App. at 248, 249 - 101 C.L.R. 246

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

METAL TRADES EMPLOYERS' ASSOCIATION AND OTHERS;

EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

Ruling'd 82 C.L.R. 587
Reffer'd to 86 C.L.R. 37

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MELBOURNE, 1950, *Oct.* 18-20, 23, 24; 1951. *March* 5.

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

Industrial Arbitration (Cth.)—Award—Validity—Enforcement—Powers of Commonwealth Court of Conciliation and Arbitration—Industrial dispute—Ambit of dispute—Overtime—Award prohibiting union of employees from being "directly or indirectly . . . a party to or concerned in any ban" on overtime—Order of compliance—Validity—Order that union cause or procure its members to work overtime without ban—Power to enjoin union from committing a "contravention of this Act"—Whether applicable to contraventions of awards or orders—Power of court to punish contempt—"Superior court of record"—Writ of prohibition issuing out of High Court—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (*v.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *ss.* 17 (3), 29 (*b*), (*c*), 32, 59-62, 119.

An industrial dispute as to standard hours of work and other matters arose out of logs of demand of organizations of employers and employees. The employers' log claimed that the following provisions should operate:—"12. . . . An employee or union of employees . . . shall not by any means whatsoever restrict or attempt to restrict any worker from working any overtime that may be required and allowable under this award." "23. . . . Any union on whom this log is served whose members are committing a breach of any of the foregoing clauses shall be liable to a penalty of £100." These claims were not conceded by the employees. The Commonwealth Court of Conciliation and Arbitration made an award which reduced the standard hours of work and contained a provision to the effect that (i) an employer might require any employee to work reasonable overtime and that such employee should work overtime in accordance with such requirement; (ii) "No organization party to this award shall

in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of" the provision. It was contended that par. ii of this provision—to the extent that it prohibited an organization from being "indirectly . . . concerned in any ban" &c.—was beyond the ambit of the dispute and therefore invalid.

Held that the provision thus challenged was within the power of the Commonwealth Court of Conciliation and Arbitration to make an award in settlement of the dispute.

Subsequently, in purported exercise of the power conferred by s. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 "to order compliance with an order or award proved . . . to have been broken or not observed," the Commonwealth Court of Conciliation and Arbitration ordered an organization of employees party to the award to cause or procure that within seven days of the date of the order overtime should be worked in accordance with the award by its members without any ban, limitation or restriction.

Held, by *McTiernan*, *Webb* and *Kitto* JJ. (*Latham* C.J. dissenting; and *Dixon* J. also dissenting, but on the ground that the validity of the order was saved by s. 32 of the Act), that a writ should issue to prohibit proceedings on this order. It exceeded the power conferred by s. 29 (*b*) because the award did not bind the organization to cause or procure that its members should work overtime.

It was also ordered—in purported exercise of the power conferred by s. 29 (*c*) of the Act "to enjoin any organization . . . from committing or continuing any contravention of this Act"—that the organization be enjoined from committing a contravention of the Act, namely, from being directly or indirectly a party to or concerned in any ban, limitation or restriction on the working of overtime in accordance with the award.

Held, by *Dixon*, *McTiernan*, *Webb* and *Kitto* JJ. (*Latham* C.J. dissenting), that the order was not within s. 29 (*c*) because the power thereby conferred was confined to contraventions of the Act (as distinct from awards or orders); and by *Dixon*, *McTiernan* and *Webb* JJ. (*Kitto* J. dissenting on the ground that, although the order was not supported by s. 29 (*c*), it was within s. 29 (*b*)), that a writ should issue to prohibit proceedings on this order; and further, by *Dixon* and *Webb* JJ., that, as the order was bad on its face, its validity was not saved by s. 32.

Held, further, by *Dixon*, *Webb* and *Kitto* JJ. (*Latham* C.J. dissenting), that, in view of the specific provisions of the Act dealing with the subject of penalizing the disobedience of orders, the Commonwealth Court of Conciliation and Arbitration did not derive from the provision in s. 17 (3) of the Act that that court should be a superior court of record any additional power to punish such disobedience as contempt of the court.

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Ordered accordingly that a writ should issue to prohibit proceedings on the orders under s. 29 (*b*) and (*c*) and also on an order of the Commonwealth Court of Conciliation and Arbitration purporting to impose a fine on the organization as for contempt of the court in failing to observe the foregoing orders.

ORDER NISI for prohibition.

An industrial dispute occurred in 1947 among parties to the prior Metal Trades Award as to the standard hours of work and conditions of employment. The dispute arose out of logs of demand by both employers and employees. The employers' log claimed the following clauses:—"12. . . . An employee or union of employees or union officer shall not by any means whatsoever restrict or attempt to restrict any worker from working any overtime that may be required and allowable under this award. . . . 23. . . . Any union on whom this log is served whose members are committing a breach of any of the foregoing clauses shall be liable to a penalty of £100." The employees did not accede to these claims. On 8th September 1947 the Commonwealth Court of Conciliation and Arbitration (hereinafter called the Arbitration Court) made an award or order varying the prior award. It reduced the standard hours of work and inserted in the prior award two sub-clauses in identical terms, one relating to shift workers (clause 11 (*hh*)), and the other to day workers (clause 13 (*k*)), providing that (i) an employer might require any employee to work reasonable overtime and that such employee should work overtime in accordance with such requirement; (ii) "No organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction on the working of overtime in accordance with the requirements of" the clause; (iii) the sub-clause should remain in operation unless otherwise determined by a competent authority. Parties to this award included the Metal Trades Employers' Association and the Amalgamated Engineering Union, Australian Section, each of which was an organization registered under the *Commonwealth Conciliation and Arbitration Act*. (Hereinafter—when the context permits—the former of these two bodies is referred to as the respondent Association and the latter as the prosecutor.)

On 19th May 1950, on the application of the respondent Association, two documents—each described on its face as a rule to show cause—issued out of the Arbitration Court requiring the prosecutor (among others) to show cause why—as to one of the documents—an order should not be made against the respondents to the rule

under s. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 (hereinafter referred to—except where the context indicates that the Act as at an earlier date is intended—as the Act) in respect of " sub-clause (2) of clause 11 " (*scil.*, clause 11 (*hh*) (ii) and clause 13 (*k*) (ii) of the award as varied); and—as to the other of the documents—why an order should not be made under s. 29 (*c*) of the Act in respect of the same clauses.

On the return of these rules the Arbitration Court on 5th June 1950 made an order pursuant to each of them against the prosecutor (among others) in respect of various shops in New South Wales which it is not necessary here to specify. As to the former of the two rules the order, which purported on its face to be made under s. 29 (*b*) of the Act, required that each of the organizations specified comply with clauses 11 (*hh*) (ii) and 13 (*k*) (ii) of the award " by causing or procuring that within seven days from the date hereof, overtime shall be worked in accordance with the said clauses by its . . . members ". As to the latter rule, the order, which purported on its face to be made under s. 29 (*c*) of the Act, enjoined each of the organizations specified " from committing a contravention of the said Act, namely from being directly or indirectly a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of " clauses 11 (*hh*) and 13 (*k*) of the award.

On 10th July 1950 the Arbitration Court imposed a fine of £100 on the prosecutor as for a contempt of the court in disobeying the foregoing orders.

The prosecutor obtained in the High Court an order nisi—directed to the respondent Association, the Arbitration Court and the judges thereof—for a writ to prohibit further proceedings on the award of 8th September 1947, the two orders of 5th June 1950 and the order of 10th July 1950 imposing the fine, on the grounds (substantially) that (*a*) clauses 11 (*hh*) (ii) and 13 (*k*) (ii) as inserted in the Metal Trades Award by the determination of the Arbitration Court on 8th September 1947 were ultra vires the court in that they were not within the ambit of the industrial dispute whereof the court then had cognizance and determined by the award of the court made on the said date; (*b*) the order of 5th June 1950 purporting to be made under s. 29 (*b*) was not an order ordering compliance with an award or order within s. 29 (*b*) and was an order requiring the prosecutor to undertake responsibilities and perform duties exceeding those contained in the provisions of the award of 8th September 1950 and beyond the powers of the prosecutor; (*c*) that the order of 5th June 1950 purporting to

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be made under s. 29 (*c*) was not an order enjoining the prosecutor from committing or continuing "any contravention of this Act" but was an order relating to a contravention of the award; (*d*) that the order of 10th July 1950 fining the prosecutor was not within the powers of the Arbitration Court in that that court had no power to punish for breach of its orders as for a contempt of court.

M. J. Ashkanasy K.C. (with him *C. Turnbull*), for the prosecutor. (1) The first matter in respect of which prohibition is sought is the award or order of the Arbitration Court of 8th September 1947 varying the original Metal Trades Award (originally made in 1941 and subsequently varied from time to time) as to clauses 11 (*hh*) and 13 (*k*). The objection is to clauses 11 (*hh*) (ii) and 13 (*k*) (ii), which provide in identical terms as to shift workers and day workers that "no organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban" &c. as to the working of overtime. It is true that in the employers' log in the dispute in question there was a claim for a clause that "an employee or union . . . shall not by any means whatever restrict or attempt to restrict any worker from working any overtime that may be required and allowable under this award." We can concede that this gave rise to a dispute as to which some order might be made. We are not concerned to define its precise ambit, but we do contend that it did not bring within the ambit of the dispute the challenged sub-clauses in so far as they say that the union shall not indirectly be concerned in any ban on overtime. There is a vast difference, it is submitted, between what appears in the employers' log about restricting the working of the overtime and what appears in the challenged provision about being indirectly concerned in a ban; a difference so vast that the order cannot be regarded as within the ambit of the dispute arising out of the claim. The words set up such a vague criterion of liability that no-one could reasonably have expected such an order to flow from the log. If this Court is satisfied that the challenged provision, on its proper construction, is open to the objection which has been presented, the prosecutor's claim for prohibition should not be defeated by any such argument as that the interpretation of the challenged provision is for the Arbitration Court under s. 29 (*d*) of the Act and that, by reason of s. 32 of the Act, its decision cannot be called in question. (2) The second matter challenged is the order made by the Arbitration Court on 5th June 1950 in purported exercise of the power under s. 29 (*b*) of the Act that the union do cause or procure that within

seven days from the date of the order overtime should be worked in accordance with clauses 11 (*hh*) and 13 (*k*) by its members without any ban, limitation or restriction. This order is attacked on two grounds. One ground is to be argued by Mr. *Phillips*, and we adopt the argument that is to be presented by him. It may be stated briefly for present purposes as being that s. 29 (*b*) has been misconstrued ; it is directed simply to ordering that something which was wrongly done or omitted in the past be remedied ; it does not provide for the mere repetition of the previous order which was broken or not observed. The second ground is that the order is not within s. 29 (*b*), because it requires a course of compulsive action on the part of the union which is nowhere required by the original order and thus goes far beyond ordering compliance with anything in the original order. The latter said that the union should not be directly or indirectly a party to or concerned in a ban ; it does not say that the union shall be responsible for causing or procuring overtime to be worked.

[DIXON J. We are not entitled to prohibit unless there has been an excess of jurisdiction. If the Arbitration Court misconstrued s. 29 (*b*), that would be a matter for prohibition. If, however, it attached your meaning to s. 29 (*b*) and then came to the conclusion that, in order to remedy a breach that had occurred, an order such as that in fact made was necessary, that might be wrong, but would it be matter for prohibition ?]

It is submitted that the present order is in excess of the jurisdiction under s. 29 (*b*) because it orders something which is plainly not compliance with the original order. By way of stressing the distinction between the two orders, it may be remarked that the order of 5th June 1950 represents an extraordinary degree of compulsion not previously known so far as awards themselves are concerned. (3) The third matter challenged is the order of 5th June 1950 purporting to be made under s. 29 (*c*) of the Act enjoining the union from committing " a contravention of the said Act, namely from being directly or indirectly a party to or concerned in any ban " &c. on the working of overtime in accordance with clause 11 (*hh*) or 13 (*k*). Here, again, there is excess of jurisdiction because what is enjoined is not a " contravention of this Act ". Throughout the Act it is clear that the terms " this Act ", " award " and " order " are used in contradistinction. Usually the distinction is between the Act on the one hand and " award or order " on the other, but there are some variants. One may begin with s. 29 itself : par. *a* (" this Act ", " order or award "), *b* (" order or award "), *c* (" contravention of this Act "), *d* (" order or award "). Other

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provisions are ss. 40 (*c*) (" breach or non-observance of any term of an order or award "), 59 (1) (" breach or non-observance of any term of the order or award "), 61 (" penalty for an offence against this Act or the regulations thereunder or for a breach or non-observance of any term of an order or award "), and, by way of contrast, 62 (" No person shall wilfully make default in compliance with any order or award "), 64 (1) (" Inspectors may . . . be appointed for the purpose of securing the observance of this Act and of awards and orders made under this Act "), 64 (6) (" An Inspector shall report . . . any breach of this Act or of any award, order or industrial agreement which comes to his knowledge "). Section 65 provides for the institution of proceedings " for an offence against this Act or for the recovery of a penalty under s. 59 ", thus showing that proceedings under s. 59 for breach or non-observance of an order or award are distinct from proceedings for an offence against the Act. The question is to be seen, therefore, as simply one of drafting: a contravention of an award is, as a simple matter of drafting, not a contravention of the Act. Accordingly, it is not to the point—even if it is the case—to say that a contravention of an award or order is an offence against the Act. It can be conceded for present purposes that an order enjoining against a contravention of an award might be so expressed as to be good as an order for compliance under s. 29 (*b*), but that is not the case here. The challenged order is expressed to enjoin against a contravention of the Act. Moreover, it appears on the face of the order that it is made under s. 29 (*c*) and it does not appear on the face of the order that, as s. 29 (*b*) requires, any finding was made of a breach or non-observance of the award. It is suggested that, as Mr. *Phillips* is concerned with the second and third of our grounds, this would be a convenient stage for him to present his argument before we proceed to our fourth ground.

