[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

KELLY AND OTHERS;

EX PARTE THE STATE OF VICTORIA AND ANOTHER.

H. C. OF A. 1950.

MELBOURNE, *Feb.* 28; *March* 1-3.

SYDNEY, *May* 4.

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

Industrial Arbitration (Cth.)—Award—Validity—Power to make award a common rule of an industry—Power to fix trading hours of shops—"Industrial dispute"—"Industrial matters"—"Matters pertaining to the relations of employers and employees"—"Matters . . . affecting or relating to work done or to be done"—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*), (*xxxix.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *ss.* 4, 41 (1), (3), 50 (*e*).

Section 41 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, which purports to give power, "if it appears to be necessary or expedient for the purpose of preventing or settling an industrial dispute . . . or of preventing further industrial disputes," to "declare . . . that any term of an order or award shall be a common rule of any industry in connection with which the dispute arose," is beyond the power conferred on the Commonwealth Parliament by s. 51 (xxxv.), (xxxix.), of the Constitution.

Australian Boot Trade Employees' Federation v. *Whybrow & Co.*, (1910) 11 C.L.R. 311, applied.

The power conferred by the *Commonwealth Conciliation and Arbitration Act* 1904-1949 to make an award for the purpose of settling an industrial dispute does not include a power to prescribe the trading hours of shopkeepers who are parties to the award. The time at which a shopkeeper (who may or may not employ labour) may open and close his shop is not a "matter" which is within the sphere of the relation of the shopkeeper as employer with any person as employee; it is therefore not within the definition of "industrial matters" in s. 4 of the Act as being a matter "pertaining to the relations of employers and employees"; as trading hours of an employer are not the same subject as working hours of an employee, it is not—under par. *a* of the definition—a matter "affecting or relating to work done or to be done,"

and it is not within any other paragraph of the definition. Accordingly, a dispute as to such a matter is not an " industrial dispute " as defined in s. 4.

Clancy v. *Butchers' Shop Employees Union*, (1904) 1 C.L.R. 181, at p. 207, applied.

Australian Tramway Employees Association v. *Prahran and Malvern Tramway Trust*, (1913) 17 C.L.R. 680, *Waterside Workers' Federation* v. *Alexander Ltd.*, (1918) 25 C.L.R. 434, *Federated Clothing Trades* v. *Archer*, (1919) 27 C.L.R. 207, *George Hudson Ltd.* v. *Australian Timber Workers' Union*, (1922) 32 C.L.R. 413, *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association*, (1925) 35 C.L.R. 528, *Amalgamated Clothing & Allied Trades Union of Australia* v. *Arnall & Sons*; *Re American Dry Cleaning Co.*, (1929) 43 C.L.R. 29, *Long* v. *Chubbs Australian Co. Ltd.* (1935) 53 C.L.R. 143, *Metal Trades Employers Association* v. *Amalgamated Engineering Union*, (1935) 54 C.L.R. 387, and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch*, (1938) 60 C.L.R. 507, considered.

ORDER NISI for prohibition.

On 20th May 1948 Mr. Frank D. Kelly, Conciliation Commissioner, made an award under the *Commonwealth Conciliation and Arbitration Act* in an industrial dispute in which the Australasian Meat Industry Employees Union was claimant and the Meat and Allied Trades Federation of Australia (an organization of employers) was respondent. The award provided that it should " be binding on the Australasian Meat Industry Employees Union its branches and its members and on the Meat and Allied Trades Federation of Australia and its members in respect of all their employees in the classifications contained herein whether members of the union or not " (clause 3) and should apply in the States of Queensland, New South Wales, Victoria and South Australia (clause 4). Clause 16 fixed the hours of labour in retail butchers' shops and smallgoods factories. Clause 16A provided that " notwithstanding anything contained in clause 16 . . . the following shall be the opening and closing times of butchers' shops " [Then followed a prescription of times, varying according to season, day of the week and locality, the details of which are not here material]. Clauses 17 and 18 dealt with meal intervals and overtime respectively. In clause 33 (*c*) " butcher's shop " was defined as meaning " any shop, tent, stall, vehicle or place other than abattoirs where uncooked meat (including the preparation thereof) are [*sic*] offered for sale, i.e., beef, mutton, lamb, pork, veal and/or sausages." On 8th December 1948, on the application of the federation of employers, to which the union of employees was respondent, the commissioner made an order that the provisions of the award " shall be a common

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rule of the industries of butchering and the sale of fresh meat and the making for sale or distribution by wholesale of small-goods and meat products in the States of New South Wales (with the exception of the City of Broken Hill), Victoria, South Australia and Queensland excluding any of such work performed in ham and bacon factories in the said States. For the purposes of this order 'fresh meat' means uncooked beef, mutton, lamb, pork or veal or preparations thereof but does not include sausages, poultry, rabbits, hams, uncooked or salted pigs' cheeks or pigs' trotters, bacon, ham or pork bones." The order further provided that the common rule should be binding upon—(*a*) the respondent union, its officers and its members respectively; (*b*) the applicant federation and the members thereof; "(*c*) all employers engaged in the above-mentioned industries and all proprietors of shops selling fresh meat in the aforesaid States; (*d*) all employees whether members of an organization or not engaged in the said industries in any of the occupations specified in the said award." This order was varied by an order of 5th April 1949, and clauses 16 and 16A of the original award were varied by an order of 1st September 1949; the nature of the variations is not material to this report.

The State of Victoria and its Attorney-General obtained in the High Court an order nisi for a writ of prohibition directed to the commissioner and the parties to the award prohibiting them from proceeding further on the award and the further orders, the validity of which was challenged on the grounds substantially that there was no power to make a common rule and, as to clause 16A, that the question of the trading hours of shops was not an "industrial matter" within s. 4 of the Act and therefore not the subject of an "industrial dispute."

