[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BLAKELEY AND ANOTHER; Ex parte AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES ASSOCIATION.

H. C. of A. 1949.

MELBOURNE, *Oct.* 12, 13; SYDNEY, *Dec.* 6.

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

Industrial Arbitration (Cth.)—Industrial dispute—Ambit of dispute—Award—Variation—Powers of Conciliation Commissioner—Award binding a number of parties—Variation binding a smaller number of parties—Procedure—Writ of prohibition—Commonwealth Conciliation and Arbitration Act 1904-1949 (*No.* 13 *of* 1904—*No.* 28 *of* 1949), *ss.* 14, 16 (1), 38, 48, 49—*Conciliation and Arbitration Regulations* (*S.R.* 1947 *No.* 142), *regs.* 17-19, 25.

An industrial dispute arising out of the rejection by employers and organizations of employers in various States of demands in a log served by a union of employees engaged in connection with theatres and picture shows was settled by an agreement between the parties which was embodied in an award. The log demanded minimum rates of pay which were specified for a large number of classifications of employees. In respect of many classifications a rate of pay was claimed for employees engaged by the week, another for those engaged by the performance and another for those engaged by the hour. As to one classification of employees in picture shows, however, although a rate was claimed in respect of all theatres for such of the employees as were engaged by the week, a rate for those engaged by the hour was claimed only in respect of continuous shows and a rate per performance only in respect of shows that were not continuous. The award followed the scheme of the log as to this classification so that a rate per hour was prescribed for those engaged in continuous shows but none was prescribed for those engaged by the hour in non-continuous shows. For those engaged in continuous shows the log claimed 6s., and the award prescribed 3s. 6d., an hour with a minimum payment as for three hours. One of the respondents to the award, an organization of employers in the picture business, subsequently applied to a conciliation commissioner for a variation of the rate for employees in the particular classification who were engaged by the hour in country theatres in Victoria

and Tasmania, no distinction being made between continuous and non-continuous shows. The order asked for was that a clause relating to such employees be inserted in the award, under the heading of hourly rates, prescribing 1s. 8d. per half-hour with a minimum payment as for two hours. The commissioner granted the application in the terms sought except that he fixed the rate per half-hour at 1s. 9d. The only parties to the proceedings for variation were the applicant and the union of employees which opposed the application. The validity of the commissioner's order was challenged by the union in proceedings in the High Court for a writ of prohibition on the ground that the variation was outside the ambit of the original dispute in that it had the effect of fixing a rate for those engaged by the hour in non-continuous shows whereas no such claim had been made in the log and therefore there had been no dispute as to it. The union also claimed that the order could not be treated as an award settling a new dispute created by the application for variation.

Held, by *Latham* C.J., *McTiernan* and *Webb* JJ. (*Rich* and *Dixon* JJ. dissenting), that a writ should not issue to prohibit further proceedings on the commissioner's order so far as the parties to the proceedings for variation were concerned. So *held*—

By *Latham* C.J., on the ground that—whether or not the variation was within the ambit of the original dispute—when the application for variation was made and was opposed by the union there was before the commissioner a dispute, which he had jurisdiction to settle, with respect to the matters as to which the variation was sought; and, by reason of s. 16 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, prohibition should not issue on the ground merely that the commissioner had followed the wrong procedure in varying the original award instead of making a new award.

By *McTiernan* and *Webb* JJ., on the ground that the variation was within the ambit of the dispute created by the log. The rejection of the log by the employers brought into dispute the entire question of rates of payment and periods for which employees might be engaged. Therefore the commissioner was not limited in making the original award to the rates and periods stipulated in the log; he could have included in the award the provision contained in the variation; accordingly (subject to the question of parties), he had power to insert it by way of variation.

Held, accordingly, that an order nisi for prohibition obtained by the union should be made absolute in respect of respondents to the award other than the applicant organization and members thereof but otherwise should be discharged.

Australian Insurance Staffs' Federation v. *Atlas Assurance Co. Ltd.*, (1931) 45 C.L.R. 409, referred to.

ORDER NISI for prohibition

In October 1947 the Australian Theatrical and Amusement Employees Association (hereinafter called the prosecutor) served

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on a number of employers and organizations of employers, including the Cinematograph Exhibitors Association, a log of demands for minimum rates of payment and conditions of employment "applicable to every person employed in general theatrical work, vaudeville and picture shows, and any other form of entertainment or amusement throughout the Commonwealth of Australia except Queensland." The employees in respect of whom the rates of pay claimed were specified were classified under various headings in the log. Under the heading "Front of House Employees" the first sub-heading was: "Engaged by the Week." Under this sub-heading the following were included, the amount in each instance being the amount claimed per week:—Hostesses or receptionists, £8. Female usherettes (not in continuous picture shows), £7. Female ticket takers (not in continuous picture shows), £7. Female usherettes (in continuous picture shows), £7. Female ticket takers (in continuous picture shows), £7. Male ushers, £7. Male ticket takers, £7. Monitors, £8. Under the sub-heading "Engaged by the Performance—Not in Continuous Picture Shows," £1 per performance was claimed for hostesses and receptionists and 17s. 6d. per performance for ushers, usherettes and ticket takers. Under the sub-heading "Engaged by the Hour" 6s. per hour was claimed for ticket takers and ushers (in continuous picture shows) with a minimum payment as for three hours. The employers did not accede to the demands in the log, but on 17th December 1947 an agreement was reached and was embodied in an award of that day. Clause 1 (H) of the award was headed: "Front of House Staff, &c." Under this heading £4 5s. 9d. per week was awarded to female front-of-house staff, including ushers, ticket takers, receptionists and monitors (not in continuous picture theatres), and £4 0s. 9d. to those engaged in continuous picture theatres. Under the sub-heading "Male front-of-house staff engaged by the week (all theatres)" £6 1s. per week was stipulated for ushers and ticket takers. Under the sub-heading "Engaged by the performance—Not in continuous picture theatres" 10s. 6d. per performance was fixed for male or female ushers, ticket takers, receptionists and monitors; and, under the sub-heading "Engaged by the hour," 3s. 6d. per hour for ticket takers and ushers (continuous picture shows) with a minimum payment as for three hours.

