[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

KELLY AND OTHERS;

Ex parte WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

H. C. of A. 1952.

MELBOURNE, *May* 20–23, 26.

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

Industrial Arbitration—Stevedoring industry—Award of Commonwealth Court of Conciliation and Arbitration—Termination of power of court to make awards in stevedoring industry—Power transferred to another authority—Continuance of award—Statute—Repeal of provision conferring power—Effect of repeal on things done and continuing under the power—Writ of prohibition—Order enforcing obligation—Validity of order—Error as to source of obligation—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*i.*), (*xxxv.*), 75 (*v.*)—*Conciliation and Arbitration Act* 1904-1951 (*No.* 13 *of* 1904—*No.* 58 *of* 1951), *ss.* 29, 48, 49—*Stevedoring Industry Act* 1947 (*No.* 2 *of* 1947)—*Stevedoring Industry Act* 1948 (*No.* 70 *of* 1948)—*Stevedoring Industry Act* 1949 (*No.* 39 *of* 1949).

The Waterside Workers' Award, made by the Commonwealth Court of Conciliation and Arbitration, which prescribed rates of wages, hours and other conditions of employment in the stevedoring industry and bound an organization of employees, and employers and organizations of employers, named in it, came into operation on 27th April 1936. It was expressed to continue in force for five years.

On 8th September 1947 (on the basis that the award remained in force by virtue of the provision—then in s. 28 (2) of the Act—which, in the *Conciliation and Arbitration Act* 1904-1951, appears in s. 48 (2)) the court made an order varying the award. The variations reduced the standard hours of work and inserted in clause 4 of the award a sub-clause (*j*) to the effect that (i) an employer might require any employee to work reasonable overtime and such employee should work overtime in accordance with such requirement. " (ii) The organization party to this award shall not in any

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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 ".

On 22nd December 1947 the *Stevedoring Industry Act* 1947 came into operation. It constituted a Stevedoring Industry Commission (s. 6) and declared that its functions should be (*a*) to prevent or settle, by conciliation or arbitration, industrial disputes, extending beyond the limits of any one State, in connection with stevedoring operations; and (*b*) to regulate industrial matters in connection with stevedoring operations, and to regulate and control the performance of stevedoring operations, in so far as those operations related to trade and commerce with other countries or among the States or were performed in a Territory of the Commonwealth (s. 12 (1)). For the purpose of hearing the parties to, and of inquiring into and investigating, an industrial dispute, the commission should have the same powers as existed under the *Conciliation and Arbitration Act* in relation to industrial disputes (s. 13 (3)). For the purpose of exercising its functions the commission should have power to make such awards and orders, give such directions and do all such other things as it thought fit (s. 14 (*a*)); and such awards and orders should have the force of law (s. 16 (1) (*c*)). The Commonwealth Court of Conciliation and Arbitration or a conciliation commissioner should not be empowered to make an award or order, under the *Conciliation and Arbitration Act*, in relation to the salaries, wages, rates of pay or other terms or conditions of service or employment of waterside workers (s. 19 (1)).

On the day the Act came into operation the commission made an order providing that all orders and awards made under the *Conciliation and Arbitration Act* " which were in force immediately prior to the commencement of the *Stevedoring Industry Act* 1947 shall except to the extent to which the same are inconsistent with the provisions of the *Stevedoring Industry Act* 1947 continue to have effect as if the same were orders made by the Stevedoring Industry Commission under the last-mentioned Act ".

The *Stevedoring Industry Act* 1947 was repealed by s. 5 (1) of the *Stevedoring Industry Act* 1949, which came into operation on 18th July 1949. By s. 5 (3) (*g*), the 1949 Act provided that, notwithstanding the repeal of the 1947 Act, all orders made, or purporting to have been made, under the 1947 Act and in force, or purporting to be in force, immediately before the commencement of the 1949 Act should continue in force as if made under the latter; and the provisions of the 1949 Act relating to orders made by the Australian Stevedoring Industry Board constituted under s. 7 of the Act were made applicable. Under Part V., the Act vested in the Commonwealth Court of Conciliation and Arbitration powers which, by s. 32, were to be exercised by a single judge. The court was empowered to prevent or settle, by conciliation or arbitration, industrial disputes, extending beyond the limits of any one State, in connection with stevedoring operations (s. 33 (1)), and for that purpose to make orders and awards (s. 33 (2)). The court was also empowered to regulate industrial matters in connection with stevedoring operations in so far as those operations related to trade and

commerce with other countries or among the States or were performed in a Territory of the Commonwealth, whether or not an industrial dispute extending beyond the limits of any one State existed in relation to those matters (s. 34 (1)) and for this purpose to make orders (s. 34 (3)); the provisions of the Act relating to orders made by the board constituted under the Act were made applicable (s. 34 (6)), and one of those provisions was that the orders should have the force of law (s. 17 (1) (*c*)). In relation to industrial disputes and other proceedings before it under the Act the court (by s. 49) was given the same powers, duties and functions as it had under the *Conciliation and Arbitration Act* in relation to industrial disputes and other proceedings before it under that Act.

On the day the *Stevedoring Industry Act* 1949 came into operation a judge of the Commonwealth Court of Conciliation and Arbitration, purporting to act as the court under Part V. of the Act, made an order to the effect that the Waterside Workers' Award was continued in force or effect as amended or varied by the court or by orders under the *Stevedoring Industry Act* 1947 and that the award as so continued was binding on all employers and waterside workers registered or deemed to have been registered under the *Stevedoring Industry Act* 1949.

The *Conciliation and Arbitration Act* 1904-1951 provided:—By s. 29, that the Commonwealth Court of Conciliation and Arbitration should have power "(*b*) to order compliance with an order or award proved to the satisfaction of the court to have been broken or not observed; (*c*) by order, to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award" and that the powers of the court under pars. (*b*) and (*c*) applied also in relation to awards or orders made by the court under the *Stevedoring Industry Act* 1949 (including orders made under s. 34 of that Act). By s. 48 (2), that, after the expiration of the period provided in an award as that for which it should continue, the award should, subject to s. 49, and unless the court, in the case of an award made by the court, otherwise ordered, continue in force until a new award had been made. By s. 49, powers were given to set aside awards and to vary the terms of awards.

On 8th May 1952 the Commonwealth Court of Conciliation and Arbitration made an order which recited that it had been proved to the satisfaction of the court that clause 4 (*j*) (ii) of the Waterside Workers' Award had been broken and not observed by the organization of employees which was a party to the award and ordered that, pursuant to s. 29 (*b*) of the *Conciliation and Arbitration Act* 1904-1951, the organization comply with clause 4 (*j*) (ii) by ceasing to be a party to or concerned in the ban, limitation or restriction imposed by the organization on the working of overtime as prescribed by clause 4 (*j*) of the award. The court also ordered that the organization be enjoined, pursuant to s. 29 (*c*) of the Act, from continuing its breach or non-observance of clause 4 (*j*) (ii).

Held:—

(1) The commencement of the *Stevedoring Industry Act* 1947 did not bring about a termination of the operation of the Waterside Workers' Award.

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The purpose of s. 19 of the *Stevedoring Industry Act* 1947 was to exclude for the future the power under the *Conciliation and Arbitration Act* in relation to the terms and conditions of employment of waterside workers because by s. 12 (1) (*a*) of the *Stevedoring Industry Act* 1947 the function of settling inter-State disputes with respect to such matters was transferred to the commission. The provisions of the *Conciliation and Arbitration Act* conferring the power to make awards of such a kind having obligatory force were not, to that extent, repealed by s. 19 (1) of the *Stevedoring Industry Act* 1947 so that the provisions must be considered *pro tanto* as if they had never existed and, consequently, as incapable of supporting an award already made except as to matters concluded before the repeal.

(2) After the commencement of the *Stevedoring Industry Act* 1947 the award continued in force pending its replacement by a fresh award made by the new authority. The termination, *pro tanto*, of the powers of putting an end to an award contemplated by ss. 48 (2) and 49 of the *Conciliation and Arbitration Act* did not leave s. 48 (2) to operate, in excess of the power conferred by s. 51 (xxxv.) of the Constitution, by continuing the award in force indefinitely. The true construction of the *Stevedoring Industry Act* 1947 was that the functions of the commission replaced, with respect to the terms and conditions of employment of waterside workers, the functions of the Arbitration Court and whatever effect a fresh award of the court produced on a prior award kept in force until the fresh award was made was to be produced by an award made by the new body exercising the transferred functions.

