adopted at ff 75, 90/1, 97/8. 1966 SR. 245
applied 151 CLR 491.
applied 159 CLR 178
applied 159 CLR 522

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BLAKELEY AND OTHERS;

EX PARTE THE ASSOCIATION OF ARCHITECTS, ENGINEERS, SURVEYORS AND DRAUGHTSMEN OF AUSTRALIA.

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SYDNEY, *Aug.* 16, 17.

MELBOURNE, *Oct.* 31.

Latham C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Referred to:— 86 C.L.R. 510

Referred to:— 84 C.L.R. 244

Industrial Arbitration (*Cth.*)—*Conciliation and arbitration*—*Industrial association*—*State branches of claimant association*—*Preparation of log*—*Sparsely attended meetings*—*Service of log*—*Restricted in one State at request of branch of that State*—*Desire for State award*—*Effect on existence of dispute*—*Quaere, whether dispute "real and genuine"*—*Decision of Conciliation Commissioner*—*Mandamus*—*The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxv.*), 75 (*v.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 28 *of* 1949), *ss.* 14-16, 34, 36-38, 40 (*d*).

A Conciliation Commissioner under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 has no jurisdiction to decide finally and conclusively whether an industrial dispute exists.

The exercise of the jurisdiction created by s. 75 (v.) of the Constitution is not affected by s. 16 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, which provides that an order of a Conciliation Commissioner shall not be subject to prohibition, mandamus or injunction in any court of any kind whatever.

Upon an application for a writ of mandamus under s. 75 (v.) of the Constitution directed to a Conciliation Commissioner to hear and determine a dispute which he has decided did not exist, the High Court must determine for itself, independently of that decision, but giving it full weight and careful consideration, whether the dispute did or did not exist.

Held, by *Latham* C.J., *Webb*, *Fullagar* and *Kitto* JJ., that the existence of a dispute cannot depend on the degree or extent of dissatisfaction or discontent with existing conditions.

Resolutions passed, either unanimously or without recorded dissent, at sparsely attended meetings of branches of a Federal organization of employees held in five States, and by 363 votes to thirty upon a referendum in the sixth State, expressed dissatisfaction with existing conditions of employment and authorized the Federal executive to prepare and serve a log of demands upon employers. A log was served on employers in all States but in New South Wales the service was, at the request of the State branch, limited to nine employers including two gas companies. Later, that State branch, the members of which constituted the large majority of the members of the organization, resolved that the log "shall not be served in N.S.W. at present." The demands in the log were not acceded to. At a compulsory conference held under s. 15 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 there was no agreement between the parties and the Conciliation Commissioner "found that prima-facie disputes existed." Notices requiring them to appear before the Commissioner as parties to an industrial dispute were served upon the employers who had been served with the log except that in New South Wales only the two gas companies were served. It was stated that the organization was desirous of securing uniformity of rates and conditions throughout the Commonwealth. The Commissioner dismissed the applications for the hearing and determination of the alleged disputes on the ground that there were no real and genuine disputes.

Held, by *Latham* C.J., *Webb*, *Fullagar* and *Kitto* JJ. (*McTiernan* and *Williams* JJ. dissenting), that the Commissioner had erroneously decided that there were no real and genuine disputes, and having wrongly declined to exercise his power and to perform his duty of hearing and determining the disputes, mandamus should issue.

MANDAMUS

In 1948, at meetings of the Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, which is registered as an organization under the *Commonwealth Conciliation and Arbitration Act* 1904-1949, held in New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania, resolutions were passed, either unanimously or without recorded dissent in all States other than Queensland, expressing dissatisfaction with existing salaries and conditions of employment generally and urging the Federal executive of the association to take action to have the salaries increased and the conditions speedily improved. In Queensland, upon a referendum, 363 members favoured the resolution and thirty voted against it. Of the 2,433 members of the association engaged in private industry 1,474 resided in New South Wales. In Victoria there were 527 members engaged in private industry; 199 members attended a meeting in June 1948 at which the dissatisfaction was discussed and of that number sixty-one were engaged in private industry. At a similar meeting held

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in October 1948 the numbers were forty-two and eleven respectively. Attendances at meetings in other States were on the same scale.

A log of salaries and working conditions was served by the association in March 1949 upon numerous persons and bodies in all States other than New South Wales, and the same log was served by the association in April 1949 upon numerous other persons and bodies in New South Wales and other States. In each case the log was accompanied by a letter in which it was stated that unless the terms of the log were granted within twenty-one days action would be taken to have the log brought before the Commonwealth Court of Conciliation and Arbitration. The log was served in New South Wales only upon nine persons or bodies seven of whom were governmental or quasi-governmental instrumentalities, the other two being gas companies. However, in May 1949, the New South Wales Divisional Council of the association, being desirous of making an independent application for an award for its members to the Industrial Commission of New South Wales, resolved "that in view of the opinion of our Legal Adviser, we inform Federal Executive that the P.I. Log of Claims shall not be served in New South Wales at present."

The employers did not accede to the association's demands.

Applications under s. 15 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 to Mr. Blakeley, a Conciliation Commissioner under the Act, were heard on 21st July 1949 when, as found by the Commissioner, "it became apparent that there was no possibility of agreement between the parties whereupon" he "found that prima-facie disputes existed".

Notices in the form of Form 3 of the First Schedule of the rules under the Act (1947, S.R. 142) were served on employers upon whom the log had been served except that in New South Wales only the two gas companies were served.

The matters again came on for hearing at Melbourne on 22nd August 1949. There were twelve sittings, all of which were confined to submissions and argument as to whether or not a real and genuine dispute existed. Submissions were made on behalf of respondents that after the members in New South Wales had participated in the drafting and ratification of the log—which contained specific reference to the application of the log to "six States" and also specific reference to climatic allowances in New South Wales, and after the members in the other States had ratified the log the Divisional Council of New South Wales, in pursuance of its power of local autonomy, decided that the log

should not be served in that State. On behalf of the association it was stated that the Federal Council, through its Federal executive, had not the power to direct any Division to undertake any work, or to comply with its wishes in any respect if by so doing it infringed the autonomy of that Division. The Divisions controlled their own affairs in their own fashion. If the New South Wales Division did not permit a log of claims to be served generally in that State, then its wishes must be respected. The New South Wales Division was engaged in the preparation of a claim to better the rates and conditions before the State Arbitration Court. The New South Wales Division had been told by its legal adviser the reasons why the then present position existed in New South Wales. The nature of the legal advice given was not stated. Of the total membership of 2,064 in New South Wales the numbers of the various classifications employed in private industry were :—architects eight; engineers eighty-five; surveyors two; draughtsmen, various 1,263; and, miscellaneous 116; total 1,474. The draughtsmen in New South Wales were covered by an award governing draughtsmen and tracers. The Commissioner said that the predominance of draughtsmen in New South Wales may have been the reason actuating the New South Wales Division when it decided to withdraw participation in the Federal log of claims. During the hearing it was reiterated that the association was desirous of securing uniformity of rates and conditions throughout the Commonwealth. Of a Commonwealth total of 2,433 members in private industry 1,474 were in New South Wales and the remaining 959 members were located in Victoria, Tasmania, South Australia, Queensland and Western Australia. It was contended for the respondents that the dispute, excluding New South Wales, was not submitted to nor approved by the members in other States before the log was served; that the dispute which was considered by all members before the log was served was one by which all States were to be covered, and with the withdrawal of New South Wales, the largest Division in the association, that dispute ceased to exist; and that a real and genuine dispute did not exist, as shown by the small attendances of members in private industry at the meetings of June and October 1948. The constitution and rules of the association made provision for proxy voting at meetings which a member was unable to attend. In such cases a member could authorize a proxy to vote on his behalf. There was little or no evidence of advantage having been taken to exercise that privilege. The Commissioner prepared the following table which, he said, showed respectively the total number of members in private industry; the

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total number of members attending the meetings which might have included members employed in the Commonwealth and State Departments, local government authorities, State instrumentalities, boards and commissions—and members in private industry. The notation " no evidence " indicated that there was not any evidence as to how many members attending the meeting were entitled to vote as private employees :—

	June 1948.		October 1948.		
	Total private industry.	Total at meeting.	Total private industry.	Total at meeting.	Total private industry.
South Australia ..	197	82	37	20	No evidence.
Victoria	527	199	61	42	11
Geelong	—	26	25	24	23
Tasmania	13	47	No evidence.	23	No evidence.
Queensland ..	178	31	8	Meeting not held.	
Western Australia	33	64	15	37	8
	948	449	146	146	42

The Commissioner said that as New South Wales was excluded by the action of the New South Wales Divisional Council in deciding to exclude that State from service of the log, attendances at meetings had not been included in the table.

For the above reasons the Commissioner arrived at the following conclusions :—(1) that if originally there was a real, genuine and substantial dispute, that dispute ceased to exist when the New South Wales Division decided against the general service of the log in that State, and (2) that even if the New South Wales Division had participated in the serving of the log in that State, the comparatively small number of members in private industry attending and voting at the meetings of June and October 1948 did not, in his opinion, indicate the necessary interest and dissatisfaction necessary to establish a real, genuine and substantial dispute.

Both matters were dismissed.

The association obtained an order nisi from the High Court for a writ of mandamus directing Mr. Blakeley, as Conciliation Commissioner, to hear and determine disputes numbered respectively 339 of 1949 and 351 of 1949 alleged to exist between the prosecutor and the respondents other than the Commissioner and claimed to be industrial disputes within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, upon the following grounds :—(a) that the decision of the New South Wales Division of the prosecutor not to serve the log of salaries and working conditions on employers generally in the State of New South Wales did not have the effect that the said disputes were not submitted to or approved by the members of the prosecutor in the States of the Commonwealth other than the State of New South Wales

before the said log was served; (b) that the decision of the New South Wales Division not to serve the log on employers generally in the State of New South Wales did not cause the said disputes to cease to exist; (c) that the fact that a large number of members of the prosecutor engaged in private industry did not attend and vote at the meetings in June and October 1948 did not justify the conclusion that a real, genuine and substantial dispute did not exist; and, (d) that the Commissioner could in relation to an industrial dispute refrain from determining disputes only under the circumstances stated in s. 40 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 and those circumstances did not exist in either of the disputes.

Upon the return of the order nisi there was no appearance by or on behalf of the respondent Commissioner although served with notice thereof.

Counsel for the prosecutor informed the Court that he did not ask for an order against the respondents Commonwealth Aircraft Corporation Pty. Ltd., John Lysaght (Aust.) Ltd. or Commonwealth Rolling Mills Pty. Ltd.

Further facts appear in the judgments hereunder.

G. Wallace K.C. (with him *C. M. Collins* and *H. A. Small*), for the prosecutor. Section 16 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, cannot override s. 75 (v.) of the Constitution (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1); *The Tramways' Case* (*No.* 1) (2); *The Builders' Labourers' Case* (3)). Section 16 cannot import into Australia the considerations affecting mandamus in England. The Commissioner's refusal to hear was not "an award or order". He had not entered upon a hearing. It was not a hearing or determination of a "question". The Commissioner refused to hear or determine a question (s. 16 (3)) as was his duty. Even if that be wrong, then s. 16 cannot bar this Court's jurisdiction to issue mandamus (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4); *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Ltd.* (5); *R.* v. *Hickman*; *Ex parte Fox and Clinton* (6); *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life*

(1) (1910) 11 C.L.R. 1, at pp. 21, 22.
(2) (1913) 18 C.L.R. 54.
(3) (1914) 18 C.L.R. 224.
(4) (1924) 34 C.L.R. 482.
(5) (1920) 28 C.L.R. 456.
(6) (1945) 70 C.L.R. 598.