On 10th May 1949 the Cinematograph Exhibitors Association took out a summons for a variation of the award. The summons was headed "In the matter of an application for variation of the award" of 17th December 1947, and it required "the persons and organizations bound by the above-mentioned award . . . to

attend before A. Blakeley, Esq., conciliation commissioner . . . to indicate whether or not you object to an application by the Cinematograph Exhibitors Association for variation of the " award by (so far as is here material) inserting at the end of clause 1 (H) (i.e., under the sub-heading " Engaged by the hour ") the following :—" Male or female ushers, ticket takers, ticket sellers, gallery ushers, cloakroom attendants, stage-doorkeepers, receptionists, monitors, telephonists (in country theatres in Victoria and Tasmania) with a minimum payment as for two hours—1s. 8d. per half-hour or part thereof." The summons was served on the prosecutor, but (so far as appeared from the evidence before the High Court) it was not served on any of the employers bound by the award and none of the employers except the applicant took part in the proceedings on the summons before the conciliation commissioner. The prosecutor opposed the application.

The commissioner made an order that the award be varied by inserting at the end of clause 1 (H) a provision which (subject to an exception, not here material, in respect of specified country towns) was as follows : " Male or female ushers, ticket takers, receptionists, monitors (in country theatres in Victoria and Tasmania) with a minimum payment as for two hours—1s. 9d. per half-hour or part thereof."

The prosecutor obtained from the High Court an order nisi for a writ to prohibit the commissioner and the Cinematograph Exhibitors Association from further proceeding upon the order of variation.

T. W. Smith K.C. (with him *G. Gowans*), for the prosecutor. The variation is invalid because it goes beyond the ambit of the dispute which arose out of the log and was settled by the award of 17th December 1947. In claiming rates of pay for various classifications of employees if employed by the week, by the performance or by the hour the log did no more than claim that, if a person was employed, say, by the week, he should be paid at a certain rate. It made no claim and raised no question as to whether any particular persons *should* be employed by the week, by the performance or by the hour. The scheme of the log is carried into the award, and it is the same scheme as that of the pre-existing awards applying to the industry. The log did not claim, and the award did not fix, rates to be paid to (*a*) monitors or receptionists employed by the hour ; (*b*) ticket takers or ushers employed by the hour who were not in continuous picture shows. That is to say, there was no dispute as to such cases, and the award accordingly imposed no obligation as to them. Neither the log nor the award says that the

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employer must only employ people in classifications for which rates are fixed. On the other hand, the union could properly instruct members not to accept employment except in such classifications; they are under no obligation to accept employment on a basis for which no rate is fixed. Even if the log had claimed that no-one should be employed by the hour except in those classifications for which a rate was fixed, it would not have warranted an award which, in addition to rejecting that claim, fixed rates for classifications engaged by the hour for which no rate was claimed when engaged by the hour. If this could not have been done in the award, it cannot be done now by way of variation. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1).] The order here in question could not settle any of the claims in the log or be incidental to their settlement. Even if an hourly rate could be regarded as incidental, there would be a difficulty as to the amount. The log claims a rate per performance for ushers and ticket takers who are not in continuous shows. Payment by the hour could result, in the case of a lengthy performance, in a higher rate; that is to say, higher than the highest amount claimed by the log and, therefore, beyond the ambit of the dispute. If it is suggested that a new dispute was constituted by the demands at conferences between the date of the delivery of the log and that of the award, the answer is that these consisted of demands for higher figures on classifications in existing awards; the variation here is outside the ambit of any such dispute. The variation cannot be justified on the basis that it was an award in settlement of a new dispute. The commissioner was not asked and did not purport to settle a new dispute. The application and the opposition to it cannot constitute the dispute which the application is to settle (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (2)). Moreover, the only parties to the new dispute would be the applicant and the prosecutor. The variation introduces into the award a clause which purports to bind all those who were bound by the award. This is sufficient in itself to invalidate the order for variation, quite apart from any question of a new dispute.

The respondent commissioner did not appear.

E. G. Coppel K.C. (with him *A. Adams*), for the respondent Cinematograph Exhibitors Association. The variation is within the ambit of the original dispute. The log on its proper construction

(1) (1938) 60 C.L.R. 507, at pp. 523, 526, 529, 540, 543.

(2) (1931) 45 C.L.R. 409, at pp. 424, 425, 451.

makes claims for rates of payment and conditions of employment applicable to every person of the specified classifications employed in the industry (except in Queensland). To claim a weekly rate for a class of workers is to claim (*a*) that they shall be employed by the week, and (*b*) that they shall receive at least the amount claimed. To claim an hourly rate for a class of workers employed in continuous picture shows and a rate per performance for the same class of workers employed in non-continuous shows is to claim that in continuous shows they must be engaged by the hour and in non-continuous shows they must be engaged per performance. The contrary contention is fantastic; it would mean that the union was willing to allow employers to engage employees on terms for which no minimum rate was prescribed. This would open the door to the engagement of non-union labour and more disputes. As to ushers and ticket takers the log claimed three minimum rates: (*a*) £7 by the week (all theatres); (*b*) 17s. 6d. by the performance (not in continuous shows); (*c*) 6s. per hour (in continuous shows). Items *b* and *c* are not different classifications; the distinction is merely in the place where the work is done. The award granted five minimum rates: (*a*) £4 5s. 9d. per week for females (not in continuous shows); (*b*) £4 0s. 9d. per week for females (in continuous shows); (*c*) £6 1s. per week for males (all theatres); (*d*) 10s. 6d. per performance (not in continuous shows); (*e*) 3s. 6d. per hour (in continuous shows). The validity of the award has not been challenged; the prosecutor, in effect, asserts its validity. It follows that the ambit of the dispute was such as to permit the fixing of different rates for males and females and different rates for females according as they worked in continuous or non-continuous shows. The variation (so far as it concerns ushers and ticket takers) merely extends item *e* just as items *a* and *b* had been limited by the award to a particular type of show. If there was an issue; as to the places at which the weekly rate claimed should be applied, there must also have been an issue as to the places at which the hourly rate claimed should apply. As to monitors and receptionists, the log claimed (*a*) £8 per week for hostesses or receptionists; (*b*) £8 per week for monitors; (*c*) £1 per performance for hostesses and receptionists (not in continuous shows). The award fixed: (*a*) No rate for hostesses; (*b*) £4 5s. 9d. a week for female receptionists and monitors (not in continuous shows); (*c*) £4 0s. 9d. for female receptionists and monitors (in continuous shows); (*d*) no weekly rate for male receptionists and monitors; (*e*) 10s. 6d. per performance for male or female receptionists and monitors (not in continuous shows). The award being accepted as valid, this shows