(3) The award was not changed in character by the order of 22nd December 1947. The purpose of the order was to give the instruments to which it referred all the authority which the commission could confer, but not to the exclusion of the authority the instruments already possessed or to the prejudice of the obligatory force belonging to them and of the means of enforcement which that carried; and there was no merger.

(4) The *Stevedoring Industry Act* 1949 did not, by s. 5 (3) (*g*), alter the meaning of the order of 22nd December 1947 nor did it cause any merger.

(5) If, as a result of the order of 18th July 1949, the award as varied took on the character of an instrument deriving authority only from an order under s. 34 of the *Stevedoring Industry Act* 1949 and on that account the orders of 8th May 1952 were to be regarded as in error as to the source of the obligation intended to be enforced, there was none the less a power under s. 29 of the *Conciliation and Arbitration Act* 1904-1951 to enforce the obligation and the orders would not be invalidated.

Accordingly, there was no ground for the issue of a writ to prohibit proceedings on the orders of 8th May 1952.

Waterside Workers' Federation of Australia v. *Commonwealth Steamship Owners' Association*, (1920) 28 C.L.R. 209, discussed.

ORDER NISI for prohibition.

The following matters were stated in an affidavit filed on behalf of the prosecutor :—

On 7th April 1936 the Commonwealth Court of Conciliation and Arbitration (Judge *Beeby*) made the Waterside Workers' Award, which came into operation on 27th April 1936 and, by clause 30, continued in force for five years from that date. It contained no provision for the compulsory working of overtime. (The terms of the award appear in the report of the proceedings in which the award was made (1); except as hereinafter appears, it is not material to the present report to refer specifically to those terms.)

Under the *National Security* (*Stevedoring Industry*) *Regulations* (Statutory Rules 1942, No. 159—1944, No. 3) various orders were made by the Stevedoring Industry Commission established thereunder which provided *inter alia* for the hours of employment applicable in various ports of the Commonwealth to be worked by waterside workers and for the working of hours of overtime as particularized in the orders.

Those regulations were repealed by reg. 55 (1) of the *National Security* (*Shipping Co-ordination*) *Regulations* (Statutory Rules 1944, No. 86, which were themselves amended in respects not here material). Part V. of the last-mentioned regulations, by reg. 58, constituted a new Stevedoring Industry Commission, and, by reg. 63, provided :—" (1) Notwithstanding anything contained in any other law but subject to the next succeeding sub-regulation, the terms and conditions of employment for waterside work and in stevedoring operations shall be such as the Commission, by order, determines. (2) Except in so far as the terms and conditions of employment for waterside work and in stevedoring operations are determined by the Commission under the last preceding sub-regulation, those terms and conditions shall not be affected by this Part." By reg. 55 (2) (*c*), it was provided that " all orders made under the regulations . . . repealed " by reg. 55 (1) " and in force immediately prior to the commencement of these regulations shall continue in force as if made under this Part.". Thereafter further orders were made by the new Stevedoring Industry Commission similar to, or varying or amending, the former orders. The general effect of the overtime provisions of the orders was that, in the various ports to which the orders related, overtime stipulated was to be worked as required by the shipowners.

The decision of the Commonwealth Court of Conciliation and Arbitration to the effect that forty hours per week should be the standard in industry generally was announced in September 1947.

(1) (1936) 36 C.A.R. 99, at pp. 104, et seq.

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On 8th September 1947 the Arbitration Court made an order varying the Waterside Workers' Award of 7th April 1936. The variations substituted forty for forty-four as the standard number of hours prescribed for a week's work and added at the end of clause 4 of the award the following new sub-clause, headed "Compulsory Overtime":—"(*j*) (i) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement. (ii) The organization party to this award shall 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 this sub-clause. (iii) This sub-clause shall remain in operation until otherwise determined by the authority competent so to do under the *Commonwealth Conciliation and Arbitration Act*". The order provided that the variations should take effect as from the first pay period in January 1948.

The *Stevedoring Industry Act* 1947, which had been assented to on 28th March 1947 but which, by s. 2, was to commence on a date to be fixed by proclamation, came into operation on 22nd December 1947. That Act set up a commission, also called the Stevedoring Industry Commission, which was empowered to the exclusion of the Arbitration Court to make awards and orders with respect to wages, hours and conditions of employment in the industry. By s. 19 the Act provided as follows:—"(1) The Court or a Conciliation Commissioner shall not be empowered to make an award or order, under the *Commonwealth Conciliation and Arbitration Act* 1904-1946, in relation to the salaries, wages, rates of pay or other terms or conditions of service or employment of waterside workers. (2) The Court or a Conciliation Commissioner shall not proceed further with any claim pending in the Court at the commencement of this Act and relating to the salaries, wages, rates of pay or other terms or conditions of service or employment of waterside workers".

On the day the Act came into operation, 22nd December 1947, the commission made an order in the following terms:—"1. All orders and awards made under the *Commonwealth Conciliation and Arbitration Act* 1904-1946 and all orders and awards made under the Acts of any State of the Commonwealth, and all agreements under the said Acts together with all orders and directions made by the Stevedoring Industry Commission which were in force immediately prior to the commencement of the *Stevedoring Industry Act* 1947 shall except to the extent to which the same are inconsistent with

the provisions of the *Stevedoring Industry Act* 1947 continue to have effect as if the same were orders made by the Stevedoring Industry Commission under the last-mentioned Act. 2. Date of operation.—This order shall come into force on and from the twenty-second day of December 1947 ". The order was made applicable to all ports and to all parties bound by the award of the Arbitration Court and by previous orders made under the *National Security Regulations*. At the time of the making of the order there was no dispute before the commission, there were no parties and no proceedings instituted by anyone before the commission.

By s. 5 (1) of the *Stevedoring Industry Act* 1949, which came into operation on 18th July 1949, the *Stevedoring Industry Act* 1947 (together with the *Stevedoring Industry Act* 1948 (No. 70 of 1948), which amended the 1947 Act in respects not here material) was repealed. The Act of 1949 vests various functions in the Stevedoring Industry Board established thereunder, such functions relating to the regulation or control of the performance of stevedoring operations in so far as those operations are performed in the course of trade and commerce with other countries or among the States or are performed in a Territory of the Commonwealth. The Act, under Part V., vests in the Commonwealth Court of Conciliation and Arbitration certain powers which, by s. 32, are to be exercised by a single judge. Section 33 empowers the court to settle industrial disputes in connection with stevedoring operations, and s. 34 empowers the court to regulate industrial matters in connection with stevedoring operations in so far as those operations relate to trade and commerce with other countries or among the States or are performed in a Territory of the Commonwealth, whether or not an industrial dispute extending beyond the limits of any one State exists in relation to those matters. By s. 49, the court has, in relation to industrial disputes and other proceedings before it under the Act, the same powers, duties and functions as the court has under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 in relation to industrial disputes and other proceedings before it under that Act.

On the day the *Stevedoring Industry Act* 1949 came into operation, 18th July 1949, *Kirby* J., purporting to act as the court under Part V. of the Act, made an order, headed " In the matter of the *Stevedoring Industry Act* 1949 and of the Waterside Workers' Award 1936 ", which was as follows :—" The Waterside Workers' Award is continued in force and effect as amended or varied by the Court and by orders of the Stevedoring Industry Commission under the *National Security Regulations* or by orders under the

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Stevedoring Industry Act 1947-1948. The Waterside Workers' Award continued in force and effect as aforesaid is binding on all employers and waterside workers registered or deemed to have been registered under the *Stevedoring Industry Act* 1949". At the time of the making of the order there was no dispute before his Honour, there were no parties and no proceedings or matter of any sort before him, and the publication by his Honour of the order was the first knowledge or information to anyone that it had been made.

The *Conciliation and Arbitration Act* (*No.* 2) 1951 (No. 18 of 1951), by s. 6, amended s. 29 of the *Conciliation and Arbitration Act* 1904-1950 by omitting par. (*c*) and inserting in its stead the following: "(*c*) by order, to enjoin an organization or person from committing or continuing a contravention of this Act or a breach or non-observance of an order or award" and by adding, *inter alia*, the following sub-section: "(3) Without prejudice to the operation of any provision of any other law providing for the enforcement of orders or awards referred to in this sub-section, the powers of the Court under paragraphs (*b*) and (*c*) of sub-section (1) of this section apply also in relation to orders or awards made by the Court under the *Stevedoring Industry Act* 1949 (including orders made under section thirty-four of that Act) and orders or awards made in pursuance of a law of the Commonwealth other than this Act by a prescribed tribunal empowered by that law to exercise functions or powers of conciliation or arbitration (including provisions in force by virtue of any such order or award)".