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Association of Australasia Ltd. (1); *R.* v. *Central Reference Board*; *Ex parte Thiess (Repairs) Pty. Ltd.* (2)). Section 16 does not expressly or impliedly give the Commissioner conclusive jurisdiction to decide his own jurisdiction. Even if it did so, it would not override s. 75 of the Constitution: see the concession made by counsel in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (3). The Commissioner cannot exclude or refuse jurisdiction on a matter committed to him by the Act (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (4)). Cases in which a a writ of mandamus issues are shown in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (5); *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (6); *Jacka* v. *Lewis* (7); *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (8); *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (9); *R.* v. *Hickman*; *Ex parte Fox and Clinton* (10); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (11); *Ex parte Bateman* (12). The existence or otherwise of an industrial dispute was dealt with in *R.* v. *Portus*; *Ex parte Federated Clerks Union of Australia* (13); *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (14); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (15); *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (16); *The Felt Hatters' Case* (17); *Australian Workers' Union* v. *Pastoralists' Federal Council* (18); *Australian Tramway and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (19); and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (20).

R. M. Eggleston K.C. (with him *A. P. Aird*), for all the respondents other than the Commissioner and the Commonwealth Aircraft Corporation Pty. Ltd. Section 14 (2)-(5) of the *Commonwealth*

(1) (1947) 75 C.L.R. 361, at pp. 368, 376.
(2) (1948) 77 C.L.R. 123.
(3) (1949) 78 C.L.R. 389, at p. 394.
(4) (1930) 42 C.L.R. 527, at pp. 546, 556.
(5) (1949) 78 C.L.R., at pp. 399-401, 407.
(6) (1942) 66 C.L.R. 161, at p. 176.
(7) (1944) 68 C.L.R. 455, at pp. 458, 459.
(8) (1930) 42 C.L.R., at pp. 547, 548.
(9) (1949) 78 C.L.R. 177.
(10) (1945) 70 C.L.R., at pp. 616, 617.
(11) (1916) 22 C.L.R. 103.
(12) (1895) 16 L.R. (N.S.W.) 34.
(13) (1949) 79 C.L.R. 428.
(14) (1925) 35 C.L.R. 528.
(15) (1916) 22 C.L.R., at p. 109.
(16) (1930) 42 C.L.R. 527.
(17) (1914) 18 C.L.R. 88, at p. 109.
(18) (1917) 23 C.L.R. 22, at p. 25.
(19) (1938) 58 C.L.R. 436, at pp. 440, 441.
(20) (1910) 11 C.L.R., at p. 57.

Conciliation and Arbitration Act shows that the legislature imposed on the Commissioner a primary duty to investigate a question as to whether there was or was not an industrial dispute. The legislature clearly indicated that the Commissioner should be the final arbiter of that question so long as he acted on proper principles. If he misdirected himself he was left open to the prerogative remedies. The principles upon which the High Court will entertain an application for a writ of mandamus are indicated in *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1) and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union* (2). The Commissioner exercised the jurisdiction against one of the parties. The legislature provided that if the Commissioner was satisfied that an industrial dispute did exist he should proceed to the making of an award, and that if he were not so satisfied then he should not make an award. If the Commissioner was satisfied that an industrial dispute existed then he had jurisdiction to determine that dispute and make an award. The Commissioner did not proceed upon a wrong basis. Although it is not a matter for this Court, on the material and in fact the Commissioner came to a proper conclusion. The difference between mandamus and prohibition was caused by a constitutional difficulty: see s. 75 (v.) of the Constitution and *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (3). The type of question involved in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (4) was not the type of question involved in this case. In that case the jurisdiction of the Court was conclusive; therefore the remedy of mandamus was not available. The legislature has provided two conditions, namely, (i) that there must be an industrial dispute, and (ii) that before the Commissioner proceeds he must have satisfied himself that an industrial dispute did exist. The prosecutor has not proved that the Commissioner satisfied himself that an industrial dispute did exist, nor does the evidence available to this Court prove the existence of such a dispute. There was nothing to suggest that a dispute had arisen. Before it could be shown that a dispute existed it would have to be shown that the persons and firms upon whom the log was served were in fact employing members of the association. An important and essential feature of the claim as made was that there should be uniformity

(1) (1933) 50 C.L.R. 228, at pp. 242, 243.
(2) (1949) 80 C.L.R. 164.
(3) (1947) 75 C.L.R., at p. 369.
(4) (1949) 78 C.L.R. 389.

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of rates and conditions in all the States, and the various States became parties on the basis that all the States would be parties. In New South Wales the log was served on two employers only and there is not any evidence as to whether either of them did or did not employ members of the association. The New South Wales branch of the association ceased to be a party to the claim and upon its defection the original dispute no longer existed. It was open to the Commissioner to find that the defection altered the position and this Court will not, in the circumstances, set aside the Commissioner's decision. The Court should not, on the evidence before it, assume that the machinery for the preparation and approval of the log was fully and properly used. The various branch resolutions authorize the preparation of a log but do not show approval of the log as prepared. It should not be assumed that all the necessary resolutions were passed and acts done by the applicant association. A dispute must be a real and genuine dispute (*The Felt Hatters' Case* (1); *R.* v. *President of Commonwealth Court of Conciliation and Arbitration; Ex parte William Holyman & Sons Ltd.* (2); *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (3)). A mere "paper" dispute is not a real and genuine dispute (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (4)). If the question of reality and genuineness be a real one, as shown by the cases, it must mean that, in all the circumstances, the Commissioner may hold either that he is satisfied or that he is not satisfied that the log represents the desire of the members to improve conditions. The mere passing of resolutions by meetings does not make a real and genuine dispute. There was not any proof that any person or firm served with the log employed a member or members of the association. The Court must be satisfied that there was evidence before the Commissioner that there was a real and genuine dispute. Evidence to that end was not given by or on behalf of the prosecutor (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (5); *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (6)). The tenor of the observations made in *Australian Tramway and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (7) show that the behaviour of members is material and relevant to the question of whether or not a dispute is real and genuine. The

(1) (1914) 18 C.L.R., at pp. 109-111.
(2) (1914) 18 C.L.R. 273.
(3) (1925) 35 C.L.R. 528.
(4) (1930) 42 C.L.R. 527.
(5) (1925) 35 C.L.R., at pp. 547, 551.
(6) (1935) 54 C.L.R. 387, at p. 415.
(7) (1938) 58 C.L.R., at pp. 440, 441.

question before this Court is: Did the prosecutor present to the Commissioner evidence upon which he ought to have found the existence of a dispute? The onus was upon the prosecutor to produce such evidence, if available. The question of whether there was or was not a dispute is not one for this Court. If the Court should hold that the Commissioner has erred then it should only refer the matter back to the Commissioner for re-hearing.

G. Wallace K.C., in reply. What constitutes a dispute is shown in *Australian Tramways and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1). The decision of the Commissioner is sufficient to warrant the granting of a writ of mandamus. The reasons adduced amount in law to no reasons at all. The log is clearly severable. Two of the respondents are New South Wales employers. Members of the prosecutor association who are employed by those employers can continue to be governed by the award. It is clear that five of the six State branches could constitute an inter-State dispute, but the claim is still a demand in six States. The fact that some members of the New South Wales branch desired to retire from the application was never a relevant factor. The Federated body was paramount to the State branches. The Federal Council of the association acted within its constitutional right. The withdrawal by the New South Wales branch did not terminate the dispute. The fact that the relevant meetings were attended by comparatively few members did not necessarily show lack of interest by members, nor that there was not any real dispute (*R.* v. *Portus*; *Ex parte Federated Clerks' Union of Australia* (2)). The question in *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (3) was not one of jurisdiction. As shown by the headnote *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (4) is clearly distinguishable. In that case the tribunal had entered upon the hearing, concluded it, and made a finding. In this case the Commissioner did not make a finding: see *Short & Mellor* on the *Practice of the Crown Office*, 2nd ed. (1908), p. 200. *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (5) is very much in point. Section 14 of the Act does not indicate that the legislature gave a final and conclusive power to the Commissioner to decide questions of jurisdiction. There was not any onus on the prosecutor to produce

(1) (1938) 58 C.L.R., at pp. 442, 443.
(2) (1949) 79 C.L.R., at pp. 431, 439.
(3) (1938) 59 C.L.R. 369.
(4) (1933) 50 C.L.R. 228.
(5) (1949) 78 C.L.R. 389.

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evidence in proof: it merely had to show that there was a misconception by the Commissioner. Parties to the dispute were employers upon whom the log was served in 1949. The affidavits sufficiently show that the parties to the dispute were represented at the hearing by employer organizations, the respondents at the hearing. The parties are sufficiently represented.

Cur. adv. vult.

Oct. 31.

The following written judgments were delivered:—

LATHAM C.J. This is the return of an order nisi for a writ of mandamus directing Mr. Arthur Blakeley, a Conciliation Commissioner appointed under the *Commonwealth Conciliation and Arbitration Act* 1904-1949, to hear and determine disputes Nos. 339 of 1949 and 351 of 1949 alleged to exist between the prosecutor and the respondents other than the said Commissioner and claimed to be industrial disputes within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. The prosecutor is the Association of Architects, Engineers, Surveyors and Draftsmen of Australia, which is an organization registered under the Act. The respondents are Chambers of Manufactures, Employers' Associations in several States, companies such as the Broken Hill Pty. Co. Ltd., Commonwealth Aircraft Corporation Pty. Ltd., two gas companies carrying on in New South Wales, and other employers in several States. Mr. Blakeley decided that no real and genuine dispute existed between the organization and its members on the one hand and the numerous employers on the other hand upon whom a log of industrial demands had been served by the organization.

An application is now made for a writ of mandamus, the prosecutor contending that the Commissioner has no power to determine conclusively so as to bind the parties that a dispute either exists or does not exist, that this Court, upon an application for a prerogative writ (whether of prohibition or mandamus), must determine that question for itself and that in so determining it in this case the Court should on the evidence hold that the alleged disputes actually do exist. If this is the case, it is then argued, the Commissioner is under a duty to exercise his powers under the Act of hearing and determining the disputes and, as he has declined to do so by reason of his erroneous decision upon a question of fact which it is beyond his power to determine conclusively, the writ of mandamus should go.