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that the ambit of the dispute was wide enough, when the log claimed only a weekly rate for monitors, to permit the fixing of a rate per performance for males and females and a weekly rate for female monitors only. The dispute related to minimum wages for each class of worker on any basis on which the commissioner thought it proper that they should be employed. Alternatively, the ambit of the dispute is to be found—not in the log—but in the application for a compulsory conference. This application was made under s. 15 (1), which was inserted in the *Commonwealth Conciliation and Arbitration Act* in 1947, when the old s. 19 was repealed. The decision in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1) depended on the old s. 19; it is not an authority on the Act as it now stands. The power of the Arbitration Court (or of a conciliation commissioner) is not now dependent as a matter of jurisdiction upon obtaining cognizance of an industrial dispute as under the old s. 19. After the failure of earlier conferences to settle the dispute, all questions of pay and conditions were thrown open by the union at the compulsory conference. Further, in the alternative, a new dispute (relating to country theatres in Victoria and Tasmania) was created concerning the matters referred to in the summons of 10th May 1948. This would not have been possible before 1947, but here, again, the repeal of the old s. 19 makes the difference. No doubt there must be an actual or threatened industrial dispute in order to justify action by a conciliation commissioner, but its existence may be proved as a matter of fact.

T. W. Smith K.C., in reply, referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Co.* (2).

Cur. adv. vult.

Dec. 6

The following written judgments were delivered:—

LATHAM C.J. This is the return of an order nisi for a writ of prohibition against Mr. Arthur Blakeley, a conciliation commissioner appointed under the *Commonwealth Conciliation Act* 1904-1949, and the Cinematograph Exhibitors' Association, which is an organization registered under the Act. The prosecutor is the Australian Theatrical and Amusement Employees' Association, which is also an organization registered under the Act. The prosecutor seeks a prohibition against any proceeding to enforce or carry out the provisions contained in an order varying a certain award which is

(1) (1931) 45 C.L.R.: See pp. 424, 429, 440, 441, 450, 451.

(2) (1910) 11 C.L.R. 1.

binding upon the prosecutors and the respondent association. The ground of the application is that the variation relates to a matter which was not within the ambit of the industrial dispute between the parties in respect of which the award was made. The employees affected by the challenged variation were—(1) male or female ushers; (2) ticket takers; (3) receptionists; (4) monitors—all in country theatres (with specified exceptions) in Victoria and Tasmania. The variation directed that they should be paid 1s. 9d. per half-hour or part thereof with a minimum payment as for two hours.

The evidence shows that in October 1947 the union sent by post to employers, including the respondent association, a log of rates of payment and conditions. Claims were made in this log in respect of rates of wages and conditions of employment for many occupations in the theatrical industry. The rates of payment varied in many cases according to whether the persons concerned were engaged by the week or by the hour or by the performance.

The log did not claim any *hourly* rate in respect of the four classes of employees mentioned in country theatres in Victoria and Tasmania. They were referred to in the log under the heading "Front of House Employees (Engaged by the Week)":—Receptionists—£8 per week; Female Usherettes (not in continuous picture shows)—£7 per week; Female Ticket Takers (not in continuous picture shows)—£7 per week; Female Usherettes (in continuous picture shows)—£7 per week; Female Ticket Takers (in continuous picture shows)—£7 per week; Monitors—£8 per week. Under another heading in the log, "Not in continuous picture shows," 17s. 6d. per performance was claimed for ushers and usherettes and ticket takers.

An hourly rate of 6s. an hour was claimed for ticket takers and ushers (but only in continuous picture shows) with a minimum payment as for three hours.

The employers upon whom the log was served made no response. The union contends that the claims were in respect of employees *if* engaged by the week or per performance. The respondent organization contends that the claims were that the employees *should* be so engaged, so that the failure to accept the log meant that there was a dispute not only as to rates of payment but as to mode of employment in respect of period. For reasons which I state hereafter, I am of opinion that it is not material to determine what precisely the original dispute was with respect to those matters.

A compulsory conference was held on 17th December 1947. The result of the conference was that the parties arrived at an agreement

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which was embodied in an award which was made on the same day. That award did not adopt the precise classifications of the log, and the amounts awarded were lower than those claimed. There was an award for female front-of-house staff engaged by the week, including female ushers &c. (not in continuous picture theatres) of £4 5s. 9d. per week and in continuous picture theatres of £4 a week. As to male front-of-house staff engaged by the week in all theatres, the award provided for £6 1s. per week for male ushers. There was a provision for male or female ushers, ticket takers, receptionists and monitors engaged by the performance not in continuous picture theatres, of 10s. 6d. per performance, and in the case of continuous picture theatres for ticket takers and ushers 3s. 6d. per hour, with a minimum payment as for three hours.

Some discussion took place between representatives of the parties as to the payment to be made to front-of-house staff in non-continuous picture theatres in the country in Victoria and Tasmania. The award included clause L, which provided for agreement for special reasons between the employees' association and employers as to the payment of lower rates in particular cases, and the representatives of the union stated that applications for such lower rates would be considered by the union. Negotiations took place and agreements were reached as to lower rates in some cases. As to others, however, no agreement was reached. The respondent association on 10th May 1949 took out a summons asking for a variation of the award in respect of " male or female ushers, ticket takers, ticket sellers, gallery ushers, cloakroom attendants, stage-doorkeepers, receptionists, monitors, telephonists (in country theatres in Victoria and Tasmania)."