On 8th May 1952, on the application of the Commonwealth Steamship Owners' Association and the Oversea Shipping Representatives' Association, the Commonwealth Court of Conciliation and Arbitration (Sir *W. R. Kelly*, Chief Judge, *Foster* and *Dunphy* JJ.) made two orders against the Waterside Workers' Federation of Australia. One order recited that it had been proved "to the satisfaction of the Court that clause 4 (*j*) (ii) of the Waterside Workers' Award has been broken and not observed by the Waterside Workers' Federation of Australia" and ordered that "pursuant to section 29 (*b*) of the *Conciliation and Arbitration Act* 1904-1951 the said . . . Federation . . . comply with the said clause 4 (*j*) (ii) of the said award by ceasing directly or indirectly to be a party to or concerned in the ban limitation or restriction imposed on or about the ninth day of April 1952 by the said Federation on the working of overtime as prescribed by clause 4 (*j*) of the said award". The other order ordered that "the Waterside

Workers' Federation of Australia be enjoined pursuant to section 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1951 from continuing its breach or non-observance of clause 4 (*j*) (ii) of the Waterside Workers' Award by being directly or indirectly a party to or concerned in the ban limitation or restriction imposed by the said Federation on or about the ninth day of April 1952 on the working of overtime as prescribed in clause 4 (*j*) of the said award ".

The Federation obtained in the High Court an order nisi for a writ prohibiting further proceedings on the orders. The order nisi was directed to the judges above named, the Commonwealth Steamship Owners' Association and Selwyn Victor Jones, Chairman of the Oversea Shipping Representatives' Association.

The Waterside Workers' Federation of Australia and the Commonwealth Steamship Owners' Association were organizations registered under the *Conciliation and Arbitration Act*. Both organizations and also the Oversea Shipping Representatives' Association (although it was not so registered) were parties to the Waterside Workers' Award.

R. M. Eggleston Q.C. (with him *S. Isaacs* Q.C. and *E. A. Laurie*), for the prosecutor. It is to be noticed that what the orders of the Arbitration Court of 8th May 1952 which are attacked in these proceedings purport to enforce (under s. 29 (*b*), (*c*), of the *Conciliation and Arbitration Act* 1904-1951) is " clause 4 (*j*) (ii) of the Waterside Workers' Award " : that is to say, the original award of the Arbitration Court made in 1936 as varied by the order of that court of 8th September 1947. At the date last mentioned the award owed its continued existence to the provision (now in s. 48 (2) of the *Conciliation and Arbitration Act*) to the effect that an award (that is, one made under the *Conciliation and Arbitration Act* : see s. 4 of the Act—definition of " award ") should continue in force " until a new award has been made " (that is, made under the Act) ; and it is a necessary implication in s. 48 (2) that the power to make such an award shall continue to exist. The implication is essential to the validity of s. 48 (2) of the Act under s. 51 (xxxv.), (xxxix.), of the Constitution. There is no power under the Constitution to keep an award in force for an unlimited time where the power to make a new award has been taken away. [He referred to *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1).] The power to make

(1) (1920) 28 C.L.R. 209, at pp. 218, 219, 228, 229, 242, 243, 247, 250, 253.

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an award under the *Conciliation and Arbitration Act* in respect of waterside workers was taken away by the *Stevedoring Industry Act* 1947 (see s. 19 thereof); and it follows that the original award was no longer supported by s. 48 (2) of the former Act. The same result can be reached by another line of reasoning, which puts aside any question of implication in, or constitutional validity of, s. 48 (2). It is submitted that, where an authority is given power to make an award or order having a continuous operation, the revocation of the power will, in the absence of any provision for continuance, terminate the operation of the award or order made under the power. The *Stevedoring Industry Act* 1947 put an end to the power under the *Conciliation and Arbitration Act* in relation to waterside workers; it contained no provision saving the operation of the former award, and (see particularly *Stevedoring Industry Act* 1947, ss. 12, 14) it vested the power for the future in the Stevedoring Industry Commission which it constituted. So far as concerned waterside workers, it was legislation inconsistent with the *Conciliation and Arbitration Act* and it effected an implied repeal *pro tanto* of the empowering provisions and s. 48 (2) of that Act. Cf. *Bird* v. *John Sharp & Sons Pty. Ltd.* (1), per *Williams* J. The original award had been subjected to many variations by orders under *National Security Regulations*. These had become of doubtful authority by 1947; and it is a reasonable inference that the legislature intended to sweep away all the existing provisions and to leave it to the Stevedoring Industry Commission to provide for the future. No doubt, it was to give an opportunity for such provisions to be made that the commencement of the 1947 Act was postponed to a date to be proclaimed. It is significant that the Act repealed Part V. of the *National Security* (*Shipping Co-ordination*) *Regulations*—which contained a provision saving previous orders and directions—but itself made no such saving; that is to say, no saving which would be apt here. [He referred to *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2).] The Stevedoring Industry Commission's order of 22nd December 1947 is not an obstacle to this argument. It is not an order which is subject to the procedure under s. 29 (*b*), (*c*), of the *Conciliation and Arbitration Act*, and it is not in fact what the Arbitration Court is now purporting to enforce. If it is suggested that the order is capable of keeping alive the Arbitration Court's award and variation in respect of clause 4 (*j*), the question arises whether the order is within power. The order, having been

(1) (1942) 66 C.L.R. 233, at p. 250.

(2) (1931) 46 C.L.R. 73, particularly at pp. 104-106.

made on the very day on which—pursuant to proclamation—the *Stevedoring Industry Act* 1947 came into force and, not being made in any proceedings in relation to an industrial dispute or after any hearing of parties, cannot have been made under the conciliation and arbitration powers conferred by the Act: see ss. 12 (1) (*a*), 13, 14, thereof. If it can be supported at all, it can only be as a regulation of inter-State and overseas trade and commerce within s. 12 (1) (*b*) (and, in so far as it is appropriate, s. 14) of the Act and s. 51 (i.) of the Constitution. On this basis it could not operate validly to keep alive, or incorporate the provisions of, the Waterside Workers' Award. That award applied without discrimination to stevedoring in connection with intra-State and other trade and commerce, and it contained many provisions which the trade and commerce power would not support. Neither the *Stevedoring Industry Act* 1949 nor the order of *Kirby* J., sitting as the Arbitration Court (as specially constituted under s. 32 of that Act), made on 18th July 1949 (again, the very day on which the Act came into operation) affects the matter. The 1949 order—as well as that of 1947—is not what the Arbitration Court is purporting to enforce, and it is not effectual to keep alive or to revive the Waterside Workers' Award as such. Moreover, the 1949 order is not within any of the powers conferred by the *Stevedoring Industry Act* 1949 on the Arbitration Court as constituted thereunder. One would suppose from the form of the order that it was intended as an exercise of the power under s. 33 of that Act; but it was not made in relation to any existing industrial dispute, and it cannot stand as an exercise of the power under s. 33 to prevent or settle disputes by conciliation or arbitration. Further—it is submitted—the order is not a valid exercise of the power conferred by s. 34 of the Act. That power is a regulatory power of a legislative character; but it is a power conferred on a court, and it must be exercised in the way in which courts are accustomed to exercise power. There must be something in the nature of judicial process; a hearing of parties or, at least, some opportunity for those affected to make submissions. This view is confirmed, rather than weakened, by s. 49 of the Act. Unless the power conferred by s. 34 is to be exercised quasi-judicially, it is not competent for the legislature to confer such a power on a Federal court. [He referred to *In re Judiciary and Navigation Acts* (1); *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (2).] If, as has been submitted, the award had gone out of existence

(1) (1921) 29 C.L.R. 257.

(2) (1938) 59 C.L.R. 556, at pp. 565 et seq., 573, 575-577.