P. D. Phillips K.C. (with him *D. Corson*), for the Federated Gas Employees' Industrial Union.* Although no orders similar to those in the first proceeding have as yet been made against us, we are confronted with rules to show cause which are in similar terms, and we are obviously threatened with similar orders. The award by which we are bound was made by consent, and the ground

* This organization was the prosecutor in another proceeding (*Post*, p. 267), which was argued together with the proceeding the subject of this report. For convenience the latter is referred to in this report of the argument relating to the two proceedings as the first proceeding and the prosecutor therein as the first prosecutor; the other proceeding to which reference is made is referred to as the second proceeding and the prosecutor therein as the second prosecutor.

in the first proceeding that the relevant provisions of the award were beyond the ambit of the dispute is not taken by us, but, so far as concerns s. 29 (*b*) and (*c*), we have the same interest as the first prosecutor to define the limits of the jurisdiction conferred by those paragraphs. As the matter is one of jurisdiction, it is apt for consideration in prohibition proceedings. The origin of the present s. 29 (*b*) is s. 38 (*da*), inserted by Act No. 18 of 1914, so that with the covering words the provision was: "The Court" (i.e., the Arbitration Court) "shall, as regards every industrial dispute of which it has cognizance, have power . . . (*da*) to order compliance with any term of an order or award proved to the satisfaction of the Court to have been broken or not observed". It will be seen that the words "any term of" after "compliance with" have been dropped from the present s. 29 (*b*). At the time of the 1914 amendment the Act contained and had from its inception contained (in what was then Part IV.—The Enforcement of Orders and Awards) s. 48, which provided: "The Court" (i.e., the Arbitration Court) "may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the award by act or omission. In this section the term 'award' includes 'order'. Penalty: One hundred pounds or three months' imprisonment." Parliament cannot have intended in s. 38 (*da*) to give to the court again, by different words, the power to order compliance by an order in the nature of mandamus, to tell the party to obey positively in future an award. The intention of s. 38 (*da*), it is submitted, was to confer a power of a different nature, a power the court did not have under s. 48. The distinction is best indicated by illustrations. If an award had directed employers to pay engine-drivers twelve shillings a day and the employers were only paying ten shillings a day, the union could go to the court under s. 48 and ask for an order directed to the employer telling him to pay twelve shillings a day. That would be for the future—from now on pay your engine-drivers twelve shillings a day. It would be an order in the nature of mandamus to compel compliance with the award; such an order might well be made because there had been a dispute as to the effect of the award. However, suppose that, for fifteen weeks since the award and prior to the date of an application to the court, the employees had been underpaid two shillings a day, the union could ask the court under s. 38 (*da*) to direct the employer to comply

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with the award in relation to his duty in the past by paying the employee the lump sum up to that time underpaid. In a proper case both orders could be made, each under its appropriate section. It is important to observe that the grant of power by s. 38 (*da*) in 1914 was to the only court which had the power under s. 48. Subsequently s. 48 was amended (see, for example, Act No. 39 of 1918, s. 6, which substituted for "The Court" the words "A County, District or Local Court"), but the amendments do not affect the position in 1914. It seems clear that the Arbitration Court was taken out of s. 48 because it had been decided that the court as then constituted could not exercise judicial power, and subsequently, when the court was reconstituted so that it could exercise judicial power, it was put back again: See Act No. 22 of 1926. It is significant, however, that Parliament at all material times left s. 38 (*da*); that demonstrates the peculiar and limited nature of the powers under s. 38 (*da*) as being powers which could have been exercised by the Arbitration Court not being the repository of judicial power between 1918 and 1926. Act No. 18 of 1928 contains a series of important amendments to the enforcing powers. In particular, it inserted s. 49A (see now s. 63) giving an employee a right of action in any court of competent jurisdiction (subject to a limitation of time) for wages in accordance with an award. Up to that time there was—so far as anything actually expressed in the Act to that effect was concerned—no provision for the recovery of arrears of wages except that any person could go to the Arbitration Court under s. 38 (*da*) and that court under that provision could fix and determine the arrears due. It is true that in *Mallinson* v. *Scottish Australian Investment Co.* (1) it had been held that the employee had a common-law right of action arising out of the statute, but s. 38 (*da*) was the only express provision under which the Arbitration Court could act in the matter. Act No. 43 of 1930 effected important eliminations of the sanctions provisions of the Act; in particular, it repealed s. 48. It is significant that it did not repeal s. 38 (*da*). It was rational and consistent of Parliament to take the view that it should be left in because it was not part of a general power to make orders for compliance with awards; that it was not designed to impose sanctions to compel the observance of awards *in futuro* but was rather a method of administration—a convenient method of quantifying and fixing accrued rights under an award and saying: "We are not concerned under this section with enforcing industrial law but with saying there is something which has accrued. We

(1) (1920) 28 C.L.R. 66.

will fix that and compel compliance with it." In that view it was consistent with—and did not overlap—s. 48 when s. 48 was there and it was consistent to retain it when the Arbitration Court was taken out of s. 48 and also when s. 48 was wholly repealed. If the view that has been put as to the original meaning of s. 38 (*da*) is correct, there cannot be found in the continuance of that provision until it has now become s. 29 (*b*) anything to alter that meaning.

[LATHAM C.J. Is that the right way to approach the construction of a statute ?]

It may be necessary to find an ambiguity ; but it is submitted that there is sufficient ambiguity in the words " order compliance " &c. Superficially these words may appear quite clear, but on examination they are not so clear. It has been demonstrated—it is submitted—that they are at least reasonably capable of more than one meaning ; and, if the restricted meaning is more consistent with the scheme of the legislation, it should be adopted. There is something essentially different between an order which compensates a person who has been injured by a failure to perform a legal duty—what may be called a " making-good " order—and an order which, as to the future, directs a person to perform his legal duty. If the words " order compliance " are capable of referring to each of those two things, it then becomes a real question whether the jurisdiction should be interpreted as one or the other or both. Under these circumstances, it is submitted, it is permissible to examine what the jurisdiction has meant in the past. If the prosecutor is right, the provision which was s. 38 (*da*) has a long-established meaning, and the rearrangement of the Act in 1947 (in particular, the dropping from s. 29 (*b*) of the words " any term of ") does not justify the conclusion that Parliament intended a radical alteration in the nature of the power. As to the relation between s. 29 (*b*) in the prosecutor's view and s. 63, the latter is concerned with an action for a sum of money to which the ordinary incidents of an action at law attach. The individual proves his personal right, and the consequences follow. The purpose of s. 29 (*b*) is different. Under it the court may be approached by that individual or any other, or a union, and it is a matter for the discretion of the court what order, if any, should be made. It may be that, if only one individual was concerned, or the right of action under s. 63 had been lost by lapse of time, the court in its discretion would refuse to make an order. It has been submitted that the power in s. 38 (*da*) was not judicial power, and the same would have applied to s. 38 (*e*) (now s. 29 (*e*)). If

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so, it may be that an order under s. 38 (*da*) would have been a mere administrative fixation of an amount and that it would have been necessary to go to another court to recover the amount. However, even if it is judicial power, the prosecutor's argument is not materially affected. There are references in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) to s. 38 (*da*) and (*e*) as if they were part of a scheme the sum total of which showed that the Act was attempting to confer judicial power on the Arbitration Court, but it does not appear clearly that s. 38 (*da*) and (*e*) were regarded as themselves conferring judicial power. [He also referred to *Federated Engine-Drivers and Firemen's Association of Australia* v. *E. Vickery & Sons Ltd.* (2).] Orders of the kind sought against the second prosecutor under s. 29 (*b*) in terms of the rule to show cause, that the prosecutor comply with the relevant clauses of the award "by ceasing to be directly or indirectly a party to or concerned in certain bans" specified, are of a kind which could have been made under the former s. 48, not s. 38 (*da*). Since s. 48 has gone, there is no power to make such orders. We adopt what has been said as to s. 29 (*c*) in the argument of the first prosecutor and add that the historical survey which we have made in relation to s. 29 (*b*) bears on and reinforces the prosecutors' view of s. 29 (*c*). It appeared in the original Act as s. 38 (*e*). The view of it as restricted to contraventions of the Act alone, that is, not of awards or orders, was stressed by the amendment of s. 48 by s. 21 of Act No. 31 of 1920, which inserted after the word "breach" in s. 48 the words "or to enjoin any organization or person from permitting or continuing any contravention of this Act or the award". At that time the Arbitration Court was no longer exercising the power in s. 48, which was being exercised by the High Court and other named courts and related only to awards and orders. By the amendment Parliament showed its recognition that a contravention of the Act was something distinct from the contravention of an award or order.

M. J. Ashkanasy K.C. (continuing his opening argument). (4) The fourth order challenged in the first proceeding is that of 10th July 1950 by which the Arbitration Court fined the first prosecutor £100 as for contempt of court in disobeying the prior orders. It will be noticed that this was not simply an exercise of the power to impose a penalty under s. 59 but was the exercise of a power to punish for contempt thought to be possessed by the Arbitration Court. The only provision in the Act since 1947

(1) (1918) 25 C.L.R. 434.

(2) (1915) 9 C.A.R. 398.

which might conceivably give such a power is s. 17 (3), which declares the court to be a superior court of record. This, however, is a confusion of thought. It treats the declaration that the court is a " superior " court of record as conferring the same unlimited and general power of dealing with contempt which the Supreme Courts of the various States have by reason of the fact that their jurisdiction under the various State Acts is based on that of the superior courts of England at Westminster. As is explained in *R.* v. *Lefroy* (1), the power of the superior courts at Westminster to deal with contempt is one which they have had from time immemorial; it does not derive from anything that is inherent in the word " superior ". It is true that the expression " superior courts " is used in the judgments in that case in a way which may at first sight suggest any superior courts, but when the context is examined it is clear that their Lordships were concerned only with the courts at Westminster. The expression " superior court " does not define or extend jurisdiction; its principal effect would seem to be to establish that the jurisdiction of the court is assumed until the contrary is shown (although that is a sufficiently difficult conception in the case of a court such as the Arbitration Court) and its orders—unless and until upset by a higher authority—are conclusive. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 8, pp. 525, 527-531; *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres Ltd.* (2); *Ex parte Goldsbrough Mort & Co.*; *Re McGrath* (3).]

[LATHAM C.J.: " The superior courts have inherent jurisdiction to punish criminal contempt " (*Halsbury*, 2nd ed., vol. 7, p. 2).]

What we are concerned with here is " civil contempt "—the disobedience of an order. The purpose of the " criminal contempt " jurisdiction is to suppress insults to the court. Probably all courts of record—perhaps all courts—have at least part of this jurisdiction, inherently if not expressly; that is, so far as insult in the face of the court is concerned.

[McTIERNAN J. Assuming that these orders under s. 29 are good orders, what is the remedy available against persons who disobey them?]

That is specifically provided for by the Act in ss. 59 and 62. Any contempt of any court, of course, is a misdemeanour at common law, punishable in any court having appropriate jurisdiction to try misdemeanours (*Halsbury*, 2nd ed., vol. 9, p. 353). A

(1) (1873) L.R. 8 Q.B. 134: See particularly p. 137.
(2) (1949) 78 C.L.R. 389.
(3) (1932) 32 S.R. (N.S.W.) 338; 49 W.N. 137.

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second ground on which the order of 10th July 1950 is challenged is that the special provisions in ss. 59, 62, 112, 113, of the Act dealing with disobedience of orders and with contempts in the face of the court are inconsistent with the existence of any general power in the court to deal with contempts (*R.* v. *Lefroy* (1)). In connection with each of these sections except s. 59 it is important that the penalty prescribed is, by reason of s. 41 of the *Acts Interpretation Act* 1901-1948, the maximum. Under s. 59 the maximum is fixed by reference to s. 40 (*c*) at £100, which happens to be the amount we were fined ; but it was not done in exercise—certainly not in professed exercise—of power under s. 59. The view we are mainly concerned to meet is that the penalties fixed as maxima by the Act may be " inadequate " in particular cases and that the court has a general overriding power to impose greater penalties if it thinks fit. [He referred to *Ex parte Brennan* (2) ; s.c. in this Court (3), but not there considered on the point now relevant.]

G. E. Barwick K.C. (with him *R. Ashburner*), for the Metal Trades Employers' Association, respondent in the first proceeding (and for respondent employers in the second proceeding). It is desired to deal first with the argument on s. 29 (*b*). As to the first proceeding, in which an order has been made under s. 29 (*b*), the ground on which prohibition is sought is in substance that the order was not an order for compliance because it imposed obligations beyond those imposed by the award itself. No ground is taken that there was no due finding of breach of the award or that the order was inappropriate to the particular breach found, if any such was found. The question raised is therefore : Is the order an order of compliance with an order which has been broken ? The order certainly purports to be such an order. It is plainly made as an order of compliance ; the Arbitration Court thought it was such an order and intended it to be so. It is submitted that it was for the Arbitration Court to construe for itself the relevant clauses of the award ; and this not merely because of s. 29 (*d*) but because it had to determine whether—and, if so, in what respect—the order had been broken. Likewise, it was for the Arbitration Court to determine what acts or abstentions were necessary or desirable in the circumstances for compliance with the award. There are the circumstances of the breach itself to be considered

(1) (1873) L.R. 8 Q.B. 134.
(2) (1915) 15 S.R. (N.S.W.) 173, particularly at p. 186 ; 32 W.N. 51.
(3) (1922) 30 C.L.R. 488.

and also those resulting from the breach. Section 29 (*b*) presupposes a breach of the award; that is, a change of situation. It is for the Arbitration Court to say what, in the changed situation occasioned by the breach, is the act or abstention which will amount to a compliance with the award. If the court reaches its conclusion on a misconstruction of the award, that is merely a matter of error—not an excess of jurisdiction. The Arbitration Court's construction of the award would affect both its finding of breach and its choice of the act of compliance. In any case, the act of compliance will almost of necessity be outside the precise obligation of the award. This Court cannot entertain, under any guise, an appeal from the decision of the Arbitration Court either on the construction of the award or the choice of the act or abstention. It follows that this Court can interfere by prohibition only if the acts directed to be done cannot on any reasonable construction of the award be regarded as acts of compliance. Once this Court began to examine what the Arbitration Court found and to compare it with what that court did, it would be going beyond what is open in prohibition proceedings and in effect entertaining an appeal on the question whether the order was proper on the findings. Consideration of the construction of the award involves, first, considering the nature and responsibility of the organization itself; that is, it must be borne in mind that the obligation bears on an organization. The organization derives great powers and privileges from the Act and has disciplinary powers over its members. It is the intention of the Act that organizations should facilitate both the making of claims and the maintenance of awards. Another matter to be considered is the effect in the regulation of industrial affairs of the countenance or tolerance by an organization of what may be called "industrial defiance" by its members acting in concert. It may well be said that failure by the union to disapprove such defiance impliedly supports it. Moreover, there can be no real disapproval while the union retains the defiant persons as members—persons whose conduct is the antithesis of the basis and reason for the organization's existence. A further relevant matter is that the clauses in question were introduced when the court was reducing hours and realised that overtime would be necessary; that is, the clauses were a condition of the grant of the forty-hour week. Another matter is the extent of the relevant dispute, if it is necessary to support the award by reference to it. The employers' log sought the inclusion in the award of this clause: "Any union . . . whose members are committing a breach of any of the foregoing clauses shall be liable