G. E. Barwick K.C. (with him *D. I. Menzies* K.C.), for the prosecutors. The Constitution does not enable the Commonwealth Parliament to confer power on an arbitral tribunal to make an award a common rule in an industry (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1)). The Act as amended in 1947 cannot validly confer any greater power than the original provisions on which the case cited was decided. It is true that the new s. 41 (1), in providing that the court or commissioner, "if it appears to be necessary or expedient for the purpose of preventing or settling an industrial dispute which comes before it or him or of preventing further industrial disputes," may declare the award &c. to "be a common rule of any industry in connection with which

(1) (1910) 11 C.L.R. 311.

the dispute arose," introduces a condition which was not expressed in the former s. 38 (*f*), but this does not bring it any the more within the constitutional power. The former s. 29 (*c*), which provided that an award should be binding on "all organizations and persons on whom" it "is at any time declared by the Court or . . . commissioner to be binding as a common rule" is now s. 50 (*e*). None of the decisions of this Court since *Whybrow's Case* (1) has departed from, or cast any doubt on the correctness of, the decision in that case, and the matter should not now be reopened. Accordingly, the orders of 8th December 1948 and 5th April 1949, which purported to make the award of 20th May 1948 a common rule, should be held invalid. So far as the application of the common-rule orders to clause 16A of the original award is concerned, it appears from the facts that the orders were not in settlement of the original dispute, and it is difficult to see that there was any other dispute as to this clause. The declaration of the common rule in regard to this clause was virtually a consent order. Clause 16A purports to fix the opening and closing hours of "butchers' shops" (as to which see the very wide definition in clause 33 (*c*) of the original award). A claim for such a provision was made in the original log of demands, and on it the award containing clause 16A was made. It follows immediately on clause 16, which provides for the hours of labour of employees, and is followed by clauses 17 and 18, providing respectively for meal intervals and overtime. After the making of the original award there does not appear to have been any dispute as to clause 16A, and, when application was made to have the award declared a common rule, the parties to the award—both employers and employees—were in agreement as to the desirability of the declaration. Apart from the common-rule question, however, clause 16A is, it is submitted, beyond any power conferred by the Act because the matter of the opening and closing hours of shops is not an "industrial matter" within the definition in s. 4 of the Act and, therefore, cannot be the subject of an "industrial dispute" as defined in s. 4. This question is determined by the decision in *Clancy* v. *Butchers Shop Employees Union* (2). That case was decided on a New South Wales Act containing a definition of "industrial matters" not expressed in the same terms as in the Commonwealth Act, but it will be seen from the judgments that the view taken of the definition would apply equally to the latter.

The respondent commissioner did not appear.

(1) (1910) 11 C.L.R. 311.

(2) (1904) 1 C.L.R. 181: See pp. 185, 200, 201, 206.

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R. Ashburner, for the respondent Meat and Allied Trades Federation of Australia. Dealing first with the prosecutors' last point, it is submitted that the fixation of trading hours of shops is an industrial matter within the meaning of the Act. The prosecutors have referred to clause 16 of the award—the hours-of-labour clause—as though it in some way determined the length of time which employees must spend in the shops. That is not so; all the clause does is to fix the ordinary working hours of employees in the shops. Clause 18 (overtime) must also be regarded. The working hours of employees in fact—whether ordinary hours or hours to be remunerated at overtime rates—are dependent on the trading hours of the shops. It is not correct to regard clause 16 as fixing the maximum hours which an employee can be called upon to work. Nor is it correct to treat the question of the validity of clause 16A in the original award and the common-rule question as one question, as the prosecutors have sought to do. The first question is whether the commissioner had power to include clause 16A in the original award; it is submitted that he had. If that is so, quite distinct considerations will determine the validity or otherwise of the common rule. It is not necessary in this case for the respondent to put the first submission as a general proposition covering all industry. It is sufficient to show, as appears from the facts here, that there is such a relationship between the trading hours of the shops concerned and the hours for which employees may be required to work that the fixation of the trading hours becomes an industrial matter. A comparison of the definitions of "industrial matters" in the Act which was before the Court in *Clancy's Case* (1) and in the Commonwealth Act shows that the latter is so much wider as to make the decision inapplicable. The definition in the latter Act, s. 4, includes "all matters pertaining to the relations of employers and employees"; these words were not in the New South Wales Act. Then the Commonwealth definition includes "(*m*) any shop, factory or industry dispute, including any matter which may be a contributory cause of such a dispute." If it is suggested that the fixation of trading hours is not generally a matter pertaining to the relations of employers and employees and is not—within par. *a* of the definition—a matter or thing "affecting or relating to work done or to be done," at least a dispute as to trading hours becomes—within par. *m*—an industrial matter as a contributory cause of a dispute which is admittedly industrial, namely, one affecting hours of labour. Alternatively, the matter is within the concluding words of the definition in s. 4 (which were

(1) (1904) 1 C.L.R. 181.

not in the New South Wales Act), " all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." In *Clancy's Case* (1) no argument was put that men were required to work, or could be required to work, in the shops at overtime rates after their ordinary hours of work had concluded. The judgments proceeded on the basis that what happened after the men went home—whether the employer kept his shop open or not—could not be an industrial matter. It nowhere appears that the Court had before it the consideration that the fixing of trading hours had a direct relation to overtime and overtime pay. That *Clancy's Case* (1) has not been regarded in this Court as an authority on the Commonwealth Act appears from *Federated Clothing Trades* v. *Archer* (2) and *Australian Tramways Employees Association* v. *Prahran and Malvern Tramway Trust* (3). As to the power to declare a common rule, the decision in *Whybrow's Case* (4) depended on a much narrower conception of the phrase " industrial disputes " in s. 51 (xxxv.) of the Constitution than has since been entertained by the Court. At the time of that decision an " industrial dispute " was conceived as being a dispute between actual employers and their existing employees in an industry, with the solitary extension that an organization as recognized under the Act could represent either employers or employees. It was also thought that the arbitration power did not extend to the prevention, as distinct from the settlement, of a dispute. [He referred to *Whybrow's Case* (5).] Since then the views of the Court have altered substantially and the conceptions of an " industrial dispute " and of the arbitral power have greatly widened. In *George Hudson Ltd.* v. *Australian Timber Workers' Union* (6) the Court upheld the validity of the then recent amendment allowing successors in business to be bound by an award. In *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association* (7) it was decided that an employer could be bound even though he did not employ any unionists, the conception apparently being that he might do so in the future. In *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (8) it was decided that employers could be bound in respect of all their employees, whether members of the union or not. [He also referred to *R.* v. *Commonwealth Court of Conciliation and*

