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to be an imperative limitation upon the power of a conciliation commissioner to proceed with a matter which a party alleges falls outside his authority. He may proceed according to the course laid down by the amended s. 16.

Then do the amendments apply to the two applications pending before the commissioners at the time when the amending Act came into operation? There is nothing in Act No. 34 of 1952 or in the language of the amendments or of the provisions as amended to confine the operation of the provisions to cases first arising before a commissioner after the commencement of Act No. 34 of 1952. But it is said that the amendments are of a kind that should be understood, subject to any express indications to the contrary, as meaning to leave any pending matter unaffected. Reliance was placed, in support of this contention, upon s. 8 (*c*) and (*e*) of the *Acts Interpretation Act* 1901-1950. What is relied upon is so much of the provision as says that, unless a contrary intention appears, a repeal shall not affect any right privilege or liability acquired accrued or incurred under the Act so repealed or any investigation legal proceeding or remedy in respect of any such right privilege or liability as aforesaid and that such investigation legal proceeding or remedy may be continued as if the repealing Act had not been passed. It was contended that upon the applications for a variation being instituted the parties, or at all events the prosecutor as a respondent to the applications, had a right, or if you like a privilege, in respect of the applications as being incompetent because, on the hypothesis accepted for the purposes of the argument, they infringed s. 13 in fact and in law. Perhaps an alternative suggestion may be that the prosecutor was "liable" to the consequences of the action of the Arbitration Court as competent to make the variation and the other party, being the applicant for the variation, was "liable" to the consequences of the want of competence to make it in a commissioner. Such a conception of the "right" or "privilege" or "liability" to which s. 8 (*c*) and (*e*) relates goes outside the meaning of the provision.

The variation of an award depends upon s. 49. As to the matters referred to by s. 25 and s. 13 respectively, the court in the one case, and a conciliation commissioner in the other, has power to vary an award for any reason the court or the commissioner thinks proper. The fact that an award is made cannot give any party bound by it a "right or privilege" or subject him to a "liability" that the demarcation of the power to amend it shall be settled in any particular way and the fact that an application for the exercise

of the power is commenced cannot do so. There is nothing in the nature of a right or privilege or liability acquired accrued or incurred by an applicant or a respondent in respect to the test or criterion of the definition of the material relations of the two authorities, court and commissioners. It is all a question of the limits of the legal powers of the two authorities *inter se*. There is no better foundation for the appeal made on behalf of the prosecutor to a supposed presumption that an amendment of such provisions as s. 16 of the *Conciliation and Arbitration Act* 1904-1951 contained is not intended to apply to pending applications. The Arbitration Court and the conciliation commissioners are authorities set up for the exercise, where conciliation has failed, of arbitral powers of industrial regulation and control, for the purpose of settling industrial disputes. These powers are exercisable primarily in the public interest. Section 16 and the amendments of s. 16 are concerned with the mutual relations of the two authorities and the settlement of questions about the application of the definition of their spheres. There is no prima-facie reason why provisions on this subject should not extend to every relevant exercise of authority to be made by the tribunals from the time when such provisions become law. There is no reason why a distinction should be drawn between matters in which steps to invoke the power of a commissioner had already been taken and those in which it had not.

In matters of ordinary legal rights and duties the distinction is familiar between the operation on existing cases of provisions going to substantive right and of provisions going to procedure. It is true that some rights arising out of the law adjective have been treated as too important to fall under the application of the principle that new procedural provisions apply to existing proceedings. See for example *Newell* v. *The King* (1) (the right of a prisoner upon his trial on indictment to the unanimous verdict of twelve men), *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2) (a right of appeal to the Privy Council): cf. *T. Conway Ltd.* v. *Henwood* (3), where a limitation on a right of appeal was held to apply to proceedings already commenced, and *Rathbone* v. *Munn* (4), where a new right of appeal was held to apply to pending proceedings. In the present case the analogy is much closer to an alteration in the procedural powers of a court, a thing which would be taken prima facie to apply to all occasions afterwards arising where the exercise of the power was appropriate and not to be

(1) (1936) 55 C.L.R. 707.
(2) (1905) A.C. 369, at p. 372.
(3) (1934) 50 T.L.R. 474.
(4) (1868) 18 L.T. 856; 9 B. & S. 708.

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restricted to occasions arising in actions or other proceedings commenced after the provisions came into force. But, while this may be said to be a closer analogy in principle, the fact is that we are not here dealing with judicial proceedings or the enforcement of rights and liabilities. We are in the field of arbitral powers in relation to industrial disputes and these are concerned with industrial control and regulation and the adoption of provisions to operate *de futuro* and prescribe and govern the relations of the parties. In such a field it is hard to see why new machinery should not be applicable to existing cases.

In our opinion the amendments in s. 16 apply to the pending applications and a writ of prohibition would no longer be an appropriate remedy, that is, even on the assumption made that on the true application of s. 13 to the variations sought there is a proposed infringement of its terms.

