[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

FINDLAY AND ANOTHER;

EX PARTE VICTORIAN CHAMBER OF MANUFACTURES AND OTHERS.

H. C. OF A. 1950.

MELBOURNE, *Oct.* 16-18; SYDNEY, *Dec.* 1.

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

Industrial Arbitration (Cth.)—Award—Validity—Industrial dispute—Ambit of dispute—Log of claims by employees not acceded to by employers—Claim for compulsory unionism—No claim for preference to unionists—Nature and extent of power to direct preference to unionists—Commonwealth Conciliation and Arbitration Act 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *ss.* 4, 56.*

An industrial dispute arose from the failure of employers to accede to a log of demands by a union of employees which contained a claim for compulsory unionism but none for preference to unionists. An award made by a conciliation commissioner under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 in settlement of the dispute contained the following clause:—"61. Subject to the provisions of the *Re-establishment and Employment Act* 1945, the following conditions shall apply in respect of employment in the industry:—(a) In employing and dismissing employees, an employer bound by the terms of this award shall give preference of employment to members of the Clothing and Allied Trades Union of Australia. (b) Without derogating from the generality or operation of sub-clause (a) hereof—(i) An employer who is bound by this award shall not employ any person who is not a member of the said Union if a person who—(1) works in the class of work in question, and (2) is a member of the said Union is available for and willing to accept such employment. (ii) An employer who is bound by this award shall not (on the ground that no such person as is described in sub-paragraphs (1) and (2) of paragraph (i) hereof is available for and willing to accept the employment in question) employ any person who is not a member of the said Union unless

* NOTE.—The provisions, so far as relevant, of s. 56 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, are set out in the judgment of *Latham* C.J. at p. 542 (*infra*).

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the said employer first notifies the said Union by sending a registered letter or telegram addressed to the nearest office of the said Union in the State in which the employee is to be employed that no such person is available for and willing to accept such employment and the said Union does not within forty-eight hours after the receipt of the said notice notify to the said employer by sending by registered letter or telegram the name and address of a member of the said Union who works in the class of work in question and is available for and willing to accept such employment. (iii) An employer who is bound by this award shall not continue to employ any person who is not a member of the said union if—(1) the said Union sends notice by registered post or telegram to the said employer that such person is not a member of the said Union; and (2) such person does not become a member of the said Union within fourteen days from the receipt by the said employer of the said notice; and (3) a person who—(a) works in the class of work in which the said employee works; and (b) is a member of the said Union is available for and willing to accept such employment. (iv) An employer who is bound by this award shall not (on the ground that no such person as is described in sub-paragraph (3) of paragraph (iii) hereof is available for and willing to accept the employment in question) continue to employ an employee for more than fourteen days after the receipt of the notice referred to in paragraph (iii) hereof unless the said employer first notifies the said Union by registered letter or telegram addressed to the nearest office of the said Union in the State in which the said person is employed that no such person is available and willing as aforesaid and the said Union does not within fourteen days after the receipt of the said notice send notice to the said employer by registered letter or telegram of the name and address of a person described in sub-paragraph (3) of paragraph (iii) hereof who is available for and willing to accept such employment. (c) Any notice sent by registered post or telegram pursuant to any of the above sub-clauses shall be deemed to have been received at the time when it would have been received in the ordinary course of delivery by the Postmaster-General's Department."

Held that clause 61 of the award was invalid because—

(1) By the whole Court, a demand for the exclusion from employment of persons not belonging to a given union is not an industrial matter within the definition in s. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 and there was in this case no dispute to the settlement of which an award directing preference to unionists under s. 56 of the Act could be appropriate.

(2) (*a*) By *Latham* C.J., *Webb* and *Kitto* JJ., the clause did not comply with the requirements of s. 56 of the Act as to what should be "specified" in an award or order directing preference to unionists.

(*b*) By *Latham* C.J., *Dixon* and *Kitto* JJ., it produced a result substantially different from anything the claim in the log for compulsory unionism could be regarded as contemplating. The final clause of the log, which sought "such additions to the above claims and/or amendments or variations

thereof as will afford to members of the claimant union relief from the disabilities and abuses from which it and its members are now suffering", could not be treated as raising a separate dispute covering every subject considered germane to the purposes lying behind the specific demands.

Nature and extent of the power conferred by s. 56 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 to make an award or order directing preference to unionists, considered.

R. v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers*, (1949) 78 C.L.R. 529, applied.

ORDER NISI for prohibition.

This was an order nisi, obtained in the High Court by the Victorian Chamber of Manufactures and others, for a writ prohibiting the enforcement of, and further proceedings on, clause 61 of the Clothing Trades Award 1950, made under the *Commonwealth Conciliation and Arbitration Act* 1904-1949. The respondents were the conciliation commissioner who made the award, Mr. G. A. Findlay, and the Clothing and Allied Trades Union of Australia.