(1) (1904) 1 C.L.R. 181.
(2) (1919) 27 C.L.R.: See pp. 209, 211, 213, 214, 216.
(3) (1913) 17 C.L.R.: See pp. 692 695, 702, 704, 705, 711, 715, 717, 718.
(4) (1910) 11 C.L.R. 311.
(5) (1910) 11 C.L.R., at pp. 317, 318, 323.
(6) (1922) 32 C.L.R. 413.
(7) (1925) 35 C.L.R. 528.
(8) (1935) 54 C.L.R. 387.

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Arbitration; *Ex parte Kirsch* (1).] Demarcation disputes as between unions of employees are well recognized as industrial disputes, and, likewise, it is submitted, there may be disputes as between organizations of employers. There are dicta to that effect, though there is no actual decision: see, e.g., *Metal Trades Case* (2). An illustration of a dispute between employers can be got from the facts of this case. Apart from the common rule the award binds only those employers who are members of the respondent Federation. It might be that some non-members are undercutting the members as to the wages paid to their employees. An industrial dispute could be created by a claim by the Federation or its members for an award that the non-members pay the same rates of wages as fixed in the original award. The matter of the common rule then becomes merely a matter of procedure. One method—but a very cumbersome and expensive one—of obtaining an award binding all employers in the industry would be to seek them all out and serve the demand on them individually. Section 41 (3) provides a simpler method—which is in effect substituted service—by advertisement of the claim for a common rule. When an application is made to have a particular award declared a common rule, it is on the basis that there is at least a threatened dispute between employers bound by the award and the other employers in the industry who are not so bound. It is submitted that *Whybrow's Case* (3) should be overruled.

P. D. Phillips K.C. (with him *C. I. Menhennitt*), for the respondent Australian Meat Industry Employees Union. The decision in *Whybrow's Case* (3) depended on three main conceptions: (1) The Court approached the power in s. 51 (xxxv.) of the Constitution in terms of the reserve powers of the States; (2) it applied common-law conceptions of arbitration; (3) having done so, it limited s. 51 (xxxv.) accordingly, without sufficient regard to the fact that the power related to arbitration for the settlement of industrial disputes. The first of these conceptions is no longer relevant. The second is not conclusive. The real question is whether, in the light of experience, it is true that the power to enact the common rule is not within s. 51 (xxxv.) and (xxxix.). The early view, which has not survived, was that the power which Parliament could confer under s. 51 (xxxv.) was judicial and must not savour of legislation (*Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (4)). [He referred to *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (5); *Clyde Engineering Co.* v. *Cowburn* (6).] The result of the

(1) (1938) 60 C.L.R. 507.
(2) (1935) 54 C.L.R., at p. 403.
(3) (1910) 11 C.L.R. 311.
(4) (1910) 10 C.L.R. 266.
(5) (1918) 25 C.L.R. 434.
(6) (1926) 37 C.L.R. 466.

more recent authorities is that in one way or another a union can effectively bind every existing employer in the industry, whether he employs members of the union or not; and can bind him if he gets unionist employees in the future; and can bind all businesses with regard to their successors. The only employer who is outside the scope of an award, in fact, is a newcomer into the industry after the date of the award. However, by fresh service of demands and variation of the original award he can be brought in; but the award can be made to speak, on the day that it is pronounced, with respect to the whole of the employers in the industry except future entrants. In practical terms, therefore, the question of the common rule comes down to this: Is it incidental to the Parliament's power to make laws with respect to arbitration to authorize the arbitrator—if he thinks it proper to do it—to make an order having the effect of bringing within the scope of the award one class that otherwise would not be within it; namely, the employers who come into the industry and establish a new business and do not buy out an existing one after the date of the award?

[LATHAM C.J. And also the other class; namely, existing employers who have not been made parties to a dispute and who have not been concerned in any arbitration proceedings.]

That is so, but, as Mr. *Ashburner* has pointed out, they can be made parties. Settling a dispute by an arbitrator does not necessarily mean quietening the disputants; it means making an order which is as just as the circumstances demand. It may be that an order imposing obligations on employers will not be a just and proper settlement of the dispute unless it be made a common rule. What Parliament claims to be able to do is to equip the arbitrator with power fairly and properly to settle a dispute. An arbitrator may make an award on the supposition that he has provided a just settlement of the dispute, and thereafter it may appear that it was not a just settlement; if such appears, Parliament says that the arbitrator has what may be a necessary power justly to settle the dispute; namely, the power to make the award a common rule. [He referred to *Master Retailers' Association of New South Wales* v. *Shop Assistants Union of New South Wales* (1).] It is conceded that making the common rule is not in itself an arbitral procedure, but in a proper case it is incidental to just arbitration. Cases which, though not directly in point here, show the great lengths to which the incidental power in relation to s. 51 (xxxv.) has been carried are

(1) (1905) 2 C.L.R. 94, at p. 112.

