration, constituted by three judges, on 24th March 1948, delivered judgment the substance of which was that the claim of the union did not involve an alteration of the standard hours of work in the industry, within the meaning of ss. 13 (*a*) and 25 (*a*) of the Act, and that it was apprehended that unless Galvin were prohibited from hearing the union's application he might make an order binding upon the Association and/or its members against which an appeal was not permissible.

The relevant provisions of the Act are sufficiently set forth in the judgment hereunder.

Upon the return of the order nisi leave was given to the Commonwealth to intervene.

There was no appearance by or on behalf of the respondent Galvin.

S. C. G. Wright (with him *Aird*), for the prosecutors. Upon the state of the award, the standard hours of work referred to in ss. 13 and 25 of the *Commonwealth Conciliation and Arbitration Act* 1904-1947 are those prescribed by clause 4 subject to any remissions allowed generally under the award. That is to say, they are the net number of working hours during which employees are liable to perform their work upon the lawful commands of their employer, and any remission which relieves the general body of employees from the obligation to carry out their work for any portion of the time laid down by the award as their normal working week is an alteration of the standard hours of work. Emphasis is laid on the words " standard " and " of work," more particularly the latter because this application is for a remission of work for a rest period. That that is an impingement on the standard lies in the fact that it is claimed for every employee covered by the award and not merely for the exceptional employee who, say for medicinal reasons, might have to drink tea. A specific provision which is universal in its incidence and regular is properly described as " standard " because it has that universal application, e.g. clause 6 (*a*) of the award is " standard " and clause 6 (*b*) is not " standard." The proper meaning of the word " standard " in this connection appertains to the average employee who is subject to the provision. Exceptional cases are dependent on particular circumstances; they are not universal to the general body of employees and they are not an impingement upon the standard hours of work. If, however, a provision as to breaks is specific as to time, regular and universal, then it is properly termed a standard and is an impingement upon the hours of work, and, involving as it does a question of standard hours, is within the exclusive jurisdiction of the court. The expression " hours of work " is not intended to denote the time during which a contract of employment subsists. The answer to any such suggestion is that such a contract of employment subsists over a public holiday or during annual leave. The " standard hours of work " means the time during which an employee is liable to devote himself to his duties on the lawful orders of his employer. The prototype of the present provision was inserted in the *Commonwealth Conciliation and Arbitration Act* in 1920, and par. 6 in the judgment of *Powers* J. in the *Standard Hours Case* (1), in which it was alluded to specifically,

(1) (1921) 15 C.A.R. 1044, at p. 1046.

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strongly supports the submissions now put to the Court. The expression "standard hours of work" does not refer only to the actual time worked on any day, but it means the hours generally recognized including in such hours "breaks" such as are there referred to. Unless there were standard tea-breaks before the Arbitration Court decided in 1947 that standard hours of work should be forty per week, tea-breaks cannot be made standard unless the Arbitration Court makes them part of the standard hours of work. A new feature or provision cannot be introduced if it diminishes the working hours of the work to be done. The words "working hours" mean some standard of hours during which an employee is employed in respect of which he is paid for what he has done. "Standard hours" may be described as "that number of hours ordinarily worked" and are "the generally accepted standard of working time" (*Printing Industry Employees Union of Australia* v. *Arbuckle, Waddell Pty. Ltd.* (1); *Australian Builders' Labourers' Federation* v. *Archer* (2); *Federated Storemen and Packers Union of Australia* v. *Australian Mercantile Land and Finance Co. Ltd.* (3)). *Re Federated Ship Painters' and Dockers' Union of Australia and Peters Slip, Brisbane* (4) was wrongly decided. That decision was based on wrong premises. Previous awards and orders of the Arbitration Court as to tea and other breaks were by consent and did not involve an alteration of standard hours. The decision of the Arbitration Court in the *Standard Hours Inquiry* (Print No. 7703 (1947)), in which the "standard hours of work" were reduced from forty-four to forty per week, recognized and perpetuated in the case under discussion such remissions as did exist in the award, and having made its decision against that background, it made an alteration which simply brought the net working time to which the employees were liable down by four hours. That decision was really a decision that this award and other awards should be varied in a particular manner. There was not a declaration as a general law on forty hours, but specific variations were made in specific awards. In form and substance it was the concurrent hearing and settlement of a number of disputes. The annals of the Arbitration Court do not establish a practice by that court as to tea-breaks based upon the view that it has never regarded such breaks as affecting standard hours. The whole of the judgment of *Kelly* J. in *Re Federated Ship Painters' and Dockers' Union of Australia and Peters Slip, Brisbane* (4)