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to a penalty of £100." Thus, the employers sought to establish responsibility on the part of the union for the conduct of its members in relation to the award. In all these circumstances the Arbitration Court might reasonably have construed the award as meaning that a union which knowingly retained members who in concert imposed a ban on overtime was directly or indirectly a party to that ban. As to the nature of the act which the court has ordered to be performed, the order is, of course, for compliance with an award which has been broken; and the act or abstention prescribed may be different from or additional to the acts or abstentions which the clause of the award itself prescribes or calls for. Therefore it is not an objection that the order requires the performance of acts which (in the words of the order nisi for prohibition) exceed those contained in the award. The order itself in substance requires the union to get its members to remove the then current ban. Although it says "any ban" it cannot reasonably mean "any possible ban in the future". The idea of requiring the lifting of the ban is sufficiently expressed by saying: "Cause the working of overtime by the members without a ban." In this context the concept of "working overtime" is that the men shall be ready and available to work as if no ban existed. The words "without any ban" are in the nature of a limitation of what otherwise might be thought an absolute obligation to procure. The idea it expresses is: "Cause the men to be free of the prohibition on the working of overtime"; in other words, "Get the ban lifted". So far as the second proceeding is concerned, Mr. *Phillips* has no argument founded on the form of any particular order; so, unless one is prepared to accept the narrow ground of his method of construing s. 29 (*b*), prohibition would not go in his case. In so far as Mr. *Phillips* suggested that there was ambiguity in the present s. 29 (*b*), it is submitted that he showed no warrant for his suggestion; but, although he admitted that some ambiguity would have to be found in order to afford room for his argument, he seemed rather to find the ambiguity in the older Acts and to be endeavouring to import it into the present Act, which does not contain the same provisions. In the last resort his argument was that the former s. 38 (*da*) had to be given a restricted meaning—a rather unnatural meaning—because of its association with the former s. 48 and that that restricted meaning must be retained in a new Act containing no equivalent of s. 48. That is contrary to the basic principle of construction that s. 29 (*b*) is to be construed in the Act in which it is found. He assumed two things: (1) that a statute can never contain overlapping

provisions; (2) that s. 48 did not permit the making of orders to rectify past breaches. The first assumption is obviously unsound. As to the second, it is submitted that s. 48 was apt to cover orders directed to the making good of past breaches. Although it is not authoritative, it is persuasive that s. 48 appears to have been so regarded in the Arbitration Court. [He referred to *Waterside Workers' Federation of Australia* v. *Stevedoring and Shipping Co. Ltd.* (1).] In the case cited by Mr. *Phillips* (*Federated Engine-Drivers and Firemen's Association of Australasia* v. *E. Vickery & Sons Ltd.* (2)) it is not clear whether the order was made under the then recently enacted s. 38 (*da*) or s. 48. In *Whittaker Brothers* v. *Australian Timber Workers' Union* (3) an application had been made for an order in the nature of mandamus under s. 48 to compel the payment of moneys due under an award. The court was of opinion that the order should be refused because there were other remedies open; but there was no suggestion that such an order could not be made under the section. The former ss. 38 (*da*) and 48 were different in several respects. Under s. 38 (*da*) the court could act of its own motion and could order compliance with particular terms of awards; under s. 48 it acted at the instance of a party and an obligation arose out of the statute (that is, not out of the court's order in itself) to observe all the terms of the award. Moreover the penalties were different. As to the suggestion that s. 38 (*da*) was in the nature of an administrative assessment provision, the language was scarcely apt for that purpose. However, even on the narrowest view of s. 38 (*da*) put by Mr. *Phillips*, it is submitted that the order made against the first prosecutor was what Mr. *Phillips* called a "making-good" order because it was directed to a then current ban which had been in existence for some time. At any rate, the present s. 29 (*b*)—it is submitted—covers, not merely past breaches, but also current and future purposes. If so, the order cannot be limited to merely repeating the words of the award; that would be only saying the same thing twice, and, according to the prosecutors, with only one penalty. Mr. *Ashkanasy's* argument as to the ambit of the dispute is without significance in the circumstances of this case because certain matters which are essential to support it cannot be established. First, it depends on a construction of s. 29 (*b*) as meaning "order compliance with an award or order to the extent to which it has been proved to have been broken." In our submission—in the absence, at all events, of the words "any term

(1) (1914) 8 C.A.R. 300, at p. 302.
(2) (1915) 9 C.A.R. 399.
(3) (1922) 31 C.L.R. 564.

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of ", which are not now in the section—the extent of the order that can be made is not limited by the nature of the breach of the award which has been found. Another matter that has not been established is that the relationship of the act ordered to the circumstances of the breach is examinable in this Court in prohibition proceedings. Further, it has not been shown that the Arbitration Court founded itself exclusively on the words of the award, " indirectly . . . concerned ", and otherwise would not have acted as it did. These matters are material to the argument on ambit because the only effect of the success of Mr. *Ashkanasy's* argument on this point would be to eliminate from the award so much as would make an indirect concern of the union in a ban a breach. It is now proposed to deal with the question of " ambit " on the footing that it has greater significance than we have contended. The expression " ambit of the dispute " in some senses tends to invert the real considerations that are involved. No doubt, it has its origin in the constitutional limitation ; but it is from asking whether an award is appropriate to the dispute that one goes back—so to speak—and asks whether it is " within the ambit ". Because in the case of money sums it is easy to set upward and downward limits to a dispute, there may be a tendency too readily to try to fix upward and downward limits in respect of other matters brought into dispute : see *R.* v. *Metal Trades Employers' Association* ; *Ex parte Amalgamated Engineering Union* (1), per *Latham* C.J. There were two relevant matters in the dispute which resulted in the order of 8th September 1947 varying the Metal Trades Award. First, the number of hours to be worked, forty a week being claimed by the union and forty-eight by the employers. It seems to be conceded by the prosecutor—rightly, it is submitted—that that dispute could be resolved by making an order for forty hours plus compulsory overtime. The other relevant subject matter of dispute was union responsibility, the employers seeking absolute union responsibility and the union desiring none. The clause in the employers' log as to penalty has already been mentioned ; the other clause in that log which is relevant here is : " An employee or union of employees . . . shall not by any means whatsoever restrict or attempt to restrict any worker from working any overtime that may be required ". The real dispute in that respect was whether the union should be made responsible and, if so, to what extent. A clause in the award imposing absolute responsibility would have been within

(1) (1949) 78 C.L.R. 366, at p. 373.

the dispute. At all events, the clause actually included was appropriate to resolve the dispute and therefore within the ambit. An alternative answer is that the clause was included as a condition of the reduction of hours. It is conceded by the prosecutor that compulsory overtime can be introduced as such a condition, and it follows that a clause which is incidental to the prescription of compulsory overtime must be equally competent. Finally, on the question of ambit, the contention of the prosecutor is not that any words should be excised from the award, but that it should be read as imposing some lesser obligation than that expressed. This is not a permissible kind of severance. The whole provision—as to the forty-hour week and the conditions attached to it—must go if anything is to go. It may be added that, if, instead of "directly or indirectly concerned in", the words had been merely "concerned in", they would not have been open to the criticism or objection that has been made; yet it is difficult to see that in present circumstances there would be any material difference in the meaning. As to s. 29 (*c*) the prosecutors seek to attach significance to what the draftsman has done in referring in some sections to the Act alone, in others to "award" or "order" (or both) without reference to the Act, and in others to all three. By way of general answer to this contention it can be said that the expressions used are appropriate to their respective contexts. If in some instances the addition of "award" and "order" to the Act is not strictly necessary (as may be the case, for example, in s. 33 (1) (*a*)), the context is such that the addition may well have been thought desirable *ex abundanti cautela*. Far from showing a distinction in the draftsman's mind between the Act on the one hand and orders and awards on the other hand, as is suggested by the prosecutors, the sections they rely on rather suggest the contrary; the effect is to show that all such matters are in the main put on the same basis. Section 59 is important in this connection. It is important to observe that s. 59 authorizes the imposition of a penalty; it does not merely provide machinery for the collection of a penalty. It does not create an offence in the strict sense at all. It is clear from s. 59 (2) that the penalty is recoverable by what is in the nature of a suit for a penalty. [He referred to *Chitty* on *Pleading*, 7th ed. (1844), pp. 385-387; *Bullen & Leake's Precedents of Pleading*, 9th ed. (1935), p. 273.] The acts which attract the penalty imposed by s. 59 are rightly described, it is submitted, as contraventions of the Act. "Contravention" is wider than "breach"; it is also wider than "offence". The prosecutors' suggestion is that s. 29 (*c*) is subject to some limitation

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not expressed in it—they do not say precisely what the limitation is—and this notwithstanding that the draftsman has in the word "contravention" chosen the widest word he could have chosen to cover both offences and acts which are merely the subject of a penalty. There is an illustration of the use of the word "contravention" in s. 27 of the Act, and it may be added that nowhere in the Act is "contravention" used in exclusion of a breach of an award. The prosecutors seem obliged to concede that breaches of s. 62 are "contraventions" of the Act; if so, it is difficult to see how they can reconcile s. 62 with what they say as to s. 29 (*c*). The former s. 48 does not assist the prosecutors on this point. The original s. 48 contained the phrase "contravention of the award". The amendment in 1920 substituted "contravention of this Act or the award", but there is no discoverable intention to make any significant distinction between the two things. In any case it is not permissible to carry forward into the present Act any such significance as there may have been in the old Act. Even if s. 29 (*c*) is to be given some meaning favourable to the prosecutors, s. 29 (*b*) is sufficient to support an order expressed in the negative form of an injunction and is therefore an answer to the prosecutors here. As to the question of contempt, it is submitted that the contempt with which we are concerned here is clearly criminal contempt. The summons is for wilful disobedience; and the power of the Arbitration Court to punish disobedience is conferred on it by the provision in s. 17 (3) that the court shall be a superior court of record. The passages cited by Mr. *Ashkanasy* from *Halsbury's Laws of England*, 2nd ed., vol. 8, pp. 525, 527-531, show that all courts of record had some powers to punish contempt. Under s. 11 of the former Act the Arbitration Court was declared to be a court of record, and, in addition to such powers as it derived from that declaration, it had some express powers under s. 82 (1) and (2), the latter of which provided that the court should have the power of a superior court of record to punish contempt by attachment and committal. In *John Fairfax & Sons Ltd.* v. *Morrison* (1) it was held that the power did not extend to the imposition of a fine. It is significant that s. 83 was repealed in 1947 at the same time that s. 17 (3) was enacted. Moreover, there would be little or no point in s. 17 (3) unless it conferred the power of a superior court of record to deal with contempt as that power was conceived in 1947. It is not likely that that sub-section was thought to be needed to create a presumption in favour of jurisdiction; s. 32 as enacted in 1947 was obviously intended to—and,

(1) (1945) A.L.R. 297.

subject to the Constitution, would—take the matter much further than s. 17 (3) could do.

[McTIERNAN J. referred to *Ex parte Fernandez* (1).]

[Counsel referred to *Ex parte Goldsbrough Mort & Co.*; *Re Magrath* (2).] As the functions of the court are largely arbitral—rather in the nature of legislative than judicial functions—one would not readily think of the protection of its officers when acting under its process. No doubt, that follows from s. 17 (3), but it does not suggest itself in any outstanding way as the intention behind s. 17 (3). Another point is to be found in s. 111, which, read with s. 118, gives the court power to punish acts in relation to a conciliation commissioner which, if he constituted a court, would be properly called contempts. It would be a curious situation if the court had a greater power in relation to what for convenience may be called "contempt" of a commissioner than in relation to contempt of the court. It is submitted that it would be immaterial for the purposes of s. 17 (3) in the meaning we attach to it whether the court is exercising an arbitral or judicial function; that is to say, the court is just as much a superior court of record when exercising the arbitral, as when exercising the judicial, function; acts or omissions which would amount to contempt in relation to the judicial function are likewise contempts in relation to the arbitral function. However, we need not go that far if—as we submit—orders under s. 29 (*b*) or (*c*) are judicial. The suggestion of Mr. *Phillips* that such orders are of an administrative nature has already been commented on. It may be added that the fact that the court may act of its own motion does not show that the proceeding is not judicial. It is on the footing that such orders are judicial and also that—as already submitted—a breach of an award is a contravention of the Act that we meet the argument that the express provisions of the Act relating to disobedience of orders exclude any general power in relation to contempt. Section 59 is relied on by Mr. *Ashkanasy* as providing the exclusive means of enforcing an order of the court. It is submitted that s. 59 is inapplicable to judicial—as distinct from arbitral—orders. That section has a number of elements which point—some very strongly—in that direction. It has the expression "bound by an order or award". "Bound by" is more commonly used in relation to arbitral orders. The phrase "penalty not exceeding . . . the maximum penalty fixed by the court or a conciliation commissioner" is scarcely apt to judicial orders, and it is a common thing in

(1) (1861) 10 C.B. (N.S.) 3, at p. 58 [142 E.R. 349].

(2) (1932) 32 S.R. (N.S.W.), at pp. 340, 341; 49 W.N., at p. 138.

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awards. The penalty refers back to s. 40, and it is concerned only with fixing a maximum penalty in advance of any breach of an award or order. Paragraphs *b* and *c* of s. 40 point strongly to arbitral orders only. Other sections supporting this view are ss. 16, 25, 31, 41, 55, 56. A further observation on s. 59 is that, although it may have punitive aspects, it is set in the Act as part of the machinery for the enforcement of awards and orders; it is not punitive in the full sense in which power to deal with contempt is punitive, and it is not the kind of provision from which one would infer that contempt jurisdiction is excluded or diminished. Moreover, s. 59 was in the former Act (as s. 44) at the same time as s. 83 (2), and it is unlikely that they were not consistent with each other. Section 112 is not inconsistent with our view of s. 17 (3); it may cover some contempts, but it goes beyond that and would cover matters that are not necessarily contempts. It may well have been thought necessary in addition to the contempt power. The disturbance mentioned in the section could be one which had no relation to the court in the sense that the persons causing it were setting out to commit a contempt of the court; they might disturb the court in some such way as conducting—in the vicinity of the court—a discussion which had nothing to do with what was going on in the court. This, again, is not the kind of section that would suggest an exclusion of the contempt power. It is, of course possible to limit a court's jurisdiction in contempt by relation to express powers in the Act from which the court derives its jurisdiction. *Ex parte Brennan* (1) is a good illustration; but it is not comparable with the present case.