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Stemp v. *Australian Glass Manufacturers Co. Ltd.* (1); *R.* v. *Taylor* (2). Some light on what is incidental to the arbitration power may be gained from seeing how ultimately the arbitration power itself has developed. On this matter, see the summary of the evolution of the power by *Dixon* J. in the *Metal Trades Case* (3). No question of the ambit of an industrial dispute arises in connection with the common rule. The common-rule power is not a power to regulate industry independently of an award or outside a dispute; it is merely a power to settle a dispute by adding something which goes beyond the ambit of the dispute itself but which is called into existence by the necessity of settling the dispute within its ambit. The effect of s. 41 is to enable the arbitrator to make a common-rule order in connection with an award which he has power to make, and not otherwise. If literally it is capable of some more extended meaning which would take it beyond the constitutional power, it should be so read as to keep it within power. On the facts of this case it is clear that the reason for the common rule was the unfairness of competition imposed on the employers bound by the award unless the award was extended to all other employers. It is submitted, therefore, that *Whybrow's Case* (4) should not be applied to the Act in its present form. As to clause 16A of the award—considered in the first instance apart from the common-rule question—it is submitted that an "industrial matter" is involved: namely, how long shops in which employees are engaged should be kept open, with or without the employees—how long shops with proprietors who have employees should keep them open, whether they keep their employees back or whether they send them home and keep the shops open. The question how long the working place in which employer and employee are concerned operates in each day is a matter pertaining to the relation of employer and employee. That is to say, if it is assumed that there are no shops without employees at all, then the hours at which the shops should remain open—all shops having employees—is a matter pertaining to the relation of employer and employee. Then it does not cease to be such because it is assumed (contrary—as must be known—to the facts in a great many cases) that the shop can continue open, after the employees' working day is done, with the proprietor and his family. With regard to the supposed shops that do not have employees, this respondent does not contend that the matter of their trading hours is an industrial matter: They are reached

(1) (1917) 23 C.L.R. 226.
(2) (1949) 79 C.L.R. 333.
(3) (1935) 54 C.L.R., at pp. 428 et seq.
(4) (1910) 11 C.L.R. 311.

because the arbitrator, having made an award on an industrial matter—on an industrial dispute—namely, the trading hours of shops which have employees, says that the common rule extends the rule of the award to non-employee shops by virtue of his statutory authority to make a fair settlement of the industrial matter—the trading hours of shops which have employees. Thus, it is conceded, by the common rule the arbitrator can affect some non-industrial situations; but it would be a mistake to assume that this involves a vast extension of the arbitrator's primary power. It is much more likely to be confined to marginal cases. The power which the arbitrator undoubtedly has to make awards in industrial matters is much more significant socially than any additional power he may get by way of the common rule.

G. Gowans K.C. (with him *R. L. Gilbert*), for the Commonwealth (intervening by leave). The Commonwealth is concerned with two constitutional aspects of this case. The first relates to clause 16A of the award. It is desired to leave to the parties the question whether this is an "industrial matter" within the meaning of the Act; but it appears to be implicit in the prosecutors' argument that the matter of this clause could not be the subject of an industrial dispute within the meaning of the Constitution, s. 51 (xxxv.), and this view it is desired to contest. The term "industrial disputes" is wide enough, it is submitted, to cover any dispute between employers and employees in the industry which touches or relates to the industrial relations of either employers or employees. The dispute must arise in the industry, but it is not necessary that it be confined to the relations of employers and employees with each other. There may be a relation between A and third persons which is an industrial relation, and a claim may be made by X against A in relation to the industrial relations subsisting between A and B. That is illustrated by the *Metal Trades Case* (1): See also *Archer's Case* (2). The reasoning in those cases is inconsistent with that in *Clancy's Case* (3). See also the *Tramways Case* (4); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Paper Mills Employees' Union* (5); *Burwood Cinema Case* (6). When the question is whether a dispute is industrial or not one is concerned only with two things, (1) whether the dispute arises between persons in the industry and (2) whether

(1) (1935) 54 C.L.R. 387: See pp. 402, 403, 416.
(2) (1919) 27 C.L.R. 207, particularly at pp. 213, 217.
(3) (1904) 1 C.L.R. 181.
(4) (1913) 17 C.L.R. 680, particularly at p. 704.
(5) (1943) 67 C.L.R. 619, at p. 631.
(6) (1925) 35 C.L.R., at pp. 539, 541, 548.

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it touches or concerns the industrial relations in the industry of either of the disputants. It is not contended that a dispute touches or concerns the industrial relations of the disputants merely because it is a claim made by employees against employers or vice versa; for instance, a claim by employees against employers that the employers should join a certain religion.

[FULLAGAR J. The position must be such that any award made will affect the relations between employer and employee?]

Yes, it must affect them at least proximately; not necessarily directly, but, on the other hand, not merely remotely. To take a case where employees are claimants, the test is whether the claimants have a practical interest which arises out of or relates to their employment, or arises out of or relates to their industrial relations, so that the claim, if granted, would tend to affect conditions of employment in their favour. The position is the same whether the dispute is between employees and their employers, between employers respondents and other employers or between employee and employer claimants and non-employers who are engaged in the industry. As to a claim against non-employers for limitation of trading hours, the question would be whether the trading hours of the non-employers had a sufficient proximate effect on the working hours of the claimants. As to the common rule, it is submitted that ss. 41 and 50 (*e*) are valid. Section 41 (1) forms a contrast with the old s. 38 (*f*), and also with the present s. 41 (2), relating to the Territories (where the legislative power depends on s. 122—not s. 51 (xxxv.)—of the Constitution). In s. 41 (2), Parliament has preserved substantially the same words as in the old s. 38 (*f*), but in s. 41 (1) it has introduced words which are obviously intended to be both significant and narrowing. Under s. 38 (*f*) the preliminary consideration was whether there was an industrial dispute of which the Court had cognizance. Under s. 41 (1) there must come before the arbitrator an industrial dispute (which, by definition in s. 4, includes a threatened, impending or probable dispute) and it must appear to be necessary or expedient for the purpose of preventing or settling such dispute or preventing further disputes to make the common rule. Then, under s. 41 (3), there must be notification by advertisement to persons or organizations interested so that an opportunity is given for them to be heard. Section 50 (*e*) is a direct provision that the persons or organizations declared to be bound shall be bound. The question whether the process of arbitration can be applied to prevent a dispute as well as to settle an existing dispute has been determined in the affirmative (*Merchant Service*