The variation actually made did not deal with ticket sellers, gallery ushers, cloakroom attendants, stage-doorkeepers or telephonists, but as to male or female ushers, ticket takers, receptionists and monitors in country theatres in Victoria and Tasmania a provision was added to the award (with a minimum payment as for two hours) of 1s. 9d. per half-hour or part thereof.

It is contended that this variation was not within the ambit of the dispute in relation to which the award of December 1947 was made. It is pointed out that the log did not make any claim in respect of the employees affected by the variation for payment at an *hourly* rate, but only for payment in cases when they were employed either by the week or per performance. It was therefore said to be beyond the jurisdiction of the conciliation commissioner to make an award upon an hourly basis. Reference was made to

the decision in *R.* v. *Commonwealth Court of Conciliation & Arbitration*; *Ex parte Whybrow* (1), where it was held that when a claim for the payment of apprentices in accordance with experience had been rejected by employers there was no dispute as to whether or not apprentices should be paid in accordance with age, so that the Arbitration Court had no jurisdiction to make an award which fixed rates for apprentices according to age. It has also been decided that any variation of an award made under the Act as it existed up to 1947 must be a variation within the ambit of the original dispute: see, e.g. *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (2). When these and many other cases were decided, s. 19 of the Act provided that the court should have cognizance for purposes of prevention and settlement of four classes of industrial disputes. They were—(*a*) disputes certified to the court by the Registrar; (*b*) industrial disputes submitted by an organization by plaint; (*c*) industrial disputes with which State industrial authorities or the Governor in Council of the State in which there was no State industrial authority requested the court to deal; and (*d*) industrial disputes as to which there had been a conference under s. 16A of the Act and as to which no agreement had been reached and which had been referred to the court. The decisions upon which the prosecutor relied were decisions with respect to disputes brought before the court by plaint or after a compulsory conference. The court could deal only with disputes of which it had cognizance. It was therefore held to be necessary in order to determine the limits of the jurisdiction of the court to ascertain what the dispute was of which the court had obtained cognizance. Obtaining cognizance of the dispute was a necessary preliminary to action by the court.

By the *Commonwealth Conciliation and Arbitration Act* 1947, s. 19 was repealed. It is no longer necessary for the court to "obtain cognizance of a dispute" in order to deal with it. The system of applying the principles of conciliation and arbitration to industrial disputes has been very substantially changed by the 1947 Act. Under this Act disputes are dealt with (subject to certain exceptions as to standard hours of work, basic wage &c. (see s. 13)) by conciliation commissioners. Section 14 provides that it is the duty of each conciliation commissioner to keep himself acquainted with industrial affairs and conditions. Section 14 (2) provides that, subject to the provisions with respect to the assignment of commissioners to industries, if it appears to a conciliation commissioner

(1) (1910) 11 C.L.R. 1. (2) (1931) 45 C.L.R. 409.

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that an industrial dispute has occurred or is likely to occur, "he shall (whether he has been notified under this section or not) immediately ascertain the parties to the industrial dispute and the matters which form the subject of that dispute and shall take such steps as he thinks fit for the prompt prevention or settlement of that dispute by conciliation or arbitration." This is the section which confers authority on a commissioner to deal with a dispute. Section 38 gives power to a commissioner to determine a dispute by an order or award. Section 49 provides that a conciliation commissioner may, subject to the exceptions mentioned in s. 13 of the Act, if for any reason he thinks it desirable to do so ". . . (*b*) vary any of the terms of an award." Where the dispute between parties turns upon whether some provision, claimed on one side and resisted on the other, should be added to an existing award, a variation of the award suggests itself as a means of settling the dispute.

Section 48 alters the law which had often been applied in the past (see e.g. *Federated Gas Employees' Union* v. *Metropolitan Gas Co.* (1)) according to which a new dispute could not arise with respect to a matter which was the subject matter of an award still current during the term specified in the award. Section 48 (4) is as follows:— "The fact that an award has been made and is in force shall not prevent an award being made for the settlement of a further dispute between all or any of the parties to the first-mentioned award, with or without additional parties, and whether or not the subject matter of the further dispute is the same in whole or in part as the subject matter of the dispute determined by the first-mentioned award."

Accordingly, under the present Act a dispute may arise when an award is current either with respect to matters dealt with in the award or with respect to other matters not dealt with in the award. No reference to the court or issue of a plaint is required in order to enable a commissioner to deal with a dispute.

In the present case, therefore, the jurisdiction of the commissioner is not diminished by the fact (if it is taken to be the fact) that claims for payment by the hour were not made on either side when the log was served. If a dispute arose with respect to these matters at a later date the commissioner had jurisdiction to deal with it.

The compulsory conference of 17th December 1947 was held in response to an application by the employees' association "for the purpose of preventing or settling an industrial dispute between the said Employees' Association and the several organizations and

(1) (1919) 27 C.L.R. 72.

companies hereinbefore set out with respect to the following matters :—

1. PARTICULARS OF THE MATTERS IN DISPUTE

(*a*) Rates of pay,
(*b*) Conditions of employment,
(*c*) Penalty rates for public holidays,
(*d*) Period of annual leave with pay,
(*e*) Standard hours of work in the industry."