R. M. Eggleston K.C. (with him *R. J. Leckie*), for the Commonwealth Court of Conciliation and Arbitration and the judges thereof to admit service of process and to submit to whatever order the High Court might make; also, for the Attorney-General of the Commonwealth (intervening by leave). The question of ambit of the dispute is not of direct concern to the Attorney-General, but on the questions of the construction of the Act it is desired to adopt the argument of Mr. *Barwick*. It may be added that an answer to Mr. *Phillips'* assumption of no overlapping between sections is afforded by provisions of both the earlier Act and the Act in its more recent form. For example, s. 29 (*a*), which was in the former Act (as s. 38 (*d*)), and s. 59 (formerly s. 44), both give the Arbitration Court power to impose penalties for breach or non-observance of awards, the one being limited to that Court

(1) (1915) 15 S.R. (N.S.W.) 173; 32 W.N. 51.

and the other giving power to other bodies as well. Mr. *Phillips'* use of the term "making-good" order (an expression which is not in the Act itself) to describe the only kind of order which he said could be made under s. 29 (*b*) (or the former s. 38 (*da*)) is not apt in the sense in which he sought to use it. Of orders to which the phrase might be applied, almost the only one which one can readily think of that carries any conception of repairing past breaches—that relating to the payment of money—in reality directs performance now, orders rectification now, of a breach still continuing at the date of the order. Thus, the only kind of order that can be made under s. 29 (*b*) is one which meets the case of a continuing obligation which is still being broken at the date at which the question of enforcement arises. That is precisely the kind of order which was made against the first prosecutor under s. 29 (*b*). The arguments of both prosecutors seem to involve the proposition that the order should particularize the conduct required of the person against whom the order was made—that the only kind of order that can be made is not a general order for the observance of the award but an order directing some specific thing to be done. The result would seem to be that the order is limited to performance of a positive obligation. Section 29 (*b*) itself, by using the expression "broken or not observed", refutes this contention. In any case, if this Court was of opinion that the order made did not correspond with the breach proved, that would be merely a matter of error, not one for prohibition. On the other hand, if this Court reached the conclusion that the Arbitration Court could not on any reasonable construction of the award and in the exercise of its judgment have made the decision appearing in the order as to what is an appropriate way of correcting a breach, the case would be one for prohibition. One realizes that s. 32 of the Act presents difficulties, but it is submitted that it operates sufficiently to support this view. As to s. 29 (*c*), in so far as the prosecutors relied on the former s. 48 in this connection, they have—it is submitted—been adequately answered by Mr. *Barwick*. As to other sections relied on by Mr. *Ashkanasy*, the only ones from which he might get assistance are ss. 33 (1) (*a*), 61, 64 and 65; that is because they refer to all three matters, "Act", "award" and "order". Sections which refer only to award or order without mention of the Act throw no light on the meaning in s. 29 (*c*) of "contravention" of the Act. It is not suggested that it is a proper method of construction to refer back to earlier acts in which the context was different from that of the present Act; but, if that method is to be adopted, one must at least go back to the

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earliest form in which the section considered relevant was enacted. In its original form, what has now become s. 33 (1) (*a*) was s. 38D. It referred to lock-outs and strikes and also to "any other breach or non-observance of the Act or of an order or award." That was a natural method of reference because the lock-out or strike was a direct breach of the Act. In 1930 the reference to strikes and lock-outs was deleted, but the words "other breach" &c. were left in. The word "other" was dropped from the present s. 33 (1) (*a*). This section throws no light on the question here. Section 61 was formerly s. 46, but in its original form it contained no reference to offences against the Act. Section 64 was first enacted in 1928 as s. 50A. Section 65 was new in 1947. None of these provisions supports the limited construction which the prosecutors seek to put on s. 29 (*c*). As to contempt, the decision referred to by *McTiernan* J., *Ex parte Fernandez* (1), suggests that, in the case of an inferior court of record, the record should show the precise contempt in question and, if it was not of a kind which an inferior court could punish, the record would be quashed or prohibition would issue. What Mr. *Ashkanasy* put as to the power of superior courts to deal with contempt was simply a statement that the doctrine that any superior court could punish a contempt other than one committed in the face of the court was based on a misunderstanding, the doctrine being that only the superior courts at Westminster had this general power. In fact it appears to have been supposed until 1906 that none of the superior courts at Westminster had such a general power that it could punish for contempt of another court. In *R.* v. *Davies* (2) it was held that the King's Bench had the general jurisdiction to punish contempts of other courts, but that the other superior courts at Westminster did not have the power. It is submitted, therefore, that when the legislature by s. 17 (3) constituted the Arbitration Court a superior court of record and, by implication from that, intended to give it power to punish contempt, it gave the power to the court to punish contempts of itself, whether committed in the face of the court or in such circumstances as in relation to any other superior court would be a punishable contempt; but that does not involve any proposition about punishing contempts of other courts.

D. Corson, in reply (for the second prosecutor). As to prohibition our case is that the Arbitration Court misconstrued s. 29 (*b*)

(1) (1861) 10 C.B. (N.S.) 3 [142 E.R. 349].

(2) (1906) 1 K.B. 32.

and (*c*). If our arguments are correct in that regard, it is submitted that our case is a proper one for prohibition (*R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries* (1). As to s. 29 (*b*), although its words may seem clear at first sight, when one examines them it appears that the order must be related to the particular breach proved. The argument of Mr. *Phillips* bears on the matter, and one looks to see where the clause came from, what its position was in the earlier Act, and what it was intended to remedy. It does not cover an order of the kind which has in fact been made in the first proceeding under s. 29 (*b*) because that order relates to future observance of orders. As s. 29 (*b*) clearly refers to awards which have been broken, it must refer to past breaches. The only explanation for Parliament's concern about giving the Arbitration Court power under s. 48, then taking it away and later putting it back again is that the former s. 38 (*da*) meant something different from s. 48. Whether or not the two provisions overlapped, now that the power under s. 48 has been taken away again s. 29 (*b*) limits the court's power as we have contended.

M. J. Ashkanasy K.C., in reply. In considering the question relating to the ambit of the dispute one cannot begin, as Mr. *Barwick* sought to do, by putting a gloss on the relevant clauses of the award. Its words have their own meaning according to the usage of words, and it is not to the point to say that the words " directly or indirectly concerned in " have no greater meaning or effect than merely " concerned in ". The words " indirectly concerned in " must be taken together with the subject of ban, limitation or restriction. The question then is whether, giving the words their literal meaning in their context and seeing to what type of case that meaning can extend, their effect is such that the clauses are within the dispute which they purported to settle. By reason of the words " indirectly concerned in " the clauses would cover a case in which a group of the union's members—perhaps a small group—acting in concert (but not with the authority of the union; perhaps contrary to that authority) has taken part in the imposition of a ban; it may be said that the union is indirectly concerned because they are its members. It cannot reasonably be supposed that such a provision was in contemplation in the dispute. This is emphasized when one sees that there are ample remedies in the Act for dealing with the recalcitrant members. The individual members may be dealt with under s. 59 or, as for an offence, under s. 62 and in the latter instance s. 5 of the *Crimes Act* can be

(1) (1944) 69 C.L.R. 407, per *Latham* C.J.

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invoked against any other persons who are knowingly concerned. The union might be de-registered, or under s. 40 (*d*) the court might refrain from having applications by a union whose members were offending. Moreover, s. 29 (*c*) could be used against the offending members themselves. As to s. 29 (*c*), there is nothing in s. 62 which can be used against us. We are not concerned here with wilful default. As to the use in s. 62 of the word "person", it may well include an organization; there are some sections in the Act in which it plainly could not do so, but it does not follow that that is the case in s. 62. We do not deny the widest scope to "contravention" as meaning breach or non-observance; all we say is that in its context in s. 29 (*c*) it is limited to contraventions of the Act. As to contempt, the argument based on the former s. 83 begs the question. The only question is whether a general power can coexist with the special provisions of the Act.

Cur. adv. vult.

March 5.

The following written judgments were delivered:—

LATHAM C.J. On 8th September 1947 the Commonwealth Court of Conciliation and Arbitration varied an award binding upon, *inter alios*, the Amalgamated Engineering Union, Australian Section, and the members thereof, reducing the standard hours of work to forty hours per week. The variation of the award included provisions (applying to shift work and to day work) that an employer might require employees to work reasonable overtime at overtime rates and that the employees should work overtime in accordance with such requirement (clauses 11 (*hh*) (i) and 13 (*k*) (i)). It included a further provision in sub-clause (ii) of those clauses in the following terms:—"No organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this sub-clause."

The employers' organization, the Metal Trades Employers' Association, complained in the Arbitration Court that a substantial number of members of the union in various shops were by concerted action refusing to work overtime in accordance with the award. An application was made that the court should make an order under s. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, ordering compliance with the award and an order under s. 29 (*c*) enjoining the organization from committing or continuing any contravention of the Act. Orders were made as sought by the employers' association. The order made under

s. 29 (*b*) required the union to procure its members to work overtime in accordance with the award without any ban, limitation or restriction. The order made under s. 29 (*c*) enjoined the union from committing a contravention of the Act, namely from being directly or indirectly a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of the award at any shop, factory or establishment of the members of the association. The association complained to the court that the orders had not been obeyed and on 10th July 1950 the court made an order fining the union £100 for contempt of court. The proceeding now before this Court is the return of an order nisi for prohibition to restrain the association and the court from further proceeding to enforce the provisions of the award in respect of the union relating to overtime and from further proceeding with the order made under s. 29 (*b*) for compliance with the award and with the order made under s. 29 (*c*) enjoining the union from committing or continuing a contravention of the Act. The order fining the union has not yet been drawn up, but prohibition is also sought against any enforcement of that order.

It is important at the outset to emphasise that the High Court is not a court of appeal from the Arbitration Court in respect of either its arbitral or its judicial functions. From time to time arguments are addressed to this Court in prohibition proceedings which would be relevant in proceedings upon appeal but which are quite irrelevant in prohibition proceedings. In prohibition proceedings directed against the Arbitration Court this Court can consider no matters other than matters affecting the jurisdiction of the Arbitration Court: for example, if a question arises in the Arbitration Court as to whether an award has been broken, it is for that court to determine whether there has been a breach of the award. It is not open to this Court in proceedings in prohibition to consider whether the Arbitration Court has decided rightly or wrongly that there has been such a breach. So also the Arbitration Court may interpret an award—rightly or wrongly. It may determine whether or not there has been a breach of the award so interpreted—again rightly or wrongly. In neither case is the decision of the Arbitration Court subject to prohibition in this Court on the ground that this Court might or would, if it were open to this Court to consider the question, be of opinion that the Arbitration Court had reached a wrong decision.

The first argument for the union is that the relevant provisions of the award are invalid because they are not within the ambit

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of the industrial dispute in relation to which the award was made. The second argument is that the order which the court purported to make under s. 29 (*b*) of the Act is not an order for compliance with the award because it requires the union to undertake responsibilities and perform duties exceeding those contained in the award and beyond the powers of the union to perform. The third ground of the order nisi is that the order made under s. 29 (*c*) is not an order enjoining the union from committing or continuing any contravention of the Act, though it may be an order relating to a contravention of the award. The last ground of the order nisi is that the order fining the union £100 for contempt of court was beyond the powers of the court because the court has no power to inflict penalties for contempt of court.

The first ground of the order nisi is that the clauses which have been cited were beyond the ambit of the industrial dispute in respect of which the award was made. The award, which has been varied on several occasions, was made in respect of a dispute which was created in 1949 by the service of logs by both the employees' organization and the employers' organization. In the log served on behalf of the employers s. 12 contained this claim :—" An employee or Union of employees or Union officer shall not by any means whatsoever restrict or attempt to restrict any worker from working any overtime that may be required and allowable under this award."

This claim was not conceded by the union. Therefore there was a dispute with respect to the responsibilities of the union in relation to the observance of overtime provisions by any workers, including, therefore, the members of the union, and the dispute particularly referred to the relation of the union to any means whereby the working of overtime in accordance with the award might be restricted. Accordingly not only the question of working overtime but also the question of the relation of the union to any obligation which might be imposed by an award upon the members to work overtime was a matter which was in dispute between the parties. The clauses included in the award provided that the employees bound by the award should work reasonable overtime as required by the employer and, further, that the union should not in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of the award. It is, I think, clear that these provisions relate to matters which were in dispute between the parties.

It is not contended that the court did not have jurisdiction to include some provisions with respect to overtime in its award and, further, it was expressly conceded that the court might, as a condition of reduction of hours to forty hours per week, impose conditions as to overtime. Indeed, the only attack upon the clause was with respect to the provision that no organization should " indirectly " be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the award. It was argued that, though the ambit of the dispute might be such as to justify a clause in the award prohibiting an organization being directly a party to or concerned in any ban, &c., it was beyond the jurisdiction of the court to make any provision with respect to a party being indirectly so concerned. I admit that I am unable fully to appreciate some of the arguments produced in support of this proposition. There were general statements to the effect that the clause went too far, but it seems to me obvious that if the object (as was evidently the case) of the clause was to secure an effective observance of the award, the Arbitration Court, unless it were remarkably naive and innocent, would be more concerned with attaching responsibility for indirect action by a union in relation to a breach of an award than for direct action by the union. In the case of direct action the union could not dispute its responsibility. But if the officers of a union were either weak or complacent or defiant, the obvious course would be to avoid all ostensible and active implication in the placing of any restriction upon overtime. The course which would naturally be adopted would be to abstain from preventing what would stoutly be asserted to be independent action of groups of members. It appears, to me therefore, that a prohibition of the union being indirectly concerned in bans upon overtime was a natural and appropriate provision to include in the award. Accordingly I am of opinion that the first ground of the order nisi has not been shown to be well founded.

The second ground of the order nisi is that the order purporting to be made under s. 29 (*b*) of the Act was not an order ordering compliance with the award because it required the union " to procure the members to work overtime in accordance with the award without any ban upon overtime ". One point made is that the order is not an order for compliance with the award because it does not simply order that some particular provision of the award should be obeyed. In my opinion there is no substance in this objection. Section 29 (*b*) provides that the court shall have power " to order compliance with an order or award proved

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to the satisfaction of the court to have been broken or not observed". An award is binding on the parties thereto. The award of its own force binds the parties: see the Act, s. 50. If, therefore, s. 29 (*b*) means only that the court shall have power to order compliance with an award in the sense that it may direct compliance with some particular term of the award, s. 29 (*b*) is quite ineffective to produce any result whatever. In *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1), the Court had to consider the provisions of s. 58E, which gave power to the court to give directions "for the performance or observance" of the rules of an organization. An election had been held and there was a dispute as to the persons who were validly elected. Under s. 58E the Arbitration Court made an order that certain individuals should be recognized as officers of the union. The rules of the union said nothing about recognizing people as officers, but it was held that under s. 58E the court had power to give detailed directions for the doing of acts or the observance of forbearances in the recognition of persons held by the court to have been duly elected as officers of the union which acts and forbearances would (in the judgment of the Arbitration Court) constitute performance or observance of the rules: see (2). In my opinion the same principle should be applied in the interpretation of s. 29 (*b*). That section authorizes the court to order a party bound by an award to do acts or observe forbearances which in the circumstances are in the judgment of the court necessary or desirable in order to bring about observance of the award. As I have already said, unless the section is construed in this manner an order made under the section would merely repeat the contents of an award which already was binding.

There is a further objection to the order for compliance made under s. 29 (*b*). It is contended that an order for compliance with an award must be an order which relates to the past, that it must be an order which is directed to making good past breaches and that the power given by s. 29 (*b*) does not include power to order any acts in the way of observance of the award to be performed *in futuro*. There is no reason whatever in the words of the section for limiting them in the suggested manner. The most obvious method of ordering compliance with an award is to tell the people concerned that in future they must obey the terms of the award.

It is sought to support the argument by an analysis of the history of the Act. It is pointed out that s. 29 (*b*), providing for orders for

(1) (1945) 70 C.L.R. 141.

(2) (1945) 70 C.L.R., at pp. 156, 157, 163, 170, 174.

compliance with awards, has been in the Act in one section or another from the first enactment of the Act in 1904: see e.g., *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 38 (*da*). So also the provision contained in s. 29 (*c*) with reference to enjoining organizations or persons from committing or continuing any contravention of the Act has been contained in the Act since 1904: see the 1904 Act, s. 38 (*e*). For many years, namely from 1904 to the enactment of Act No. 43 of 1930, s. 48 also was included in the Act. That section in its various forms provided for the making of orders by various courts in the nature of a mandamus or injunction to compel compliance with an award or to restrain its breach or to enjoin a person (or, after Act No. 31 of 1920, an organization) from committing any contravention of an award or, in the later forms of the section, of the Act. If after notice of such order, any person was guilty of any contravention of an award or of the Act he was subject to a penalty of £100 or three months' imprisonment. This section was amended from time to time. It disappeared in 1930. An argument was presented to the Court to the effect that the coexistence of s. 48 and the provision now contained in s. 29 (*b*) of the present Act showed that s. 48 referred to the future only and that s. 29 (*b*) or its former equivalents referred only to the past, with the result that no order could be made under s. 29 (*b*) for compliance with an award except in order to remedy past defaults. The consequence would be that where a clause of an award was (as in the present case) negative in its terms, no order could be made under s. 29 (*b*) for compliance with that term of the award in the future.