Leave to intervene was granted to members of certain firms which were respondents to the award. It appeared that they and their employees were members of a religion which precluded them from becoming members of a trade union or of an association of employers or from influencing or requiring others to become such members.

S. C. G. Wright (with him *R. Ashburner*), for the prosecutors. It is submitted that the commissioner had no power in the circumstances of this case to direct preference to unionists, and further that, even if he had such power, he did not exercise it by clause 61 of the award in such a manner as is authorized by s. 56 of the Act. As to the first submission, there was no claim in the log of demands for preference to unionists and, on the facts, there was no supervening claim which might be treated as raising a fresh dispute on this point. The only claim in the log which might conceivably be regarded as raising a dispute as to preference to unionists is the claim for compulsory unionism. If it is suggested that this raises a dispute as to preference, it is submitted that the suggestion is unsound. It is not a case of the greater including the less, because preference is something which is quite different in kind from compulsory unionism, as is made plain in *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers and H. V. McKay Massey Harris Pty. Ltd.* (1). Accordingly, preference was

(1) (1949) 78 C.L.R. 529.

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beyond the ambit of the dispute and was therefore a matter with which the commissioner had no power to deal (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1)). Notwithstanding the wide words of s. 56 (2), it does not—at all events, it cannot validly—empower the commissioner to go beyond the ambit of the dispute in making his award. Even if this is not so and there was room in this case for the exercise of the power conferred by s. 56, the second submission is that clause 61 is not a valid exercise of the power given by s. 56 because it does not comply with the requirements of the section. The section requires a specification of "matters," "manner" and "conditions" and also the persons to be preferred. Clause 61 complies with none of these requirements. It would leave an employer quite at a loss to know what obligations it purports to impose on him and would make it practically impossible for him to carry on his business. It is an attempt to bring about in an indirect way compulsory unionism and thus to circumvent the decision in *Wallis' Case* (2). Accordingly, it is wholly invalid. [He referred to *Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (3); *British Medical Association* v. *Commonwealth* (4).]

R. M. Eggleston K.C. (with him *A. P. Aird*), for the interveners adopted the argument of the prosecutors. If any legitimate purpose was to be served thereby, it may be that some portions of clause 61 could be severed and given an independent operation. It is submitted, however, that no such purpose is to be served. Even if the commissioner had power to act under s. 56, the whole scheme of clause 61 is bad by relation to the section and there is no part of it which can be given operation as complying with the requirements of the section.

The respondent commissioner did not appear.

Dr. *H. V. Evatt* K.C. (with him *G. E. Barwick* K.C., *S. R. Lewis* K.C. and *W. O. Harris*), for the respondent union. It is submitted that clause 61 is authorized by s. 56 of the Act; it is appropriate and relevant to the settlement of the dispute, and the power given by s. 56 is independent of the existence in the dispute of a claim for preference. The power given by s. 56 as it was enacted in 1947 is much wider than that conferred by the former s. 40. The Act as it now exists is designed to give the commissioner power to deal

(1) (1938) 60 C.L.R. 507.
(2) (1949) 78 C.L.R. 529.
(3) (1932) 47 C.L.R. 1.
(4) (1949) 79 C.L.R. 201.

with rapidly changing conditions, and it is no longer possible to determine the existence or extent of a dispute merely by reference to a log of demands and the fact that it has not been acceded to. It appears on the facts here that when the parties were before the commissioner it was indicated on behalf of the union that the claim for compulsory unionism was abandoned because of the decision in *Wallis' Case* (1), which had been given since the service of the log, and that preference to unionists was claimed. There was no acceptance of this by the employers; and, if necessary, these facts are relied on as showing a dispute arising at that time. However, it is submitted, notwithstanding what has been said on behalf of the prosecutors as to the claims being different in kind, that there is a sufficient relation between compulsory unionism and preference to bring the latter within the ambit of the original dispute. As to the objections which have been taken to clause 61 by relation to s. 56 because certain things have not, it is said, been "specified", the section does not mean to limit the power of the commissioner. It seems clear that the commissioner is not bound to subject the preference to any conditions; the section merely means that he may specify such conditions &c. as he may think fit. The clause specifies the respondent union as the organization the members of which are to have preference, and that is a sufficient compliance with the section. [He referred to *R.* v. *Blakeley*; *Ex parte Australian Theatrical and Amusement Employees' Association* (2); *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (3); *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (4); *Federated Clothing Trades of Australia* v. *Archer* (5); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (6).]

R. Ashburner, in reply. The facts in evidence do not show any new dispute as to preference arising before the commissioner. The most that appears is a statement that it was intended to make a claim for preference, but it does not appear that any definite claim was made and there is no evidence of opposition by the employers to any such claim. [He referred to *R.* v. *Blakeley*; *Ex parte Australian Theatrical and Amusement Employees' Association* (7).]

Cur. adv. vult.