The evidence before this Court shows that in 1948 meetings of members of the Association were held in New South Wales, Queensland, South Australia, Victoria, Tasmania and Western Australia, and that at these meetings resolutions were passed expressing dissatisfaction with existing salaries and conditions of employment and urging the executive of the organization to take action to secure more favourable terms of employment. The resolutions authorized the executive to prepare and serve a log of demands upon employers. The resolutions were carried either unanimously or without recorded dissent in New South Wales, Victoria, South Australia, Tasmania and Western Australia. In Queensland the voting on the resolution was 363 in favour and thirty against. In New South Wales, however, a question arose as to the inclusion of private as distinct from public employers within the demands to be made on behalf of the organization. In the affidavit of S. E. Wootten, secretary of the organization, the following statement, which is not challenged in any way, is made :— " The New South Wales Division requested that the said log should not be served upon any persons or bodies in New South Wales other than 9 employers and no persons or bodies other than the said 9 employers were served in New South Wales." Thus the Federal Executive complied with the request made by the New South Wales Division. It is argued for the respondents that the New South Wales Division was entitled to control the service of the log in New South Wales because all the divisions and branches were autonomous. No specific rule of the association was cited to show that this was the case, but the matter is immaterial because the Federal Executive complied with the request made and only nine employers in New South Wales were served. Two of the employers so served were the Australian Gas Light Co. and the North Shore Gas Co. Ltd., which are among the respondents in these proceedings. The log was served upon persons in Queensland, Victoria, South Australia, Western Australia and Tasmania on or about 23rd March 1949 and upon other persons, including persons in the State of New South Wales, on or about 29th April 1949. On 13th May 1949, that is, after what the evidence shows to have been the dates of service of the log, the New South Wales Divisional Council carried a resolution in the following terms : " That in view of the opinion of our Legal Adviser, we inform Federal Executive that the P.I." [that is, private industry] " Log of Claims shall not be served in N.S.W. at present." If the date attributed to this resolution is correct, the log had already been served upon certain persons in New South Wales with the authority of the New South

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Wales Division. But the resolution may fairly be read as indicating a withdrawal of the New South Wales Division from the dispute. The New South Wales Division, however, though autonomous, had no power of veto in respect of the whole organization, and, for reasons which I state hereafter, even if it be taken that there is no longer a dispute in New South Wales, that fact would not affect the existence of the dispute in all the other States of the Commonwealth.

The log when served was accompanied by a letter which asked that the terms of the log be applied to the members of the Association and to all other persons employed within twenty-one days of receipt of the log, and stated that unless the terms of the log were granted within the said time of twenty-one days the general secretary had been instructed to have the log brought before the Commonwealth Court of Conciliation and Arbitration.

The employers upon whom the log was served did not agree to the proposals of the organization within twenty-one days of service and the organization accordingly applied for a compulsory conference under s. 15 (1) of the Act. The conference was held, there was no agreement between the parties, and the Conciliation Commissioner " found that prima-facie disputes existed ".

Then notices in the form of Form 3 of the First Schedule to the rules made under the Act (1947, S.R. 142) were served stating that the parties on whom the notices were served were alleged to be parties to an industrial dispute and requiring them to appear before the Commissioner. These notices were served on employers upon whom the log had been served, except that in New South Wales only two respondents (the gas companies) were served.

The Conciliation Commissioner, after hearing evidence and argument on the matter for twelve days, dismissed the applications for the hearing and determination of the alleged disputes on the ground that there were no real and genuine disputes. The statement of reasons of the Commissioner showed that he based his decision in part upon the statement on behalf of the Association that the Association was desirous of securing uniformity of rates and conditions throughout the Commonwealth. The members of the organization were employed by governments and public authorities and also in private industry. Of the Commonwealth total of 2,433 members engaged in private industry more than half, namely 1,474, were in New South Wales. The Commissioner took the view that if private industry in New South Wales were left out the organization could not be regarded as still claiming the uniformity which it desired. He said, in the statement of his

reasons for his decision—" If originally there was a real, genuine and substantial dispute, that dispute ceased to exist when the New South Wales Division decided against the general service of the log in that State."

The disputes alleged by the organization to exist are disputes between the organization and the employers who were served with the log and with those employers only. It is not suggested that any other dispute exists. In New South Wales the disputants (if any) are the organization and the nine employers who were served. The dispute said to have been created was narrower than that which was originally contemplated. Thus the evidence before this Court shows affirmatively that the members approve the action of the organization in serving the log upon the persons upon whom it was actually served and with whom alone it was intended to create a dispute with the object of obtaining an award if the demands made in the log were not granted.

No evidence has been placed before this Court to show that the Association and its members did not wish to maintain their demands unless they could obtain what is vaguely called " uniformity " in all States. What was wanted was the set of rates of pay and conditions of employment which were specified in the log. The evidence shows that the Association persisted before the Commissioner most actively in making the demands in the log in the case of the employers who were served in all the States, including certainly the two gas companies in New South Wales. There was no evidence adduced in this Court which would support a conclusion that if the Association did not get all it asked for it would be content to abandon its claim and get nothing. Further, even if New South Wales had completely disappeared from the dispute, this fact would not have ended the disputes in the other States. Even if the dispute had been left standing only in a single State it would nevertheless have been the duty of the Court to deal with the unsettled part of the existing inter-State dispute (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.* (1)). In that case it was said :—" The Court became seised of a dispute extending beyond the limits of one State, and it then became its duty to determine that dispute in so far as no agreement between the parties was arrived at (see sec. 24). The fact that the Court or the parties on the road to or in process of settlement of the dispute made some awards or some such agreements, which did not together cover the whole area of the dispute, did not dispose of or end the

(1) (1920) 28 C.L.R. 1.

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dispute or change its character. The jurisdiction of the Court having once vested is not divested, and the duty of the Court is not completely performed by the partial settlement of the matter. The contrary view is, indeed, opposed to sec. 24, which provides that the Court shall determine the dispute or so much of the dispute as is not settled by agreement " (1).

Section 38 in the *Commonwealth Conciliation and Arbitration Act* 1904-1949 is in the same terms as s. 24 (2) of the Act of 1904-1915 in relation to which the cited case was decided.

The Commissioner further said in the statement of his reasons— " Even if the New South Wales Division had participated in the serving of the log in that State, the comparatively small number of members in private industry attending and voting at the meetings of June and October, 1948, did not, in my opinion, indicate the necessary interest and dissatisfaction necessary to establish a real, genuine and substantial dispute. Both matters are dismissed."

In Victoria there were 527 members engaged in private industry; 199 members attended the meeting in June and of this number sixty-one were engaged in private industry. At a meeting in October the numbers were substantially smaller, corresponding numbers being forty-two and eleven. Attendances at meetings in other States were on the same scale.

The Association is registered as an organization under the *Commonwealth Conciliation and Arbitration Act* and is a corporation: s. 58 (*Jumbunna Coal Mine (N.L.)* v. *Victorian Coal Miners' Association* (2)). In the absence of a special provision to the contrary in its constitution a corporation and its members are bound " by the acts not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole or not ": Bacon Abr. II 269. Thus the fact, as is often the case, that a relatively small number of members attended meetings does not show that the Association, in doing what the meetings authorized, was not acting properly and within its power. It is not necessary, in order that an industrial dispute between an organization of employees and a number of employers should be real, that all the members of the organization should agree to the making of particular demands upon their employers. If the organization makes the demand it is a party principal in the dispute (see *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (3)).

(1) (1920) 28 C.L.R., at p. 9.
(2) (1908) 6 C.L.R. 309.
(3) (1925) 35 C.L.R., at p. 551.

Prima facie, therefore, the service of the log and the refusal of the employers to agree to what was asked created industrial disputes. A dispute, however, must be real and genuine before it can be dealt with under the Act (*R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.* (1)). If for example it were shown that the demands were made to assist some other employees to procure the acceptance of demands made by those employees and not for the purpose of procuring acceptance of demands made by the alleged disputants, it would be held that the dispute was not real and genuine (*Caledonian Collieries Ltd.* v. *Australasian Coal & Shale Employees' Federation* [*No.* 2] (2)). In order to determine whether a dispute is real and genuine, a Conciliation Commissioner (and this Court) may go behind what has been described as the paper demand made by an organization and examine the question whether such a demand presents specific industrial claims which are really supported by its members.

But the fact that members of an organization do not attend in large numbers for the purpose of dealing with a particular matter when they know what the business before a meeting will be frequently shows that the members agree with and approve the course proposed by the managing body. It certainly does not, in my opinion, show the contrary. There is no evidence before this Court (other than that to which reference has been made) which was relied upon to show that the demands of the Association did not truly represent the will of the members.

Accordingly I am of opinion that the reasons given by the Commissioner for his decision that the alleged industrial disputes did not exist do not establish that conclusion—they do not displace the proposition that prima facie the service of the log and the refusal to accede to the demands made thereby created disputes—and that the evidence shows that disputes did exist.

I proceed, therefore, to consider the case upon the basis that the decision of the Commissioner that the disputes did not exist was erroneous, and that, for reasons which I will state, this Court must determine for itself, independently of any decision of the Commissioner, whether disputes did or did not exist, though the Court would naturally not arrive at a different decision without carefully considering and giving much weight to his decision. In this case, as I have said, the evidence before this Court shows, in my opinion, that disputes did exist.

1. In the first place, it was proper and necessary for the Commissioner to make a preliminary inquiry as to the existence of a

(1) (1921) 29 C.L.R. 290, at p. 299. (2) (1930) 42 C.L.R. 558.

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dispute in order to make up his own mind whether he had jurisdiction to proceed to deal with the disputes or should abstain from proceeding (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (1)). This case shows that in making this preliminary inquiry the Commissioner (who now discharges most of the functions of the President of the Arbitration Court) is not bound by rules of evidence.

2. But the Commissioner cannot conclusively determine the question of the existence of a dispute. He cannot give himself jurisdiction by wrongly deciding this question of fact. The actual existence of a dispute is a condition of the exercise by the Commissioner of his power to determine a dispute. It was held in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2), with reference to the President of the Arbitration Court, that Parliament has not said that the Arbitration Court should have jurisdiction to determine whether any and what dispute existed. It has said that, conditionally upon there being a dispute in fact, the court may proceed: see also *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (3); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (4). *Griffith* C.J. said:—"Whether the Court has or has not jurisdiction, *i.e.* whether an industrial dispute actually exists, and if so whether it extends beyond the limits of any one State, are questions of fact. The jurisdiction of the Court depends upon the existence of the facts. If the existence is challenged by proceedings for prohibition in this Court, or possibly on an attempt to enforce the award, the fact must be determined independently, and the opinion of the President of the Court on the point is not binding. In other words, the existence of the facts is a condition of jurisdiction. If they exist, it is quite immaterial to inquire by what route the President arrived at a right conclusion. If they do not, it is equally unimportant to inquire how he fell into error. In such a matter this Court is not a Court of Appeal from him. But the first duty of every judicial officer is to satisfy himself that he has jurisdiction, if only to avoid putting the parties to unnecessary risk and expense" (5). (The Commissioner is not a judicial officer, but the principles stated apply to him because he now, with some exceptions, exercises the same arbitral powers as were formerly vested in the President of the Court.) See per *Isaacs* J. (6)—

(1) (1911) 12 C.L.R., at pp. 415, 416, 428, 453-454.
(2) (1910) 11 C.L.R., at p. 56.
(3) (1909) 8 C.L.R. 419.
(4) (1911) 12 C.L.R. 398.
(5) (1911) 12 C.L.R., at p. 415.
(6) (1911) 12 C.L.R., at pp. 453-454.

"The jurisdiction of the Court to deal with the matter before it depends on the actual existence of the dispute, and not on what material its existence or non-existence is made to appear to the Court itself." See also *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1). These cases are cases of prohibition. They establish that a Commissioner cannot conclusively determine for himself that an industrial dispute exists. The existence or non-existence of the dispute is a matter collateral to his jurisdiction which can be examined in a superior court in proceedings for a prerogative writ (see *R.* v. *Commissioners for Special Purposes of the Income Tax* (2)).