Guild of Australasia v. *Newcastle & Hunter River Steamship Co. Ltd.* [*No.* 1] (1)). Section 41 can be compared with s. 14, which is the main section conferring jurisdiction on conciliation commissioners. Under s. 14, before he gets to the stage of arbitration, at the time when he ascertains that a dispute exists or is likely to occur, the commissioner has to ascertain the parties to the dispute and the matters which form the subject of the dispute. Under s. 41, at the stage when the question of making a common rule arises, the commissioner must ascertain the classes of persons interested in the dispute. It may be that only at that stage the dispute receives sufficient definition to enable the process of arbitration to take place. If the matter rested entirely on s. 51 (xxxv.) of the Constitution, perhaps Parliament could not empower the arbitrator to make an award in the first instance which would bind any but the persons or organizations which are before him or those that they represent. But s. 51 (xxxix.) enables Parliament to take the matter further, as has already been submitted on behalf of the respondents. As to the objection that ss. 41 and 50 (*e*) purport to bind non-disputants, it has already been held (as a general proposition—though not with particular reference to the common rule) that there is a power to bind non-disputants (*Hudson's Case* (2)). This would seem to depend on the incidental power. The result of that decision is that there is power to bind a person who has not been notified of any dispute, has not been called—or given an opportunity of being heard—before any tribunal and who is not represented by any organization which is before the tribunal. The class generally in respect of which the dispute arose having been ascertained, the obligations of the award are extended into the future to include persons who subsequently come within that class. Section 41 may be described as contemplating the extension of the award " laterally " to include persons who are not strictly disputants but are within the industry to which the dispute relates, who are—so to speak—within the area of the dispute. This is equally within the logical basis of *Hudson's Case* (2), and the same may be said as to provisions such as ss. 40 (*f*), 50 (*b*) and (*c*).

G. E. Barwick K.C., in reply. The two respondents in this case have sought—each by a different approach—to give clause 16A of the award a construction which will limit it in some way so as to bring it within an employer-employee relationship. The argument of Mr. *Phillips*, in particular, seeks to read into the clause restrictive

(1) (1913) 16 C.L.R. 591 : See pp. 633, 643, 644.

(2) (1922) 32 C.L.R. 413.

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words which are not warranted by anything to be found in the award and in some cases will leave it in doubt as to how the clause is to operate. In the original award (apart from the common rule) the clause is a perfectly general one, limited—as to the persons to be bound—only by the words of clause 3 to the effect that the award shall be binding on the respondent union and its members and on the respondent Federation "and its members in respect of all their employees in the classifications contained herein whether members of the union or not." If this clause was to have the effect claimed, it would itself have to have words read into it; it would need to be expressed to be binding on the Federation "and its members, if employers, in respect of" &c. This would not give the award its natural construction. Moreover, it would create difficulty in the case, for example, of the proprietor of a small business, who sometimes has, say, one employee and sometimes none. There is no such inter-relation between clause 16A and clauses 16 and 18 as was suggested by Mr. *Ashburner*. Clause 16A is quite independent of the provisions as to hours of employment and overtime. It would not be an apt order to make in a dispute as to the hours at which employees should be required to work; the appropriate order in such a case would be one directly providing that employees should only be employed during hours specified. The argument for the respondents has not succeeded in showing that the clause is within any of the words of the definition of "industrial matters." *Clancy's Case* (1) is not distinguishable on the ground which has been suggested. The argument as reported would seem to have brought sufficiently to the mind of the Court such bearing as trading hours of shops might have on hours of employment. The definition of "industrial matters" in the Act then before the Court was no narrower than that in the present Commonwealth Act; if anything, it was wider. As to the common rule, it is contended by the respondents and by the Commonwealth that the present s. 41 is limited in a way in which the original s. 38 (*f*) was not by the introduction of the words of the condition relating to the prevention or settlement of disputes. Section 41 does differ in certain respects from s. 38 (*f*), but not in the manner so suggested. Section 38 (*f*) was itself conditioned on the Court's being engaged in settling a dispute of which it had cognizance under the former s. 19 (now repealed). Therefore, no change has been made by way of limiting the purpose of the exercise of the power to make the common rule. A change does, however, seem to have been effected in this way. Section 38 (*f*) spoke of "a common rule of any industry in which the dispute

(1) (1904) 1 C.L.R. 181: See pp. 191, 194, 196.

arises"; in s. 41, the word "*arose*" is substituted for "arises." The arguments both of Mr. *Ashburner* and Mr. *Gowans* appear to be founded on the assumption that the common-rule power now extends to the declaration of the rule in a new dispute, not necessarily in the same industry as the original dispute or having the same parties. The section does seem wide enough as a matter of construction to support such arguments, but that does not contribute in any way to its validity. At all events, the reasoning of *Whybrow's Case* (1) is at least as applicable to the new section as it was to the old one. Such changes as there may have been since in judicial views as to what is "arbitration" and what is an "industrial dispute" do not touch the present question. The view that there must be a dispute—necessarily involving ascertained disputants—still remains, and that is the fundamental consideration here. So far as threatened or future disputes are concerned, they must still be disputes between ascertained disputants. Whether the common rule is regarded as one operating universally in an industry or as having some less extensive operation by reason of s. 50 (*e*), it necessarily has the effect of extending the award to non-disputants. The idea that a person might be represented in a dispute by an organization was already current at the time of *Whybrow's Case* (1). The later decisions are merely applications of this idea, so that "disputants" must be understood as meaning those who are in fact disputants or those who might be described as their privies either by representation or succession. These decisions have not impaired the authority of *Whybrow's Case* (1); rather they have reinforced it. Problems such as arose in the *Metal Trades Case* (2), for instance, need not have arisen if the power to make a common rule had been recognized. As to the incidental power, the argument really comes to this: that a power to bind non-disputants can be incidental to a power which itself is limited to binding disputants—in effect, that the incidental power may be inconsistent with the main power. There is no authority to support this. The suggestion that the common rule is or may be necessary to do justice between the parties to a dispute hides the real problem. There is no general power "to do justice"; the powers of the arbitrator are those validly conferred by the Act. The argument that the common rule, being declared at a later stage than the original award, is in settlement of the original dispute must fail on the facts here; there was no claim for a common rule in the original dispute. If it is a question of settling a new dispute, there is no evidence here of any new dispute.