Under this description of the dispute the particulars of the matter in dispute included rates of pay and conditions of employment. A conference upon these matters could well consider whether a payment should be on a weekly, hourly or performance basis. At that stage the particular matters with which the variation deals were not clearly raised. But they immediately became a matter of negotiation between the parties, and the discussions continued for months. Some degree of agreement was reached but there was no agreement by the union to the demands made by the employers' association in respect of which the summons for variation of the award was subsequently issued. Thus, when that summons was issued and when the union continued to resist the claim made, there was a dispute before the commissioner with respect to the matters as to which the variation was sought. That dispute was a dispute as to whether any and what hourly rates should be prescribed in respect of certain employees. I do not think that it should be supposed that the union, if hourly rates were prescribed, wanted something less than what the employer proposed, viz. 1s. 8d. per hour. The commissioner fixed 1s. 9d. per hour. Such an order, in my opinion, dealt with matters in dispute between the parties. Accordingly, under the Act as it now stands, the commissioner had jurisdiction to make those variations. In my opinion, in view of the great changes made by the 1947 Act, the above-stated objections of the prosecutor to the variation made by the commissioner are irrelevant.

My brother *Dixon*, in his reasons for judgment, shows that the commissioner did not purport to act as in settlement of a new dispute, but to act under s. 49 by varying the award, and that he did not comply with 1947 Statutory Rules No. 142, regs. 17, 18 and 19, prescribing the procedure for dealing with a dispute as distinguished from an application for variation of an award. But the commissioner had power to deal with the dispute as to whether the rate of payment per hour proposed by the employees' association should be made binding upon the parties who were in dispute upon that matter. The *Arbitration Act*, s. 16 (1), is as follows :—" An

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award or order of a Conciliation Commissioner shall not be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever." Such a provision, it has frequently been held, does not operate to exclude the jurisdiction vested in the High Court to grant a writ of prohibition against an officer of the Commonwealth under s. 75 (v.) of the Constitution: *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (1); *R.* v. *Hickman*; *Ex parte Fox & Clinton* (2). But a provision in these terms does, where jurisdiction to deal with a matter exists, prevent prohibition going on grounds of purely procedural errors not affecting jurisdiction: *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (3):—"Such a provision will operate to prevent prohibition going in cases of procedural deficiencies where the authority whose powers are in question is in substance dealing with the matter in respect of which power is conferred upon it." In the present case the commissioner had jurisdiction to deal with the indubitably real dispute between the parties relating to the introduction of rates of payment on an hourly basis, but a wrong procedure was followed. In such a case, in my opinion, s. 16 (1) should be held to prevent the issue of a writ of prohibition. There was a new dispute with which, under the 1947 Act the commissioner had power to deal, and, in view of the great change made by that Act, I am of opinion that the above-stated objections of the prosecutor to the variation made by the commissioner should be overruled.

But the commissioner has varied the award in respect of all the employers bound. The respondent association was the only applicant for the variation. That variation cannot bind other employers (whatever view may be taken of the extent of the original dispute) because they were not parties to the proceedings for variation. The order should therefore be made absolute in respect of the order for variation so far as that order applies in respect of respondents to the award other than the Cinematograph Exhibitors' Association. The result is that the prosecutor has substantially failed in these proceedings and should therefore pay the costs.

RICH J. Full consideration of all the circumstances lead, I think, to the conclusion that clause 1 of the order of variation made on 19th July 1949 is not within the ambit of the dispute the subject of the award made on 17th December 1947, and I am unable to

(1) (1944) 69 C.L.R. 407.
(2) (1945) 70 C.L.R. 598.
(3) (1947) 75 C.L.R. 361, at p. 369.

find any foundation for the suggestion that this order amounted to another or new award with respect to the settlement of a new dispute.

In my opinion the rule nisi should be made absolute.

DIXON J. This is an order nisi for a writ of prohibition directed to a conciliation commissioner prohibiting him from further proceeding upon part of an order made by him for the variation of an award. The award was made on 17th December 1947.

The order of variation was made on 19th July 1949. The award was made at the instance of the prosecutor, the Australian Theatrical and Amusement Employees' Association, who had created a dispute by serving a log of claims or demands. The order of variation was made upon the application of the respondent, the Cinematograph Exhibitors' Association. Both the log of demands and the award specified minimum rates of pay for a large number of classifications of employees engaged in connection with theatres, moving picture exhibitions and other amusements. In most cases rates of pay for "the front of the house staff" were indicated under three headings viz. "(engaged by the week)," "(engaged by the performance)," "(engaged by the hour)."

In the case of many, if not most, classifications, a rate of pay was claimed by the log and prescribed by the award for those engaged by the week, another for those engaged by the performance and another for those engaged by the hour. But in moving picture shows rates of pay for engagement by the hour of four classes of employees were covered neither by the log of demands nor by the award. The four classes, male and female, are (1) ushers; (2) ticket takers; (3) receptionists; and (4) monitors.

In the case of the first and third (ushers and receptionists) an hourly rate was demanded and prescribed "in continuous picture shows." But there was no rate for them in picture exhibitions that are not continuous and no rate by the hour for receptionists and monitors whether in continuous or non-continuous shows. In country picture shows the employers said that the conditions were different and that the front-of-the-house staff should not be so highly remunerated. It is needless to go into the history of the rates payable in the country. But before the award of 17th December 1947 the rates payable by the country exhibitors in Victoria and Tasmania were regarded by them as less onerous. They objected however to the performance rate fixed by that award for, amongst others, the four classifications with which this order nisi is concerned. They claimed that in country picture theatres

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the ushers and ticket takers were at work only for two hours and not for the duration of the performance. The respondent (the Exhibitors' Association) carried on negotiations with the prosecutor (the Employees' Association) for lower rates. There is a clause in the award (clause 1 (L)) which provides that where the Federal Executive of the Australian Theatrical and Amusement Employees' Association agrees with any employer that for special reasons rates and conditions different from those prescribed should be accepted by an employee, lower rates or altered conditions may be agreed upon between the association and the employer. But it provides that the Industrial Registrar must first approve any agreement for lower rates. The negotiations contemplated an agreement under this clause but none was arrived at. An obvious course for the employers to take was to employ the staff falling under the four classifications at an hourly rate. As no minimum hourly rate was prescribed by the award it might appear that all the employers had to do was to engage these members of the front-of-the-house staff at an hourly rate fixed by themselves and accepted by those they employed. But it was unlikely that the Employees' Association would permit its members to accept engagement at an hourly rate so fixed.