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before the 1949 Act, then the 1949 order could not revive it. If, however, the 1947 order kept the content of the award alive as a regulation under the 1947 Act, then the 1949 order was unnecessary because the 1947 order is kept in force (if it can validly be done at all) by s. 5 (3) (*g*) of the 1949 Act. In any event, the source of the power is not the *Conciliation and Arbitration Act*; accordingly, s. 29 (*b*), (*c*), of that Act cannot apply. In the result it may be that what the Arbitration Court is now seeking to enforce is, in reality the Stevedoring Industry Commission's order of 1947 as kept on foot by s. 5 (3) (*g*) of the *Stevedoring Industry Act* 1949. For the reasons which have been submitted, that cannot be done. As to the 1947 order, also, it may be remarked that, in view of its terms and the power to which it must be ascribed, its effect—if valid—would be to change the operation of the award which it purports to adopt. The provisions of the award would no longer be limited to the parties to the award but would become a general regulation of conditions of employment on the waterfront. It is a curious feature of the 1949 order that it is expressed to bind employers and workers, but nothing is said about organizations. Accordingly, if it is to be assumed that the 1949 order has an operation which—under the new sub-s. (3) of s. 29 of the *Conciliation and Arbitration Act* as amended by Act No. 18 of 1951, s. 6—makes it enforceable against those whom it is expressed to bind, it is nevertheless not enforceable against the prosecutor. There is nothing in the protective provisions of the Acts here under discussion which avails to prevent the prosecutor from calling in question in these proceedings either the 1947 or the 1949 order. An order under s. 33 of the *Stevedoring Industry Act* 1949 presumably would, under s. 50 (1) of that Act, get the protection of s. 32 of the *Conciliation and Arbitration Act*; and it would seem that an order under s. 34 of the *Stevedoring Industry Act* 1949 would be protected by the combination of s. 34 (6) and s. 52 of that Act. The 1949 order here, however, gets none of this protection, because it is not ascribable to either s. 33 or s. 34. It seems an attempt to fit into the trade and commerce power a prescription made under the arbitration power; this is quite impracticable, and the order fails to qualify under either power. This leads to the further point that s. 34 is itself invalid as being beyond the legislative power conferred by s. 51 (i.) of the Constitution. The section has the same vice as has already been pointed out in relation to the order purporting to be made under the Act: it attempts to fit too much into the trade and commerce power. The definition of "industrial matters" in s. 6 of the Act is very wide; it seems as wide in relation

to stevedoring as the same expression in s. 4 of the *Conciliation and Arbitration Act*. It means (*Stevedoring Industry Act* 1949, s. 6) " all matters pertaining to the relations of employers and of waterside workers . . . and includes all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole ". When s. 34 is expanded in the light of this wide definition, it becomes apparent that the grant of " power to regulate industrial matters in connection with stevedoring operations " is directed to the regulation of such matters as an end in itself and not merely as an incident of trade and commerce. No doubt, stevedoring is closely related in some respects to trade and commerce ; but the whole relationship between employer and employee is not the same subject matter as trade and commerce. [He referred to the *Railway Servants Case* (1) ; *Australian Steamships Ltd.* v. *Malcolm* (2) ; *Huddart Parker Ltd.* v. *Commonwealth* (3).]. It is true that the section purports to confine itself to operations which " relate to trade and commerce with other countries or among the States or . . . in a Territory of the Commonwealth " ; but it is difficult to see how intra-State operations can be separated or to see any way in which the section can be severed or read down so as to leave room for the operation of s. 15A of the *Acts Interpretation Act*. If it is thought to be possible to sever the provisions of the Waterside Workers' Award so that some part of it may survive consistently with s. 51 (i.) of the Constitution, it is sufficient to say that the Arbitration Court has attempted no such severance for the purpose of the orders under s. 29 (*b*), (*c*), of the *Conciliation and Arbitration Act* which are now challenged. Those orders, therefore, are in excess of jurisdiction ; and it is not an excess by relation merely to a statutory grant of jurisdiction. It is an excess by relation to the constitutional power, and no statutory provision—such as s. 32 of the *Conciliation and Arbitration Act*—can prevail over s. 75 (v.) of the Constitution.

There was no appearance for the respondent judges of the Commonwealth Court of Conciliation and Arbitration.

E. R. T. Reynolds Q.C. (with him *R. L. Gilbert*), for the respondent Commonwealth Steamship Owners' Association and Selwyn Victor Jones. A court will not readily conclude that a statute impliedly repeals a pre-existing law because of inconsistency. Strong reasons

(1) (1906) 4 C.L.R. 488, at p. 545.
(2) (1914) 19 C.L.R. 298, at pp. 307, 319, 320, 335.
(3) (1931) 44 C.L.R. 492, at pp. 500, 503.]

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must be found for reading into an enactment a repealing intention which it does not express (*Hack* v. *Minister for Lands (N.S.W.)* (1), per *O'Connor* J.; *Goodwin* v. *Phillips* (2), per *Barton* J.). The prosecutor has not shown any sufficient reason for the implication of repeal asserted. There is no such inconsistency as the prosecutor suggests between the pre-existing law and the *Stevedoring Industry Act* 1947. On the contrary—it is submitted—the intention disclosed by that Act is, so far as is appropriate, to keep the *Conciliation and Arbitration Act* (and the powers of the court thereunder) and the award in operation subject to the power of the Stevedoring Industry Commission to make awards and orders which must necessarily affect to some extent the future operation of the award. That this did not effect any sudden and sweeping change in the law is seen when one examines the previous state of the law, which was very much the same. When the Act came into force Part V. of the *National Security* (*Shipping Co-ordination*) *Regulations* was in existence, and it was provided, by reg. 63, that "the terms and conditions of employment for waterside work and in stevedoring operations shall be such as" the Stevedoring Industry Commission constituted under the regulations, "by order, determines". Nevertheless, it was held by this Court that the jurisdiction of the Arbitration Court was not entirely ousted (*Commonwealth Steamship Owners' Association* v. *Waterside Workers' Federation* (3)). When the *Stevedoring Industry Act* 1947 was enacted, the case as to standard hours of work was pending in the Arbitration Court, and it was as a result of the court's decision that the order or award of 8th September 1947 was made introducing the variation now in question. That award or order amended the provisions of the original award fixing forty-four hours as the standard, substituting forty for forty-four, and it also introduced the provision as to compulsory overtime, clause 4 (*j*), with which we are now concerned. It is important that this was all done in the one order; the fixing of the shorter hours and the provision for overtime were inseparably linked together. Cf. the discussion by this Court of the like variation of another award in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (4). When the *Stevedoring Industry Act* 1947 came into operation on 22nd December 1947 there was nothing to which s. 18 of that Act could attach, as setting up standard hours and basic wage in the industry, except the original

(1) (1905) 3 C.L.R. 10, at p. 23.
(2) (1908) 7 C.L.R. 1, at p. 10.
(3) (1946) 73 C.L.R. 66.
(4) (1951) 82 C.L.R. 208, particularly at pp. 235, 244, 257.

award as varied; and, as already submitted, the overtime provision was an inseparable part of the variation. If the prosecutor's contention was right, it would involve the termination of everything in the award, including the provision for the forty-hour week itself. It is submitted that, in view of s. 18, the contention must fail. That section assumes and recognizes the existence of the award as something having its foundation in the *Conciliation and Arbitration Act*; it does not reject the provisions of that Act. When one comes to s. 19 of the *Stevedoring Industry Act* 1947 (on which the prosecutor mainly relied for the implication of repeal) it is seen that there is nothing in it which is inconsistent with the continued existence of the award—nothing from which such a repealing intention could be inferred. If repeal had been intended, it would have been simple to express the intention; and it is highly improbable that the intention would not have been clearly expressed. The proper view of the section is that it looks entirely to the future. [He referred to *Craies* on *Statute Law*, 3rd ed., (1923) p. 326.] The Act gave the Stevedoring Industry Commission ample powers to meet future circumstances, and there is no reason to suppose that it was intended to discontinue the old award unless and until occasion arose for the exercise of those powers. The award had, of course, been the subject of many variations under the *National Security Regulations* as well as of the Arbitration Court's variation; but there still remained substantial parts of it—in particular, the provisions as to standard hours and basic wage. The main submission is that what was left of the award continued in existence at all times here material by reason of s. 48 (2) of the *Conciliation and Arbitration Act* and remained subject to the Arbitration Court's powers of enforcement under that Act. In this view the reference in s. 48 (2) to a new award would have to be regarded as including an award or order made under the *Stevedoring Industry Act* 1947. This is warranted by the latter Act; the two Acts must be read together, and s. 48 (2) must be read as modified accordingly. As to the reading together of two Acts dealing with the same subject matter, cf. *Sweeney* v. *Fitzhardinge* (1). This view also means that the 1947 order of the Stevedoring Industry Commission—and the same may be said of the 1949 order of the court—was not really necessary to keep the award in existence; the order was merely declaratory of the existing state of the law. The terms of the order itself suggest that it was intended to be declaratory only. If anything is needed to confirm the respondents' view of the *Stevedoring Industry Act*

(1) (1906) 4 C.L.R. 716, at p. 726.