(1) (1927) 25 C.A.R. 1264, at pp. 1276-1278.
(2) (1913) 7 C.A.R. 210, at p. 228.
(3) (1942) 48 C.A.R. 569, at p. 575.
(4) (1948) Not yet reported.

is respectfully adopted as part of this argument. Hours of work mean hours which are spent in work. The time involved in a tea-break would not be time spent in work and, therefore, would constitute an alteration of the standard hours of work.

A. R. Taylor K.C. (with him *Prior*), for the respondent union. This is not a case where the prosecutors seek to prohibit the enforcement of an order or a penalty but they ask that the further hearing upon the summons be prohibited. Before a writ of prohibition will be sent out of this Court it must clearly appear that there is a want of jurisdiction in the tribunal to which it is addressed (*R.* v. *President of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Agricultural Co. Ltd.* (1). The terms of the Act, particularly ss. 14, 16, 25, 34, 39 and 40, show that a case has not been made out that the conciliation commissioner is about to, or is even likely to exceed, his jurisdiction. It is not conceded that s. 13 is an absolute qualification of the powers of conciliation commissioners under the Act. Section 34 is an important section in practice in the Arbitration Court, because it by no means follows that an application made to that Court is granted in the terms in which it is sought. Under s. 39 a commissioner is not bound to act in a formal manner, he is required to act according to equity and good conscience and the substantial merits of the case without regard to legal forms. Section 40 confers upon a commissioner general powers with regard to disputes occurring within his jurisdiction. The court's jurisdiction is marked out by s. 25. In the main the jurisdiction is defined. The matters enumerated in that section are identical with those which are specified in s. 13. Generally, the jurisdiction of the Arbitration Court and the jurisdiction of the commissioners are mutually exclusive. The Act itself, by s. 16, provides its own means for determining the boundary line between the jurisdiction of the court and the jurisdiction of the commissioners. Section 13 read with s. 16, means that a commissioner "shall not be empowered to make an order or award which in the opinion of the Full Court operates to alter the standard hours of work in an industry." Although a question as to his jurisdiction has been raised, before it is determined he is permitted to make a tentative award if he so desires. Not only is he dealing with collateral questions of law, but questions which go to the jurisdiction, and in that very matter in which a question of jurisdiction has arisen he is given power, under s. 16 (4), to make an order even though he has otherwise no jurisdiction. It is

(1) (1916) 22 C.L.R. 261, at p. 266.

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clearly obvious that that is the intention of the section, because it deals with a matter in which a question has arisen. The words "in the opinion of the court" should be read into s. 13. There cannot be want of jurisdiction if in effect the jurisdiction given to the commissioners is jurisdiction to deal with matters which in the opinion of the Full Court of the Arbitration Court falls within their capacity. Leaving out questions of constitutional powers and considering only the construction of the Act, the powers, jurisdictions and functions of the commissioners are prescribed, and therefore limited, in various sections of the Act; but s. 16 recognizes that questions may arise as to the extent of the limits of those powers and provides that, in so far as there is a separation of powers under the Act or a limitation of the powers of the commissioners under the Act, the commissioners may nevertheless make an award *pro tem*, subject to a reference to the Arbitration Court, in relation to matters which, so far as the terms of the Act are concerned, may be beyond their jurisdiction. It is not unreasonable to suggest that the legislature meant that the matter of determining the boundary line was a matter which ought to be left to the discretion of the Arbitration Court. There is no power to make an award under s. 16 (4) unless the question has been stated for the opinion of the court. If the Full Court determines that the question so stated does not involve an alteration of standard hours, then the commissioner has jurisdiction. Under s. 16 (5) (*a*) if the commissioner has not made an order or award in the matter in which the question arose, he may make an order or award not inconsistent with the opinion of the court. There is not, therefore, any reason to assume that the commissioner in this case will not send the matter on to the court.