Section 78 of the *Commonwealth Conciliation & Arbitration Act* 1904-1949 however penalizes officers and office bearers of an organization if during the currency of an award they advise, encourage or incite any member of the organization to refrain from accepting employment or offering for work or working in accordance with the award. If, therefore, an hourly rate for these classifications were prescribed by the award there was no reason to anticipate any such difficulty from the Employees' Association. Accordingly an application was made to the Conciliation Commissioner for a variation of the award so as to include front-of-the-house staff under the heading of hourly rates and to fix a rate. The variation sought was confined to country theatres in Victoria and Tasmania and named an hourly rate of 1s. 8d. a half-hour with a minimum of two hours pay.

The commissioner gave a decision by which he ordered and prescribed that the award of 17th December 1947 should be varied by, among other things, inserting in the clause headed "engaged by the hour" a sub-clause as follows:—"Male and female ushers, ticket takers, receptionists (in country theatres in Victoria and Tasmania) with a minimum payment for two hours . . . 1s. 9d. per half hour or part thereof." Certain large towns were specifically excepted.

It is in respect of this order that the Employees' Association or prosecutor seeks a writ of prohibition. The ground is that there was not an industrial dispute as to an hourly rate for the four classifications in question, except for ticket takers and ushers in continuous picture shows.

Notwithstanding some uncertainty about the time and circumstances when the log of demands was served both sides on the hearing of this order nisi appeared to accept it as a demand, not acceded to, which gave rise to and so served to define the ambit of the industrial dispute upon which the award is founded. On this footing the prosecutor says that there was no demand for an hourly rate (except as aforesaid) for ticket takers, ushers, receptionists and monitors.

To this contention the respondent, Exhibitors' Association, gives two answers. The first is that on the true meaning of the log of demands, the claim was that employees of these classifications should be employed by the week or by the performance and at the rates indicated in the log and that accordingly the period of engagement, as well as the rates of pay, was in dispute, so that the conciliation commissioner might as arbitrator in settling the dispute adopt for himself any period of engagement and fix rates appropriate to that period.

In my opinion this answer is founded upon a misreading of the log of demands. When the log is studied it becomes clear that it proceeds upon the assumption that employees may be engaged by the week, by the performance or by the hour and, in many cases though as it happens not front-of-the-house staff, by the day. It claims a minimum wage for each form of engagement and neither expresses nor implies any demand that these forms of engagement or any of them shall be adopted. During the argument our attention was directed to earlier awards and a perusal of them shows that the industrial regulation of the industry has been based upon the assumption that various periods of engagement would exist and that it was desirable to fix minimum rates applicable to the periods customarily adopted. There is no indication anywhere of an intention to prescribe the period or periods that must be adopted.

I do not think the dispute originating in the log extends to the period for which employees may be engaged. It appears to me to follow that the variation went outside the original dispute. The log is detailed and precise and it is not possible to treat the dispute arising from the demands it contains as of a general character for the settlement of which the arbitrator may provide such rates for

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such periods of engagement and subject to such conditions as seem good to him.

The second answer was that a new dispute had since arisen affording a new foundation for the industrial regulation, or hourly rates of pay, prescribed by the conciliation commissioner in his order of variation. It was argued that what had occurred since the making of the award of 17th December 1947 had brought into existence an industrial dispute wide enough in ambit to sustain an arbitral determination of a minimum rate of 1s. 9d. a half-hour for ushers, ticket takers, receptionists and monitors employed by the hour in country theatres in Victoria and Tasmania.

Immediately after the award the respondent, Exhibitors' Association, notified its members that a country exhibitor considering that he could not pay the full rates prescribed by the new award should through the Association apply in effect under clause 1 (L). A number of applications was received. The respondent, Exhibitors' Association, made repeated attempts to secure a meeting with the prosecutor, Employees' Association, for the discussion of the matter. Among other things the former sent a letter to the latter setting out the grievance of country exhibitors and requesting a conference for the purpose of reaching agreement on a lower rate of pay for a shorter working time. This was followed by a threat to bring the matter before the conciliation commissioner. A reply was elicited to the effect that in the conferences which led to the award (which was an agreed award) the Employees' Association had undertaken that if hardship were shown relief from award rates and conditions would be agreed to. After further pressure from the respondent, Exhibitors' Association, officers of the prosecutor, Employees' Association, informed the former that the Federal Executive of the latter had decided upon exempting country exhibitors in the two States who exhibited once a week only and upon certain principles for exempting others. Attempts, however, to obtain some final arrangement were made without success and after protracted negotiations or communications which led to no definite result the respondent, Exhibitors' Association, gave the notice of application for the variation of the award. The respondent, Exhibitors' Association, contends that all this amounted to a new industrial dispute between them and the prosecutor, Employees' Association, which supplies a foundation for the order the commissioner made. The notice of application is relied on as a demand giving definition to the dispute.

But the conciliation commissioner never purported to exercise his powers in relation to a new industrial dispute and never pur-

ported to make an award determining such a dispute. He did not act under s. 14 (2) or (5) or (6). He did not make or sign a record of the matters appearing or ascertained by him as required by reg. 17 (1) of the *Conciliation and Arbitration Regulations*, that is to say, he did not record that it appeared to him that an industrial dispute had occurred or was likely to occur or that he had ascertained that a dispute existed or was threatened, impending or probable and that he had ascertained the parties to the industrial dispute and the matters which form the subject of the dispute. He did not as required by reg. 18 (1) fix a time and place for hearing the parties to the dispute and persons alleged to be parties with a view to the settlement of the dispute by arbitration. No notice was served pursuant to reg. 18 (3) and the commissioner did not proceed in the manner prescribed by reg. 19. What he did purport to do was to act under s. 49 of the Act upon an application made in pursuance of reg. 25 by a notice in the form prescribed by that regulation. He made an order expressed to vary the award. The Act does not maintain the distinction between an order and award consistently (see for example s. 38) but as the fixed period of the award of 17th December 1947 has not expired, the authority to determine any new dispute would arise from s. 48 (4) and that provision requires an award.