Where provisions in a statute are ambiguous reference may be made to the history of the statute in an endeavour to ascertain its meaning. There is, however, no ambiguity in s. 29 (*b*). The words "to order compliance with an . . . award" plainly cover the giving of a direction that the award shall be observed in the future as well as a direction that past defaults as, e.g., by the failure to pay the award rate of wages, should be remedied by appropriate action. But even if the complicated history of the legislation is considered, all that it can show, when the maximum effect is given to the argument presented, is that when s. 48 appeared in the former Acts concurrently with provisions corresponding to s. 29 (*b*) it might have been necessary, in order to afford separate fields of operation for the two provisions, to interpret the equivalents of s. 29 (*b*) in the limited sense proposed. This argument assumes and, in my opinion, without any justification, that there can never be any overlapping or duplication between provisions of a statute.

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Further, the restricted interpretation which, it is suggested, should properly be attached to s. 29 (*b*) depended in the past upon the contemporaneous presence in the Act of s. 48. Section 48 has now disappeared and therefore the ground of the argument for the restricted interpretation has also disappeared.

It is further argued that an order that the union do procure the members of the union to work overtime without any ban is not an order requiring the union to comply with the term of the award that the union shall not directly or indirectly be a party to or concerned in any ban &c. upon the working of overtime. It is in my opinion a matter for the Arbitration Court to determine whether or not a particular course of action is a course of action which will procure compliance with an award. That court is in a position to know, much better than the High Court, what officers of a union can get their members to do if the officers really want them to do it. It is for the Arbitration Court to determine whether efforts of the union officers to get the men to cease their defiance of the award should be taken at their face value, and whether they can and should do more than they have done to give effect to the responsibility of the union under the award. It is not for this Court to review the discretion which the Arbitration Court exercises in relation to a particular means of securing compliance with an award. The particular form of order which the Arbitration Court adopts for the purpose of securing compliance with an award cannot raise any question of jurisdiction unless indeed it could be shown that the alleged order for compliance was so entirely unconnected with any of the terms of the award that the making of the order could not possibly be regarded as a real exercise of the powers conferred by s. 29 (*b*). There is no foundation for such an argument in the present case.

The third ground of the order nisi relates to the order made under s. 29 (*c*). That was an order enjoining the organization "from committing a contravention of the said Act" namely from "directly or indirectly being a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with" the award.

The point made in support of this ground is that a breach of an award is not itself a "contravention of the Act". Section 62 of the Act provides that no person shall wilfully make default in compliance with any order or award. Such wilful default is therefore an offence against the Act, but a breach or non-observance of an award which is not wilful is not made an offence by any

provision of the Act. Section 59 provides that where any organization or person bound by an order or award has committed any breach or non-observance of any term of an order or award certain penalties may be imposed by the court or by certain other courts. Section 59 (*c*) provides that any such penalty may be sued for and recovered by the Registrar and certain other persons. This section does not create an offence. It provides for an action for penalties. It was not argued that, as far as the breach of the award was concerned, there had been a wilful breach of the award—though it would in my opinion be entirely a matter for the Arbitration Court, and not for this Court, to determine whether particular facts showed a wilful breach of the award. The case before this Court was argued upon the basis that the only breach of the award by the union which was alleged was not charged as a breach which was wilful. It was, therefore, said that the non-wilful breach of the award was not " a contravention of this Act " and therefore could not be the subject matter of an injunction under s. 29 (*c*).

Section 29 (*c*) refers to a contravention of the Act. It is pointed out that in several sections separate references are made to breaches of the Act and breaches of an award: see, e.g., ss. 33, 61, 64. This is true, but in my opinion the words " contravention of this Act " were chosen in order to include failures to observe provisions of the Act which did not amount to offences, as well as actual offences against the Act. The term " contravention " is plainly used in this sense in s. 27, which relates to State authorities dealing with industrial disputes which are within the sphere of action of the Commonwealth Court. Section 27 (2) provides that an order, award, &c. of a State Industrial Authority made " in contravention of an order " made by the Commonwealth Court under the section shall " to the extent of the contravention " be void. A State Industrial Authority would not commit an offence by making an order dealing with the industrial matter in question but nevertheless an award made by such an authority could be an award in " contravention " of an order by the Commonwealth Court, that is to say, it could be inconsistent with the terms of such an order. " Contravention " should be interpreted in the same sense in s. 29 (*c*).

Section 59 of the Act provides for the imposition of penalties in the case of a breach or non-observance of an award. A breach of an award which subjects a person to an action for penalties may fairly be described as something done in contravention of the Act. There is another and independent argument which supports

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this conclusion. Section 50 provides that an award shall be binding upon certain persons. A breach of an award which the Act declares to be binding upon a person is therefore a contravention of the Act—of s. 50 thereof. Accordingly, in my opinion, though a non-wilful breach of an award is not an offence against the Act, it is nevertheless a contravention of the Act. Thus in my opinion the third ground of the order nisi fails.

The final ground of the order nisi refers to the order fining the union £100 for contempt of court. It is contended that the court now has no power to deal with contempt of court. In the *Commonwealth Conciliation and Arbitration Act* 1904-1934, s. 83 made it an offence for a person "wilfully to insult or disturb the court, or interrupt the proceedings of the court, or use any insulting language towards the court, or by writing or speech use words calculated to improperly influence the court . . . or to bring the court into disrepute or be guilty in any manner of wilful contempt of the court". Section 83 (2) in that Act provided as follows:—"The court shall have the power of a superior Court of Record to punish by attachment and committal any person whom it finds to have been guilty of contempt of the Court."

Section 83A made it an offence to create a disturbance in or near the court. Section 112 reproduces s. 83A in relation to both the court and conciliation commissioners. In the present Act (1904-1949) there is no repetition of s. 83. That section was repealed. It is therefore argued that the powers of the court to punish for contempt have been abolished.

It will be observed that s. 83 (2) in the former Act expressly conferred upon a court a specific power to punish by attachment and committal for contempt of court and that it did so by reference only to "the power of a superior Court of Record". It was that power which the Arbitration Court was to have though it was not then a superior court, though it was a court of record.

The 1947 Act repealed s. 83 and introduced s. 17 (3). This section provides that "The Court shall be a superior Court of Record". In the earlier forms of the Act (e.g., 1904-1934 Act, s. 11) it was provided simply that the court should be a court of record. Under the new Act it is to be a superior court of record. What did Parliament intend when it made this express amendment of the law?

I approach this question by stating the ordinary characteristics of a superior court and considering the Arbitration Court in relation to each of them.

In the first place, the orders of a superior court are assumed to be valid until the contrary is shown, but this does not mean

that a court cannot be a superior court unless it has unlimited jurisdiction: see, for example, *Ex parte Fernandez* (1). The Court of Arbitration is not a court of general unlimited jurisdiction and therefore, notwithstanding s. 17 (3), does not possess this characteristic of a superior court: see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (2). Secondly, the officers of a superior court are protected in relation to executions effected by them, even though the orders under which they act are void. The officers of the Arbitration Court however, do not act in the execution of judgments or orders and this ordinary characteristic of a superior court has no practical significance in relation to the Arbitration Court. Thirdly, certiorari does not go to a superior court. But it was not necessary to enact s. 17 (3) in order to bring about this result in the case of the Arbitration Court because s. 32 of the Act provides that a judgment, order or award of the court shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground whatever. Thus s. 32 had already taken away certiorari in relation to the court and s. 17 (3) was not necessary for that purpose. Fourthly, in general, prohibition and mandamus do not go to a superior court. In the case of the Arbitration Court, however, prohibition and mandamus do go in appropriate cases under s. 75 (v.) of the Constitution, as has been decided many times. See the cases cited in *Australian Coal and Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (3).

Thus, so far as the four attributes of the superior court which have been mentioned are concerned, s. 17 (3) of the Act produces little, if any, effect.

But, fifthly, a further and most important attribute of a superior court is that it has power to punish for contempt of court. The power to punish for contempt has for many years been the distinguishing characteristic of a superior court: see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 2—" The superior courts have an inherent jurisdiction to punish criminal contempt by the summary process of attachment or committal in cases where indictment or information is not calculated to serve the ends of justice." In *Ex parte Fernandez* (4) the question was whether a court of assize had power to imprison and fine for contempt of court. All the learned judges held, as *Erle* C.J. said *in arguendo* (5),

(1) (1861) 10 C.B. (N.S.), at pp. 42, 43 [142 E.R., at p. 365].
(2) (1949) 78 C.L.R. 389, at p. 399.
(3) (1942) 66 C.L.R. 161, at p. 176.
(4) (1861) 10 C.B. (N.S.) 3 [142 E.R. 349].
(5) (1861) 10 C.B. (N.S.), at p. 6 [142 E.R., at p. 351].

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that " It is the undoubted right of a superior court to commit for contempt ". The question which was considered to arise was whether the court of assize was a superior court. If that were the case then it followed as of course that it had power to commit for contempt. (The other question in the case was whether the warrant of commitment was sufficiently specific, a question which does not arise in the present case.) *Byles* J. said (1): " It is plain, upon the authorities and is admitted, that a superior court may commit for contempt of court in terms much more general than the language of this warrant. That power has been decided to belong not only to the High Court of Parliament, that is, to the House of Lords and to the House of Commons, but also to the Courts of Queen's Bench, Common Pleas and Exchequer and to all superior courts of record. The main question, therefore, is whether a court of assize be one of the superior courts of record."

In *R.* v. *Lefroy* (2) there was an examination of the distinction between a superior and an inferior court in relation to the power to fine and imprison for contempts committed out of court. It was said that " the superior courts have exercised this power from time immemorial ". *Quain* J. (3), quoting from *Blackstone's Commentaries*, (1841), vol. 4, p. 232, said that a power to commit for contempt so as to secure the administration of justice by the courts from disobedience and contempt " must be an inseparable attendant upon any superior tribunal. Accordingly we find it actually exercised as early as the annals of our laws extend ". See also *Ex parte Goldsbrough Mort & Co. Ltd.*; *Re Magrath* (4). There have been discussions as to whether the power to commit for contempt has been exercised from time immemorial in the case of libels upon the court or a judge. But ever since the case of *R.* v. *Almon* (5) it has been held that superior courts undoubtedly possess this power. *Holdsworth, History of English Law* 2nd ed., vol. 3, p. 394, after referring to the criticisms of *R.* v. *Almon* (5), contained in articles in the *Law Quarterly Review* by *C. J. Fox*, says that, in spite of the absence of prior authority for some of the propositions laid down in *R.* v. *Almon* (5) " it was accepted as correct and it forms the basis of the modern law on this subject ".

Under s. 83 of the 1904-1934 Act, to disturb the court was made an offence (sub-s. (1)) and the court was given part of the power of a superior court to punish for contempt (sub-s. (2)). It was a power to punish by attachment and committal. In 1945 in

(1) (1861) 10 C.B. (N.S.), at pp. 57, 58 [142 E.R., at p. 371].
(2) (1873) L.R. 8 Q.B. 134.
(3) (1873) L.R. 8 Q.B., at p. 140.
(4) (1932) 32 S.R. (N.S.W.) 338, at p. 341; 49 W.N. 137, at p. 138.
(5) (1765) Wilm. 243 [97 E.R. 94].

John Fairfax & Sons Pty. Ltd. v. *Morrison* (1), this Court held that sub-s. (2) of s. 83 did not purport to confer upon the Arbitration Court the common-law power of punishing for contempt which was possessed by superior courts of record, but only the power of a superior court of record to punish by attachment and committal any person whom it found to have been guilty of contempt of the court. It was held, therefore, that the court had no power to fine a person found guilty of contempt of court. In 1947 the Act was amended by the repeal of s. 83 and the introduction of s. 17 (3). Section 17 (3) deals with the position as disclosed by the decision in *John Fairfax & Sons Pty. Ltd.* v. *Morrison* (1). The section, in my opinion means (unless it is almost meaningless) that the Arbitration Court has all the powers of a superior court of record except and in so far as there are specific provisions (to some of which reference has already been made) which have the effect of limiting those powers. The one power of a superior court of record as to which the Act contains no limitation is the power to punish for contempt of court. In my opinion the object and the effect of s. 17 (3) is to confer upon the Arbitration Court the full power of superior courts of record to punish for contempt which the common law has attributed to them for very many years.

Wilful disobedience to an order of the court is contempt of a criminal nature. It is not merely a means of enforcing a civil right of a litigant. This distinction is made clear in *In re Freston* (2). *Brett* M.R. (3), referring to *Re M'Williams* (4), says that if the ground of a proceeding is not a debt but is a contempt "as for instance, disobedience of some order of the Court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature." See also per *Lindley* L.J. (5).

In the present case the charge against the union was that it had wilfully disobeyed the orders of the court directing compliance with the award by causing or procuring overtime to be worked and restraining further contraventions of the Act. It was for the Arbitration Court to determine whether there had been disobedience of the orders and whether that disobedience was wilful. Those are not questions which can be considered by this court upon proceedings by way of prohibition. If the Arbitration Court has jurisdiction to punish for contempt, as, in my opinion, it has, the exercise of that jurisdiction is for the reasons which I have stated,

(1) (1945) A.L.R. 297.
(2) (1883) 11 Q.B.D. 545.
(3) (1883) 11 Q.B.D., at p. 553.
(4) (1803) 1 Sch. & Lef. 174.
(5) (1883) 11 Q.B.D., at p. 556.

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a matter for that court. There is no appeal from its decision to this Court.

Accordingly I am of opinion that the order nisi in the Amalgamated Engineering Union's case should be discharged.

DIXON J. The prosecutor seeks a writ of prohibition in respect of four orders of the Court of Conciliation and Arbitration: first an order made on 8th September 1947 varying an award, second an order made on 5th June 1950 in purported pursuance of s. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 ordering compliance with certain provisions introduced into the award by the order of variation, third an order also made on 5th June 1950 but in purported pursuance of s. 29 (*c*) of the Act restraining breaches of such provisions, and fourth an order not yet drawn up made on 10th July 1950 fining the prosecutor for contempt of court.

The first of these orders, that varying the award, dealt with the Arbitration Court's determination that the standard hours of work should be forty hours a week. The award varied is the Metal Trades Award 1941 as consolidated by an order of 13th September 1946. The prosecutor is an organization of employees bound by that award. The variation applied the principle of the determination concerning standard hours to the award and introduced into the award some clauses containing accompanying conditions or incidental provisions. These included the terms in relation to the working of overtime. The same terms were inserted in two different places in the award, in one place as clause 11 (*hh*) governing shift workers and in the other place as clause 13 (*k*) governing day workers. In each case there are three paragraphs to the clause. Paragraph (1) provides that an employer may require any employee to work reasonable overtime at overtime rates and that such employees shall work overtime in accordance with such requirement. Paragraph (2) provides that no organization party to the award shall in any way directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of the sub-clause. Paragraph (3) provides that the sub-clause shall remain in operation unless otherwise determined by an authority competent to do so under the Act. The writ of prohibition sought with reference to the order of variation is confined to a portion only of the purported operation of par. (2) of the sub-clause. The prosecutor desires to prohibit the Arbitration Court from proceeding upon so much of that paragraph as provides that no

organization party to the award shall in any way *indirectly be concerned* in any ban, limitation or restriction upon the working of overtime in accordance with the requirement of the sub-clause. As to the rest of the operation of par. (2) no objection is made.