(1) (1949) 78 C.L.R. 529.
(2) (1949) 80 C.L.R. 82.
(3) (1925) 35 C.L.R. 528, at pp. 540, 541.
(4) (1908) 6 C.L.R. 309.
(5) (1919) 27 C.L.R. 207.
(6) (1938) 60 C.L.R., at p. 538.
(7) (1949) 80 C.L.R., at p. 98.

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Dec. 1.

The following written judgments were delivered :—

LATHAM C.J. This is the return of an order nisi to prohibit further proceedings upon an award made by a conciliation commissioner, Mr. G. A. Findlay. The challenged provision is supported by the respondent union as a valid award of preference to unionists under s. 56 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. The prosecutors, who are employers or registered organizations of employers, contend that the challenged provision of the award deals with a matter which was not within the ambit of the industrial dispute which was settled by the award and, further, as a separate argument, that that provision is invalid as being unauthorized by the statute.

The award was made in settlement of a dispute created by the refusal of employers to agree to the demands made in a log which was served by the union in January 1949. That log contained in par. 244 the following claim :—

"244. Compulsory Unionism.

No employer (subject to the provisions of any relevant Commonwealth law in force) shall employ any person on work covered by this Log unless such person is a financial member of the Clothing and Allied Trades Union of Australia."

In August 1949 this Court decided in the case of *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (1) that an award could not give a monopoly of employment in an industry to the members of an organization. In view of the decision in *Wallis' Case* (1), it must be conceded, and it was not denied, that an award could not include the provision for compulsory unionism which was claimed; that is, no valid award could be made prescribing compulsory unionism.

If a log makes a demand which the court cannot validly grant the person upon whom the demand is made is entitled to ignore it as an element in an industrial dispute. The demand amounts to nothing. It does not enable a conciliation commissioner to deal with the matter to which the demand relates. I illustrate the position by taking an extreme case. Let it be supposed that in or in connection with a dispute in the building trade the employees claim that rents or the price of food should be reduced by some general legislation, or the employers claim that the employees should join a particular political organization. The making of such a demand, as to which a commissioner could make no award, could not properly be treated as an element in an industrial dispute for any purpose whatever. So also in the present

(1) (1949) 78 C.L.R. 529.

case the demand for compulsory unionism cannot be treated as an industrial matter in dispute between the parties. It cannot provide a foundation for granting the demand made or for including any provision whatever in an award. It is not argued that there was any other claim in the log which is relevant. Accordingly there was no dispute with which the commissioner could deal as to the employment of unionists as against non-unionists. This matter was beyond the ambit of the dispute.

Section 42 of the Act provides that the commissioner is not limited to awarding the specific relief claimed by the parties or to the demands made by them but may include in the award any matter which he thinks necessary or expedient for the purpose of preventing or settling a dispute or preventing further disputes. But this provision does not enable the commissioner to deal with a matter as to which there is no dispute: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1).

But it is argued for the respondent union that s. 56 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 operates independently of any dispute. Section 56, so far as relevant, is in the following terms:—"(1) A Conciliation Commissioner may, by an award, or by an order made on the application of any organization or person bound by an award, direct that preference shall, in relation to such matters, in such manner and subject to such conditions as are specified in the order or award, be given to such organizations or members thereof as are specified in the order or award. (2) Whenever, in the opinion of a Conciliation Commissioner, it is necessary, for the prevention or settlement of an industrial dispute, or for the maintenance of industrial peace, or for the welfare of society, to direct that preference shall be given to members of organizations as provided by the last preceding sub-section, the Commissioner shall so direct." It is contended that the application of these provisions does not depend upon preference to unionists being an element in a dispute, and that they confer power upon a commissioner to make an award for preference to unionists whether or not there is any dispute about that matter.

In my opinion s. 56 cannot be applied in any award where the subject matter to which the section refers is not in dispute between the parties. The Commonwealth Parliament has no general power of industrial legislation. It has power to make laws for arbitration and conciliation for the prevention and settlement of certain industrial disputes: Commonwealth Constitution, s. 51 (xxxv.). In

(1) (1938) 60 C.L.R. 507.

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the present case the power which was exercised was the power of arbitration. Arbitration is necessarily a proceeding which results, if it has any result, in an award with reference to matters in dispute between the parties to the arbitration proceedings. The submission of matters in dispute to an arbitrator does not entitle the arbitrator to make an award so as to bind the parties with respect to matters not in dispute. If an arbitrator is empowered, by statute or by agreement, to determine by an award questions identified as question A and question B, he can do nothing about other questions—questions Y and Z—as to which there has been no reference to arbitration. A conciliation commissioner can deal only with industrial disputes and with the particular content of particular industrial disputes. He has not been given and cannot under the Constitution be given a general power of industrial legislation independently of the existence or the content of particular disputes. Therefore s. 56 is not a provision enabling a commissioner to order preference to unionists independently of whether or not that matter is in dispute between the parties. For the reasons stated, there was no dispute as to preference to unionists between the parties and therefore no award as to preference to unionists could be made.