It is, in my opinion, impossible to treat the order of the conciliation commissioner varying the award of 17th December 1947 as a new award settling a new dispute.

But if he had purported to determine a new dispute consisting in or arising out of the matters to which I have referred by an award to the effect of the order, its validity could not, in my opinion, have been sustained. There are three independent reasons why it would be void. In the first place, if the claim of the respondent is expressed anywhere, it is in the application for the variation and that asks for a rate of 1s. 8d. a half-hour. But the rate fixed by the conciliation commissioner is 1s. 9d. a half-hour. The ambit of the supposed dispute is defined by the application and the amount fixed by the commissioner goes outside the dispute so defined by exceeding the amount claimed: *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1). In the second place the only parties to the supposed dispute would be the respondent, Exhibitors' Association, on the side of the employers and on the side of the employees the prosecutor, Employees' Association. But in the schedule to the award of 17th December 1947 there are other employers at least half a dozen of whom might well be affected.

(1) (1931) 45 C.L.R. 409.

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The order makes a variation on the footing that all employers listed in the schedule would be bound by the variation. To treat such an order as an award binding only one association of employers is to change its character from an industrial determination binding the disputants in the dispute of 1947 to a discriminating industrial regulation affecting the operations of one body of employers only and as it appears giving them an advantage. I doubt whether an order or an award of a conciliation commissioner is, within the meaning of s. 46 of the *Acts Interpretation Act* 1901-1948, an instrument made, granted or issued under a power conferred by an Act upon an authority to make, grant or issue an instrument. But if it were so the present is not the kind of question to which s. 46 (*b*) is directed, a question of construing an instrument subject to the Act under which it was made and so as not to exceed the power of the authority making it. The question relates to the persons to whom a dispute extends. In the third place on the facts it appears to me that the discussions between the respondent, Exhibitors' Association, and the prosecutor were directed to obtaining an agreement with the Executive Committee of the latter pursuant to the special provision contained in the award authorizing lower rates or altered conditions if the parties agreed and the Industrial Registrar approved. (Clause 1 (L) of the Award). No doubt this fact does not exclude absolutely the possibility of an industrial dispute having arisen out of the discussions. For I suppose that there is no form of discussion or communication between parties standing in an industrial relation which may not be the occasion of an industrial dispute. But where there is nothing but an attempt to obtain agreement in pursuance of a special clause of the kind resorted to, the failure to reach agreement can hardly in itself amount to a new industrial dispute. The formulation in the application for variation of the precise claim of the respondent, the Cinematograph Exhibitors' Association, ought not in my opinion to be treated as a demand upon the prosecutor, Employees' Association, the failure to concede which constitutes an industrial dispute for the settlement of which the Constitution authorizes the employment of conciliation and arbitration. The application is addressed to the conciliation commissioner and invokes his authority as an Arbitrator to deal (by variation of the award) with an antecedent dispute. By asking the appointed arbitrator to give some relief in an acknowledged dispute the constitutional remedy is invoked. The failure of the other party to concede that the relief should be granted by the arbitrator can hardly be treated as giving rise to a new industrial dispute. It is an issue as to what course the

arbitrator should take in making a complete determination of the old dispute.

For these reasons I am of opinion that no industrial dispute existed of sufficient ambit to sustain the order of variation which therefore was made without jurisdiction.

In my opinion the order nisi for prohibition should be made absolute.

McTIERNAN J. The prosecutor applies for a writ of prohibition under s. 75 of the Constitution. The prosecutor's right to obtain the writ depends upon the principles adopted in the line of cases which include *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1) and *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (2). According to the terms of the order nisi the writ is sought to restrain the respondents from further proceeding upon or taking any action to carry out part of an order, dated 19th July 1949, varying the award, dated 17th December 1947. This part of that order inserts a new sub-clause into the award providing for a half-hourly rate of payment, with a minimum amount for two hours, for men and women engaged as ushers, ticket takers, receptionists and monitors in picture theatres in towns and cities in Victoria and Tasmania. These workers belong to a group called "Front-of-House employees". The order was made upon the application of the respondent organization and the only other party to the application was the prosecutor, which opposed it. The award which was varied by the order of which the prosecutor complains was made in settlement of a dispute to which it, the respondent organization, and other organizations of employers were parties. The prosecutor and all these organizations are parties to the award. Section 49 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, so far as it applies to a conciliation commissioner, provides that he may, if for any reason he considers it desirable to do so, vary any of the terms of an award. This grant of power is made subject to s. 13 which is restrictive of the jurisdiction of a conciliation commissioner, but nothing turns on that section. The ground of the application for the writ of prohibition is that the part of the order, which the prosecutor attacks, is beyond the power of the conciliation commissioner because the rates of payment which the new sub-clause adds to the award were not a subject with which the dispute settled by the award was concerned. In making the order of variation the conciliation commissioner did not entirely accede to the respondent's application. It sought a rate of 1s. 8d. per half-hour or part

(1) (1920) 28 C.L.R. 456. (2) (1944) 69 C.L.R. 407.

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thereof with a minimum payment for two hours for more classes of workers than those which have been mentioned. The new rate ordered was 1s. 9d. per half-hour or part thereof with the above-mentioned minimum. The order was given a limited operation territorially.