But it is contended that in forbidding an organization to be indirectly concerned in a ban &c., the paragraph goes too far and exceeds the jurisdiction of the Arbitration Court. It is said that the words set a vague criterion of liability capable of what may be called an extensible application and that in the ambit or nature of the industrial dispute settled by the award no warrant can be found for such a provision as they make. The dispute arose out of a log of demands on behalf of the employees and another log of demands on behalf of the employers. The former contained claims with respect to standard hours and the latter a claim with respect to the obligation to work overtime. I find it unnecessary to consider the scope, or the effect upon this question, of the employers' claim with respect to the working of overtime, because, in my opinion, it was competent to the court independently of that claim to adopt in full the paragraph portion of the operation of which is impugned. The ground upon which I think that it was open to the Arbitration Court to introduce the paragraph into the award is that it is a relevant and appropriate condition, relevant and appropriate to the relief awarded to the organization and its members in the determination of standard hours. That relief was awarded by the order of variation in consequence of a demand made by the organization for shorter standard working hours which resulted in a dispute on the subject. It is evident that when a reduction of standard hours of work at ordinary rates of pay is under consideration, the effect on output must be regarded and that involves the question whether longer hours will be worked if work at overtime rates is called for. It would be open to the Arbitration Court to treat the two matters as inseparable. It would thus be competent for that court to insist on overtime work as a compensatory condition of granting a reduction in the standard hours of work fixed for ordinary rates of wages.

As an incident of providing for the performance of such overtime work, I think the Arbitration Court might lawfully bind the organization making the demand to have no part in any restriction upon overtime work which might be practised in disobedience of the principal provision. How far the Arbitration Court should go in framing the prohibition against the organization having any complicity in a ban or limitation or restriction on working overtime as required by the compensatory condition imposed appears to

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me to be a matter for the judgment and discretion of that court. No doubt the prohibition must be fairly incidental to the principal provision requiring the working of overtime. But it is difficult to see why it is not fairly incidental to such a requirement to insist that the organization shall not be concerned in a restriction calculated to defeat the obligation of the principal provision whether the concern in the restriction is direct or indirect. In my opinion the objection to the order of variation fails and no writ of prohibition should go in respect of any part of par. (2) of the sub-clauses relating to compulsory overtime which the order inserts in the award.

The second order which it is sought to prohibit is founded upon s. 29 (*b*) of the Act. Section 29 (*b*) empowers the Arbitration Court to order compliance with an order or award proved to the satisfaction of the court to have been broken or not observed. The operative part of the order mentions the second paragraphs of the two sub-clauses inserted in the award and orders that certain organizations, including the prosecutor, do comply with such paragraph by causing or procuring that within seven days from the date of the order overtime should be worked in accordance with the clauses (*scil.* sub-clauses) by the members of the respective organizations employed by certain named employers without any ban limitation or restriction. In support of the contention that this order was outside the scope of s. 29 (*b*) counsel for the prosecutor adopted an argument as to the meaning of the provision which was advanced with some elaboration in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Gas Employees Industrial Union* (1), a case argued with this case. The argument was in effect that s. 29 (*b*) is confined to orders for the purpose of ensuring that past breaches or non-observances of an order or award are set right. I do not accept the argument and, in dealing with that case, I shall say why I reject it. But, in any event, it is doubtful whether it helps the prosecutor in this case.

The more serious objection to the order made as under s. 29 (*b*) is that it goes beyond the tenor of the obligation with which it requires the organizations to comply. The tenor of the obligation is that no organization shall in any way, whether directly or indirectly, be party to or concerned in any ban &c. upon the working of overtime in accordance with the requirements of the sub-clause. How, it may be asked, is a duty to cause or procure members to work overtime without any ban &c. contained in that obligation? To comply with the obligation is it not enough

(1) *Post*, p. 267.

if the organization ceases and desists from any part or concern direct or indirect in any ban &c. ? The order requires the organization at its peril to see that its members resume the working of overtime without ban restriction or limitation. That imports an absolute obligation on the part of the organization for the failure of the members or any of them to resume the fulfilment of the duty laid upon them to work reasonable overtime, and, says the prosecutor, it is an obligation different in kind as well as in degree from the negative duty expressed in par. (2) to have no part or concern in a ban, restriction or limitation. Therefore, so the prosecutor contends, the order is not one of compliance with the term of the award. The contention distinguishes, of course, between, on the one hand, the organization acting as a corporate or collective body in the manner appointed by its rules or through its officers, servants or agents and, on the other hand, members or groups of members acting independently and neither exercising nor possessing the authority of the body.

The answer made by the respondents to this attack upon the order made as under s. 29 (*b*) may, I think, be divided into three steps. Summarily stated, what they amount to is as follows :— (1) An assertion that, if, as must be assumed, the organization had been party to or concerned in the imposition of a ban, restriction or limitation, the wrongful act could be undone only by the organization causing the men to work overtime ; (2) an insistence that the interpretation of the award and the ascertainment of the facts fall within the competence of the Arbitration Court ; (3) a reliance upon the principles governing the use of the writ of prohibition ; that is to say, the impossibility on prohibition of examining more than the existence of the jurisdiction which the order purports to exercise. If it were not for s. 32 of the Act I think that this answer would not suffice. For, after all, what s. 29 (*b*) authorizes is an order to comply with an award and that postulates an award and an ascertainable duty arising thereunder. Interpretation may justify the adoption of a particular meaning and the assignment of a particular operation of which the award is capable where it is capable of more than one meaning and operation, but it cannot go further. Given so much, the order must be confined to compliance with the instrument according to its true meaning or some interpretation of which it is capable. But I think the validity of the order is saved by the presence of s. 32 in the Act. It must be borne in mind that we are here concerned only with an alleged excess of the jurisdiction conferred upon the Arbitration Court by

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the Act. The case does not touch the limitations which the Constitution imposes upon the power of the legislature to confer jurisdiction. The legislature might have conferred power upon the court in terms which would have justified the order. The prosecutor's complaint is simply that the order goes beyond the power which the statute has actually conferred. Now it cannot be denied that the order impugned was made by the Arbitration Court in purported pursuance of s. 29 (*b*), that it is an attempt to exercise that power and that upon its face the order appears to be an exercise of the power. It is only when you look behind it at the terms of the award that any ground is disclosed for denying that the order falls within s. 29 (*b*).

In my opinion in such a case s. 32 operates to give validity to the order. The general policy of the Act is to give efficacy to the completed proceedings of the Arbitration Court and no doubt also of the conciliation commissioners. This can be seen from the provisions contained in s. 32 and in s. 16. No doubt there are instances in the Act where imperative duties or inviolable limitations or restraints are imposed by the Act on the Arbitration Court or the commissioners. When that is the case invalidity affects any transgression of the limitation or restraint and a mistaken decision that the duty is less extensive than it is does not relieve the court or the commissioner from its imperative obligation. In such cases prerogative writs will issue for the enforcement of the duty or restraint. An example may be seen in the mutual operation of ss. 13 and 25 of the Act. For it is plain that the boundary between the power of the Arbitration Court and the power of the conciliation commissioners must be maintained absolutely and that the encroachment of one tribunal upon the province of the other must mean invalidity *pro tanto*. Otherwise there might be conflicting orders or awards of equal authority upon the same subject. Conversely an erroneous decision by one of the tribunals that a matter lies outside its authority and is within the authority of the other can have no effect. The duty of a tribunal to exercise the jurisdiction thus erroneously declined remains imperative and may be enforced by mandamus. Otherwise the matter submitted to the jurisdiction would remain without a valid determination. But these are considerations which go to the interpretation of the particular provisions of the statute and the reason why prohibition and mandamus lie is because, upon the interpretation to which they point, the division of power is absolute and the two jurisdictions are at once mutually exclusive and complementary. There can be no encroachment which is valid and no intermediate field of power

allowed to remain mistakenly uncovered or unexercised. The general policy of the Act of conferring validity on determinations once they have been actually made and completed can have no application to such a situation: see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (1) and *R.* v. *Galvin*; *Ex parte Metal Trades Employers' Association* (2).

But, unless from the nature of some particular provision defining or limiting the power of the tribunal it appears to be the true intention that no excess of the power should have any effect, s. 32 (1) (*c*) and (*d*) operate to give validity to an order or award notwithstanding that it goes outside the definition of the power as expressed or beyond the limitations by which it is restricted if the order or award does not upon its face exceed the expressed authority of the Arbitration Court and if it relates to the subject matter of the Court's authority and amounts to a bona-fide attempt to exercise a power or powers which the court possesses. In *R.* v. *Hickman*; *Ex parte Fox and Clinton* (3), a case concerned with a protective regulation of the same general character as s. 32 (1) (*c*) and (*d*), I stated what in my opinion is the relation of such a provision to the jurisdiction of this Court under s. 75 (v.) of the Constitution to grant writs of prohibition and mandamus against officers of the Commonwealth, what is the interpretation placed upon such provisions and what effect should be given to them where the validity of an order or award is challenged upon grounds arising from an Act of Parliament whether immediately or mediately and not because the order or award goes beyond what the Constitution allows. I shall not discuss again the significance or operation of such provisions nor cite the authorities I there mention, but I desire the passage to which I have referred to be read, *mutatis mutandis*, as part of this judgment. It is enough to say that I am of opinion that s. 32 (1) operates to protect an order or award of the Arbitration Court from invalidation on the ground that the court has not fulfilled the requirements prescribed by the Act for its proceedings or for the exercise of its powers or upon the ground that the limits of the relevant power of the court as expressed in the definition of the power or in some restriction upon it have been exceeded if it appears that the order or award is reasonably capable of reference to a power belonging to the court and relates to the subject matter of the jurisdiction and amounts to a bona-fide attempt to exercise an authority possessed by the court.

(1) (1949) 78 C.L.R. 389, at pp. 400, 401.
(2) (1949) 77 C.L.R. 432.
(3) (1945) 70 C.L.R. 598, at pp. 614-617.

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It is perhaps desirable to mention some subsequent cases where the application of provisions of the character of s. 32 (1) have been in question. They are *R.* v. *Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australia Ltd.* (1); *R.* v. *Central Reference Board*; *Ex parte Thiess (Repairs) Pty. Ltd.* (2); *R.* v. *Murray*; *Ex parte Proctor* (3); and *R.* v. *Dunphy*; *Ex parte Grant* (4). These cases or some of them relate to limitations considered to be absolute and outside the protection of provisions like s. 32 (1), but they do not detract from the principle and, on the contrary, support it.

The order of 5th June 1950 made in purported pursuance of s. 29 (*b*) is in my opinion protected from invalidity by the operation of s. 32 (1) (*c*) and (*d*). The order is based on s. 29 (*b*) and is expressed as an order of compliance. It is only when the award behind the order is examined that the question arises whether it does not go beyond compliance with the provisions of the award. It is obviously an attempt to exercise power conferred by the Act and the order deals with a matter which is a subject of the legislative enactment. The constitutional power of the Parliament extends to authorizing such an order and the attack upon the order is on the ground that it goes beyond the definition of the authority actually conferred as expressed in the specific provision by which it is given, viz., s. 29 (*b*). Such a case comes within the principle upon which s. 32 proceeds and the order is saved by its operation.

I am therefore of opinion that no writ of prohibition should go in respect of the order of 5th June 1950 made as under s. 29 (*b*).

The third order which it is sought to prohibit was made on the same day in the purported exercise of the authority conferred by s. 29 (*c*). It is expressed to enjoin certain organizations, including the prosecutor, from committing a contravention of the Act, namely from being directly or indirectly a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirement of par. (2) of the sub-clauses at any factory or establishment carried on by any member of the respondent employees' organization in New South Wales.

It will be seen that what this order does is to enjoin future breaches in New South Wales of par. (2) of the sub-clauses as contraventions of the Act. The objection which is made to it on the part of the prosecutors is that s. 29 (*c*) empowers the court to enjoin contraventions of the Act as distinguished from breaches,

(1) (1947) 75 C.L.R. 361, at pp. 368, 369.
(2) (1948) 77 C.L.R. 123.
(3) (1949) 77 C.L.R. 387, at pp. 398, 399.
(4) (1950) 81 C.L.R. 27.

contraventions or non-observances of awards and orders and that the order under colour of enjoining against a contravention of the Act restrains breaches of an award. In answer to this it is said first that a breach or non-observance of an award is a contravention of the Act and second that, even if s. 29 (*c*) failed as an authority for making the order, the power conferred upon the Arbitration Court by s. 29 (*b*) is wide enough to support an order expressed in the negative form of an injunction as well as one in the positive form of command; the former is as much an order for compliance with an award as the latter.

The first answer, in spite of its plausible appearance, ought not, I think, to be accepted. There is a question whether the Act formally does make breach or non-observance of an award a contravention of the Act, but I pass it by. The reason why the answer is not a good one is that, as I read it, the *Conciliation and Arbitration Act* maintains a distinction between infringements of the Act and infringements of awards and when it speaks of contraventions of the Act it is not referring to breaches of or failures to observe awards, even if such breaches or non-observances are contrary to the statute and expose the persons offending against the awards to penal consequences. The distinction is made in the terms in which the following provisions are expressed, viz.:—ss. 31 (1) (*a*) and (*b*), 33 (1) (*a*), 61, 64 (1) and (6) and 80 (1) (*c*). Indeed it is indicated by s. 29 (*b*) and (*c*) when they are considered together. The form of s. 65, which treats proceedings for an offence against the Act as not including the recovery of a penalty under s. 59 for breach or non-observance of an award, follows the distinction and appears to me to confirm the inference that an infringement of an award is not to be treated as included under the expression contravention of the Act. When s. 40 (*c*) empowers the Arbitration Court in relation to an industrial dispute to fix maximum penalties for any breach or non-observance of a term of an award it marks the difference in the manner in which the statute regards non-compliance with the Act and non-compliance with awards under the Act. The provisions relating to State industrial regulation observe the same distinction when they speak of a "State law dealing with an industrial matter" and "an order, award, decision or determination of a State Industrial Authority": s. 28 (1) and s. 51. Finally the importance attached by the framers of the Act to the enforcement of orders and awards and its treatment of their enforcement as a separate legislative subject tends to make it unlikely that the power to grant an injunction against contraventions of the Act was intended to comprise injunctions against

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breaches and non-observances of awards: see s. 2 (*e*) and the heading to Part V.