The Commissioner has properly made the preliminary inquiry as to the existence of the alleged disputes. The considerations upon which he based his decision were not irrelevant or extraneous to that inquiry. But, as *Griffith* C.J. showed in the passage quoted from the *Engine Drivers' Case* (3), it is immaterial, upon an application for a prerogative writ, to inquire how he reached his conclusion. It is important to remember that the mandamus sought against him is not directed against the preliminary inquiry, but against his refusal to hear and determine the disputes.

3. The Commonwealth Constitution, s. 75 (v.), provides that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The Commissioner is an officer of the Commonwealth within the meaning of the Constitution, s. 75 (v.): *R.* v. *Galvin*; *Ex parte Metal Trades Employers' Association* (4); *R.* v. *Wallis* (5). The exercise of the jurisdiction created by the Constitution is not affected by such a statutory provision as s. 16 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, which provides that an order of a Conciliation Commissioner shall not be subject to prohibition, mandamus or injunction in any court of any kind whatever (see *Australian Coal and Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (6); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (7); *R.* v. *Hickman*; *Ex parte Fox and Clinton* (8); *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia* (9)).

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres* (*Aust.*) *Ltd.* (10), it was held that a writ

(1) (1930) 42 C.L.R., at p. 556.
(2) (1888) 21 Q.B.D. 313, at p. 390.
(3) (1911) 12 C.L.R., at p. 415.
(4) (1949) 77 C.L.R. 432.
(5) (1949) 78 C.L.R. 529.
(6) (1942) 66 C.L.R. 161—cases cited at p. 176.
(7) (1944) 69 C.L.R. 407.
(8) (1945) 70 C.L.R. 598.
(9) (1947) 75 C.L.R. 361.
(10) (1949) 78 C.L.R. 389.

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of mandamus could and should go to the Arbitration Court directing the court to hear and determine an application which it had refused to consider because that court was of opinion that it had no jurisdiction to deal with it. This Court was not bound by the opinion of the Arbitration Court upon a question of the jurisdiction of that court. The reasoning which in the *Ozone Theatres Case* (1) showed that mandamus could go to the Arbitration Court in respect of arbitral functions committed to it equally supports the proposition that mandamus may in a proper case go to a Conciliation Commissioner in respect of arbitral functions committed to him.

4. The writ of mandamus will go to compel the performance of a public legal duty which the person who is subject to the duty has refused to perform in a case where the performance of the duty cannot be enforced by any other adequate legal remedy (*R.* v. *Inland Revenue Commissioners*; *In re Nathan* (2); *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts* (*Vict.*) (3)). In the present case, if industrial disputes exist it is the duty of the Commissioner, subject to the provisions of the Act, to hear and determine them. This duty is created by s. 38 of the Act. Section 38 provides that if no agreement between the parties as to the whole of a dispute is arrived at, the Court or Conciliation Commissioner shall, by an order or award, determine the dispute, or (if an agreement has been arrived at as to a part of the dispute) so much of the dispute as is not settled by the agreement. (It may be observed that this section provides that, even though there is no longer a dispute as to part of the matters originally involved in the dispute, the industrial authority must proceed to determine the rest of the dispute.) In the *Ozone Theatres Case* (4) it was expressly held that s. 38 creates a duty to hear and determine a dispute. That duty is plainly a public duty. The duty is to hear and determine, not to determine in a particular way, and an order could not be made that he should determine a dispute in a particular way (*R.* v. *Farquhar* (5)). The Commissioner must exercise this function in accordance with the Act, and, accordingly, it would be open to him, if he thought proper, under s. 40 (*d*) to dismiss a matter or refrain from hearing or determining a dispute if it appeared that the dispute was trivial or was being dealt with or was proper to be dealt with by a State authority or that further proceedings were not necessary or desirable in the public interest. The Commissioner in the present case has not acted under s. 40 (*d*) and accordingly under s. 38 it is his

(1) (1949) 78 C.L.R. 389.
(2) (1884) 12 Q.B.D. 461.
(3) (1938) 60 C.L.R. 741.
(4) (1949) 78 C.L.R., at p. 398.
(5) (1874) L.R. 9 Q.B. 258.

duty to hear and determine the disputes, though he might at a later stage decide to refrain from determining particular disputes if he was of opinion that s. 40 (*d*) was properly applicable.

5. Upon an application such as this for a prerogative writ under s. 75 (v.) of the Constitution it is for this Court to determine for itself whether a dispute really exists and to determine that upon evidence placed before this Court (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co. Ltd.* (1)).

It is contended for the respondents in this Court that there is or may be further evidence (not before this Court) which would establish the negative proposition that no real dispute exists. If such evidence exists it was for the respondents to bring it before this Court. They have not done so and the matter must be determined upon the evidence as it stands.

6. This proceeding is an application for a writ of mandamus. It is not a proceeding by way of appeal. The fact that a decision made by an authority with power to act in a matter was erroneous would not justify the granting of a writ of mandamus if it was within the power of that authority to make the decision. It is argued for the respondents that the case of *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (2) shows that the writ should not issue even if, contrary to their contention, the decision of the Commissioner was erroneous. In *Bott's Case* (2) it was said :—

"A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated

(1) (1909) 8 C.L.R. 419. (2) (1933) 50 C.L.R. 228.

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by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void. But the prosecutor who undertakes to establish that a tribunal has so acted ought not to be permitted under colour of doing so to enter upon an examination of the correctness of the tribunal's decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or of the regularity or irregularity of the manner in which the tribunal has proceeded. The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies " (1).

The matters which the Commissioner considered in reaching the conclusion of his preliminary inquiry as to the genuineness of the alleged disputes were, as I have said, not extraneous to the matter then to be decided by him. The question of the extent of the dispute (whether it included New South Wales or not) and of the degree in which the members of the organization approved of the action of the executive in serving the log, were matters which were relevant to the extent and the reality of the alleged disputes and the Commissioner properly regarded them in making his preliminary inquiry. But it does not follow that the Commissioner was right in declining to proceed with the hearing of the disputes and the determination thereof. Whether he was right in so declining depends upon whether there was in fact not an industrial dispute and not upon his decision whether there was such a dispute.

The authorities to which reference has already been made show that the Commissioner had no power to determine (so as to exclude proceedings by way of prohibition or mandamus) the collateral question of fact upon which his jurisdiction to proceed and his duty to proceed depended—viz., the existence or non-existence of a dispute. He therefore was not, in reference to this question, in the words of *Bott's Case* (2), a person " charged by law with the duty of ascertaining or determining facts upon which rights depend ". The case would be entirely different if the Commissioner could be given and had been given the power and was charged with the duty of determining whether or not the condition of his jurisdiction, viz., a dispute, existed.

The position of a Conciliation Commissioner (as an officer of the Commonwealth) in relation to the prerogative writs of prohibition and mandamus is the same as that of the President of the Arbitration Court under the Act in its earlier form. In *Federated Engine-*

(1) (1933) 50 C.L.R., at pp. 242, 243. (2) (1933) 50 C.L.R., at p. 242.

Drivers' and Firemen's Association of Australasia v. *Broken Hill Pty. Co. Ltd.* (1) *Isaacs* J., after saying that the learned President of the Court was in precisely the same position as every other judge whose jurisdiction depends upon the existence of some extraneous circumstance, asked "What is he to do?", and replied to this question in the following words:—"The situation is described by *Coleridge* J. in *Bunbury* v. *Fuller* (2), thus:—'Suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; and on its being presented, the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not proceed with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake'" (3).

This long-standing decision is precisely in point. If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a wrong preliminary decision either way, the mistake will be corrected by mandamus or prohibition—by mandamus if he wrongly decides that he has no jurisdiction, by prohibition if he wrongly decides that he has jurisdiction.

In the present case the Commissioner has in my opinion erroneously decided that there are no disputes existing between the Association and its members on the one hand and the employers who were served with the log on the other. He has wrongly declined to exercise his power and to perform his duty of hearing and determining the disputes. Therefore, in my opinion, mandamus should issue.

It has been objected that only some of the employers served with the log are now before this Court. Some of the employers' associations before the Court are registered organizations representing employers who were served, but it is said that they are not themselves parties to the dispute. But the object of the

(1) (1911) 12 C.L.R. 398.
(2) (1853) 9 Ex. 111, at p. 140 [156 E.R. 47, at p. 60].
(3) (1911) 12 C.L.R., at p. 454.

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proceeding is to obtain a decision from the Court as to whether the Commissioner was right in deciding that there were no disputes. The Commissioner is before the Court and many parties interested in supporting his decision are before the Court. I know of no requirement that every person so interested must be joined in the proceedings. Such a rule has never been applied in prohibition proceedings. Indeed the Rules of the High Court, Order XLVII., rule 14, show that when a prosecutor has made only some interested persons parties to the proceedings the Court may add other parties who are interested; but the Court is not bound to add them. In addition to the Commissioner, there are twenty-one respondents to these proceedings, all of whom have a relevant interest. In my opinion the proceedings are not in any way vitiated by reason of the fact that it is not shown that all the persons upon whom the log was served are before the Court.

Accordingly, in my opinion, the order nisi should be made absolute in the form prescribed by Order XLVII., rule 15, of the Rules of the High Court.

McTIERNAN J. The applicant organization had the right as an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 to negotiate with the employers of its members about industrial matters, for the purposes of the Act, and to enter into "industrial agreements" on behalf of its members with their employers. The applicant demanded from the employers of its members and other employers the salaries and conditions of work set out in a log served upon the employers. It was in the industrial interest of the members to include non-members in the demand, as the applicant organization did, because members might be prejudiced if the employment of non-unionists became less costly to the employers than the employment of members of the organization. It was therefore within the authority of the organization to demand that the salaries and conditions should be conceded to all the employees, whether unionists or non-unionists. The employers refused to concede anything which was demanded.

The demand and the refusal were constitutive elements of an industrial dispute within the meaning of the Act, s. 4. It is the duty of a Conciliation Commissioner to take such steps as he thinks fit for the prompt prevention or settlement of an industrial dispute by conciliation or arbitration. This duty arises if it appears to him that an industrial dispute has occurred or is likely to occur: s. 14.

The first step towards the prevention or settlement of an industrial dispute which is expressly authorized by the Act is a compulsory conference. Section 15 gives a Conciliation Commissioner power to summon such a conference. It may be summoned by the Commissioner whenever in his opinion it is desirable to do so for the purpose of preventing an industrial dispute or upon application made by any party to the dispute. It seems from the considerations laid down in sub-s. (2) of s. 15 for the guidance of the Commissioner in summoning the conference that its object is "to negotiate for" the settlement of the dispute.

Upon the refusal of the employers to accede to the demand of the applicant organization the respondent Commissioner summoned a compulsory conference at the instance of the organization. It appears that after the parties met in conference the respondent Commissioner found that there was "no possibility of agreement between the parties" and "prima-facie disputes existed".

The Commissioner's finding that "prima-facie disputes existed" means, I apprehend, that the knowledge he then had of the relations between the parties was sufficient, in his opinion, to establish the fact that industrial disputes existed between the parties unless rebutted by other evidence or matters which might be brought to his knowledge.

It was the duty of the Commissioner to proceed beyond the compulsory conference until he exhausted the authority which the Act gave him to deal with industrial disputes.