There are, in my opinion, other grounds upon which the provision as to employment of unionists contained in this particular award is invalid. The demand contained in the log was a simple demand for compulsory unionism the terms of which have already been stated. The award which was actually made and which it is sought to justify by reference to the demand in the log was in the following terms :—" Subject to the provisions of the *Re-establishment and Employment Act* 1945, the following conditions shall apply in respect of employment in the industry :—(a) In employing and dismissing employees, an employer bound by the terms of this award shall give preference of employment to members of the Clothing and Allied Trades Union of Australia. (b) Without derogating from the generality or operation of sub-clause (a) hereof—(i) An employer who is bound by this award shall not employ any person who is not a member of the said Union if a person who—(1) works in the class of work in question, and (2) is a member of the said Union—is available for and willing to accept such employment. (ii) An employer who is bound by this award shall not (on the ground that no such person as is described in sub-paragraphs (1) and (2) of paragraph (i) hereof is available for and willing to accept the employment in question) employ any person who is not a member of the said Union unless the said employer

first notifies the said Union by sending a registered letter or telegram addressed to the nearest office of the said Union in the State in which the employee is to be employed that no such person is available for and willing to accept such employment and the said Union does not within forty-eight hours after the receipt of the said notice notify to the said employer by sending by registered letter or telegram the name and address of a member of the said Union who works in the class of work in question and is available for and willing to accept such employment. (iii) An employer who is bound by this award shall not continue to employ any person who is not a member of the said union if—(1) the said Union sends notice by registered post or telegram to the said employer that such person is not a member of the said Union; and (2) such person does not become a member of the said Union within fourteen days from the receipt by the said employer of the said notice; and (3) a person who—(a) works in the class of work in which the said employee works; and (b) is a member of the said Union if available for and willing to accept such employment. (iv) An employer who is bound by this award shall not (on the ground that no such person as is described in sub-paragraph (3) of paragraph (iii) hereof is available for and willing to accept the employment in question) continue to employ an employee for more than fourteen days after the receipt of the notice referred to in paragraph (iii) hereof unless the said employer first notifies the said Union by registered letter or telegram addressed to the nearest office of the said Union in the State in which the said person is employed that no such person is available and willing as aforesaid and the said Union does not within fourteen days after the receipt of the said notice send notice to the said employer by registered letter or telegram of the name and address of a person described in sub-paragraph (3) of paragraph (iii) hereof who is available for and willing to accept such employment. (c) Any notice sent by registered post or telegram pursuant to any of the above sub-clauses shall be deemed to have been received at the time when it would have been received in the ordinary course of delivery by the Postmaster-General's Department."

I set out the terms of the award in full because the respondents argue that all that the award did was to grant to the claimant union not all that was claimed but a part of what was claimed—something less than what was claimed.

The difference between the simple claim in the log and the detailed and complicated provisions of the award is obvious. A person upon which the log was served would not, I venture to say, have any conception that by not taking part in the arbitration

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proceedings he exposed himself to an award in anything like the terms of clause 61. Apart from what has already been said as to the complete ineffectiveness for all relevant purposes of the inclusion of the claim for compulsory unionism in the log, preference to unionists is different in kind from a monopoly of employment for unionists: see *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1); *R.* v. *Wallis* (2). For this reason a claim for compulsory unionism contained in the log cannot be relied upon to support an award for preference to unionists.

Paragraph (a) of clause 61 is included in the award as an independent and self-operating provision. It provides as follows: "In employing and dismissing employees, an employer bound by the terms of this award shall give preference of employment to members of the Clothing and Allied Trades Union of Australia." Paragraph (b) is introduced by the words "Without derogating from the generality or operation of sub-clause (a) hereof"—then follow the detailed provisions which have already been quoted. Accordingly, par. (a) is intended to operate quite independently of par. (b).

Section 56 of the Act requires a commissioner, when directing that preference shall be given, to give it "in such manner and subject to such conditions as are specified in the order or award" and to such organizations or members thereof as are specified in the order or award. Paragraph (a) of clause 61 contains no provision as to the manner in which preference shall be given and no provisions which in any way specify any members to whom preference is to be given by defining any conditions compliance with which will entitle members to preference. It was argued that s. 56 did not require any manner or conditions to be specified or require members of an organization to be specified and that the section simply meant that if the commissioner chose he might specify a manner of giving preference and conditions of preference and members who were to get preference, but that he was not bound to do so. If a commissioner gives preference to an organization he must identify the organization, and in that case at least it is plain that the organization must be specified in the award in the sense of being made identifiable by reference to provisions in the award. In my opinion the nature of the subject matter shows that Parliament must be held to have required a manner of giving preference and conditions of preference also to be specified. An employer, let it be supposed, wants a skilled male tailor. There is such a man available who is a non-unionist, but there is a unionist office-boy who wants employment. Is the employer then bound under

(1) (1935) 54 C.L.R. 387. (2) (1949) 78 C.L.R. 529.

par. (a) to employ an office-boy whom he does not want because the office-boy is a unionist? An employer has too many male machinists, all of whom are unionists. Is he bound before dismissing any of them to dismiss female pressers who are not unionists? It is clear that clause (a) specifies no manner of giving preference whatever. The illustrations given—and there is no limit to the illustrations which could be given—show the necessity of specifying some manner and conditions of preference if any intelligible system of preference in employment is intended to be established. Accordingly, in my opinion, par. (a) of clause 61 is invalid.