This application is premature. The parties should be allowed to pursue the remedy in the Arbitration Court. The meaning of reason No. 6 in the *Standard Hours Case* (1) is clear and indicates that at that time there was a general understanding that standard hours of work included the breaks there referred to. It was an interpretation by the judge of the words of the Act. Judgments in *Re Federated Ship Painters' and Dockers' Union of Australia and Peters Slip, Brisbane* (2) show that there has been a history, apparently, in the view of the judges that variations of awards such as that sought in this case have never been regarded as applications which, if granted, would alter the standard hours of work: see also *In re Laundry Employees (State) Award* (3). The expression "standard hours of work in an

(1) (1921) 15 C.A.R., at p. 1046.
(2) (1948) Not yet reported.
(3) (1944) 43 A.R. (N.S.W.) 263, at pp. 269, 279.

industry " cannot in this case be confined to the ship-painting and docking industry, but is applicable also to the employer's industry as a whole, the industry in which his competitors are associated. The employees are not only employed as, for example, painters, but they are also engaged in the industry of their employer. In the ordinary sense there is no ship-painting and docking industry, it is part of a general industry. The award does not itself fix standard hours; it fixes ordinary hours. The standard hours of an industry can be determined only after inquiry, not simply by reference to an award. It may be that the bulk of the employees concerned have for many years been getting time off for tea. It does not appear on the face of the application that there will be any want of jurisdiction because standard hours will not be determined until an inquiry be held. The onus is upon the prosecutors to show what are the standard hours, it is not incumbent upon the respondent union to furnish evidence to satisfy the Court to the contrary. " Breaks " of the description now under consideration do not constitute any alteration of standard hours. Provisions dealing with " breaks " of this kind are normal provisions as to conditions of employment. It is conceded that some remission of working time under the guise of regulation and conditions of employment would constitute in reality an alteration of standard hours. It cannot be said in advance of every remission of labour that an alteration of standard hours is involved.

Holmes K.C. (with him *Brennan*), for the Commonwealth, intervening. The intervener adopts the argument submitted to the Court on behalf of the respondent union as to the construction of s. 16 of the Act as amended in 1947. The provisions of sub-s. (5) of that section only come into operation when a particular matter has been referred by the commissioner to the Arbitration Court. Where there is no such reference and the commissioner merely makes an award altering standard hours, prohibition goes. Section 16 adds to the jurisdiction which the commissioner otherwise would have. Under sub-s. (4) the commissioner may make an order in the award or matter in which the question arose but it is subject to be set aside if there is a reference. The scheme of s. 16 is in the first place to leave it to the commissioner to determine whether or not he will refer the matter to the Arbitration Court. If he makes an order outside his jurisdiction and does not so refer the matter this Court intervenes. If he makes an order, or if he refers the matter concerning jurisdiction or some other matter, he can make an order, but in that case only. The Court is entitled to have regard to the

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history in the Arbitration Court of this matter (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (1)). The expression "standard hours of work in an industry" had a history in the Act before s. 18A was introduced into the Act in 1920. That section does not refer to matters whether in the nature of short rest periods or "smoke-ohs" or the like, for the reason that those are not matters which were ever part of the determination of the standard hours, they were included within it. It cannot be said in advance that a break in the continuity of work would be a variation of standard hours, or that it would be an amenity. Provisions to meet conditions identifiable with the circumstances of an industry and the persons concerned therein, are amenities and nothing more than amenities. The tea-break period is an absence from working not from work, that is it is part of the hours of work but not part of the hours of working. It is part of the time during which the employee is required to be at his place of work. In *Australian Federated Union of Locomotive Enginemen* v. *Victorian Railways Commissioners* (2) the Arbitration Court did regard the granting of a meal-break as not being a variation of standard hours. The principle sought in this case is a matter of the same character.