Section 34 provides that a Conciliation Commissioner may exercise any of his powers, duties or functions under the Act of his own motion or on the application of any party to an industrial dispute.

I assume that in this case the applicant organization duly applied to the respondent Commissioner to "hear and determine the dispute" constituted by the making of the demand and its refusal. Mandamus is sought to direct the respondent Commissioner to do so. The first duty of a Commissioner when called upon to exercise his arbitral authority is one of inquiry. This duty is prescribed by s. 36. In so far as the section applies to a Conciliation Commissioner it says that he shall, in such manner as he thinks fit, carefully and expeditiously hear, inquire into and investigate every industrial dispute which is before him and all matters affecting the merits of the dispute and the right settlement thereof. It is clear that this section extends to any industrial dispute which was the subject of a compulsory conference held under s. 15 but not settled at the conference.

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When a Conciliation Commissioner enters upon his duty under s. 36, he may begin anew, although the dispute was the subject of a compulsory conference. It is his duty under s. 36 to hear, inquire into and investigate not only the dispute but also all matters affecting its merits. The section requires the Commissioner, in the first instance, to endeavour to reconcile the parties to the industrial dispute before him and to bring about its settlement by "amicable agreement". If this method of settling the dispute fails then the Commissioner must take the course prescribed by s. 38. This section says that the Commissioner "shall, by an order or award, determine the dispute".

In the present case, when the compulsory conference failed, the respondent Commissioner operated under the powers conferred upon him by s. 36. It appears that when he entered upon the exercise of his authority under this section, at the outset, the question raised was whether there was a real and genuine dispute. On this question he ruled against the applicant organization and proceeded no further. If it were within the powers of the Commissioner to find that the dispute was not real and genuine, there could be no doubt that he did not omit to perform any duty entrusted to him in not making an award.

It is not clear whether the writ of mandamus which is sought is to direct the Commissioner to hear and determine the question whether a dispute existed or to direct the Commissioner to determine the dispute by an award.

The duties of Conciliation Commissioners which it is necessary to consider are those prescribed by ss. 36 and 38 respectively.

The duties prescribed by s. 36 have been mentioned. These duties are to hear, inquire into and investigate the dispute and all matters affecting its merits. The question whether an industrial dispute is real and genuine affects the merits of the dispute. It has long been a settled principle that matters which assume the form of an industrial dispute do not properly call for settlement by the processes of the Act if they are not real and genuine industrial disputes.

A Conciliation Commissioner has not jurisdiction to decide finally and conclusively whether an industrial dispute exists. He is not vested with jurisdiction to make a decision binding on the parties as to the scope of the jurisdiction entrusted to him. For example, he has not jurisdiction to define finally and conclusively whether a matter is an industrial dispute under the Act. If under a misconception of what the Act intends by the term "an industrial dispute" he meddles with a matter which is not such a statutory

industrial dispute, he may be exposed to prohibition. On the other hand, if he improperly refuses to exercise his statutory duties in relation to a matter which is such a dispute he would be exposed to mandamus. The question in the present case is broadly whether the respondent Commissioner failed to perform the duty which the Act entrusts to him to settle industrial disputes. If he has misconceived what is meant by an industrial dispute or applied a wrong criterion in deciding whether such a dispute existed, he would have brought himself within the scope of the remedy of mandamus. Although a Commissioner has no jurisdiction to give a decision binding on the parties whether an industrial dispute exists or not, he is not liable to mandamus whenever he decides that such a dispute does not exist, merely because this Court would on the facts brought before it, if it were within the province of the Court to decide the issue, reach a different conclusion.

It was within the authority vested in the respondent Commissioner by the Act to inquire into and investigate the question whether the industrial dispute which appeared to result from the refusal and demand was a real and genuine dispute. The demand and refusal were not necessarily conclusive of that question. The respondent Commissioner took into consideration a number of collateral facts and it was upon those facts he found that the dispute was not real and genuine. It is necessary to consider whether he took into consideration any fact which had no legal relevance to the question which he had to determine. It was his duty to determine the question according to law. If he did so, mandamus would not lie.

The Commissioner has set out the facts which he took into consideration. In my opinion those facts were relevant to the question whether the dispute was real and genuine. These facts were that the demand was promoted by the Federal Council of the organization. It was persisted in against the express wishes of a large majority of the members. Only a small proportion of the remainder of members evinced any interest in the promotion of the demand or exhibited dissatisfaction with their existing conditions.

The organization was made up of autonomous State divisions. The membership of the divisions in New South Wales was much larger than that of the total membership of all the other Divisions. The members of the organization in New South Wales expressly dissociated themselves from the demand made by the Federal Council. They desired that a State not a Federal award be made.

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The evidence showed that the demand had only relatively insignificant support among the members in other States.

In my opinion these facts and considerations were highly relevant on the question whether, although the making of the demand by the Federal Council and its refusal created an issue between the organization and its members which had the semblance of an industrial dispute, it was a real and genuine dispute. The respondent Commissioner found that the issue was not a real and genuine industrial dispute. Having reached that conclusion he was justified in proceeding no further. Mandamus does not lie against him. The principles which apply are those stated in *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1).

The application for the writ is founded upon s. 75 of the Constitution. This constitutional writ lies to command an officer of the Commonwealth to fulfil some duty of a public nature which he has failed to perform. The question whether the respondent Commissioner, who is an officer of the Commonwealth, failed to perform any duty entrusted to him by law can be properly determined upon the principles laid down in *Bott's Case* (2). The result of applying those principles in this case must be the refusal of the writ.

This application for a mandamus cannot be dealt with as if it were an appeal from the decision of the respondent Commissioner. "The function of a *mandamus* is to direct the person to whom it is addressed, whether a magistrate or anyone else, to do his duty, but not to direct him to do his duty in any particular mode" (*R.* v. *Kennedy* (3)).

The present case is different from the case of *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (4) in this respect. There mandamus was granted because the Arbitration Court did not correctly interpret s. 25 (*b*) of the Act and failed to perform the duty entrusted to it by that provision.

In my opinion the order nisi should be discharged.

WILLIAMS J. This is an application to make absolute an order nisi for a mandamus directing Arthur Blakeley, a Conciliation Commissioner under the *Commonwealth Conciliation and Arbitration Act* 1904-1949, to hear and determine disputes Nos. 339 of 1949 and 351 of 1949, alleged to exist between the prosecutor and the respondents other than the Commissioner and claimed

(1) (1933) 50 C.L.R., at pp. 242, 243.
(2) (1933) 50 C.L.R. 228.
(3) (1902) 86 L.T. 753, at p. 759.
(4) (1949) 78 C.L.R. 389.

to be disputes within the meaning of that Act. The prosecutor is the Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, an organization of employees registered pursuant to the *Commonwealth Conciliation and Arbitration Act*. It served a log of salaries and working conditions upon a number of employers of its members in Queensland, Victoria, South Australia, West Australia and Tasmania, claiming that there was a dispute with these employers in the Australian Capital Territory and all States of the Commonwealth of Australia as to the salaries and working conditions of its members and all other persons employed by them, whether members of the Association or not. It also served nine employers in New South Wales, but refrained from serving any other employers in that State at the request of the New South Wales Division of the Association, which desires to make an independent application for an award for its members to the Industrial Commission of New South Wales.

The prosecutor made applications to the Commissioner under s. 15 (1) of the *Commonwealth Conciliation and Arbitration Act* to direct employers on whom the log had been served to attend at a conference presided over by himself. This was done and the applications came on for hearing on 21st July 1949 when it appeared to the Commissioner that there was no possibility of agreement between the parties and he thereupon found that the disputes prima facie existed. The two applications came on again for hearing at Melbourne on 22nd August 1949 and on subsequent dates. There were twelve sittings, all of which were confined to submissions and argument as to whether or not real and genuine disputes existed between the parties. On 16th November 1949 the Commissioner gave his decision upon the question whether such disputes existed and found in the negative. He therefore dismissed both applications.

He gave two reasons for his decision—(1) that if originally there was a real, genuine and substantial dispute, that dispute ceased to exist when the New South Wales Division decided against the general service of the log in that State; (2) that even if the New South Wales Division had participated in the serving of the log in that State, the comparatively small number of members of the Association in private industry attending and voting at general meetings held in the various States in June and October 1948 to approve the log, did not, in his opinion, indicate the necessary interest and dissatisfaction necessary to establish a real, genuine and substantial dispute.

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The application to this Court is not an appeal. There is no appeal to any Court from the finding of the Commissioner. Further, s. 16 of the *Commonwealth Conciliation and Arbitration Act* provides that an 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. A Conciliation Commissioner is, however, an officer of the Commonwealth and s. 16 cannot oust the constitutional right of this Court under s. 75 (v.) of the Constitution to grant a mandamus against such an officer in a proper case. But this is not, in my opinion, such a case.

The nature of the writ of mandamus and the circumstances in which it is granted have been discussed in this Court in several cases, including *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1); *R.* v. *Trebilco*; *Ex parte F. S. Falkiner & Sons Ltd.* (2); *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts* (*Vict.*) (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres* (*Aust.*) *Ltd.* (4); *Water Conservation and Irrigation Commission* (*N.S.W.*) v. *Browning* (5). The general powers of a Conciliation Commissioner with respect to industrial disputes, that is, disputes as to industrial matters which extend beyond the limits of any one State, are contained in Part IV, comprising ss. 34 to 58 of the *Commonwealth Conciliation and Arbitration Act*. Section 36 provides, so far as material, that a Conciliation Commissioner shall carefully and expeditiously hear, inquire into and investigate every industrial dispute which is before him. The same section provides that he shall do so by attempting to reconcile the parties and inducing settlement of the dispute by amicable agreement in the first instance. Section 38 provides that if no agreement as to the whole dispute is arrived at, he shall by order or award determine the dispute, or (if an agreement has been arrived at as to a part of the dispute) so much of the dispute as is not settled by the agreement. The first inquiry which a Conciliation Commissioner has to make under Part IV is whether there is an industrial dispute before him because that is the subject-matter with which he is concerned. This is an issue of fact. The Commissioner has not declined to hear and determine this issue. He has heard and determined it. It is not a collateral fact. It is a fact for his determination. The prosecutor must therefore show "that the ostensible determination is

(1) (1933) 50 C.L.R. 228.
(2) (1936) 56 C.L.R. 20.
(3) (1938) 60 C.L.R. 741.
(4) (1949) 78 C.L.R. 389.
(5) (1949) 74 C.L.R. 492.

not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void " (*Bott's Case* (1)).

The Commissioner has applied himself to the question which the law prescribed, so that it must be shown that in purporting to decide it he was actuated by extraneous considerations or in some other respect has so proceeded that his determination is nugatory and void. The matters which the Commissioner took into consideration and which are discussed in his decision are not matters altogether extraneous to the question whether a real and genuine dispute existed or not. Prima facie the request made with the log is to be considered as real and genuine and intended to be pressed by any appropriate means, but it is always open to the respondent to prove the contrary: *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Caledonian Coal Co. Ltd.* (2); *The Felt Hatters' Case* (3); *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (4); *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (5); *Australian Tramway and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (6). Where an Association such as the prosecutor applies for an award, it is not irrelevant, as these citations indicate, to inquire whether the alleged dispute has the support or not of its members. The facts that the meetings of June and October were sparsely attended and that subsequently the New South Wales Division of the Association which contains more than half its members employed in private industry preferred to seek a State award, cannot be said to be altogether irrelevant on this question.