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1947, it is to be found in the *Stevedoring Industry Act* 1949. That Act contains, in ss. 36 and 37, provisions of the same nature as ss. 18 and 19 of the 1947 Act; and s. 36 of the 1949 Act, together with s. 35 (*c*) thereof, clearly recognizes the continued existence of the 1936 award and the order of variation introducing clause 4 (*j*). It is true that the sections do not specifically mention either the award or the variation, but there are in fact no other awards or orders to which the sections could apply. It is submitted that s. 36 puts the matter beyond doubt; it clearly recognizes the award as varied in relation to standard hours. If the respondents' main contention is correct, there is no need to meet the prosecutor's arguments as to the validity of s. 34 of the *Stevedoring Industry Act* 1949 or of the order purporting to be made under that Act. If, however, contrary to our main submission, the Waterside Workers' Award ceased to operate of its own force either in 1947 or 1949, there was still an instrument known and identifiable as the Waterside Workers' Award. If dead, it could be—and was by the 1949 order—validly revived, it is submitted, with its characteristics of an award of the Arbitration Court. In this view the respondents are not really concerned with the order of 22nd December 1947 under the *Stevedoring Industry Act* 1947. Perhaps on this account the prosecutor rather concentrated on s. 34 of the 1949 Act, and did not in so many words attack s. 12 (1) (*b*) of the 1947 Act. However, the considerations applicable to each seem to be the same for present purposes. If each of those sections is invalid, necessarily both the orders are invalid. However, the respondents submit that each of the orders was validly made, and —as each was made on the day on which its respective Act came into operation—there was no moment of time at which the Waterside Workers' Award ceased to operate. The 1947 order—it is submitted—was validly made under the wide powers given by s. 14 (*a*)—together with s. 12—of the 1947 Act and the 1949 order under s. 34 of the 1949 Act. The cases cited by Mr. *Eggleston* do not show that s. 34 (and the same would apply to s. 12 (1) (*b*) of the earlier Act) cannot rest on the trade and commerce power in s. 51 (i.) of the Constitution; they rather tend to show the contrary. He did not cite *Joyce* v. *Australasian United Steam Navigation Co. Ltd.* (1), which clearly indicates the power to legislate under s. 51 (i.) in relation to industries engaged in inter-State trade and commerce. His argument as to the 1949 order seemed to be based on a notion of the separation of powers; but it is submitted that there is nothing in the Constitution or the cases he cited to

(1) (1939) 62 C.L.R. 160.

support the argument as he sought to apply it. There is a further submission, which is that—so far as the challenge to the 1947 or 1949 order or both is concerned—the present proceedings are misconceived. The Arbitration Court was obliged to accept these orders as valid (*Stevedoring Industry Act* 1947, s. 20; *Stevedoring Industry Act* 1949, ss. 52 and 34 (6)); accordingly—whatever the position might have been in this Court under s. 75 (v.) of the Constitution in a direct challenge to either of these orders—there was no excess of jurisdiction on the part of the Arbitration Court in the proceedings which are now being called into question. What the prosecutor should have done was to have come direct to this Court to challenge each of the orders when it was made. It would seem to be still open to the prosecutor to take such action against the 1949 order, which presumably is still in operation. If the attack succeeded, it would mean that the foundation for the order of enforcement made by the Arbitration Court would disappear.

P. D. Phillips Q.C. (with him *C. I. Menhennitt* and *J. R. Kerr*), for the Attorney-General of the Commonwealth (intervening by leave). The course which the respondents' argument took made the questions of constitutional validity raised by the prosecutor appear to be of secondary importance in this case. As a result they were not as fully canvassed as the Attorney-General would desire to be done if that is necessary for the purposes of the Court's decision. No doubt the course of the respondents' argument was influenced by the expectation or hope that the Court might find it possible to determine the matter in the respondents' favour without going into the constitutional questions. It is proposed on behalf of the intervener to adopt a somewhat similar course in the first instance: to deal with such matters as do not raise questions of validity—in effect, to make a temporary assumption of constitutional validity. Taking first the prosecutor's argument that the Waterside Workers' Award was terminated when the *Stevedoring Industry Act* 1947 came into operation, it assumes that Parliament intended a hiatus to occur and a complete destruction of an elaborate system of industrial regulation. Prima facie, there is the strongest reason to suppose that the contrary was intended; and, when one examines the provisions of the Act, it is submitted that they justify this supposition. The empowering ss. 12, 13 and 14, with the section terminating the power of the Arbitration Court in certain respects, s. 19, and ss. 18 and 21 continuing its powers in some respects present a picture, not of the

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system under the *Conciliation and Arbitration Act* ceasing with regard to the waterfront, but of that system becoming diversified, the diversity taking the form of the Stevedoring Industry Commission laying down the details of the award and the Arbitration Court retaining such control as is involved in interpretation and, above all, really exercising the same power as to standard hours and basic wage as it does with regard to other industries. The effect of the prosecutor's objection to the view that s. 48 (2) of the *Conciliation and Arbitration Act* kept the award in force after the *Stevedoring Industry Act* 1947 is to present a supposed dilemma: Either the words in s. 48 (2), "until a new award has been made," must be read in a way which is not consistent with the proper construction of the sub-section or they must be disregarded; in the result the limitation of time imposed by those words is destroyed; the sub-section becomes a provision that the award shall go on for ever, and that—the prosecutor says—is not permitted by the Constitution. If s. 19 of the *Stevedoring Industry Act* 1947 stood alone that might well be so; but, at the time that section came into operation, the other sections also operated, which gave the Stevedoring Industry Commission the power to make awards and orders which could supersede the old award; and it is important to observe that, by s. 16 (1) (*c*), those awards and orders are given the force of law. In that state of the law—reading the *Stevedoring Industry Act* 1947 with s. 48 (2) of the *Conciliation and Arbitration Act*—s. 48 (2) could not have the effect of making the old award go on forever. The matter can be put in either of two ways. The effect of the *Stevedoring Industry Act* on s. 48 (2) of the *Conciliation and Arbitration Act* is either to alter the meaning of the terminating provision expressed in the words "until a new award has been made" (so as to cover awards of the Stevedoring Industry Commission) or to nullify the effect of the terminating provision because it is no longer needed. The latter view perhaps is to be preferred; in this view the matter is seen, not so much as a matter of construction of s. 48 (2), but rather as in the nature of an implied repeal *pro tanto* because of inconsistency. If it is necessary to rely on the orders of 1947 and 1949, it is submitted that the former is within the power conferred by s. 12 (1) (*b*) of the earlier of the two *Stevedoring Industry Acts* and the latter within s. 34 of the later Act; that is, on the assumption that the sections are valid. In so far as the prosecutor's argument meant that—even if the sections were valid—the orders were not, because they touched intra-State trade, it is submitted that the argument is not sound. It would be quite impracticable to distinguish between stevedoring

operations having relation to intra-State trade and those related to inter-State trade; and, if there is to be an effective exercise of power in relation to inter-State trade, it must inevitably touch intra-State trade. The effect of the prosecutor's argument would be that the power could not be exercised at all. The 1947 order is given the force of law—if that is needed—by the combined operation of ss. 5 (3) (*g*), 17 (1) (*c*) and 34 (6) of the *Stevedoring Industry Act* 1949; and both the orders are linked with the Arbitration Court's power of enforcement by the new s. 29 (3) of the *Conciliation and Arbitration Act*. If the Court thinks it necessary, we are prepared to proceed to the questions of constitutional validity; but it is not desired to take up the Court's time with an argument which would have to be put at considerable length unless it is necessary for the purposes of this case.

[THE COURT intimated that it would hear counsel for the prosecutor in reply to the arguments already presented.]