Paragraph (b) (i) and (ii) relates to the engagement of employees, and par. (b) (iii) and (iv) relates to the dismissal of employees. The operation of each of these paragraphs depends upon a notification by "the union"—not by any specified officer of the union—that there is a member of the union who is available and willing to accept what is described as "such employment".

The Act, s. 55, contains the following provision:—"The Court or a Conciliation Commissioner shall not include in an order or award a provision—(a) requiring a person claiming the benefit of an award to notify his employer that he is a member of an organization bound by the award".

Before a member of the union can obtain what is said to be the preference awarded by par. (b) of clause 61 he is required through the union to notify his employer, or to authorize the union to notify his employer on his behalf, that he is a member of the union which is bound by the award. Therefore the provisions contained in par. (b) of clause 61 are in my opinion invalid by reason of infringement of s. 55.

The legal operation of par. (b) (iii) and (iv) is to require an employer to dismiss a non-unionist upon receipt of a statement from the union that there is a unionist who is available and willing to accept "such employment". The award does not purport to provide that a member of a union may be compelled by the union or by a potential employer to allow himself to be nominated for employment by a particular employer, or that he must work for an employer selected by a union officer. It is not suggested that the nominated person is bound to accept the employment or that the employer is bound to employ him. The nominated person may be incompetent or dishonest, but, apart from such considerations, it is clear that the operation of this part of the award does not bring about as a legal result the employment of any person. These provisions operate, as a matter of legal effect, simply to

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bring about the dismissal of non-unionists and not to secure the employment, preferential or otherwise, of unionists. Such a result cannot be properly described as preference to unionists.

Clause 61 has evidently been prepared in an endeavour to escape by valid provisions the effect of the decision in *R.* v. *Wallis* (1), so as to bring about in actual practice the result that employers shall be at liberty to employ only unionists nominated by union officers. One of the matters to which reference was made in *R.* v. *Wallis* (1) was the conception that preference involves a choice between alternatives and that an exclusion of choice could not properly be described as awarding preference. Clause 61 endeavours to create, by the terms of the award itself, whenever an employer engages or dismisses an employee, a position in which the employer will be presented with a unionist "available" to be employed and so to create a position in which, it is conceived, s. 56 will become applicable. It is in my opinion a question of some difficulty as to whether an award can validly create a problem simply for the purpose of applying a particular means of solving it where, apart from the terms of the award itself, that problem in some cases at least would not exist. It is not necessary, however, to answer this question in the present case.

It is unnecessary to consider various other objections to clause 61, but I do refer to the position of the persons who were allowed to intervene and to be heard upon the argument. They are employers in the industry who were served with the log. They employ substantial numbers of employees who are bound by the award so far as it is valid. These employers and employees believe in and observe a form of religion which prevents them from becoming members of an organization such as a union. If clause 61 of the award is valid they will lose their livelihood. No argument based upon their special position was presented to the Court, but I refer to what I said in *Wallis' Case* (2) as to the constitutional power of the Commonwealth Parliament under a provision in the Constitution relating to conciliation and arbitration for the prevention and settlement of inter-State industrial disputes to compel persons to become members of organizations which may have other than industrial objectives and policies. It is not necessary, however, to consider this question in the present case.

The order nisi for prohibition was made on 31st March 1950 and the affidavit in support sworn on 30th March 1950 contained a statement on behalf of the prosecutors that, if before the hearing

(1) (1949) 78 C.L.R. 529.

(2) (1949) 78 C.L.R., at pp. 545, 546.

of the application the commissioner should make an award in the terms of clause 61, they asked for the issue of a writ prohibiting further proceedings by him or by the union by way of enforcement thereof. On 15th August 1950 an affidavit was made on behalf of the respondent union and filed in this Court in which it was stated that an award containing par. 61 had been made on 30th March 1950. The order nisi should therefore be made absolute for a writ prohibiting the enforcement of clause 61 of the award and further proceedings upon that clause.

DIXON J. This is an order nisi for a writ of prohibition directed to a conciliation commissioner. The purpose of the writ sought is to prohibit him from further proceeding upon a clause in an award made by him headed "Preference to Unionists." It is clause 61 in the Clothing Trades Award made by the conciliation commissioner on 30th March 1950. The clause contains elaborate machinery calculated to bring about the employment of members of the respondent union to the exclusion of non-members, wherever members are available. The clause is attacked as going beyond the jurisdiction of the conciliation commissioner.