It may well be that this Court, if it had to decide this question for itself, would not attach the same weight to these considerations as the Commissioner, but this Court must be careful not to substitute its opinion for that of the Commissioner. The prosecutor is really seeking to do the very thing which it is said in *Bott's Case* (7) a prosecutor is not entitled to do, that is to say, ask this Court to enter upon an examination of the correctness of the tribunal's

(1) (1933) 50 C.L.R., at pp. 242, 243.
(2) (1910) 4 C.A.R. 52.
(3) (1914) 18 C.L.R., at pp. 109, 111, 112.
(4) (1925) 35 C.L.R., at p. 533.
(5) (1935) 54 C.L.R., at pp. 415, 442.
(6) (1938) 58 C.L.R., at p. 442.
(7) (1933) 50 C.L.R., at p. 243.

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decision, and the sufficiency of the evidence supporting it, and the weight of the evidence against it. As is there said: "The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies." In *R.* v. *Dayman* (1) Lord *Campbell* C.J., in a case where a police magistrate had to decide whether a street was a new street within the meaning of a certain Act, said :—" He was bound to hear and to adjudicate upon this. I think he did do so ; the question was whether Dawson Place was or was not a new street ; on that issue was joined. He heard the parties and the evidence, and gave a solemn judgment that it was not a new street. Could we, supposing we should think that he was wrong in so determining, make an order that he shall give an opposite judgment ? I think that we cannot do so. We have no authority to do more than order him to hear and adjudicate " (2). In my opinion that case is on all fours with the present case. At one stage this Court had power under s. 21AA of the Act to determine the question of fact whether an industrial dispute or any part thereof existed, or was threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State. But this statutory power was taken away when s. 21AA was repealed by the *Commonwealth Conciliation and Arbitration Act* 1947 which came into force on 10th October 1947. The repeal of that section and the general structure of the present Act and the language of some of its specific provisions, particularly s. 16, indicate to my mind an intention on the part of the legislature so far as it can to empower a Conciliation Commissioner conclusively to decide whether or not there is before him an industrial dispute extending beyond the limits of any one State, just as in *Dayman's Case* (1) it was for the magistrate conclusively to decide whether a street was or was not a new street. The prosecutor is really asking the Court to act as though s. 21AA was still in the Act.

In conferring on a Conciliation Commissioner the power to determine whether there is an industrial dispute before him, the legislature has attempted to make his decision final as far as it can. But the *Commonwealth Conciliation and Arbitration Act* is an exercise by the legislature of the power conferred by s. 51, par. xxxv., of the Constitution to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The legislature cannot confer on a Conciliation Commissioner

(1) (1857) 7 El. & Bl. 672 [119 E.R. 1395].

(2) (1857) 7 El. & Bl., at p. 675 [119 E.R., at p. 1396].

power to settle a dispute unless such an industrial dispute in fact exists. If a Commissioner wrongly decides that such a dispute exists when it does not, he has exceeded any power which the legislature can validly confer upon him. If the *Commonwealth Conciliation and Arbitration Act* is in terms wide enough to include such a power, it must be read down to that extent under s. 15A of the *Acts Interpretation Act* 1901-1949. On an application for a prohibition on the ground that a Commissioner has wrongly decided that an industrial dispute exists when in fact it does not, this Court must decide the fact for itself, because, unless it does so, the Conciliation Commissioner or the Court of Conciliation and Arbitration will have exceeded any jurisdiction which the Commonwealth Parliament has power to confer upon a tribunal under s. 51, par. xxxv., of the Constitution. In the present case no question of the over-exercise of jurisdiction arises. If the Commissioner has erred, he has erred within the limits of his jurisdiction. He has not exceeded it. He has not declined jurisdiction, he has purported to exercise it and, in my opinion, the prosecutor has not established that he has done anything which so vitiates its exercise that in law it is not an exercise at all.

For these reasons I would discharge the order nisi.

WEBB J. If the Commonwealth Parliament had and exercised authority under s. 51 (xxxv.) of the Commonwealth Constitution to confer on a conciliation commissioner power finally to determine whether an industrial dispute existed, then, in the circumstances of this case, I think the only question for our determination would be whether he had misconceived his duty (*R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1)). But Parliament has not conferred such authority on a conciliation commissioner. Sections 14, 36, 37 and 38 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 do not purport to go that far. The commissioner is authorized to make an order or award in settlement of an inter-State dispute only if in fact the dispute exists.

Then on this application for a writ of mandamus under s. 75 (v.) of the Commonwealth Constitution the question is whether the dispute did in fact exist. This Court must determine that question for itself on the evidence before it, although in so doing it will consider the commissioner's finding and may give some weight to it. Nothing in s. 16 of the *Commonwealth Conciliation and Arbitration Act* can affect the power and the duty of this Court under s. 75 (v.) of the Constitution.

(1) (1933) 50 C.L.R. 228.

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As to the facts, the defection of the New South Wales employees reduced the area of the dispute, but did not terminate the dispute. It continued as regards the other five States. As to those other five States, however, the commissioner thought that, as so little interest had been displayed by the employees concerned, i.e., those in private industry, there was in fact no real dispute. In coming to this conclusion he was guided by attendances at meetings of employees held in June and October 1948 in all the States. The June meetings were held to decide whether the claims should be pressed. Employees other than those concerned attended, but it appears that in the five States other than New South Wales at least 138 of those concerned voted on the question whether the claim should be pressed and that in all five States except Queensland the voting was unanimous or without dissent. In Queensland there was a substantial minority against pressing the claims; but we do not know whether those concerned voted. The October meetings were held in four States. There was no meeting in Queensland. The attendance at all meetings of those concerned was only forty-two; but those meetings were not held to decide whether the claims should be pressed, but merely to consider the form of the claims. Under those circumstances the reduced attendances in October did not necessarily indicate any change of attitude since the previous June.

Such being the facts I think the proper conclusion is that there was always a real dispute before the commissioner, and that he should be required to proceed to determine it, subject to his authority to apply s. 40 (*d*) of the *Commonwealth Conciliation and Arbitration Act* if the circumstances warrant that course.

I would make the order absolute.

FULLAGAR J. The prosecutor in this case is an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1949. It seeks the issue of a writ of mandamus directing Arthur Blakeley, a Conciliation Commissioner under the Act, to hear and determine two industrial disputes which are alleged to exist between itself and a number of employers. The first essential is to obtain as clear an understanding of the facts as possible. The material put before the Court is far from being as clear as it should be, but the following seem to be the relevant facts.

At some time prior to June 1948 an attempt had been made by the council or executive of the Association to obtain from a Conciliation Commissioner an award in an alleged dispute as to salaries

and other conditions of employment between the Association and certain employers. Mr. Wallis, a Conciliation Commissioner, decided that no real and genuine industrial dispute existed and, accordingly, declined jurisdiction in the matter. It does not appear on what ground or grounds Mr. Wallis based his decision, but it seems probable that he was not satisfied that the Association had authority, either derived from its rules, or expressly given by members, to make the claims which were said to be the subject matter of a dispute. That this is probable appears, I think, from the fact that in and about June 1948 meetings of members of the Association were held in all States except Queensland, at which meetings resolutions in very similar terms were adopted. It may be noted in passing that the meetings were sparsely attended by members concerned. All the resolutions in effect (a) expressed grave concern at the decision of Mr. Commissioner Wallis that no real dispute existed at the time of the serving of the log, (b) declared that there had existed and was still existing dissatisfaction with salaries and working conditions, and (c) desired the Federal executive of the Association to prepare and serve a fresh log claiming, so far as salaries were concerned, higher rates than had been claimed by the log which had come before Mr. Commissioner Wallis. In Queensland a referendum was held at which 363 members voted in favour of, and thirty against, a resolution expressing dissatisfaction with salaries and conditions of employment and urging the Federal executive to take action to have conditions speedily improved.

The executive or a committee thereof seems thereupon to have prepared a new log of claims relating to salaries and conditions of employment in all States and in the Australian Capital Territory. This log was served on or about 23rd March 1949 upon A.C.I. Engineering Pty. Ltd. and numerous persons and bodies in all the States other than New South Wales. The same log was served on or about 29th April 1949 upon William Adams & Co. Ltd. and numerous other persons in the State of New South Wales and other States. In each case the log was accompanied by a letter intimating that unless the terms of the log were granted within twenty-one days steps would be taken to have the log brought before the Commonwealth Court of Conciliation and Arbitration. Actually the log was served only upon nine persons in New South Wales. Of those nine persons seven were what may be described as governmental instrumentalities. The remaining two were engaged in what is described as private industry. Those two were the Australian Gas Light Co. and the North Shore Gas Co. Ltd.

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However, on 13th May 1949 the New South Wales Divisional Council of the Association passed a resolution " that in view of the opinion of our Legal Adviser we inform Federal Executive that the P.I. Log of Claims shall not be served in N.S.W. at present." This resolution was apparently communicated to the Federal executive.

None of the persons served agreed to the conditions claimed by the log, and a compulsory conference was called and held at which Mr. Blakeley presided. It would appear that representatives of the Association and of employers who had been served attended the conference. But Mr. Blakeley himself says that it became apparent that there was no possibility of agreement between the parties and he found that prima-facie disputes existed. (The reason for the plural " disputes " is not clear to me, since the same log appears to have been served on all persons who were in fact served, but for some reason it seems to have been taken that there was one dispute between the Association and the persons served on or about 23rd March 1949 and another dispute between the Association and the persons served on or about 29th April 1949.)

Notices to appear as parties to the disputes were then served by the Association. What followed is very surprising. An argument which extended over twelve days took place before Mr. Blakeley on the question whether a dispute existed. Ultimately Mr. Blakeley decided that no dispute existed. He accordingly refused to consider the claim contained in the Association's log and to make an award thereon. The present application for amendment seeks to compel him to consider the Association's claims in accordance with the Act and to make an award thereon.

The principal sections of the Act which confer jurisdiction upon the Commissioner are ss. 14, 36 and 38. It is s. 38, I think, that is really invoked. Section 38 uses the word " shall " : it is imperative in terms. It assumes the existence of an industrial dispute extending beyond the limits of one State, but if such a dispute exists, it imposes a duty of a public character on an officer of the Commonwealth, and such a duty is prima facie enforceable by mandamus in pursuance of s. 75 (v.) of the Constitution. The Commissioner has decided in the present case that no dispute exists, that he has no jurisdiction to make an award and is therefore, of course, under no duty to proceed.

The power given to this Court to issue mandamus or prohibition is derived from the Constitution, and, as has often been said, cannot be taken away by the Parliament. But a jurisdiction, the exercise of which may be compelled by mandamus or the excess of

which may be restrained by prohibition, may, within the limits set by the Constitution, be defined by the Parliament in whatever way it thinks fit. In particular, within those limits, the Parliament may, in conferring jurisdiction upon a person or body, enact that that person or body shall have power to determine conclusively a question upon which the jurisdiction is made to depend, and the effect of so enacting may be that neither mandamus nor prohibition will lie to that person or body. If that effect follows, it is not because any power is taken away from this Court but because no situation justifying the issue of mandamus or prohibition ever comes into existence. But power to determine conclusively a question upon which jurisdiction is made to depend cannot validly be conferred upon a person or body in such manner as to enable a jurisdiction to be exercised which would exceed the limits of constitutional power.