Having regard to the foregoing considerations the orders nisi should be discharged but without prejudice to the question whether clause 4 (d) (iii) of the Transport Workers' (General) Award 1950 as amended or any part of that clause is a term of the award made without jurisdiction and void.

The discharge of the orders nisi is in part due to subsequent legislation and in part to the desirability of dealing with any questions relating to clause 4 (d) (iii), should it be ever necessary, in other proceedings. Having regard to this consideration we think that, in a matter of this kind, there should be no order as to costs.

Reg. v. *Blackburn and Another*; *Ex parte Transport Workers' Union of Australia.*

Order nisi discharged without prejudice to the question whether clause 4 *(d) (iii) of the Transport Workers' (General) Award as amended or any part of that clause is a term of the award made without jurisdiction and void.*

No order as to costs.

Reg. v. *Galvin and Another*; *Ex parte Transport Workers' Union of Australia.*

Order nisi discharged. No order as to costs.

Solicitors for the prosecutor, *Maurice Blackburn & Co.*

Solicitors for the respondent Chambers of Manufactures, *Moule, Hamilton & Derham.*

J. B.

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION. APPELLANT;

AND

RICKARD . . . . . RESPONDENT.

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SYDNEY, *April* 29.

MELBOURNE, *May* 20.

Webb J.

Taxation—Assessable income—Australian defence force—"Member of a body, contingent or detachment of that Force engaged on service out of Australia"—"Detachment"—Military officer—Special duties in London—Sole appointee—Pay and allowances—Exemption—Income Tax Assessment Act 1936-1945 (*No.* 27 *of* 1936—*No.* 4 *of* 1945), *s.* 23 (*s*) (ii) (1), (2).

The taxpayer enlisted in October 1939 for active service and served overseas. In 1943 he commenced work on combined operations and took part in the planning and execution of the amphibious landing at Lae. Later, while he was attached to the British Pacific Fleet, the British Joint Communication Board requested that a representative from Australia should join that board's Bombardment Sub-Committee, which had under consideration combined codes and procedures for the control of gunfire, with the object of providing one book for all inter-service use, apparently in the war then being waged. On 18th March 1945, upon the recommendation of the Australian Naval Board, the taxpayer was posted as Australian representative on the Bombardment Sub-Committee and took up duty in London. That appointment was not included on the war establishment of the Australian Military Forces. Whilst absent on that duty the taxpayer remained on the strength of his unit as a major, and, later, as a seconded officer. He did not serve in London with any other member of the Australian Defence Force.

Held that the taxpayer's service in London was as a detachment of the Australian Defence Force within the meaning of s. 23 (*s*) (ii) (1) of the *Income Tax Assessment Act* 1936-1945, and that therefore the military pay and allowances received by him in the income year ended 30th June 1945 as a major in the Australian Defence Force did not form part of his assessable income for that year.

APPEAL under *Income Tax Assessment Act.*

The Federal Commissioner of Taxation appealed to the High Court from a decision of the Board of Review upholding an objection by the taxpayer to the inclusion in his assessable income for the

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year ended 30th June 1945 of military pay and allowances received by him in that year as a major in the Australian Defence Force. His objection was based on service in London during part of that year which he claimed was rendered by him as a detachment of the Australian Defence Force.

The appeal was heard by *Webb* J., in whose judgment hereunder the material facts are set forth.

K. W. Asprey, for the appellant.

J. D. O'Meally, for the respondent.

Cur. adv. vult.

May 20.

WEBB J. delivered the following written judgment:—

This is an appeal from a decision of the Board of Review under the *Income Tax Assessment Act* 1936-1945.

The respondent taxpayer objected to the inclusion in his assessable income for the year ended 30th June 1945 of military pay and allowances totalling £379 which he had received in that year as a major in the Australian Defence Force. He based this objection on his service in London during part of that year; service which he claimed was rendered by him as a detachment of the Australian Defence Force. The appellant commissioner disallowed the objection, but the Board of Review upheld it.

The taxpayer enlisted in October 1939 as a lieutenant in the 2/1st Australian Field Regiment and served in Palestine, Egypt, Libya, Greece and Ceylon. He returned to Australia in August 1942, and in 1943 commenced work on combined operations (naval bombardment). He took part in the planning and execution of the amphibious landing at Lae. Subsequently he was attached to the British Pacific Fleet, and, whilst so attached, the British Joint Communication Board requested in February 1945 that a representative from Australia should join that board's Bombardment Sub-Committee, which had under discussion combined codes and procedures for the control of gunfire, with the object of providing one book for all inter-service use, apparently in the war then being waged. The Australian Naval Board considered that the taxpayer was the most suitable representative and recommended his release for this important duty. On 18th March 1945 he was posted as Australian representative on the Bombardment Sub-Committee. This appointment was not included on the War Establishment of the Australian Military Forces. Whilst he was absent on this duty he remained a major on the list of the