To support the clause reliance is placed upon s. 56 (1) and (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. In *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (1), this Court decided that s. 56 is the source of the power of conciliation commissioners to make any award or order with respect to a question how far employment is to be available to persons who are not members of an organization. It follows that to be valid a clause dealing with such a matter must conform with the requirements of s. 56. In the present case clause 61 is attacked as failing to fulfil this condition. But there is a prior question. Before the power given by s. 56 becomes exercisable there must be an industrial dispute of such a kind that a provision under s. 56 in the award is appropriate or relevant to its settlement. I am aware that in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2), *Starke* J. expressed the view that s. 40 of the Act of 1904-1921 was a substantive grant of authority to the Arbitration Court in connection with industrial disputes, of which it has cognizance, whether preference has or has not been put in dispute by the parties or claimed in the proceedings before it. But I do not think that this view can be pressed so far as to make it unnecessary that an industrial dispute should exist and that the subject of the dispute should be one to

(1) (1949) 78 C.L.R. 529.

(2) (1924) 34 C.L.R. 482, at p. 549.

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which an award of preference may be related as appropriate, incidental or relevant to its settlement. In other words, behind the exercise of the power conferred now by s. 56, there must be a question at issue in a two-State industrial dispute which would support an award of preference. Now in the present case there was no dispute about preference in terms. A log of claims was delivered by the union containing a demand that no employer (subject to the provisions of any relevant Commonwealth law in force) should employ any person on work covered by the log unless such person were a financial member of the union. To this claim the employers did not accede.

Does such a claim raise an industrial dispute covering preference in employment to the members of the union ?

In my opinion it does not and for two reasons. The first is that such a demand is for the exclusion of all but members of the union from employment in the industry and such a demand is not in respect of an " industrial matter " within the definition contained in s. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. To fall within that definition the matter must pertain to the relations of employers and employees or else fall within one or other of the paragraphs lettered *a* to *q* which follow the general words of the definition. As I read the judgments in *R.* v. *Wallis* (1), the Court was of opinion that such a claim pertained, not to the relation of employers and employees, but to the relation of employees to the union, and that it was not covered by the lettered paragraphs.

This demand in the log was therefore not capable of raising a dispute falling within the Act.

In the second place I think that clause 61 as framed in the award is outside the demand in the log. It is a detailed provision intricate in its plan and involving a variety of situations. It produces a result substantially different from anything the demand could be regarded as contemplating. It is true that the log concludes with a general clause seeking amendments and variations of the specific demands made in the log for the purpose of affording relief to members of the union from the disabilities and abuses from which the members suffered. But this, I think, can hardly be treated as raising a separate dispute covering every subject considered germane to the purposes lying behind the specific demands. I think that the conciliation commissioner had no jurisdiction to include clause 61 in his award because no industrial dispute existed within the meaning of the *Commonwealth Conciliation*

(1) (1949) 78 C.L.R. 529.

and Arbitration Act 1904-1949 which would support the inclusion of such a clause.

I cannot accept the view that the parties entered upon a new dispute when they appeared before the commissioner. Apart from other difficulties, they were simply engaged in discussing before him how far his powers extended and how he should exercise them.

I think that the order nisi should be made absolute and a writ of prohibition should go prohibiting the enforcement of clause 61 of the award and further proceedings upon that clause.

McTIERNAN J. In my opinion clause 61 of the "Clothing Trades Award 1950" is beyond any of the powers conferred by the *Commonwealth Conciliation and Arbitration Act* 1904-1949 on a conciliation commissioner.

The Act by sub-ss. 1 and 2 of s. 56 confers power on a conciliation commissioner to award or order "preference". This is a privilege intended to be given to members of organizations or their organizations as an aid to the maintenance of industrial peace through conciliation and arbitration. The content of the expression is not expressly defined by the Act. An award or order directing preference is not valid unless it conforms with the above-mentioned provisions. It is argued for the prosecutor that clause 61 does not do so.

A prior question is whether there is in the present case the requisite foundation of an industrial dispute for an award or order directing "preference". The preference is to be directed by award or order made upon the application of any organization. It is explicit in the Act creating the power that it is to be exercised by way of conciliation or arbitration. The direction as to preference must therefore have a proper relation to "an industrial dispute" and be appropriate, ancillary or incidental to its settlement.

The definition of industrial dispute is governed by the definition of "industrial matters". These are "all matters pertaining to the relations of employers and employees": s. 4. Such a matter is not anything in general that might affect the state of feeling between employers and employees by straining or improving their relations. It must pertain to specific affairs in which the employers and employees are mutually or reciprocally interested. An industrial dispute cannot be the subject of an arbitration under the Act unless it is a dispute about a matter pertaining to these relations.

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The demand for compulsory unionism upon which the employers in the present case would not come to terms with the employees was not a demand in respect of such a matter: *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (1).