The result of the above considerations may very well be, as Mr. *Eggleston* argued, that the Parliament may, in legislation conferring a jurisdiction upon a person or body, create a state of affairs in which mandamus will not lie where the person or body has wrongly determined that there is no jurisdiction, although prohibition will lie, and cannot be excluded, where he or it has wrongly determined that there is jurisdiction. So under the *Commonwealth Conciliation and Arbitration Act* the jurisdiction of the Court or a Conciliation Commissioner to make an award is conditioned by the existence of an industrial dispute. And the terms of s. 51 (xxxv.) of the Constitution are such that it cannot validly be conferred except by reference to an industrial dispute. If Parliament purports to make the decision of the Court or a Commissioner conclusive as to the existence or non-existence of an industrial dispute, the Court or a Commissioner may determine in any particular case that a dispute does not exist or that a dispute does exist. If it or he determines, though wrongly, that a dispute does not exist and declines to make an award there is no transgression of the limits of s. 51 (xxxv.). If, however, it or he determines wrongly that an industrial dispute does exist and proceeds towards the making of an award, there will or may be a transgression of the limits of s. 51 (xxxv.). In the former case, Mr. *Eggleston* said, the statutory denial of mandamus will be valid. In the latter case, he said, the statutory denial of prohibition will be invalid.

So far as the Court is concerned, the position is governed by s. 32 (2) of the Act and Mr. *Eggleston's* argument is not affected by *R.* v. *Commonwealth Court of Conciliation and Arbitration*;

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Ex parte Ozone Theatres (Aust.) Ltd. (1). That sub-section however does not deal with Conciliation Commissioners. With regard to Commissioners the relevant provisions are contained in s. 16 though s. 14 (5) was also referred to. In the case of Commissioners the position may be complicated by considerations relating to judicial power but I do not think it necessary to consider whether this is so because I do not think that s. 16 (1) can be made to apply to the present case. Here the Commissioner has not made any award or order: he has simply refused to make an award or order. In the absence of some special definition (such as is to be found in s. 4 of the Victorian *Justices Act* 1948) or some special context the word "order" does not include a refusal to adjudicate (see *Boulter* v. *Kent Justices* (2)). It may be said that the very inclusion of "mandamus" in s. 16 (1) shows that the word "order" is used in an extended sense, but it is not impossible that mandamus should be an appropriate remedy where an order in the normal sense of the word has been made. The expression "award or order" occurs in many places in the Act, and in no other place, I think, could it be construed as including a mere refusal to make an order. I do not think that the position is affected by the fact that the Commissioner has said that both applications are "dismissed". They have not been dismissed on the merits. The Commissioner has simply held that he has no jurisdiction and has declined to adjudicate.

The position, then, seems to me to be that s. 38 has imposed a duty upon the Commissioner, if a dispute exists, to determine the dispute by order or award. The condition of his jurisdiction is that a dispute should exist, and he has held that no dispute exists. I can find nothing in the Act to exclude the remedy of mandamus if he is wrong in holding that the condition of jurisdiction does not exist.

Generally speaking, when a tribunal, other than a superior Court in the technical sense, is called upon to exercise jurisdiction, it must, of necessity, begin by considering for itself the preliminary question whether it possesses the jurisdiction invoked. That question may depend on questions of law or questions of fact or on questions both of law and of fact. As *Griffith* C.J. said in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (3):—". . . the first duty of every judicial officer is to satisfy himself that he has jurisdiction, if only to avoid

(1) (1949) 78 C.L.R. 389.
(2) (1897) A.C. 556, at pp. 567, 569 (per Lord *Herschell*).
(3) (1911) 12 C.L.R., at p. 415.

putting the parties to unnecessary risk and expense." In the same case *Barton* J. said :—" Where the jurisdiction is disputed, adequate and careful inquiry is still the duty of the court of first instance " (1). But the important point is that the decision or finding with regard to the existence of jurisdiction, whether it be affirmative or negative, stands in a radically different position from a decision or finding given or made within jurisdiction on the merits of the case. The latter is conclusive and binding subject only to any appeal that may be given : if no appeal is given, it is absolutely conclusive and binding. The former is not conclusive or binding at all. It is open, if it be affirmative and wrong, to prohibition. It is open, if it be negative and wrong, to mandamus. The position is very clearly put by *Coleridge* J. in *Bunbury* v. *Fuller* (2), in a passage quoted by *Isaacs* J. in the *Engine-Drivers' Case* (3). His Lordship said :—" Suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits ; and on its being presented, the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not proceed with the principal subject-matter according as he finds on that point ; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake."

When this Court is invited to issue mandamus or prohibition under s. 75 (v.), it is its original jurisdiction that is invoked and not its appellate jurisdiction. It has the task of deciding for itself on the material placed before it every question of law and every question of fact on which jurisdiction depends. It is entitled and, indeed, bound to consider all relevant material put before it, whether that material was before the inferior tribunal or not. In the case of prohibition (which goes as of right) I would think that generally speaking it would not matter (except as affecting costs) whether the material before the superior court was before the inferior court or not. In the case of mandamus it might often affect the grant or refusal of the remedy, but this would be only because mandamus is discretionary and because of the rule that

(1) (1911) 12 C.L.R., at p. 428.
(2) (1853) 9 Ex., at pp. 140, 141 [156 E.R. at p. 60].
(3) (1911) 12 C.L.R., at p. 454.

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a clear demand for the exercise of the jurisdiction based on proper materials must be made to the inferior tribunal before mandamus to exercise jurisdiction will be granted. If the jurisdiction was not shown before the inferior tribunal but was shown before the superior tribunal, the latter would, I should think, apart from very special circumstances, refuse the writ and leave the prosecutor to make another application to the inferior tribunal.

While, as I have said, the superior court which is invited to issue mandamus or prohibition must decide for itself on the material before it every question of law and every question of fact, there must, almost of necessity, be a difference in its attitude to the decision of the inferior court according as the question of jurisdiction depends on matter of law or matter of fact. If it depends on matter of law the question of law must simply be decided like any other question of law. But, if the jurisdiction depends on matter of fact, considerable weight is attached to the view of the facts taken by the inferior court. The position is clearly indicated in two passages quoted by *Isaacs* J. in *Caledonian Collieries Ltd.* v. *Australasian Coal & Shale Employees' Federation* (1). The first is taken from the judgment of *Kennedy* L.J. in *R.* v. *Assessment Committee of Metropolitan Borough of Shoreditch*; *Ex parte Morgan* (2), and is as follows:—"Where the evidence upon which the inferior tribunal has decided in exercising or refusing to exercise jurisdiction, is conflicting, that circumstance, though not conclusive upon the Court so as absolutely to deprive it of the discretionary power of granting the prohibition or the mandamus, *will so far influence the Court that very strong grounds will be required before it interferes with the decision.*" The second is from the judgment of *Griffith* C.J. in *R.* v. *Yaldwyn* (3) and is as follows:—"If the decision of justices on a question on which their jurisdiction depends is manifestly wrong, the Court will not pay any attention to their finding; if it manifestly proceeded upon a wrong notion of the law, the Court would not pay any attention to their finding; but if the facts upon which their jurisdiction depends were investigated by them, and their finding was not manifestly wrong, the Court will hesitate very much before it will interfere. That does not import that the Court abrogates its right to inquire into the jurisdiction of inferior Courts, but that *it will decline to interfere when it is very doubtful whether the facts are different from what the inferior Courts have found.*" After quoting, *Isaacs* J., referring to an arbitrator or a judge of

(1) (1930) 42 C.L.R., at p. 547.
(2) (1910) 2 K.B. 859, at p. 888.
(3) (1899) 9 Q.L.J. 242, at p. 244.

an inferior court said :—" If he errs in law that is manifest. As to fact a doubt as to error is resolved in favour of jurisdiction " (1). The case which was under consideration was a case of prohibition, and it may be that *Isaacs* J. had not in mind a case of mandamus. It may be more correct to say that, as to fact, a doubt as to error is resolved in favour of the decision of the inferior tribunal.

There is one other point which ought to be mentioned before proceeding to consider the position in the present case, although it follows clearly from what I have already said. If the fact which the Commissioner has determined were a fact on which he had power to give a binding decision, mandamus could not go to direct him to decide it otherwise, even though this Court thought his finding erroneous. Mandamus could only go to direct him to reconsider the matter, and could only go if this Court thought that he had misdirected himself as to the real question to be decided or had taken into account some irrelevant matter or that for some other reason his decision could not be regarded as a real decision. See generally per *Dixon* J. in *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts (Vict.)* (2). But where, as here, the fact which the Commissioner has determined is a fact on which his jurisdiction depends and therefore a fact on which he has no power to give a binding decision, the position is wholly different. This Court must in such a case consider the position for itself, and, if satisfied that he was wrong, will not normally direct him to hear and determine the question of jurisdiction again, but will direct him to proceed or to abstain from proceeding with the substantive matter before him. In the present case the substantive matter before him was an application for an award as to wages and conditions of employment in the terms of the log served by the Association.

The Commissioner has decided that there was not a real and genuine dispute and has refused to deal with the application for an award. What he has decided is a jurisdictional fact, and this Court must examine his finding and decide whether it is correct or not, though, since the question is a question of fact, or at least involves questions of fact, it will, as I have said, regard with respect the Commissioner's view and will not grant mandamus unless satisfied that he was wrong. But, on the material before us, I feel satisfied that he was wrong. A log of claims was served on employers, and that claim was rejected or not granted. Whatever other view may initially have been open, it is now well settled that a demand and refusal of this kind is sufficient prima facie to

(1) (1930) 42 C.L.R., at p. 548. (2) (1938) 60 C.L.R., at p. 755.

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constitute a dispute. In *The Felt Hatters' Case* (1) *Higgins* J. said:—"There was an industrial dispute, as the employees had demanded and the employers had (in effect) refused the letter of demand of 2nd August 1912." In the *Burwood Cinema Case* (2), *Knox* C.J. and *Gavan Duffy* J., in the course of a joint judgment, said: "The dispute referred to the Arbitration Court was constituted by the refusal of the employers on whom the log was served to comply with the demands contained in it". In *Australian Tramway and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (3), *Evatt* J. said:—"It need not be shown that in making the demand the demandants were ready to enforce it by strike or lock-out". Of course the demand must be genuine in the sense that it is seriously put forward for serious consideration. *Evatt* J., in the case cited and on the same page, said that the question to be asked was whether the demand upon the respondents in two or more States was genuine or was a sham or pretended demand. He added:—"If, after considering all the circumstances, it is determined that the demands were genuinely made in the interests of an organization or its members, and they have not been acceded to, then, so long as the geographical limits of one State are exceeded, there is a dispute extending beyond the limits of one State" (4).

Here the Commissioner rightly, as I think, took the view that the demand followed by refusal or failure to comply showed that prima facie a dispute existed. He nevertheless held that there was not a "real, genuine and substantial dispute". He gave two reasons for this view. The first is that "if originally there was a real, genuine and substantial dispute, that dispute ceased to exist when the New South Wales Division decided against the general service of the log in that State." The second is that "even if the New South Wales Division had participated in the serving of the log in that State, the comparatively small number of members in private industry attending and voting at the meetings of June and October, 1948, did not, in my opinion, indicate the necessary interest and dissatisfaction necessary to establish a real, genuine and substantial dispute". No other reasons are given by the Commissioner, or were stated in argument before this Court, for saying that the prima-facie view that a dispute existed was displaced.