R. M. Eggleston Q.C., in reply accordingly. The argument against us seems to involve an assumption that the arbitral power and the trade and commerce power are coextensive. In so far as the argument was directed to supporting one or other or both of the orders of 1947 and 1949 reliance was put on s. 12 (1) (*b*) of the earlier *Stevedoring Industry Act* and s. 34 of the later Act—the trade and commerce power in each instance; but reliance on the powers conferred by the Acts did not stop at that. It was also given a bearing on the question of the operation of s. 48 (2) of the *Conciliation and Arbitration Act* in relation to the continued existence of the old award. Mr. *Phillips* particularly stressed s. 34 of the *Stevedoring Industry Act* 1949—on the assumption that it was valid, as to which his argument stands reserved at this stage—as the basis for the 1949 order. His argument necessarily involved a proposition as to the extent of the trade and commerce power which would apply alike to s. 34 of the Act and s. 51 (i.) of the Constitution; and his answer to the objection that intra-State trade would be affected was to the effect that the subject matter was inseparable—part of it could not be regulated without regulating the whole. This was mere assertion; he did not show that it was the fact. No effective answer was made—it is submitted—to our opening proposition that an award made in exercise of arbitral power cannot be fitted into the trade and commerce power. The prosecutor adheres to this proposition as it was originally put (that is, in relation to the orders) and also extends it (now that it seems to have assumed further relevance) to the argument on

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s. 48 (2) of the *Conciliation and Arbitration Act*. Stress was put on s. 12 of the *Stevedoring Industry Act* 1947—that is, on the mere existence, independent of any actual exercise, of the powers under that section—to support the suggested new construction or application of s. 48 (2) of the *Conciliation and Arbitration Act*; and the argument did not appear to discriminate between the arbitral power and the trade and commerce power. If and in so far as the contention was that an order under s. 12 (1) (*b*) of the *Stevedoring Industry Act* 1947 could be a "new award" for the purposes of s. 48 (2) of the *Conciliation and Arbitration Act*, the answer is that such an order is not, and cannot fill the place of, an arbitral award. In any event the mere existence of the powers (whether arbitral or otherwise) shows nothing more than a possibility that something might be done to prevent the old award from going on indefinitely; and Parliament could revoke the grant of power at any time. Moreover, in the *Conciliation and Arbitration Act* s. 48 (2) is accompanied by, and expressed to be subject to, s. 49, which gives power to set aside an award. There is no corresponding provision in the *Stevedoring Industry Act* 1947. Under s. 12 (1) (*a*) of that Act the power is "to prevent or settle, by conciliation or arbitration, industrial disputes" &c. It may be that that is only a power to settle disputes arising after the commencement of the Act; but it can be accepted for present purposes that in settlement of a new dispute, or in resettlement of the old dispute, the commission could have made an order which would have had the effect of superseding the old award, if it survived the commencement of the Act. It would, however, have had to be in settlement of some dispute. The commission could not make an order which said in effect: "In order to get a clean sheet to begin with we shall simply set aside the old award". Sections 13 and 14 of the Act—it is submitted— add nothing to s. 12 (1) (*a*) in this regard; and s. 19 of that Act would preclude the exercise of any power under s. 49 of the *Conciliation and Arbitration Act* to set aside the old award. The validity of s. 48 (2) of the latter Act depends, not merely on the power to make an award which will replace the old award, but on the power to terminate the award and leave the matter with a clean sheet.

[DIXON C.J. referred to *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (1).]

As to the opening contention that the *Stevedoring Industry Act* 1947 itself put an end to the old award, the critical matter is the termination (by s. 19 of that Act) of the power to make such an

(1) (1928) 41 C.L.R. 402, at pp. 421, 428, 435.

award. It is not essential to the contention to find any repeal (whether express or implied) in relation to s. 48 (2) of the *Conciliation and Arbitration Act*; but it seems an inevitable consequence of the termination of the award-making power under that Act either that s. 48 (2) ceased to apply to the circumstances or that it was repealed *pro tanto* by implication. It is not put as a universal proposition that the repeal of a power necessarily puts an end to things already done and continuing under the power. What is put is that prima facie that is the effect of the repeal. The legislation may evince an intention that that is not to be the result; but positive indications of that intention would have to be disclosed. In the present case the indications are the other way; and the reason for this seems plain. In view of the many modifications which had been made to the award by orders under the *National Security Regulations*, there must have been great doubt in 1947 as to what was left of the original award and as to how s. 48 (2) of the *Conciliation and Arbitration Act* might operate in relation to it. Section 4 of the *Stevedoring Industry Act* 1947, which (by sub-s. (1)) repealed the regulations, contained (in sub-s. (2)) an elaborate saving clause which appears to have been drafted with meticulous care. One would suppose that it was intended to preserve everything that was thought worth preserving of the pre-existing state of affairs; yet it contains no saving of the original award or any part of it or of the orders affecting it that had been made under the regulations. It seems unlikely that it was intended to revive the original award *in toto* or to leave such part of it as had not been affected by the orders to operate only over part of the subject matter. When it is found that there is an express repeal of part of what may be called the pre-existing code, namely, the *National Security Regulations*, there is necessarily an implied repeal of the remainder (that is, whatever was left of the award) in so far as it might have derived continued operation from s. 48 (2) of the *Conciliation and Arbitration Act*. It would not be appropriate to look for any express repeal in relation to s. 48 (2), because there is not an express repeal of the provisions of the *Conciliation and Arbitration Act* under which—if it was not for s. 19 of the *Stevedoring Industry Act* 1947—there would have been power to make awards in the stevedoring industry. Positive indications of an intention in the *Stevedoring Industry Act* 1947 that the commission thereunder should start with a clean sheet are seen in contrasting the Act with the regulations, Part V. of which was repealed by s. 4 (1) of the Act, namely, the *National Security (Shipping Co-ordination) Regulations* which came into operation on

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2nd June 1944. Regulation 55 (2) (*c*) saved orders under the prior regulations which were repealed by reg. 55 (1); there is no similar provision in the Act. The same can be said of reg. 63 (2), which continued the award in operation subject to determinations of the commission under reg. 63 (1). The award was again recognized in reg. 82, which provided that "a person shall not contravene . . . any provision of an award or order of the court . . . applicable to him"; the Act, s. 16 (3), is similar in form but refers only to "an award or order made by the Commission". Neither s. 18 nor s. 21 of that Act discloses any intention that the award should remain in force or that s. 48 (2) of the *Conciliation and Arbitration Act* should receive any altered construction or operation; nor does s. 35 or s. 36 of the *Stevedoring Industry Act* 1949 have any greater effect in this regard. Both s. 18 of the earlier *Stevedoring Industry Act* and s. 36 of the later one seem to conceive standards as to hours and basic wage which are to be gathered from awards generally—necessarily in industries other than the stevedoring industry; and s. 35 (*c*) is strangely expressed if it was intended to refer to a specific award. Even if these provisions involve an assumption of the existence of the award here in question, there is nothing else in the legislation to support it; and the mere assumption would not give legislative force to the award. An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it (*Maxwell* on *Interpretation of Statutes*, 9th ed. (1946), p. 316). Moreover, the legislation contains its own express provisions as to what the powers of the Arbitration Court are to be in relation to the stevedoring industry; and the application of the *Conciliation and Arbitration Act* to the stevedoring industry is necessarily limited to the purposes of those provisions. If s. 48 (2) of the *Conciliation and Arbitration Act* is to be read as continuing the award only until action is taken under some other power to supersede it, then the award as such disappeared as soon as the Stevedoring Industry Commission's order of 1947 was made. Accordingly, the proceedings now challenged were proceedings to enforce an award which did not exist. If the argument against us is that the award remains merely in abeyance so long as there is a prescription of some kind under the *Stevedoring Industry Act* and can come to life again under s. 48 (2) of the *Conciliation and Arbitration Act*, the argument is open to the objections that have already been submitted as to the validity of s. 48 (2) in the construction or operation that is sought to be given to it. The 1947 order itself could not keep the award on foot as an arbitral award. Under the order the prescriptions in the award would have operated as a general regula-