Wright, in reply. The decision of the Industrial Commission of New South Wales in *In re Laundry Employees (State) Award* (3) is not relevant to the question before the Court. Until that Commission has, under s. 64 of the *Industrial Arbitration Act* 1940-1947 (N.S.W.), instituted an amenities inquiry on the subject of standard hours there is no fetter on the powers of that Commission in the State of New South Wales to do what it pleases on the subject of working hours, and it is obvious that it was on that basis that it was ruled that the matter then before the Commission was not a matter concerning standard hours. The rest period there granted was confined to females in the industry and at worst could only amount to an exception upon specific grounds from the general standard working hours. There is no ground for the contention that this application for a writ of prohibition is in any way premature. In view of the comity which must exist between conciliation commissioners and the Arbitration Court this Court will assume that having regard to the decision of the Arbitration Court in *Re Federated Ship Painters' and Dockers' Union of Australia and Peters Slip, Brisbane* (4) the commissioner would not have any intention of referring the question to that Court,

(1) (1933) 49 C.L.R. 589, at p. 597.
(2) (1935) 34 C.A.R. 285.
(3) (1944) 43 A.R. (N.S.W.) 263.
(4) (1948) Not yet reported.

and would not decline jurisdiction. As the application by the respondent union involves an alteration of standard hours of work the commissioner has no right even to hear it if it can be held that he cannot grant it. The standing over of that application by the commissioner was an exercise of jurisdiction. There is no power to make an order in pursuance of the summons, and the fact that the commissioner may dismiss the application does not affect the fact that he is asked, and asked only, to exercise a jurisdiction which he does not possess. If time of application were considered important it would be a fair conclusion that it could be mischievous to allow it to proceed to decision. Section 16 is quite compatible with s. 13 and other sections of the *Commonwealth Conciliation and Arbitration Act* 1904-1947, which vest jurisdiction in the commissioners. It is clearly a convenient code of procedure to afford commissioners legal assistance from a judicial tribunal but must not be read in any sense as an enlargement of jurisdiction. It is simply pertaining to whatever jurisdiction the commissioners have under the Act. This Court will strain against any construction of s. 16 which would involve transcending the constitutional aspect of the matter, and maybe, the ambit of the Act. It is to be noted that the Act does not purport to give any power whatever in the nature of prohibition or mandamus or injunction against the commissioners. The Arbitration Court has no power of disciplining a commissioner or of correcting a commissioner who determines contrary to its decisions. Such a power must repose in this Court under s. 75 (v.) of the Constitution. The right of appeal to the Arbitration Court under s. 16 (1) was abolished by the 1947 amending Act. The industry concerned is ascertained by reference to the award (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (1)). In *Australian Federated Union of Locomotive Enginemen* v. *Victorian Railways Commissioners* (2) the Court was not concerned with the altering of hours of duty or hours of work; there was no question of an alteration of standard hours of work involved.

Cur. adv. vult.

April 27.

The following written judgment was delivered by :—

LATHAM C.J., DIXON, MCTIERNAN, WILLIAMS and WEBB JJ. This is the return of an order nisi for prohibition directed to John Michael Galvin, a conciliation commissioner appointed under the *Commonwealth Conciliation and Arbitration Act* 1904-1947, and the

(1) (1933) 49 C.L.R., at pp. 597, 602, 607.

(2) (1935) 34 C.A.R. 285.

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Federated Ship Painters' and Dockers' Union of Australia. The respondent union has made an application by summons to the respondent conciliation commissioner for a variation of an existing award binding the union by adding to it a provision that a break for fifteen minutes be allowed employees for a rest period for tea, such break to be allowed two hours after the usual starting time. The *Commonwealth Conciliation and Arbitration Act* 1904-1947 contains the following provisions :—" 13. A Conciliation Commissioner shall not be empowered to make an order or award altering :—(*a*) the standard hours of work in an industry ; . . . " " 25. The Court may, for the purpose of preventing or settling an industrial dispute, make an order or award altering :—(*a*) the standard hours of work in an industry ; . . . " Thus Parliament has very clearly expressed its intention that any alteration of standard hours should be made, if at all, by the court (consisting of not less than three judges—s. 24) and not by a conciliation commissioner.