The Act and the constitutional power under which it is passed require that an award should be the determination of the rates and conditions which ought to be granted by employers and accepted by their employees in order to prevent or settle an inter-State industrial dispute. An award may prescribe the rates and conditions which are claimed or conceded by either side, provided they are lawful, or it may prescribe other rates and conditions which are appropriate for the prevention or settlement of the dispute. Section 42 of the Act says: "In making an order or award in relation to an industrial dispute, the court or a conciliation commissioner shall not be restricted to the specific relief claimed by the parties to the industrial dispute, or to the demands made by the parties in the course of the dispute, but may include in the order or award any matter or thing which the court or commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further industrial disputes." The power to vary an award, like the power to make the award, is not a power to determine rates of payment or conditions of employment in gross; a determination cannot be lawfully made irrespective of an industrial dispute. But the power to vary an award is not a more limited power to determine rates and conditions than the power to make an award. An order of variation may lawfully prescribe any matter or thing which could have been lawfully prescribed by the award which it varies: *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union* (1). Where there is a log and counter log the disagreement manifested by these documents constitutes the industrial dispute and marks its outlines, unless there is other evidence which shows a wider or narrower disagreement. An award which exceeds the demand or gives less than is conceded would not operate as a determination of the dispute and such an award would have no lawful authority. An order varying an award would be open to the same objection if it caused the award to travel beyond the ambit of the dispute which the award prevented or settled, either by exceeding the demand or denying what was conceded: *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (2); *Australian Workers' Union* v. *Graziers' Association of N.S.W.* (3).

(1) (1949) 78 C.L.R. 366.
(2) (1931) 45 C.L.R. 409.
(3) (1932) 47 C.L.R. 22.

The award to which the conciliation commissioner added the new sub-clause determined a dispute resulting from the total disagreement of the respondent organization, and other employers' organizations (all parties to the award), with the log prepared by the prosecutor on behalf of its members. This log is in evidence. There was no counter-log from the employers; they did not concede anything in the log. The log put a ceiling on the dispute but as there was no intimation by the employers that they would concede anything, the dispute had no floor. The log is entitled "Log of rates of payment and conditions." It has been stated that the workers to whom the new sub-clause applies belong to a group of employees described in the log and the award as "Front-of-House employees." The log sets out rates per week for employees in that group ("engaged by the week"), "in continuous picture shows" and "not in continuous picture shows"; and for employees in the same group ("engaged by the performance") "not in continuous picture shows." The log does not claim hourly rates of payment or payment for any minimum period less than a performance, for the workers to whom the new sub-clause applies: they are included in the "Front-of-House employees."

The validity of the new sub-clause depends upon the question whether the dispute resulting from the rejection of the log, so far as it relates to those workers, was limited to the rate to be paid for periods specified in the log. It is necessary to consider the claims made by the log and the employers' refusal to concede any of them in order to ascertain the extent of the disagreement about rates of payment. The general refusal of the employers does not lead to the inference that they agreed with payment on a weekly basis or by performance but disagreed only with the rate demanded. The refusal could hardly have had the same effect in determining the extent of the disagreement about rates of payment as a counter log conceding that the basis of payment stipulated by the log should apply but disagreeing only about the rates of remuneration. The outright rejection of the log brought into dispute the entire question of the rates of payment; the employers did not accept the position that there should be no engagement of the workers to whom the new sub-clause applies for less than the period of a performance or that their engagement should not be on an hourly basis. In making the award the commissioner was not limited to the rates stipulated in the log. At the time he made the award it was within his jurisdiction to put in it the provisions of which the new sub-clause consists. It follows that the insertion of this new sub-clause is a valid variation of the award. The result is that the order varying

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the award binds the prosecutor and the respondent organization (s. 50). There is no ground for prohibition against the respondent.

The order nisi should be discharged in so far as it calls upon the respondent to show cause: otherwise the order nisi should be made absolute.

The respondent organization is entitled to its costs of resisting this application for prohibition and these costs should be paid by the prosecutor.

In the view which I take that the award was validly varied by the part of the order which the prosecutor attacked, it is not necessary for me to enter into the inquiry whether there was a new dispute of which the order was a valid settlement.

WEBB J. In my opinion the log of claims which led to the Award of 17th December 1947 and the employers' refusal to grant the claims put in issue not merely the rate of wages to be paid but also the period for which employees might be engaged; otherwise the dispute so far as it embraced wages was not worth creating or settling, as the log, the employers' refusal of it, and the award would have left the employers still at liberty to pay any rates of wages they pleased by resorting to the simple expedient of engaging their employees for terms not specified in the award. The fact that certain periods of engagement were customary in this industry has, I think, no bearing on the question whether the period of engagement was put in issue by the log and the employers' refusal. I think the reasonable implication is that the period of engagement in each classification was put in issue and limited by the award to that prescribed. I realize it is important that claims which are the first step in the creation of disputes of the magnitude and importance of inter-State industrial disputes should be expressed with precision, but not necessarily with the precision required in pleadings. Then if, as I think, the length of engagement was put in issue and determined by the award, the application for variation was within the ambit of the original dispute, and there was jurisdiction to vary the award within the limits of the application for variation. The employers claimed the half-hourly rate of 1s. 8d. and the conciliation commissioner fixed the half-hourly rate of 1s. 9d. The application was for a new term of engagement not permitted by the award as it stood and I see no reason why the conciliation commissioner could not grant it at a rate of pay which he thought proper. If the application had been made by the employees' union it would have been beyond power to award more than the union sought, but this was an employer's application

directed to securing more favourable conditions for the employer than the award provided as it stood.

But if the conciliation commissioner exceeded his authority in purporting to place in the award something which the employer could lawfully do without any variation of the award, then there would, I think, be no proper ground for a prohibition against a variation which really achieved nothing beyond adding a further term of employment which the employer must avoid if he desires to pay whatever wages he pleases.

I think, however, that variation was validly made, but it binds only the employers who were made parties to the application for it.

I agree then with the Chief Justice that the order nisi for prohibition should be made absolute as far as the variation purports to apply to employers other than the respondent Exhibitors' Association, but should be discharged as regards the respondent association, and that the prosecutor should pay the respondent association its costs of this application.

Order absolute so far as order of Conciliation Commissioner applies in respect of respondents to the award other than the Cinematograph Exhibitors Association and members thereof respondents to the award. Order nisi otherwise discharged. Prosecutor to pay costs (including reserved costs) of respondent association.

Solicitors for the prosecutor: *Ridgeway and Pearce.*

Solicitors for the respondent association: *Holt, Graham and Newman.*

E. F. H.