tion of trade and commerce, binding everyone concerned in its operation whether originally bound by the award or not. As to the persons to whom it would apply, the award would be given an extended operation; on the other hand, as a regulation of inter-State and overseas trade, it would have to be restricted accordingly. The 1947 order is not enforceable by the Arbitration Court—as contended by Mr. *Phillips*—under s. 29 of the *Conciliation and Arbitration Act* as amended by s. 6 of Act No. 18 of 1951. It is not, within the meaning of the new s. 29 (3), an order "made by the court under the *Stevedoring Industry Act* 1949". That language is not apt to include an order made under another Act; and there is nothing in the *Stevedoring Industry Act* 1949 which could enlarge its meaning. All that s. 5 (3) (*g*) of that Act says is that the order shall continue in force "as if made . . . under this Act"; it does not say "made *by the court*", and there is nothing in the Act to give it the character of an order of the court as distinct from an order of the board. The language of s. 5 (3) (*g*) rather suggests the latter. The 1949 order (if valid) would be enforceable under the new s. 29 (3) of the *Conciliation and Arbitration Act* in appropriate proceedings against persons whom it is expressed to bind; but it contains its own limitations in that regard. It does not bind the prosecutor; and, if this order had been what the Arbitration Court purported to enforce, it would have been quite wrong of the court to ignore the limitations expressed in the order. However, that order was not what the court purported to enforce; and, it may be added, the court did not purport to act under s. 29 (3) of the *Conciliation and Arbitration Act*. One of the orders against which prohibition is now sought is expressed to be made pursuant to s. 29 (*b*) of the Act and the other pursuant to s. 29 (*c*); and the recital in the order under s. 29 (*b*) shows plainly that what the court conceived itself to be enforcing was the award as such, subject necessarily to the 1947 variation made by the court. The recital is to the effect that it had been proved to the satisfaction of the court "that clause 4 (*j*) (ii) of the Waterside Workers' Award has been broken and not observed by the Waterside Workers' Federation". Even if the prosecutor's arguments as to the validity of the 1947 and 1949 orders are wrong, it is not a sufficient answer to the application for prohibition to say that this is an immaterial misdescription of what is being enforced. The orders under s. 29 (*b*) and (*c*) show such a fundamental misapprehension of the true position that they should not be allowed to stand. If other proceedings are taken, directed to enforcing against us one or other or both of the 1947 and 1949 orders as such, we shall know

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what questions we have to debate as to the validity of the orders. It is submitted, therefore, that on the argument so far as it has proceeded there is a case for an order absolute for prohibition in respect of each of the orders in respect of which the application is made.

The judgment of THE COURT was delivered by DIXON C.J. as follows :—

We have reached a conclusion in this case which makes it unnecessary to have it further argued.

I shall give the judgment on behalf of the Court.

This is an order nisi for a writ of prohibition directed to three Judges of the Commonwealth Court of Conciliation and Arbitration and the purpose of the writ sought is to prohibit further proceedings upon two orders which their Honours made on 8th May 1952. One order was made in purported pursuance of s. 29 (*b*) of the *Conciliation and Arbitration Act* 1904-1951. The Arbitration Court thereby ordered that the Waterside Workers' Federation of Australia comply with clause 4 (*j*) (ii) of the Waterside Workers' Award by ceasing directly or indirectly to be a party to or concerned in the ban limitation or restriction imposed on or about 9th April 1952 by the Federation on the working of overtime as prescribed by clause 4 (*j*).

The other order was made in purported pursuance of s. 29 (*c*) of the same Act. This order is expressed to enjoin the Federation from continuing its breach or non-observance of clause 4 (*j*) (ii) of the award, by being directly or indirectly a party to or concerned in the ban limitation or restriction imposed by the Federation on or about 9th April 1952.

The Federation is the prosecutor seeking the writ of prohibition against these two orders. To obtain the writ the prosecutor must show that the orders as made are not within the power of the Arbitration Court.

The ground upon which it is sought to make out this conclusion is that the award containing the clause which the two orders enforce has no longer any existence, at all events as an award enforceable by such orders.

It is said that it ceased to have a legal operation, at all events in that character, as a result of the *Stevedoring Industry Act* 1947, which commenced on 22nd December 1947.

The first answer put forward to this ground for prohibition is that the continued existence of the award was a matter for the Arbitration Court to decide as a step towards making the orders

and, whether the reasons for saying it had gone out of force depended upon statute or upon the Constitution, an erroneous decision of the matter means no more than that the Arbitration Court has fallen into error in exercising its power and does not mean that it has gone beyond its power. This contention may be put on one side, with the observation that even if the difficulties it presents were overcome, the fact that it assumes error on the part of the Arbitration Court as an hypothesis does not make it a satisfactory ground upon which to discharge the present order nisi and in the view we take it is unnecessary to pursue it.

For, in our opinion, the contention that the award containing the clause enforced by the orders of 8th May 1952 has gone out of force or has ceased to operate in its character of an award, is not well founded.

The clause in question was placed in the Waterside Workers' Award made on 7th April 1936 by an order of variation made by the Full Court of the Arbitration Court on 8th September 1947. The order provided that the variation should come into operation as from the beginning of the first pay period to commence in January 1948.

The original award specified a period of five years for its duration. But the provision which now stands as s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1951 continues an award in force until another award is made, unless the court otherwise orders and subject to the power to set aside or vary an award.

When the order of variation was made on 8th September 1947 the operation of the award depended upon this provision. The Stevedoring Industry Commission established in 1944 by Part V. of the *National Security* (*Shipping Co-ordination*) *Regulations* in succession to that established in 1942 by the *National Security* (*Stevedoring Industry*) *Regulations* still existed. But this Court had held that the *Shipping Co-ordination Regulations* did not deprive the Commonwealth Court of Conciliation and Arbitration of such powers as that of varying an award (*Commonwealth Steamship Owners' Association* v. *Waterside Workers' Federation of Australia* (1)).

Further, *Williams* J., sitting in the original jurisdiction as a single Judge, had decided that the power of the commission under those regulations was no longer wide enough to make orders which had no specific relation to circumstances arising from the war as distinguished from matters going to the well-being of the industry

(1) (1946) 73 C.L.R. 66.

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as a whole (*Huddart Parker Ltd.* v. *Stevedoring Industry Commission* (1)).

In this state of things the *Stevedoring Industry Act* 1947 was passed. It commenced on 22nd December 1947, a date fixed by proclamation.

The primary contention on the part of the prosecutor is that upon its coming into operation it became impossible for the Arbitration Court to make an award fulfilling the condition expressed by s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1947, by the words " the award shall . . . continue in force until a new award has been made ". It became impossible, too, for that court, and for that matter any other tribunal, to set aside or to vary the award. Therefore, so it was said, if it were thereafter maintained in force by s. 48 (2) it would be continued indefinitely, a thing which would be beyond constitutional power.

The purpose of the *Stevedoring Industry Act* 1947 was to place in the hands of the Stevedoring Industry Commission which that Act established (the third body of that title) the functions of dealing with industrial disputes extending beyond the limits of one State and of regulating industrial matters if the disputes or matters related to stevedoring.

These functions were to be performed by the commission to the exclusion of the Arbitration Court. Section 19 (1) provided that the court or a conciliation commissioner should not be empowered to make an award or order under the *Commonwealth Conciliation and Arbitration Act* 1904-1946 in relation to the salaries, wages, rates of pay or other terms or conditions of service or employment of waterside workers.

The contention is advanced that this amounts to a repeal *pro tanto* of the power to make awards in relation to waterside workers, a power contained within ss. 18 and 24 (2) of the Act to which the sub-section refers—namely, the Act 1904-1946.

Accordingly, as the power under which the award was made is repealed, so the contention runs, the award made under the power must cease to have any effect. The principle enunciated in *Bird* v. *John Sharp & Sons Pty. Ltd.* (2) by *Williams* J. is invoked. The passage relied upon is as follows :—" The general principle is plain that when a statute or part of a statute is repealed it must be considered, except as to transactions passed and closed, as if it had never existed (*Surtees* v. *Ellison* (3) ; *In re Mexican and South*

(1) Unreported, 4th December 1946.
(2) (1942) 66 C.L.R. 233, at p. 250.
(3) (1829) 9 B. & C. 750 [109 E.R. 278].

American Co. (1)). In *Watson* v. *Winch* (2) it was held that, where by-laws have been made under powers conferred by a section of an Act, the repeal of the section abrogates the by-laws unless they are preserved by the repealing Act by means of a saving clause or otherwise. But this must not be taken to be a rule of law applicable in every case ".

In the present instance, s. 19 does not repeal the power. It merely terminates its further operation upon the particular subject matter which for the future it transfers to the new commission.