The prosecutor contends that the order sought by the summons issued on behalf of the union would alter the standard hours of work in the industry to which the members of the respondent union belong and that therefore the conciliation commissioner has no jurisdiction to make such an order upon the summons.

If the conciliation commissioner has no jurisdiction to make such an order, then this Court has jurisdiction, by virtue of s. 75 (v.) of the Constitution, to prohibit further proceedings upon the summons. A conciliation commissioner is an officer of the Commonwealth within the meaning of that provision.

The relevant award was made by his Honour Judge *Beeby* on 21st March 1940. It provided in clause 4 as follows :—" The ordinary weekly working hours shall be 44, to be worked in a five or five and one-half day week to suit the convenience of the employer. The daily working hours shall be :—*New South Wales and Victoria* (excepting that in Sydney the present method of working the 44 hours at Morts Dock shall continue)—For a five day week, from 7.30 a.m. to 5 p.m. For a five and a half day week, Monday to Friday inclusive 8 a.m. to 5 p.m., Saturday 8 a.m. to noon, or in accordance with the usual custom of the establishment at which the men are employed." Provisions for other starting and finishing times were made in respect of South Australia and Queensland. Clause 5 related to meal hours and provided that in all ports the time for breakfast should be the hour preceding the usual starting time, and that the breakfast-break should not be taken when men were required to commence work at 7 a.m. or

after, and preceding the usual starting time. Provision was also made for an interval of time for dinner, an hour, fifty-five minutes and forty-five minutes in different places, and another interval of time for supper, an hour. The award provided that for work during meal hours double time should be paid. Clause 6 provided as follows:—"(*a*) When practicable accommodation shall be provided for men to change their clothing, five minutes shall be allowed the men to clean their hands at each break, and suitable material provided for the purpose . . . (*b*) Men engaged in cleaning out oil tanks or bilges, when the work is of an exceptionally dirty nature, shall be allowed a reasonable time to cleanse themselves, and shall be provided with hot water for that purpose."

Clause 14 provided that employees should not be entitled to travelling time from the place of engagement to the usual place of work, but that where men were required by the employer to travel they should be paid for actual travelling time. In Sydney men required to travel between Mort's Dock and Woolwich Dock were allowed a quarter of an hour each way. In Melbourne it was provided that no travelling time should be allowed to men called upon to work on either side of the River Yarra within stated places, but that for all travelling time on the River Yarra outside the area so defined and to certain other places men should be allowed twenty minutes' travelling time each way. Thirty minutes' travelling time was allowed where men worked at Yarraville, Spotswood or Williamstown. This provision for travelling time meant that men would be paid in respect of the period of travelling. It was not suggested that this provision meant that the working hours were to be reduced by the amount of travelling time. Such a provision does not relate to hours of work.

On 8th September 1947 the Full Court of the Commonwealth Court of Conciliation and Arbitration varied clause 4 of the award by an order made as a result of what was described by the court as the *Standard Hours Inquiry*: see Print No. 7703 (1947). The proceedings were entitled "In the matter of applications by organizations of employees for variation of awards and agreements of the court re standard hours." The application was an application "for a reduction of the standard hours prescribed by awards from forty-four to forty per week." The court decided that the standard hours should be reduced and, in the case of the respondent union, made an order that the current award be varied by deleting clause 4 and inserting a new clause. The new clause provided as follows:—"Working Hours. 4. The ordinary

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weekly working hours shall be 40, to be worked in a five or five and one-half day week to suit the convenience of the employer." This clause also contains provisions relating to the daily working hours of the same character as had been included in the original clause 4.

The prosecutors contend that clause 4 determines the standard hours in an industry in which the members of the respondent union are employed, and that any order for a tea-break would be an order altering the standard hours of work in the industry.