(1) (1910) 11 C.L.R. 311.

(2) (1935) 54 C.L.R. 387.

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May 4.

P. D. Phillips K.C., by leave, referred to *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Case*) (1).

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is the return of an order nisi for a writ of prohibition directed to Mr. F. D. Kelly, a Conciliation Commissioner, under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 and others, prohibiting them from proceeding further upon four awards or orders dated respectively 20th May 1948, 8th December 1948, 5th April 1949 and 1st September 1949. The first of these instruments is an award made by Mr. Kelly in a dispute in which the Australasian Meat Industry Employees' Union was claimant and the Meat & Allied Trades Federation of Australia (an organization of employers) was respondent. This award dealt in detail with wages, hours of work, and many other matters. The order of 8th December 1948 provided that the "regulations, rules, customs, terms of agreements and conditions of employment" determined by the award should be "a common rule of the industries of butchering and the sale of fresh meat and the making for sale or distribution by wholesale of small goods and meat products" in the State of New South Wales (with the exception of the City of Broken Hill) and in the States of Victoria, South Australia and Queensland. The term "fresh meat" is defined. It is declared that "the common rule shall be binding upon" (*a*) the Australasian Meat Industry Employees' Union, its officers and members respectively, (*b*) the Meat & Allied Trades Federation of Australia and the members thereof, (*c*) all employers engaged in the above-mentioned industries and all proprietors of shops selling fresh meat in the aforesaid States, (*d*) all employees whether members of an organization or not engaged in the said industries in any of the occupations specified in the said award. The order of 5th April 1949 varied this order in a manner not material for present purposes.

The first of the two main questions raised by the order nisi is whether the order of 8th December 1948 making the award a "common rule" is valid. It appears that a previous award in 1944 had been made a common rule of the industry by Chief Judge *Piper* acting under the power conferred by reg. 6 of the *National Security* (*Industrial Peace*) *Regulations*, but no argument was

(1) (1943) 67 C.L.R. 347, at p. 403.

addressed to the Court based upon the *Defence (Transitional Provisions) Act* 1946-1949, which purports to keep those regulations in force until 31st December 1950. The common rule in this case was made by a conciliation commissioner and the *Industrial Peace Regulations* gave power to the court, and not to a commissioner, to make a common rule. The reasoning in *R.* v. *Foster* (1) shows, moreover, that the regulations were no longer in operation in December 1948. The making of the common rule is, however, authorized in terms by s. 41 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. Sub-section (1) of that section, which was inserted by Act No. 10 of 1947, provides :—" The Court or a Conciliation Commissioner may, if it appears to be necessary or expedient for the purpose of preventing or settling an industrial dispute which comes before it or him or of preventing further industrial disputes, declare by an order or award that any term of an order or award shall be a common rule of any industry in connexion with which the dispute arose." Sub-section (3) provides that, before a common rule is declared, certain notices shall be published and interested persons desiring to object shall be heard. The question at issue, therefore, resolves itself into this—whether s. 41 (1) of the Act is within the legislative power conferred upon the Parliament by pars. (xxxv.) and (xxxix.) of s. 51 of the Constitution.

In 1910 in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2) it was unanimously held by a Court consisting of *Griffith* C.J. and *Barton*, *O'Connor*, *Isaacs* and *Higgins* JJ., that the Constitution did not authorize the Parliament to confer upon the tribunal constituted under the Act power to declare a common rule in an industry. At that time, and up to 1947, the relevant provision of the Act was contained in s. 38, which provided :—" The Court shall, as regards every industrial dispute of which it has cognisance have power . . . (*f*) to declare by any award or order, that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matter shall be a common rule of any industry in connection with which the dispute arises." It is clear, however, that no distinction can be drawn between the present case and *Whybrow's Case* (2) on the basis of any difference between the language of the old s. 38 (*f*) and the new s. 41 (1). The reasoning of all the judgments in *Whybrow's Case* (2) makes it quite plain that it is by reason of its inherent nature that the common rule is held to be outside the constitutional power. That which is actually

(1) (1949) 79 C.L.R. 40.

(2) (1910) 11 C.L.R. 311.

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authorized by s. 41 (1) is exactly the same thing as that which was authorized by s. 38 (*f*), and it was held that that very thing could not be constitutionally authorized. This was because the constitutional power is limited to conciliation and arbitration between disputing parties, and to make a common rule is to go outside the scope of conciliation and arbitration and to assume a function of general industrial legislation. It was clearly recognized by both *Isaacs* J. (1) and *Higgins* J. (2) that it might (to use the words of s. 41) be " necessary or expedient for the purpose of settling an industrial dispute " to make a common rule. But each, like the other members of the Court, rejected the contention that this afforded any reason for saying that a specific function essentially different from conciliation or arbitration was " incidental " to conciliation or arbitration. *Isaacs* J. (3) said :—" It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met." Then follows a passage which concludes with the well known and often quoted saying that " you may complement, but you may not supplement, a granted power."

If, then, the common rule is to be upheld in this case, it is necessary that *Whybrow's Case* (4) should be overruled, and we were invited to overrule it. *Whybrow's Case* (4) ought not, in our opinion, to be overruled. The decision has stood for forty years, the reasoning of the judgments commends itself to us as unanswerable, and the main argument presented to us, while it has commanded consideration, does not seem to us to cast any doubt upon that reasoning.