The second answer means in effect that an order made under s. 29 (*b*) for compliance with a term of an order or award imposing a duty to refrain from some act or course of conduct may take the form of an injunction and that there is no reason why the order should not be justified under s. 29 (*b*), notwithstanding that it is expressed as made upon an order nisi for an injunction pursuant to s. 29 (*c*). I have come to the conclusion that this contention ought not to be sustained. One reason is that the order contains an express statement enjoining the prosecutor and other organizations from committing a contravention of the Act. It is true that it is followed by a *videlicet* which defines the contravention and shows that it is limited to par. (2) in the sub-clauses of the award. But I do not think that it can be treated as superfluous. The order is not an injunction against acts amounting to breaches of par. (2) *simpliciter*. It is against contravening the Act by such conduct and the expression in the context must have the same meaning as contravening the Act has in s. 29 (*c*). That produces on the face of the order what may be called a legal self-contradiction, once s. 29 (*c*) is given the meaning I have placed upon it.

Another reason for rejecting the view that the order may be supported under s. 29 (*b*) is that s. 29 (*b*) requires proof that the award has been broken. The order shows on its face that the court took as the foundation for making the order what s. 29 (*c*) says, not what s. 29 (*b*) requires, and that means that the necessity of proof of breach of the award did not enter into the question of making the order. This may seem an artificial reason from the standpoint of the actual view taken by the court of the total situation forming the occasion of the two orders of 5th June 1950. But we are here dealing with a question which is independent of the facts behind the orders. The question is whether the attempted exercise of a power thought to be conferred by s. 29 (*c*) of necessity amounts to an exercise of the power actually conferred by s. 29 (*b*). The answer is that it does not of necessity amount to the same thing, because the grounds on which the exercise of the two powers proceeds are not entirely the same. Moreover, it must be remembered that the reasons of the Arbitration Court for making two orders instead of one may have included this very consideration.

A third reason for the conclusion that s. 29 (*b*) cannot be used to support the order is that in making two orders, one under s. 29 (*b*) and another under s. 29 (*c*), the Arbitration Court exercised

a discretion based on the supposition that two applicable powers existed which were not identical, whether in scope, purpose or the conditions governing their exercise. *Non constat* that a second order would have been made, if the Arbitration Court had addressed its discretion to one power only, taking the view that I have adopted, namely that s. 29 (*c*) is inapplicable.

Section 32 will not save the validity of the order now under discussion because on its face that order is bad. The *videlicet* shows that it is outside the power of the Arbitration Court in the sense that it professes to do what the court has no power at all to do, namely to grant an injunction against a breach of the Act constituted by failure to comply with an award and that it is not an attempt to exercise the court's actual jurisdiction.

For these reasons I am of opinion that the order of 5th June 1950 made in purported pursuance of s. 29 (*c*) is invalid and a writ of prohibition should issue to restrain further proceedings upon that order.

The fourth order in respect of which the prosecutor seeks the issue of a writ of prohibition is an order fining the organization £100 for contempt of court. The order, though not drawn up, clearly enough was made by way of punishment for a contempt in not fulfilling or observing the order made on 5th June 1950 in purported pursuance of s. 29 (*b*) for compliance with par. (2) of the sub-clauses, that is to say the order which, according to the opinion I have expressed, is protected from invalidity by s. 32 (1) (*c*) and (*d*). The summons upon which the order was made calls upon the prosecutor and other organizations to answer a charge that they had been guilty of contempt of the Arbitration Court and to show cause why they should not be punished for that they did commit contempt of the Arbitration Court by wilfully disobeying an order of such court. The summons goes on to identify the order so wilfully disobeyed. It will be seen that proceedings, although commenced by a party entitled to the benefit of the order of 5th June 1950, amount to much more than a recourse to civil process to enforce the execution of the order. The contempt charged is treated as a special or criminal contempt and not as a contempt in procedure. The distinction between civil and criminal contempts is well recognized, although when orders restraining or commanding the doing of specific things are defied or disobeyed the remedy by contempt may have a double aspect. This is not an occasion calling for a discussion of the two classes of contempt and of the middle ground upon which they overlap or of the purposes for which the distinction is important. The manner in

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which it has been treated may be seen from the following cases, though some of them, those relating to the right of appeal, are concerned rather with the nature of the cause or matter in which the contempt order was made than with the character of the contempt: *Re Freston* (1); *Harvey* v. *Harvey* (2); *R.* v. *Barnado* (3); *O'Shea* v. *O'Shea and Parnell* (4); *Re Evans*; *Evans* v. *Noton* (5); *Seaward* v. *Paterson* (6); *Seldon* v. *Wilde* (7); *Scott* v. *Scott* (8); *Gower* v. *Gower* (9).

It is enough for present purposes to say that the imposition of a fine, as well as the nature of the summons, shows that the order is of a punitive or disciplinary nature. The learned judges of the Arbitration Court in making the order acted in the purported exercise of a jurisdiction to deal summarily with contempts of that court. The jurisdiction asserted depends on s. 17 (3) of the Act, which provides that the Arbitration Court shall be a superior court of record. One of the powers which a superior court of record possesses at common law is to punish summarily for contempts of its judicial authority. The power is not confined to contempts in the face of the court but extends to contempts of the superior court inside and outside the court. It is in virtue of this power belonging to a superior court at common law that the Arbitration Court has made the order now brought into question.

To my mind the difficulty in sustaining the order as an exercise of a power arising by the common law from the status of the Arbitration Court as a superior court arises from the presence in the Act of specific provisions dealing with the very subject of penalizing the disobedience of orders. Section 59 (1) provides specifically for the imposition by the Arbitration Court, among other courts, of a penalty upon any organization or person bound by an order or award who has committed any breach or non-observance of any term of the order or award. The amount of the penalty is limited to the maximum fixed under s. 40 (*c*), or if none is fixed the maximum which might be fixed under that provision. The maximum which might be fixed for an organization is £100. The same maximum is fixed for an employer not a member of an organization. For members of organizations the maximum is £10. Section 59 (2) names the persons or classes of person who may

(1) (1883) 11 Q.B.D. 545, at pp. 552, 553, 556, 557.
(2) (1884) 26 Ch. D. 644, at pp. 650-653.
(3) (1889) 23 Q.B.D. 305, at pp. 308, 309.
(4) (1890) 15 P.D., at pp. 62, 63, 65.
(5) (1893) 1 Ch. 252, at p. 266.
(6) (1897) 1 Ch. 545, at pp. 555, 556, 559, 560.
(7) (1911) 1 K.B. 701.
(8) (1912) P. 241, at pp. 249, 268, 269; (1913) A.C. 417, at pp. 440, 455 et seq.
(9) (1938) P. 106.

sue for and recover the penalties incurred under s. 59 (1). They are the Registrar, an Inspector, an organization, if it or its members are affected by the breach or non-observance, a member of any organization, if he is so affected, a party to the order or award and an officer of an organization if it or its members are so affected and if he is authorized by the rules to sue on behalf of the organization. Section 59 (3) gives a court before which proceedings under sub-s. (1) come power to order payment to an employee of an amount due to him under an award which during the preceding twelve months he has been underpaid. Section 60 then authorizes the court to order that the penalty be paid either to Consolidated Revenue or to such organization or person as is specified in the order. Section 61 provides machinery for enforcing payment of the penalty. Section 62 enacts that no person shall wilfully make default in compliance with an order or award: penalty £20. Section 119 provides that a person who has committed an offence against the Act may be charged before the Arbitration Court and the court may impose the penalty provided by the Act in respect of that offence. As s. 59 (1) expressly gives the Arbitration Court jurisdiction it is unnecessary to consider whether s. 119 would otherwise cover proceedings under s. 59; but it does cover proceedings for an offence under s. 62. A question was raised as to the scope of s. 62 and doubt was thrown on its application to organizations. It is perhaps a little remarkable that the maximum penalty for wilful default in compliance with an order or award should be fixed at so low an amount, but the section has not been altered since it was introduced as s. 49 of the Act of 1904, and in any case the amount of the penalty is no reason for excluding organizations from its operation. They are "persons" as much as other corporate bodies. Sections 59, 60 and 61 contain a carefully considered set of provisions for the enforcement of orders and awards by penal sanctions. Under them the Arbitration Court takes a specifically regulated power. Maximum penalties are fixed by reference to a standard involving a discrimination among three possible objects of the sanctions, viz., an organization, an employer not a member of an organization bound by the order or award and members of an organization. The persons who may proceed for the penalties are carefully defined, the destination of the penalties is dealt with and the mode of enforcing orders for the recovery of penalties is prescribed. None of these conditions or limitations belong to the summary power of punishing contempts which at common law belongs to a superior court and, if in virtue of its being a superior court it may punish for contempt for dis-

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obedience of its orders, the Arbitration Court possesses a power which, for the enforcement at all events of judicial orders, enables it to impose fines subject to no limitation of amount, to imprison natural persons and to sequestrate the property of organizations and to do so in proceedings commenced by persons not falling within the enumeration in s. 59 (2) and perhaps to do so even *ex mero motu*. Section 59 stands in Part V. of the Act, which is headed "Enforcement of orders and awards". There is no ground for saying that it is confined to arbitral as distinguished from judicial orders. It is of course penned in the affirmative, but the carefully framed conditions and limitations it expresses appear to me clearly to imply a negative, namely an intention that the same thing shall not be done without regard to these conditions and limitations.

The whole question of the enforcement of orders as well as awards having received the particular attention of the legislature and specific statutory provisions having been made for the purpose giving a guarded summary remedy, it must be taken to exclude recourse to the summary jurisdiction belonging at common law to a superior court of record to enforce its orders by fine, imprisonment or sequestration for contempt of its authority. I am therefore of opinion that the order of 10th July 1950 fining the prosecutor organization £100 cannot be supported as an exercise of a power to punish for contempt. The amount of the fine does not exceed the maximum penalty recoverable under s. 59 and it may be asked why cannot the order for the fine be supported under s. 59. The answer is that the jurisdiction given by s. 59 was not exercised. The organization was pronounced guilty of contempt. No consideration was given to the disposition of the penalty. The Arbitration Court, in dealing with the summons, disclaimed resort to the provision, and before this Court counsel for the respondent organization declined to attempt to refer the order to s. 59. The order, if drawn up, would doubtless show upon its face that it was outside s. 59, but it has not been drawn up and I do not think s. 32 is applicable to it. In my opinion the writ of prohibition should go in respect of the order pronounced on 10th July 1950.

I think that the order nisi should be made absolute for a writ of prohibition prohibiting further proceedings in respect of the order made on 5th June 1950 purporting to enjoin the organizations mentioned in the schedule thereto from committing a contravention of the Act and in respect of the order pronounced on 10th July purporting to fine the prosecutor £100 for contempt of the Arbitration Court.

McTIERNAN J. The first question is whether the Commonwealth Court of Conciliation and Arbitration exceeded its jurisdiction in prescribing the prohibition, which is in the Metal Trades Award, against bans on the working of overtime.

The provision containing this prohibition is attacked on the ground that it is too wide because it extends to any indirect concern in a ban, limitation or restriction.

It is necessary that the prohibition should be justified by reference to the subject matter of the industrial dispute as defined by the respective logs of the employers and employees. The employers demanded that no union of employees should place restrictions on the working of overtime. The refusal of that demand could have made an industrial dispute if the subject of the demand was an industrial matter within the meaning of the statute. In order to determine that question it would be necessary to consider how far the principle in *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1) goes. Further, the employers' demand is that unions of employees only should not interfere with the working of overtime, whereas the prohibition in the award may apply to organizations of employers as well as of employees. In my opinion it is not necessary to justify the prohibition relating to bans on overtime by the employers' demand. The hours of work and the related question of overtime were subjects of the industrial dispute, and there could be no doubt that these were industrial matters which came within the industrial dispute determined by the award. The Arbitration Court determined the dispute in relation to those matters by prescribing the right of employers on the one hand and the duty of employees on the other hand in respect of the working of overtime. The prohibition against bans on the working of overtime is ancillary to the prescription of this right and duty. The court has put any conduct involving complicity either as a principal or accessory in banning, limiting or restricting the working of overtime, within the prohibition. In prescribing the prohibition the court has substantially adopted the language of s. 5 of the *Crimes Act* to describe the nature and extent of the prohibition. It is attacked only on account of its width, because it extends even to any action or inaction by an organization which exhibits only an indirect concern inimical to the fulfilment by employees of their duty to work overtime in accordance with the award. The prohibition is within power because it is ancillary to the provision of the award making the working of overtime a condition of the

(1) (1936) 54 C.L.R. 626.

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employment. It cannot be fatal to the prohibition that it is as thorough and detailed as the court considered necessary to make it in order to prevent the frustration of the conditions of the award relating to overtime by the action of any organization which is a party to the award. In my opinion the provision which the court inserted in the award relating to bans on the working of overtime is within the jurisdiction of the court and is valid.

The second question is whether the order made under s. 29 (*b*) of the Act is within the jurisdiction of the court. The court ordered the prosecutor to comply with the award by causing or procuring that within seven days from the date of the order overtime should be worked by its members employed by certain employers without any ban, limitation or restriction. This order compels action, presumed to be in accordance with the award, in the future. It is argued that s. 29 (*b*) gives power to the court only to order that a breach of an award should be repaired. Taking the ordinary meaning of the word " compliance ", it is a power to order a person or organization to act in accordance with an award. The words of s. 29 (*b*) make it plain that its intent is that the court should have this power. The inferences which it was sought to draw from the history of the legislation are too uncertain to justify a construction of s. 29 (*b*) which would give the court less power than the words of this provision clearly grant to the court.

It was within the jurisdiction of the court to order the prosecutor to act in accordance with the provision in the award relating to bans on the working of overtime. The order made by the court is not invalid on the ground that it purports to compel future action in accordance with the award. But the action ordered by the court raises the question whether the court has exceeded its power to order compliance with the award. The grant of this power gives the court power to make an effective order. But it is clear that whatever its terms the order must be of the description which the court is given power to make. It was beyond the power of the court to order the prosecutor to do anything which the award did not bind it to do. In my opinion the award does not bind the prosecutor to cause or procure that any of its members should work overtime. The order imposes upon the prosecutor an obligation which is different from and more onerous than any obligation which the award imposes upon it. The order makes the prosecutor an instrument for compelling its members to work overtime in accordance with the award. The provision of the award relating to bans on the working of overtime does not according to its true meaning bind the prosecutor to undertake that

responsibility. The order made under s. 29 (*b*) is not capable of being regarded as an order to comply with the award and is upon its face beyond any jurisdiction which the Act confers on the court.

If the provision of the award contains the obligation which the order of the court imposes upon the prosecutor, it would be necessary, in my opinion, to consider the question whether the court has jurisdiction under the Act to bind an organization of employees or employers in that way.

The third question is whether the order made under s. 29 (*c*) is beyond the jurisdiction of the court. The word "Act" in this provision cannot be read to include the word "award". Upon an examination of the whole Act it does not show that the contravention of an award is to be treated as a contravention of the Act.

In the view which I take that the orders made respectively under clauses (*b*) and (*c*) of s. 29 are beyond the power of the court it is not necessary for me to decide the point under s. 17 (3) as to the powers of the court to punish for contempt. The order imposing a fine upon the prosecutor is invalid because it does not appear that the prosecutor was guilty of a breach of any valid order.

The order nisi should, in my opinion, be made absolute as to the three orders of the court and discharged so far as it relates to the award itself.