It is contended on behalf of the respondent union in the first place that, even if such an order would alter standard hours, a conciliation commissioner may have jurisdiction to make such an order. This argument depends upon s. 16 of the *Commonwealth Conciliation and Arbitration Act* 1904-1947. Section 16 provides :— ". . . (2) A conciliation commissioner may, if he thinks fit, at any stage of a matter before him, and upon such terms as he thinks fit, refer any question of law arising in relation to that matter or any question as to whether he has jurisdiction under this Act in relation to that matter, for the opinion of the court. (3) The court shall hear and determine any question referred to it under this section. (4) Notwithstanding the reference of a question to the court under this section, the commissioner may make an order or award in a matter in which the question arose. (5) Upon the determination by the court of the question referred to it under this section :—(*a*) if the commissioner has not made an order or award in the matter in which the question arose, the commissioner may make an order or award not inconsistent with the opinion of the court ; or (*b*) if the commissioner has made an order or award in the matter in which the question arose, the commissioner shall vary that order or award in such a way as will make it consistent with the opinion of the court."

It is argued that these provisions enable a conciliation commissioner to proceed, where his jurisdiction is challenged, subject to a reference to the Arbitration Court of the question whether he has jurisdiction or not. That court will then make a binding determination of the question and upon this his jurisdiction will depend. If the decision is that he has no jurisdiction his provisional award must be altered by him to accord with the decision. If the decision is that he has jurisdiction, then under sub-s. (5) (*a*) he obtains jurisdiction by virtue of the decision. What ground, it was asked, is there for supposing that the conciliation commissioner will exercise the power the summons seeks to invoke without first proceeding to obtain the decision of the Arbitration Court upon the

question whether he possesses jurisdiction? If he does refer the question to the Arbitration Court then his jurisdiction will depend on the decision of that court. The answer to this argument is to be found in a number of considerations. The commissioner is not bound to refer the question to the Arbitration Court. There already exists a pronouncement of that court in favour of his jurisdiction upon which he might well be expected to act without making a reference. What the summons asks him to do is to make an order which the prosecutors allege is outside his power. A person against whom a non-existent jurisdiction is invoked is not bound to wait until the tribunal decides for itself whether it has jurisdiction or obtains a decision of the question by a reference or case stated or the like. He may move at once for a prohibition. Section 13 imposes an absolute prohibition on the jurisdiction of the conciliation commissioner. Section 16 is not a grant of jurisdiction. It is merely a *non obstante* provision. It means only that the reference of a question to the court shall not prevent the commissioner from exercising such powers as are conferred upon him by the Act in relation to the making of an order or award. When a commissioner deals with a dispute there are many matters which may engage his consideration. He may be in doubt as to his jurisdiction to deal with a particular matter or to deal with some matter in a particular way. The object of s. 16 is to enable him to obtain the guidance of the Court of Arbitration upon the matter without impeding his consideration of other matters involved in the dispute which it is his function to prevent or settle. We are therefore not prepared to accept the proposition that s. 16 affords a bar to an application for a writ of prohibition prohibiting a commissioner from making an award upon a matter beyond the jurisdiction conferred upon him by other provisions in the Act.

It is next argued for the respondent union that the occupation of the members of the union is not "an industry," so that even if an order for a tea-break would be an order altering standard hours of work it would not be an order altering standard hours of work "in an industry." The work of the members of the union is described in the award as "work done in connection with the docking, cleaning and painting of ships." It is true that they may be regarded as engaged in the industry of ship building or ship repairing, just as a carpenter who is employed in a boot factory may be regarded as employed in the industry of manufacturing boots. But such a man is none the less also employed in the industry constituted by the carpenter's craft. Similarly, ship

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painters and dockers are employed in an industry determined by the character of their occupation. Section 4 of the Act provides that "industry" includes, *inter alia*, "(*b*) any calling, service, employment, handicraft or industrial occupation or avocation of employees; and (*c*) a branch of an industry." There is nothing in the context or subject matter to displace the application of this definition to ss. 13 and 25. The industrial occupation of ship painters and dockers is therefore an industry under (*b*). Even if those engaged in that occupation are also engaged in the larger industry of ship-building or ship-repairing, the occupation of the members of the union is a "branch of an industry" within the meaning of par. (*c*) and is therefore an industry for the purposes of the Act. Thus there is no foundation for the contention that the award applying to ship painters and dockers is not an award which relates to hours in "an industry."