The argument naturally founded itself on changes which have taken place over the years in the accepted view of the nature and scope of the power conferred by s. 51 (xxxv.). The view adopted by the majority of the Court in the first *Whybrow Case* (5) with respect to inconsistencies in Federal awards and State laws was expressly overruled in *Clyde Engineering Co.* v. *Cowburn* (6), but the reasoning of the dissenting judgments of *Isaacs* and *Higgins* JJ. in the first *Whybrow Case* (5), which was in substance adopted in *Cowburn's Case* (6), has no bearing on the power to make a common rule. *Isaacs* and *Higgins* JJ. were themselves parties to the decision as to the common rule in the third *Whybrow Case* (4). It was suggested that in 1910 the view was entertained that the power to arbitrate, which is conferred by the *Commonwealth Conciliation and*

(1) (1910) 11 C.L.R., at pp. 337, 338.
(2) (1910) 11 C.L.R., at pp. 345, 346.
(3) (1910) 11 C.L.R., at p. 338.
(4) (1910) 11 C.L.R. 311.
(5) (1910) 10 C.L.R. 266.
(6) (1926) 37 C.L.R. 466.

Arbitration Act, partakes of the nature of judicial power, and that this view was rejected in *Waterside Workers' Federation* v. *Alexander Ltd.* (1). It was also suggested that it is now established that the arbitral power is of the nature of legislative power rather than judicial power, and the decision that the common-rule provisions were invalid was said to rest fundamentally on the view that the arbitral power was judicial in its nature. But the argument will not really bear examination. It employs words in different and misleading senses. On the one hand, the comparison in the *Whybrow Cases* between the arbitral power and judicial power was only intended to illustrate and emphasize the fact that s. 51 (xxxv.) does not enable the Parliament to legislate, or to authorize any other body to legislate, on the general subject of industrial conditions. On the other hand, it was not suggested in *Alexander's Case* (1) that the arbitral power was in any relevant sense a legislative power. On the contrary, *Isaacs* and *Rich* JJ. (2) were careful to point out that an arbitrator did not legislate in the true sense: he made a determination, and the Act then operated to give to the terms of his determination the "character of a legal right or obligation." When it is said that industrial awards are of a legislative character, the point of the statement is to be found in the fact that such awards prescribe rules of conduct for the future in respect of the disputing parties and do not determine the rights and duties of those parties under the law as it already exists.

In *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3), it was held that the provision in the *Commonwealth Conciliation and Arbitration Act* that an award should be binding on successive assignees and transmittees of the business of any party bound by an award was valid. But this decision lends no countenance to the common rule. *Isaacs* J. made this plain (4). The provision in question simply made the award effective "throughout the whole period of its operation for and against those who during that period are or voluntarily *come within the area of the dispute.*" (The italics are the italics of *Isaacs* J.)

The most substantial argument for the common rule, however, rested on a series of cases which begins with *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association* (5) and may be said to end with *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (6). The other cases in the series are *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.* (7),

(1) (1918) 25 C.L.R. 434.
(2) (1918) 25 C.L.R., at p. 463.
(3) (1922) 32 C.L.R. 413.
(4) (1922) 32 C.L.R., at pp. 440, 441.
(5) (1925) 35 C.L.R. 528.
(6) (1935) 54 C.L.R. 387.
(7) (1928) 41 C.L.R. 402.

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Amalgamated Clothing & Allied Trades Union of Australia v. *D. E. Arnall & Sons* (1) and *Long* v. *Chubbs Australian Co. Ltd.* (2), and to the list should be added *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (3). *Alderdice's Case* was overruled by the *Metal Trades Case*. In the first of these cases, the *Burwood Cinema Case*, the reasons for judgment give no support to the proposition that power to make a common rule can validly be given to the court or to a conciliation commissioner. *Isaacs* J. expressly says that "the common rule as one extreme is excluded" (4). The principle upon which the doctrine of the *Metal Trades Case* rests is "that the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members, and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists" (per *Dixon* J. in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (5)). But in such a case there is *ex hypothesi* a dispute between the organization and the employers whom it is sought to affect by the award. The award does not affect any non-disputant. It does not create (as the common rule would create) actual rights and duties as between persons who are non-disputants. According to the theory of the *Metal Trades Case* it does nothing that is "foreign to arbitration" (per *Isaacs* J. in *Arnall's Case* (6)). This is made plain by *Latham* C.J. in the *Metal Trades Case* (7). A common rule *does* effect a result which is "foreign to arbitration." The distinction may seem technical, and the practical result of observing it may be, as Mr. *Ashburner* said, merely to compel the joining of many additional parties as respondents before the court or commissioner—but any parties so joined would not be bound by an award made in relation to the dispute unless they were parties, not only to the proceedings, but also to the dispute. The distinction has been observed and emphasised throughout the whole series of cases, it is a clear and logical distinction, and, in our opinion, it ought to be observed and the power to make a common rule denied.

The other question in the present case relates to the validity of clause 16A of the award of 20th May 1948. Clause 16 of the award

(1) (1929) 43 C.L.R. 29.
(2) (1935) 53 C.L.R. 143.
(3) (1938) 60 C.L.R. 507.
(4) (1925) 35 C.L.R., at p. 541.
(5) (1938) 60 C.L.R., at pp. 537, 538.
(6) (1929) 43 C.L.R., at p. 44.
(7) (1935) 54 C.L.R., at p. 408.

deals with hours of labour, providing for what are to be deemed to be "ordinary working hours." Clause 17 provides for meal intervals, and clause 18 for overtime. Clause 18 declares (*inter alia*) that all time worked outside the ordinary working hours on any one day shall be deemed to be overtime and shall be paid for at time and a half. These clauses are not challenged. But clause 16A is attacked. It need not be set out in full. It provides that "notwithstanding anything contained in clause 16 of this award the following shall be the opening and closing times of butchers' shops." Then follows a detailed prescription of the hours of opening and closing, which differ according to season, day of the week, State, and district. The clause was amended in certain details by the order of 1st September 1949. The term "butcher's shop" is defined by clause 33 of the award.