WEBB J. I would make absolute the order nisi for prohibition, for the reasons given by *Dixon* J., except his Honour's reasons for supporting the order of 5th June 1950 purporting to be made under s. 29 (*b*) of the Act. In my opinion that order is invalid on its face, as the award does not impose a duty on the organization to cause or procure its members to work even reasonable overtime. The award requires no more than that the organization should not be directly or indirectly a party to or concerned in any ban, limitation or restriction on the working of overtime. That does not impose on the organization the active duty of taking steps to have overtime worked by its members.

I think, then, that the order nisi for prohibition should also be made absolute in respect of the order of the Arbitration Court of 5th June 1950 purporting to be made under s. 29 (*b*) of the Act.

KITTO J. This is the return of an order nisi for prohibition, by which the validity of four orders of the Commonwealth Court of Conciliation and Arbitration is called into question.

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The first order was made on 8th September 1947, on the hearing of a summons issued by the prosecutor and others by which variations were sought in the Metal Trades Award 1941 as consolidated on 9th July 1943 in respect of standard hours. The order made a number of variations in the terms of the award, directed in the main to establishing forty hours instead of forty-four as the ordinary hours of work per week. It also inserted two new sub-clauses, the first (*hh*) being added to clause 11 dealing with shift-workers, and the second (*k*) being added to clause 13 dealing with other workers. These two sub-clauses were in identical terms, providing, so far as material, (1) that an employer may require any employee to work reasonable overtime at overtime rates and that the employee shall work overtime in accordance with such requirement, and (2) that no organization party to the award shall in any way either directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of the sub-clauses.

The prosecutor does not deny that the order was within the jurisdiction of the court to settle the dispute in respect of which the award was made, insofar as it altered the standard hours and made the first of the provisions contained in sub-clauses (*hh*) and (*k*) and so much of the second of those provisions as stipulates that no organization party to the award shall in any way either directly or indirectly be a party to, or directly concerned in any ban, limitation or restriction upon the working of overtime. What is challenged is the jurisdiction to provide by the order that no such organization shall be indirectly concerned in any such ban, limitation or restriction. It is said that to impose upon organizations prohibitions in terms as far-reaching as these was to exceed anything that could properly be regarded as relevant to the settlement of the dispute to which the award related.

In my opinion the contention is groundless. Once it is conceded, as it is and I think must be, that it was within jurisdiction to make, as an integral part of the scheme adopted for the reduction of ordinary working hours, a provision for the working of overtime, including a prohibition against the direct concern of organizations bound by the award in any ban on overtime, it becomes, in my opinion, impossible logically to refuse a similar concession in respect of a provision against the indirect concern of those organizations in such a ban. A union may be none the less really concerned in a ban because its concern is indirect. To provide against its being directly or indirectly concerned is thus to make a single effective provision against its being concerned at all.

If the words "directly or indirectly" had been omitted, the provision, in my opinion, would not have been open to any possible attack, for the words "concerned in any ban" &c. must be construed in a limited sense dictated by the nature of the document in which they appear: cf. *William Cory & Son, Ltd.* v. *Harrison* (1); *T. W. Cronin Shoe Pty. Ltd.* v. *Cronin* (2). So construed, they do not refer, in my opinion, to anything more than having such a real connection with a ban as involves some degree of responsibility for it. The inclusion of the words "directly or indirectly" serves to make plain the completeness of the prohibition, but makes no difference to its operation: cf. *Todd* v. *Robinson* (3). I am therefore of opinion that the challenge to the validity of the order of 8th September 1947 must fail.

The second order, made on 5th June 1950, recited a rule nisi whereby the prosecutor and certain other unions had been called upon to show cause why orders should not be made, under s. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, that they should each comply with the above-mentioned sub-clauses of the Metal Trades Award by ceasing to be directly or indirectly a party to or concerned in certain bans, limitations or restrictions upon the working of overtime in accordance with the requirements of those sub-clauses; and it ordered each of the unions to comply with those sub-clauses by causing or procuring that, within seven days from the date of the order, overtime should be worked in accordance therewith by its respective members employed by eleven named employers without any ban, limitation or restriction.

This order was based upon a finding that the named unions had been proved to the satisfaction of the court to have broken the relevant sub-clauses of the award. The court, having made that finding, had power under s. 29 (*b*) "to order compliance with" the award on the part of the unions concerned. This power was not confined, as I read s. 29 (*b*), to ordering the unions in general terms to comply with the award or with the sub-clauses proved to have been broken. It extended, in my opinion, to ordering any acts or forbearances on the part of the unions which were necessary for compliance with the award in the existing situation. It was within the jurisdiction of the Arbitration Court to decide what acts or forbearances were necessary in the circumstances in order that the award should be complied with. Against its decision on that point no appeal or challenge can be entertained (s. 32),

(1) (1906) A.C. 274, at p. 276.
(2) (1929) V.L.R. 244, at p. 248.
(3) (1884) 14 Q.B.D. 739, at p. 746.

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except insofar as s. 75 (v.) of the Constitution subjects it to supervision by the High Court on an application for a writ of mandamus or prohibition. It may be true to say, and I am prepared to assume for the purposes of this case, that an order purporting to be made under s. 29 (*b*) and directing particular acts or forbearances should be held valid if those acts or forbearances were reasonably capable of being considered to be necessary for compliance with the award: cf. *Morgan and Australian Workers' Union* v. *Rylands Bros. (Aust.) Ltd.* (1); but to go further than this would be to superadd to s. 29 (*b*) a new and essentially different power, not a power to make specific a duty which the court, acting within its jurisdiction, considers to be obligatory under the award, but a power to create a new duty independent of the obligation of the award. The power which s. 29 (*b*) confers may, perhaps, be regarded as purposive, in the sense that it enables orders to be made for the purpose of producing compliance with an award; but even on this view it does not authorize an order whose obligation extends beyond anything that could reasonably be regarded as necessary for such compliance.

The situation in which the Arbitration Court came to make the order now in question was that a ban upon the working of overtime was being observed by members of the unions concerned, and the unions had been proved to have been parties to or concerned in that ban. It may be said that the court was justified in taking into account the probability that the fact of the unions' past support of the ban would or might influence their members to continue the ban, even though the unions should cease to have any part in or connection with the ban, so that nothing short of disciplinary action by the unions to compel a resumption of overtime working would suffice to counteract the effects of what the unions had done in breach of the award. The answer, in my opinion, is that s. 29 (*b*) confers only a power to order future compliance with an award, and not to order steps to be taken, exceeding compliance with the award, for the purpose of overcoming the effects of past non-compliance. An illustration will make the distinction clear. If a breach of an award were proved, which consisted of non-payment of a sum of money, no doubt s. 29 (*b*) would authorize an order for the payment of that sum in the future in order that non-compliance with the award might be terminated; but it would not authorize an order for the payment of interest on the overdue sum, for such an order would create a new duty not referable to the award at all.

(1) (1927) 39 C.L.R. 517, at p. 524.

In the situation which existed on 5th June 1950 the Arbitration Court, I assume, had power under s. 29 (*b*) to order the unions to do anything which might reasonably be considered capable of ending their connection with the existing ban, and to order them to refrain from anything which might reasonably be considered to amount to participation or concern in any fresh ban. But what the court in fact ordered was something which went much further, and was directed to the excessive purpose of causing the unions (1) to bring about the ending, not of their connection with the ban, but of the ban itself, whatever organizations or persons might be parties to or concerned in any effort to continue it, and (2) to prevent the imposition within seven days of any other ban on overtime affecting their members whether the unions should be parties to or concerned in it or not. Thus the order purported to create an obligation more extensive and more onerous than compliance with the award could reasonably be considered to require, and its manifest purpose was not merely to bring about compliance with the award on the part of the unions, but to compel the unions to bring about compliance with the award on the part of their individual members. Such an order, in my opinion, cannot be regarded as within the Arbitration Court's power by reason either of the terms of s. 29 (*b*) itself or of any elasticity of jurisdiction which it may be proper to imply from other provisions of the Act. To uphold the order would be tantamount to writing into the Act a new power of such importance that it ought not to be rested upon other than clear words. In my opinion the order should be held to have been made without jurisdiction.

I have not discussed, because I think it irrelevant, an argument based upon an examination of the legislative history of various sections of the Act, from which the conclusion was attempted to be drawn that s. 29 (*b*) is limited to authorizing orders for the making good of past breaches of orders or awards. Not only was the argument inconclusive, but in my opinion it was inadmissible ; for it appealed to earlier enactments, not for the purpose of removing any uncertainty in s. 29 (*b*), either patent or latent, but for the purpose, first of introducing uncertainty into plain words, and then of resolving the difficulty thus illegitimately created. This method of dealing with a statute is not permissible : *Aristide Ouellette* v. *Canadian Pacific Railway Co.* (1).

The third order, which also was made on 5th June 1950, recited a rule nisi whereby the prosecutor, along with other unions, was

(1) (1925) A.C. 569, at pp. 575, 576.

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called upon to show cause why it should not be enjoined pursuant to s. 29 (*c*) of the Act from committing or continuing a contravention of the Act, namely the breach by it of the provisions above referred to by being directly or indirectly a party to or concerned in any bans, limitations or restrictions upon the working of overtime in accordance with the requirements of those provisions; and it ordered that each of the unions be enjoined from committing a contravention of the Act, namely from being directly or indirectly a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of sub-clause (*hh*) of clause 11 and sub-clause (*k*) of clause 13 of the Metal Trades Award, 1941, as consolidated and varied, at any shop, factory or establishment carried on by any member of the Metal Trades Employers' Association in the State of New South Wales.

The jurisdiction of the court to make this order was challenged on the ground that par. (*c*) of s. 29 refers to any contravention of "the Act", and not to any contravention of the Act or of an order or award, and that a breach of an order or award is not a contravention of the Act within the meaning of the paragraph. In my opinion the construction sought to be placed upon s. 29 (*c*) is correct. It is true, I think, that a breach of an order or award may be described as a contravention of the Act in one sense of that expression; for, while the Act nowhere imposes in express terms an obligation upon persons or organizations bound by an order or award to comply with it, ss. 50 and 59 together do, in a real sense, create such an obligation. But the Act in a number of its provisions preserves a distinction between a breach or non-observance of the Act and a breach or non-observance of an order or award; see e.g. ss. 29 (*a*), 33 (1) (*a*), 40 (*c*), 59 (1) (*a*), 61, 64 (1) (*b*). These provisions use the expression "breach or non-observance" and not the word "contravention", but I am unable to perceive any difference between a contravention on the one hand and a breach or non-observance on the other. Since the draftsmanship of the Act treats contraventions of the Act as topics distinct from contraventions of orders or awards, it seems to me necessary to observe that distinction in construing s. 29 (*c*); and for that reason I am of opinion that s. 29 (*c*) did not authorize the order.

But there remains the question whether the order can be upheld under s. 29 (*b*). The obligation it purported to create did not go beyond compliance with the award, and the award had been proved to the satisfaction of the court to have been broken or not observed. Proof of that fact had been given upon the applications,

which were heard together, for the two orders made on 5th June 1950, and the court delivered the one set of reasons for making the two orders. The rule nisi, upon which the order now in question was made, referred to s. 29 (*c*) alone, but this defect could have been dealt with under s. 40 (*l*) or (*m*) without any injustice to the unions, and it has no more than procedural significance. The court described itself as acting under s. 29 (*c*) in making this particular order, but in my opinion the order does not fall outside jurisdiction merely because it recites an inappropriate head of power. The fact that two separate orders were made does not appear to me to warrant an inference that the order purporting to be made under s. 29 (*c*) was or may have been made without regard to the conditions of jurisdiction under s. 29 (*b*), seeing that the court made both orders for the reason that it found the unions to be in breach of their obligations under the award. Reliance was placed upon the fact that the order now in question in terms enjoined the union, not simply from conduct amounting to non-compliance with the award, but "from committing a contravention of the said Act". These words, however, had no operative effect at all, for the sum total of the obligation created by the order was immediately explained and delimited by words defining the specific conduct enjoined. The words referring to contravention of the Act served no other purpose than that of a description of the legal result of the conduct in which the unions were forbidden to engage, and I have stated my reasons for regarding it as a misdescription of that result. In my opinion, to allow these words to invalidate the order would be to treat as vital to the order a part of it which is inessential to its full operation. Section 29 (*b*) empowered the court, in the circumstances which it found to exist, to make this order, and in my opinion the objections urged against it afford no ground for prohibition.

The fourth order called into question in these proceedings was made on 10th July 1950. By it the Arbitration Court imposed upon the prosecutor a fine of £100 for contempt of court consisting in a breach of the first of the two orders above mentioned made on 5th June 1950. Jurisdiction to impose a fine for contempt of court by way of punishment for a breach of an order of the court was rested upon s. 17 (3) of the Act, which makes the court a superior court of record. That provision, in my opinion, would suffice to confer the jurisdiction claimed if there were no implication to the contrary arising from other provisions of the Act; but the Act confers express powers to deal with breaches and non-observances of orders of the court, and in my opinion it should not be taken that, by describing the court as a superior court, the

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Parliament intended to make available by implication an additional power to deal with the same matters: cf. *Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1); *R.* v. *Wallis*; *Ex parte Employers' Association of Wool Selling Brokers* (2). The reasons for this conclusion which have been stated by my brother *Dixon* appear to me to be conclusive. A similar problem arose many years ago in New South Wales, and it was similarly answered: *Ex parte Brennan* (3). Speaking of the then Court of Industrial Arbitration, *Cullen* C.J. said (4): "a claim that any particular power can be implied from the fact that it is declared to be a superior court must be tested by the special provisions of the Act of 1912. *Expressum facit cessare tacitum* and where any particular exercise of the power of the Court of Industrial Arbitration is expressly provided for in other parts of the Act, these must be looked at in order to see whether they do not exclude the power sought to be implied from the use of the word 'superior'"; and he proceeded to hold, with the concurrence of *Pring* and *Sly* JJ., that since the Act made a breach of the court's injunction an indictable offence there was no jurisdiction to deal with it in summary proceedings for contempt. On this point the case is not affected by the decision of this Court in *Minister for Labour and Industry (N.S.W.)* v. *Mutual Life and Citizens' Assurance Co. Ltd.* (5).

In the result I am of opinion that the order nisi should be made absolute for a writ of prohibition in respect only of the order of 5th June 1950 purporting to be made under s. 29 (*b*) and the order of 10th July 1950.

Order nisi discharged in relation to award made on 8th September 1947, *otherwise order absolute. Respondent association to pay costs of prosecutor.*

Solicitors for the Amalgamated Engineering Union, *Sullivan Brothers*, Sydney.

Solicitors for the Metal Trades Employers' Association, *Salway and Primrose*, Sydney, by *Darvall and Hambleton*.

Solicitor for the other respondents and the intervener, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1932) 47 C.L.R. 1, at pp. 7, 20.
(2) (1949) 78 C.L.R. 529, at pp. 543, 550.
(3) (1915) 15 S.R. (N.S.W.) 173; 32 W.N. 51.
(4) (1915) 15 S.R. (N.S.W.), at p. 178; 32 W.N., at p. 52.
(5) (1922) 30 C.L.R. 488.