The respondent union demanded in effect that the employers should use their economic power over their employees to compel those who were not members of the union to join it. The power to award preference implies the existence of two groups, unionists and non-unionists. The effect of the union's demand, if conceded by the employers, would have been to eliminate the second group from the industry. When the employers had complied with the demand, members of that group would either have been absorbed by the former group or have been expelled from the industry. It is one thing for a union to demand "preference": it is another to demand that all the employees shall qualify for "preference". The latter demand cuts across the principle of preference to unionists.

An industrial organization is a voluntary society of workmen or employers as the case may be: it is not an industry organization. Employers and workmen in an industry are workers in a common enterprise and in the realm of economics share activities and interests. They have different roles in industry and separate legal orders of economic life. They are not mutually or reciprocally interested in the affairs of their respective industrial organizations. The enrolment of members of these organizations is one of those affairs. Membership of an industrial organization is not an employer-employee affair.

The union's demand that the employers should see that all employees were unionists and refuse to employ anybody who would not be a member of the union, did not pertain to those affairs described in the Act as the "relations of employers and employees." An industrial dispute within the meaning of the Act did not result from the employers' refusal. The situation which was the occasion for the insertion of clause 61 in the award was that refusal. That situation cannot provide a legal foundation for the clause.

The demand was modified at the hearing of the "dispute". The materials before the Court do not show that a new dispute involving the issue of preference had occurred. What is shown is that the union receded to some extent from the position which they originally took up in order to gain concessions in respect of the original demand; but the employers firmly adhered to their

(1) (1949) 78 C.L.R., at pp. 554-555.

original refusal of the demand. No new dispute supplanted the original dispute and as that was not an industrial dispute, clause 61 of the award has no legal foundation and is beyond the powers of the conciliation commissioner.

In my opinion there should be an order absolute for prohibition.

WEBB J. Clause 61 of the award permits the employment of a non-unionist when the union does not nominate a unionist, and so it is not directed to ensure an absolute monopoly of employment to unionists, as were the clauses held invalid in *R.* v. *Wallis*; *Ex parte Employers' Association of Wool Selling Brokers* (1). However, it exceeds what, in my opinion, is preference within the ordinary acceptation of the term. Preference, as I understand it, presupposes an employer who needs the services of an employee, and who is able to secure those of a unionist who is not only qualified for the particular task but who is also available to perform it when required, which may be immediately. A clause which, like clause 61, has the effect of making an employer await the union's nomination of a unionist, no matter how urgently the services of an employee may be required, and then to select an unqualified unionist, if the union sees fit to nominate one, and which also has the effect of requiring the employer to dismiss a qualified non-unionist and employ in his place an unqualified unionist nominated by the union, might necessarily lead to the termination of an employer's operations. Such a clause is as objectionable as the clauses held invalid in *Wallis' Case* (1); and in any event is, I think, also invalid as going beyond preference as commonly understood. It was not submitted for the respondent union that clause 61 should be read down to any extent.

As to the other questions argued, a claim for compulsory unionism is outside the *Commonwealth Conciliation and Arbitration Act*, and so, when refused, cannot give rise to a dispute which the conciliation commissioner has jurisdiction to settle: *Wallis' Case* (1). There was no other claim by employees or employers which warranted the direction of preference as an appropriate method of settling any matter in dispute. The necessity and expediency to which s. 42 of the Act refers must, I think, be due to the nature of the dispute itself and not to independent considerations. If Parliament intended otherwise it is difficult to see how s. 42 could be sustained as within the power conferred by s. 51 (xxxv.) of the Commonwealth Constitution. But although Parliament cannot validly direct an arbitrator as to what should

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be the terms of a settlement, at all events to the extent of directing him to impose terms having no relevance to the actual dispute, still I am not prepared to say that Parliament cannot suggest terms that may be found by the commissioner to be appropriate. It may well be that Parliament can go even as far as it purports to go in s. 56 and require the commissioner to direct preference, if, in his opinion, it is necessary for the prevention or settlement of the industrial dispute, or for the maintenance of industrial peace, *or for the welfare of society*. One cannot readily hold that such a provision is beyond the power conferred on Parliament by s. 51 (xxxv.). There was no argument to the contrary.

As to the need for conditions in a direction of preference under s. 56, there might be cases in which it would not be necessary to specify conditions, but if clause 61 were otherwise unobjectionable, the preferred unionists, as well as conditions, should be specified to render it effective.

I would make absolute the order nisi for prohibition.

KITTO J. The question for decision in this matter is whether the respondent conciliation commissioner had power to include in an award which he made on 30th March 1950, entitled the Clothing Trades Award 1950, clause 61, headed "Preference to Unionists".

I agree with the reasons stated by the Chief Justice and my brother *Dixon* for the conclusion that the commissioner had not that power. As I have formed the opinion that, apart from other grounds of invalidity, the clause fails to comply with the requirements of s. 56 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, I shall state briefly my reasons for that view.

At the outset it may be observed that s. 56 (1) authorizes, not a preference to be given by an award or order, but a direction in an award or order that preference shall be given. It is therefore not a valid argument in support of a clause relating to preference that (to use a figure of speech suggested by counsel), the clause makes the stream of employment flow in the direction of union labour. The question is narrower than such an argument would suggest. It is whether the award or order directs that a preference shall be given, and does so in accordance with s. 56 (1).