Hours of work are determined for employers and employees in this industry by the award. It is contended for the respondent that provision for a tea-break relates to "conditions of employment"—to "amenities"—and not to hours of work. It is said that this view represents the uniform practice of the Arbitration Court. The uniform practice of that court could not relieve us of the duty of construing the statute and it could not alter the meaning of the language it employs. But, of course, as evidence of the construction which the Arbitration Court has placed upon the words, it would not be without persuasive force. Reference was made to various awards made by a single judge which provided for such breaks. It was not shown, however, that those awards brought about any alteration in relation to tea-breaks. There was nothing to show that they did not merely reproduce pre-existing standards which may have originally been established by practice or awards. The question, however, did come before the Arbitration Court in March 1948, when the Full Court held by a majority that a claim for a tea-break was not a claim for an alteration of standard hours of work in an industry. The decision was based upon a distinction between hours of work and conditions of work. But the fact that a particular provision may be described as relating to conditions of work does not show that it may not also be a provision which alters the standard hours in an industry. The categories of hours of work and conditions of work are not mutually exclusive. All the provisions relating to the terms upon which persons are employed may be accurately described as conditions of work.

Where hours of work are determined by an award, the award specifies certain hours as working periods as distinct from non-

working periods. During a non-working period, the employees are not subject to the control of the employer in relation to the work for doing which they are employed. An hour during which no work is to be done cannot be called an hour of work. So also a shorter period during which no work is to be done is not part of "hours of work." Thus a luncheon interval is not a period of work. If an award prescribed that working hours should be from 8 a.m. to 5 p.m. with one hour for lunch, there would be eight hours of work. If the award were altered so as to provide that the working hours should be from 8 a.m. to 5 p.m. with seventy-five minutes for lunch or with forty-five minutes only for lunch, the hours of work would be altered. No distinction can be drawn between such a case and the alteration of an award by providing a new tea-break of fifteen minutes or by abolishing an existing tea-break of fifteen minutes. In either case the hours of work would be altered.

The relevant provision relates to "standard" hours of work in an industry.

It was contended for the union that there were no standard hours in the industry because of such provisions as those in clause 6 for time to be allowed for cleaning &c.

The word "standard" is used in several senses. The meaning of the word may vary in accordance with the context in which it is used. The primary idea which the word expresses is that of a measure of quantity or quality fixed or approved by some authority, e.g., standard foot, standard pound, standard of behaviour. In this case the word is applied to working hours in industry. When those hours are fixed by an award reference must be made to the terms of the award for the purpose of identifying the "standard hours." The legislature must be assumed to have been aware of the long-established practice in industrial tribunals of prescribing in awards what were to be the normal working hours in an industry subject to special provisions where such circumstances were deemed to warrant some remission in such working hours. The general provisions for normal hours must be regarded as fixing the standard hours of work.

The question does not arise in this case whether a change of the time of starting or finishing work within the prescribed hours would be an alteration of standard hours.

The provision for a tea-break of fifteen minutes would alter the length of the hours of work in each day prescribed in the award as the general rule for those engaged in the industry. It would therefore be an alteration of the standard hours of work in the industry

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and would be an alteration which a conciliation commissioner is not empowered to make. Accordingly the order nisi should be made absolute. The union's proper course is to make the application for a tea-break to the Court of Conciliation and Arbitration.

Order absolute. Costs of prosecutors to be paid by respondent union.

Solicitors for the prosecutors: *Salwey & Primrose.*

Solicitors for the respondent union: *Arthur Kennedy & Co.*

Solicitor for the Commonwealth: *K. C. Waugh,* Acting Crown Solicitor for the Commonwealth.

J. B.