We think that, as a matter of construction, clause 16A operates to compel all proprietors of butchers' shops who are among the parties bound by the award to close their shops at the times specified irrespective of whether they employ any employee or employees. It applies, in our opinion, to shopkeepers who employ no labour equally with shopkeepers who employ labour. It was sought to limit the application of clause 16A by reference to clause 3 which provides that the award "shall be binding on the Australasian Meat Industry Employees' Union its branches and its members and on the Meat & Allied Trades Federation of Australia and its members in respect of all their employees in the classifications contained herein whether members of the Union or not." But it seems impossible to apply clause 3 so as to limit in any intelligible way the operation of clause 16A. No meaning can be attached to an obligation to close shops "in respect of employees." The shop must be either closed or not closed. It seems equally impossible to apply clause 3 so as to limit in any intelligible way the operation of clause 35 (*b*), which provides that deliveries of meat (subject to certain extensions) shall not be made outside the opening and closing hours of retail shops. We think that the true purpose and effect of clause 3 is to provide that, so far as the award affects employees, it shall bind members of the employers' organization in respect of *all* their employees whether those employees are members of the union or not. So construed, clause 3 has no limiting or qualifying effect on clause 16A or clause 35 (*b*).

The question of the validity of clause 16A depends primarily on the question whether it deals with an "industrial matter" within the meaning of the *Commonwealth Conciliation and Arbitration Act.*

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The term "industrial matters" is defined by s. 4 as meaning "all matters pertaining to the relations of employers and employees". The definition goes on to provide that the term includes a number of specified matters, but the subject matter of clause 16A cannot be brought within any of these, unless perhaps it be "(*a*) matters or things affecting or relating to work done or to be done." We do not think that the subject matter (the closing of shops as distinct from the work of employees in shops) is a "matter pertaining to the relations of employers and employees." The words "pertaining to" mean "belonging to" or "within the sphere of," and the expression "the relations of employers and employees" must refer to the relation of an employer as employer with an employee as employee. The time at which a shopkeeper (who may or may not employ anybody) may open and close his shop is not a "matter" which belongs to or is within the sphere of the relation of that shopkeeper as employer with any person as employee. Nor is it, in our opinion, a matter affecting work done or to be done within the meaning of par. (*a*) of the definition. Trading hours of an employer are not the same subject as working hours of an employee, and a prescription of trading hours as distinct from working hours does not "affect or relate to work done or to be done." Provisions with respect to trading hours may affect the turnover of shopkeepers who employ persons and so indirectly affect their ability to pay award rates, and this state of affairs may in turn affect the relations of those shopkeepers and their employees. But this is the most that can be said, and it is obviously not enough. It shows only the possibility of an indirect, consequential and remote effect upon the relations of the last-mentioned persons. All kinds of matters, e.g. supply and prices of raw material, the state of the money market, may affect the capacity of employers to pay wages at a certain standard. But these are not industrial matters within the definition contained in s. 4 of the Act. What *O'Connor* J. said in *Clancy* v. *Butchers' Shop Employees Union* (1) is as true of the Commonwealth Act here in question as it was of the New South Wales Act there under consideration. His Honour said: "If once we begin to introduce and include in its scope" (i.e. the scope of the Act) "matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part."

(1) (1904) 1 C.L.R., at p. 207.

In the case of Commonwealth legislation with respect to the same subject matter any such extension would seem inevitably to involve an excess of the power conferred by s. 51 (xxxv.) of the Constitution. A matter does not become an "industrial matter" or the subject of an "industrial dispute" simply because it is a matter with respect to which persons who are employers and employees are disputing.

The case of *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (1) presents no difficulty. Whether an employer should permit his employee to wear a particular badge when on duty seems plainly a matter pertaining to the relations between an employer as employer and an employee as employee. The question whether an employee should wear a uniform when on duty would stand on the same footing. The case of *Federated Clothing Trades* v. *Archer* (2) is less clear so far as it was concerned with the claim by employees that all garments made by an employer should bear upon a label the name of the actual manufacturer. It may be regarded as a border-line case, the justification for the decision being that the order sought would tend to protect employees against possible evasions by an employer of the obligation to pay award rates of wages for work done in the manufacture of clothing sold by him: see per *Isaacs* and *Rich* JJ. (3) and per *Higgins* J. (4). It may be noted that *Higgins* J. (5), referring to *Clancy's Case*, said: "What the shopkeeper or his wife or daughter might do after the employees had left was not a matter affecting the employment."

Prohibition should go as to clause 16A of the award of 20th May 1948 as varied by the order of 1st September 1949, and as to the whole of the orders of 8th December 1948 and 5th April 1949.

Order absolute for a writ of prohibition prohibiting Frank D. Kelly, Conciliation Commissioner, the Meat and Allied Trades Federation of Australia and the Australasian Meat Industry Employees' Union from proceeding further upon clause 16A *of the award made on* 20*th May* 1948 *in matters between the said Union and the said Federation as varied by the order of* 1*st September* 1949 *and upon the orders of the said Commissioner therein*

(1) (1913) 17 C.L.R. 680.
(2) (1919) 27 C.L.R. 207.
(3) (1919) 27 C.L.R., at p. 214.
(4) (1919) 27 C.L.R., at pp. 217, 218.
(5) (1919) 27 C.L.R., at p. 216.

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made on 8th December 1948 *and 5th April* 1949. *The said Federation and Union to pay in equal shares the costs of the prosecutor including reserved costs.*

Solicitor for the prosecutors: *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondents: *Salwey & Primrose*, Sydney, by *Darvall & Hambleton*; *Maurice Blackburn & Co.*

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

E. F. H.