Neither of the reasons given for the decision reached can, in my opinion, be supported. The log had been served on employers in

(1) (1914) 18 C.L.R., at p. 111.
(2) (1925) 35 C.L.R., at p. 535.
(3) (1938) 58 C.L.R., at p. 442.
(4) (1938) 58 C.L.R., at pp. 442, 443.

all States. It had been in effect rejected, and prima facie there was a dispute extending beyond the limits of one State. In this state of affairs I can find nothing in the rules of the Association authorizing the New South Wales Divisional Council to withdraw from the dispute if the Federal Council, which is the "supreme governing body", chose to proceed with it on behalf of members in New South Wales. But, if as a matter of policy the Federal executive decided not to press the claims except as to two employers in New South Wales, the withdrawal of New South Wales from the scope of the dispute could not annihilate the dispute. The dispute continued to exist as to the other five States. Even if we say that technically it is a different dispute, there is still a dispute and it extends beyond the limits of one State. The second reason is, I think, equally irrelevant. The disputing party is the organization which is represented under its rules by the Federal council or the Federal executive. The existence of a dispute cannot depend on the degree or extent of dissatisfaction or discontent with existing conditions. If it were shown that the council or executive was acting without the authority of the organization or its members or against the wishes of the majority of the members, the position might well indeed be different. But, apart from the fact that thirty Queensland members out of a total of about 400 who voted were against proceeding with the claims, there is no evidence whatever that the action of the council or executive did not command the approval and support of members. The mere fact that meetings were sparsely attended is perfectly consistent with the view that members generally were quite content to leave matters in the hands of the council and executive.

Mr. *Eggleston* objected that it was not shown that any employer who had been served with the log was named as a respondent to this application for mandamus. It would appear, however, that two companies, the Australian Gas Light Co. and the North Shore Gas Co. Ltd., were served with the log, and both were also served with the order nisi for mandamus in this case and were represented before us by Mr. *Eggleston*.

In my opinion mandamus should go. I do not, however, think that in this case it should be peremptory in the first instance. The order should, I think, be in accordance with the first paragraph of Order XLVII, rule 15. This will give an opportunity of raising any other objections to the jurisdiction which may exist. None, as I have said, were stated before us, but there was a suggestion that it was desired to raise other points.

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I may add that it has occurred to me to wonder whether members of the prosecuting Association are engaged in industry within the meaning of the Constitution and of the *Commonwealth Conciliation and Arbitration Act*. That question, however, has not been raised in these proceedings.

KITTO J. Section 36 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 provides that a Conciliation Commissioner shall, in such manner as he thinks fit, carefully and expeditiously hear, inquire into and investigate every industrial dispute which is before him and all matters affecting the merits of the dispute and the right settlement thereof. Section 37 provides what is to be done if an agreement is arrived at; and s. 38 provides that if no agreement between the parties as to the whole of the dispute is arrived at, the Commissioner shall, by an order or award, determine the dispute, or (if an agreement has been arrived at as to a part of the dispute) so much of the dispute as is not settled by the agreement.

It has already been held by this Court that s. 38 imperatively requires that in the absence of agreement the Conciliation Commissioner shall subject to the Act determine a dispute which comes before him, and also that this Court has jurisdiction, by virtue of s. 75 (v.) of the Constitution and notwithstanding a statutory provision such as s. 16 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, to issue a writ of mandamus directing the performance of the positive duty thus created (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (1)).

The prosecutor organization brought before the respondent Conciliation Commissioner two alleged disputes which it contended had arisen by reason of the failure of a large number of employers to agree to certain claims, in respect of salaries and working conditions, contained in a log served upon them by the prosecutor. The service of the log and the failure of the employers served to agree to the claims made thereby were proved, and indeed were not denied, before the Commissioner and before this Court. The employers concerned were persons and bodies in all States of the Commonwealth, and the claims contained in the log were expressed to be made for the members of the prosecutor organization employed by these persons and bodies, and for other persons employed. Industrial disputes within the meaning of the Act were thus prima facie established, and the Commissioner so found; but, after

(1) (1949) 78 C.L.R. 389.

hearing the parties at twelve sittings, he formed the opinion that there was no "real, genuine and substantial dispute", and he declined to proceed further.

It was contended for the respondent employers on the hearing of this application that the Commissioner applied himself to the correct question, that he was not actuated by any extraneous or irrelevant consideration, and that he did not in any other respect so proceed that his decision was nugatory and void; and it was argued that, that being so, the Commissioner cannot be held to have declined any duty cast upon him by s. 38, and that accordingly no case for mandamus is made out.

This argument rests upon the view that s. 38 empowers the Commissioner to decide whether a dispute within the meaning of the Act exists, and imposes no duty upon him to determine a dispute, which exists in fact, if he decides validly, though wrongly, that it does not exist. It is necessary to consider whether this is the correct view of the section.

The cases are legion which deal with "the perpetually recurring question whether a tribunal . . . is or is not intended to decide upon a particular matter which is a condition of its power to act. The question is whether or not the opinion of the tribunal is made the test of the existence of the relevant matter" (*R.* v. *Commissioner of Patents*; *Ex parte Weiss* (1)). This question is of fundamental importance in an application for one of the prerogative writs, because upon the answer to it depends the attitude which the Court must adopt towards a finding of the tribunal upon the matter which forms the condition of the tribunal's power and duty.

On the one hand, if the existence of a particular state of things, though essential to the validity of a purported exercise of power by the tribunal, is committed by the relevant legislation to the decision of the tribunal itself, a finding by the tribunal that that state of things does or does not exist provides the answer to the question whether an occasion for the exercise of power has arisen. In such a case a superior court, upon an application for prohibition or mandamus, has no other function than to decide whether the finding of the tribunal is a valid finding; it has not to make any finding of its own as to the existence or non-existence of the particular state of things.

On the other hand, if, upon the true construction of the legislation, the power of the tribunal depends, not upon the existence of a state of things as ascertained by the opinion of the tribunal,

(1) (1939) 61 C.L.R. 240, at p. 249.

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but upon its existence in point of fact, the function of a superior court upon an application for prohibition or mandamus is to ascertain for itself whether the state of things exists. It must perform that function by considering the evidence placed before it, together, of course, with any matters of which it is entitled to take judicial notice; and, whatever may be the persuasive value properly to be allowed to the decision of the tribunal upon contested facts, the superior court must make its own finding. To limit its consideration to the question whether for some reason the finding of the tribunal is invalid would be to mistake the purpose both of the investigation undertaken by the tribunal and of the investigation which the Court itself has to make. The tribunal may, and should, inquire whether the state of things exists upon which its power depends, but only for the purpose of deciding whether it will act on the basis that its power is exercisable or on the basis that it is not. The superior court, however, inquires whether the fact exists, for the purpose of giving a binding decision on the question; and it does not discharge its responsibility if it accepts the finding of the tribunal, however clear it may be that the finding was not vitiated by a misconception of the relevant question, or by attention to extraneous considerations, or otherwise.

The distinction between the two classes of cases is established and illustrated by a long line of decisions, of which some of the more important were reviewed by *Isaacs* J. in *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (1), and by *Jordan* C.J. in *Ex parte Mullen*; *Re Hood* (2), and *Ex parte Redgrave*; *Re Bennett* (3).

Then, does s. 38 require a Conciliation Commissioner to make an order or award whenever he concludes that a real and genuine dispute exists, or does it require him to do so whenever a real and genuine dispute exists in fact and comes before him? In my opinion it is the latter question and not the former which must be answered in the affirmative. In the first place, a duty to determine a "dispute", i.e., an industrial dispute as defined in s. 4, could not be validly created except in relation to a "dispute" actually existing. (I omit any reference to threatened or impending or probable disputes, as having no relevance in this case). This follows from the limitation upon legislative power inherent in s. 51 (xxxv.) of the Constitution. In the second place, s. 35,

(1) (1907) 5 C.L.R. 33, at pp. 52, 55.
(2) (1935) 35 S.R. (N.S.W.) 289, at pp. 298-301; 52 W.N. 84, at p. 85.
(3) (1945) 46 S.R. (N.S.W.) 122, at pp. 124, 125; 63 W.N. 31, at p. 32.

which makes a certificate by the registrar that an industrial dispute exists, as an industrial dispute extending beyond the limits of any one State, prima-facie evidence that the fact is as stated, suggests strongly that the sections which follow are intended to apply where the fact is that a dispute exists. Thirdly, s. 36 in terms applies to every industrial dispute which is before a Conciliation Commissioner, i.e., which is in fact before him. Fourthly, s. 37 plainly operates in respect of every dispute as to the whole or part of which an agreement is arrived at, and therefore presupposes a dispute in fact. And finally, the language of s. 38 itself, and particularly that portion of it which refers to so much of a dispute as is not settled by agreement, is inapt to make the operation of the section conditional upon a finding by the Arbitration Court or the Commissioner that the dispute exists.

It follows, in my opinion, that, in a case where there are no special circumstances affecting the discretion of the Court, mandamus must go to direct a Conciliation Commissioner to determine a dispute which this Court finds to exist, if the dispute has come before the Commissioner, and otherwise than in accordance with the Act he has refused or failed, actually or constructively, to determine it. Where an authority charged with a duty has purported to perform his duty, it may be found that he has constructively failed to do so, because the ostensible performance of his duty is in law not a performance of it at all. The principle to be applied in a case of alleged constructive failure is the same as that by which the validity of a finding of fact is decided in a case where jurisdiction depends upon the finding (see *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1), and *Ex parte Belling*; *Re Woollahra Council* (2)). But the present case is not one of constructive failure to determine a dispute; the Conciliation Commissioner has expressly declined to proceed. The principle of the authorities last cited is therefore inapplicable.

Accordingly, in my opinion, the question which this Court has to decide in this case is whether or not the alleged disputes actually exist as real and genuine disputes; and for the reasons I have given I am of opinion the Court is bound to decide this question in the same manner as it would decide it if the case were one of prohibition, namely by ascertaining for itself what is the proper conclusion upon the evidence adduced before the Court. It is not dealing with an appeal from the Commissioner's finding, nor

(1) (1933) 50 C.L.R. 228.

(2) (1946) 47 S.R. (N.S.W.) 166, at pp. 169, 170; 63 W.N. 295, at at p. 297.

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has it to decide whether that finding should be treated as a nullity by reason of some invalidating circumstance; it has to decide what is the fact concerning a matter which is a condition of the Commissioner's duty and as to which the Commissioner himself had no authority to give a decision binding upon the parties.

I have thought it right to state for myself the reasons which have led me to reject a method of approach which I regard as inadmissible in the present case. For the rest, it is enough to say that after full consideration I find myself in agreement with the judgment of the Chief Justice, and in my opinion the order nisi should be made absolute as proposed by him.

Order absolute, respondents other than Arthur Blakeley to pay costs of prosecutor.

Solicitors for the prosecutor, *Sullivan Brothers.*

Solicitors for the respondents other than the Commissioner, *Dawson, Waldron, Edwards & Nicholls.*

J. B.