A direction to A to give preference to B as against C is meaningless unless A is enabled to identify B and C, and is told in relation to what matter and in what manner he is to give the preference, and (if the obligation to give preference is conditional) what are the conditions to which the obligation is subject. Section 56 (1) appears to me to recognize these inherent essentials of a direction

to give preference, and in my opinion its meaning is that a direction to give preference, in order to be valid, must specify (1) a matter or matters in relation to which the preference is to be given, (2) a manner in which it is to be given, (3) any conditions subject to which it is required to be given, and (4) the organizations to which, or the members of organizations to whom, it is to be given. I read the expression "such organizations or members thereof as are specified" in its natural meaning of "such organizations, or such members of organizations, as are specified".

In my opinion sub-clause (a) of clause 61, if it were free from objection in any other respect, would be invalid for want of specification of the manner in which preference is to be given. It leaves the employers who are bound by the award entirely uninformed as to how they are to act in order to comply with the direction—whether they are to treat membership of the union as outweighing all other considerations, including character, ability, experience, sex and age, or as outweighing some other considerations only or as giving a right to preference if other things are equal. It does not tell them whether they are to confine their attention to persons known to them to desire employment or are to institute some form of inquiry. In short, it does not advert at all to the question of the manner of giving preference, and therefore it fails to comply with s. 56 (1).

Sub-clause (b) contains four paragraphs. Paragraph (i) takes the form of a prohibition against the employment of any non-member of the union if a member of the union who works in the class of work in question is available for and willing to accept the employment. This paragraph, in my opinion, fails to specify the members of the union to whom preference is to be given. To specify them is to describe them with such particularity as enables them to be identified with certainty. That part of the description which consists of the words "a person who works in the class of work in question" is in my opinion so uncertain in meaning that the description as a whole fails to provide the necessary identification. The word "works" may mean "is working" or "usually works" or "sometimes works", and the paragraph does not choose any one of these meanings. If the word means "usually works," as it may well have been intended to mean, no criterion of usualness is provided. Even more baffling is the expression "the class of work in question". A class of work must be narrower than the entirety of the work in the industry, but how much narrower is it? The award provides no definition of a class of work. Its classification of employees for the purposes of marginal

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rates does not purport to provide a complete list of the classes of work comprised in the industry, and is clearly inapplicable for the purposes of clause 61. If an employer wishes to engage a cutter for men's evening dress clothes, is he bound to refrain from employing a non-unionist skilled in that specialized work, when the only unionist available and willing to accept the employment is one whose work has hitherto been confined to cutting men's ready-made lounge suits? For want of a sufficient specification of the members to whom preference is to be given, par. (i) does not enable such questions as this to be answered. It therefore, in my opinion, fails to satisfy the requirements of s. 56 (1).

Paragraph (ii) presents some difficulties of construction. It is not expressed as a qualification upon par. (i), though its purpose seems to be to alter the onus of proof where a breach of par. (i) is alleged, and to provide an exclusive method of discharging that onus. It cannot, I think, operate independently of par. (i), and in my opinion they fall together.

Paragraph (iii) is open to the same objection as par. (i), but it also fails, in my opinion, as not being a direction to give preference in relation to any specified matter. A preference, in the sense of s. 56 (1), can be given only when making a selection of one or more persons for some advantage, to the exclusion of another or others. An employer cannot be said to be constantly making a selection between his existing employees whom he desires to retain and persons who are outside his employment. Until he comes to make a change in his staff of employees no situation exists in which there is room for the giving of a preference. The statutory power to direct that preference shall be given does not extend, in my opinion, to directing that a non-unionist employee shall be dismissed in order to create a situation in which a preference may be given to a member of a union. In short, I am of opinion that the situation to which par. (iii) applies is not one in connection with which there is a "matter" capable of being specified as one in relation to which a preference shall be given.

Paragraph (iv) stands in relation to par. (iii) in a position similar to that in which par. (ii) stands in relation to par. (i), and in my opinion it is likewise invalid.

I have not attempted to review all the criticisms to which clause 61 of the award was subjected during the argument. Many of them related to difficulties in the practical working of the clause, and, though warranting serious consideration by the conciliation commissioner, were not relevant to its validity.

In my opinion the order nisi should be made absolute for prohibition against the enforcement of clause 61 of the award and against further proceedings thereon.

Order absolute with costs for a writ of prohibition prohibiting enforcement of and further proceedings upon clause 61 *of the award made on* 30*th March* 1950 *in disputes No.* 158 *of* 1949 *and No.* 442 *of* 1949.

Solicitors for the prosecutors, *Moule, Hamilton & Derham.*

Solicitors for the interveners, *Arthur Muddle & Stephenson*, Sydney.

Solicitors for the respondent union, *John W. McComas & Co.*

E. F. H.