The case resembles rather that described in the immediately ensuing passage of the judgment of *Williams* J., which proceeds :— " As a general rule the repeal of the section would no doubt have this effect. But a different result would follow where, from other sections which were not repealed, it was manifest that all that Parliament intended to do was to revoke the power to make further by-laws, leaving the existing by-laws in force, subject to their liability to be amended, varied or revoked under powers conferred by other sections contained in the Act at the time of the repeal or introduced into it by amendment at that time " (3).

It is evident that the purpose of s. 19 was to exclude for the future the power of the Arbitration Court in relation to the terms and conditions of employment of waterside workers because by s. 12 (1) (*a*) the function of settling inter-State disputes with respect to such matters was transferred to the commission. What powers of amendment and revocation of awards in relation to waterside workers the commission took, and whether any remained to the court, is another question. But, however that may be, it is clear enough that the provisions conferring upon the Arbitration Court the power to make awards of such a kind having obligatory force were not, to that extent, repealed by s. 19 (1) so that the provisions must be considered *pro tanto* as if they had never existed and consequently as incapable of supporting an award already made except as to matters concluded before the repeal. That principle is not brought into play by s. 19 (1).

But, independently of any such principle, it is contended for the prosecutor that the award of 1936 as varied could no longer be maintained in force by s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1947 after the *Stevedoring Industry Act* 1947 came into operation. The foundation of the contention is the failure of the latter Act to make any express provision to replace that made in s. 48 (2) of the former Act by the words " until a new award has

(1) (1859) 4 De G. & J. 544, at p. 557 [45 E.R. 211, at p. 216].
(2) (1916) 1 K.B. 688.
(3) (1942) 66 C.L.R., at p. 250.

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been made" and by the words "unless the court or a conciliation commissioner . . . otherwise orders" and that made by the combined operation of the reference in sub-s. (2) of s. 48 to the succeeding section and of the authority given by the succeeding section to the Arbitration Court or a conciliation commissioner as the case may be to set aside or vary the terms of an award.

There being no substitutional provision and the relevant power of the Arbitration Court and of the conciliation commissioner being excluded by s. 19, to treat s. 48 (2) as continuing the award in force after the commencement of the *Stevedoring Industry Act* 1947 would, it is said, be to attribute to s. 48 (2) an operation which would maintain the award in force indefinitely.

To do that would be beyond the legislative power conferred by s. 51 (xxxv.) of the Constitution. No accidental omission to make such a substitutional provision is ascribed to the legislature on the part of the prosecutor. On the contrary, it is said to have been due to an intention that previous awards and industrial regulations of waterside work should lapse unless, and except in so far as, the new commission should adopt them and give them efficacy under its authority.

For this view, certain features of the *Stevedoring Industry Act* 1947 were relied upon and a contrast was made with those of Part V. of the *National Security* (*Shipping Co-ordination*) *Regulations* which the draftsman had before him. It is unnecessary to say more of these features than that they do not afford any sufficient indication of the existence of such an intention to present a *tabula rasa* to the new Stevedoring Industry Commission, an intention which would seem *a priori* most improbable.

It is true, however, that if the effect of what was done were to give to s. 48 (2) an application which, if valid, would keep in force the award indefinitely, that is to say, until the legislature again intervened, that would be beyond the power given by s. 51 (xxxv.) of the Constitution.

In *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) a majority of this Court upheld the validity of what is now sub-s. (2) of s. 48, when the provision simply said: "After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made" (s. 28 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1918). The provision was upheld as a law with respect to conciliation and arbitration

(1) (1920) 28 C.L.R. 209.

for the prevention and settlement of industrial disputes extending beyond the limits of any one state, that is, as dealing with one of the incidents of that subject. Precisely why it was incidental to the subject was stated from varying points of view by the Judges forming the majority, of whom *Powers* J. may, perhaps, be taken to be one, once the provision is treated, as now it should be, as consistent with the existence of a dispute upon the same subject while the award continues. But the substantial consideration that warrants the conclusion is that in a system of conciliation and arbitration of the kind that exists it is incidental to the legislative power over the subject to keep alive the industrial regulations made by one award until another award makes a new regulation. The decision did not necessarily go beyond the validity of the subsection which contained the qualification that the Arbitration Court might "otherwise order". But in a system where it is allowable for any party dissatisfied with the continuing regulation to raise a dispute by a demand for other conditions not acceded to, this qualification cannot be constitutionally essential to the conclusion in favour of validity. The question, therefore, upon which the contention that the commencement of the *Stevedoring Industry Act* 1947 made the further continuance by s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1947 impossible depends must ultimately be whether there then arose, in replacement of the Arbitration Court's power to bring the operation of the award to an end by a new award, another power to do so.

Now, s. 12 (1) (*a*) of the *Stevedoring Industry Act* 1947 conferred upon the Stevedoring Industry Commission an authority to prevent and settle, by conciliation or arbitration, industrial disputes extending beyond any one State in connection with stevedoring operations.

Section 13 conferred the powers of the Arbitration Court or a conciliation commissioner for the purpose of hearing the parties to the dispute and of inquiring into and investigating the dispute. Section 14 provided that, for the purpose of exercising its functions under s. 12, the commission should have power to make such awards and orders, give such directions and do all such other things as it thinks fit.

Section 16 required that the awards and orders should be in writing and gave them the force of law. Section 18 said that the commission should not alter the standard hours or basic wage of waterside workers otherwise than in conformity with the awards of the Arbitration Court with respect to standard hours and the basic wage.

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These provisions effected a pretty complete transfer to the Stevedoring Industry Commission of the authority theretofore possessed by the Arbitration Court in relation to the terms and conditions of employment of waterside workers. It is said that it is incomplete, inasmuch as it does not include authority to set aside awards already made by the Arbitration Court or authority "otherwise to order" as to their continuance under s. 48 (2) of the *Conciliation and Arbitration Act*.

It is a question whether the wide powers given in relation to industrial disputes extending &c. did not cover disputes with respect to which an award of the Arbitration Court already existed. But however that may be, the want of the two specific authorities mentioned, if they be two, would not be fatal constitutionally, for the reasons already given.

The operation of the provisions that have been mentioned of the *Stevedoring Industry Act* 1947 negatives the contention that, after the commencement of that Act, s. 48 (2) would, if it could validly do so, continue the award in force indefinitely. It might be enough to say that, independently of any intention to replace the Arbitration Court's power to make a new award and thus terminate the operation of the previous award under s. 48 (2), the legislature had given the Stevedoring Commission a full power to settle disputes in the industry by award and any award made in the exercise of the power on the same subject must supersede the old award, unless consistent with it. But it is sufficiently clear that the *Stevedoring Industry Act* 1947 meant to invest the Commission with full industrial authority with respect to the terms and conditions of employment of waterside workers.

The Act went further than the industrial-arbitration power in s. 51 (xxxv.), for s. 12 (1) (*b*) gives a regulating power based on s. 51 (i.) of the Constitution so far as the stevedoring operations relate to trade and commerce with other countries and among the States and to Territories. But for the immediate purpose in hand this may be left out of account, except as evidence of an intention to give the commission as full an authority as possible in relation to the terms and conditions of employment of waterside workers. The intention to replace the power of the court with a parallel power of the commission almost of itself implies an intention to authorize the commission to replace for all purposes the awards already existing of the court with awards of the commission. But when the provisions by which it is done are examined and considered in relation to the courses open, it appears with sufficient clearness that this must have been so. One course open was to

terminate all existing awards. But no such intention appears and its existence is extremely unlikely. Another course was to make some express provision on the subject, and that was not done.

The course of keeping them alive indefinitely without providing any way of terminating such awards would not only be unconstitutional, it would be unreasonable and without purpose. It cannot be supposed that such an intention was entertained.

The remaining course open was to treat the awards of the commission as doing the work an award of the Arbitration Court or of a conciliation commissioner would have done under s. 48 (2) of the *Conciliation and Arbitration Act*.

The true conclusion is that this was the course which the *Stevedoring Industry Act* 1947 contemplated. The functions of the commission replaced, with respect to the terms and conditions of employment of waterside workers, the functions of the Arbitration Court and whatever effect a fresh award of the court produced on a prior award kept in force until it was made was to be produced by an award made by the new body exercising the transferred functions. This is not the result of any construction of s. 48 (2), but of the special provisions creating the substituted authority with all their implications.

It follows that the commencement of the *Stevedoring Industry Act* 1947 did not bring about a termination of the operation of the award made on 7th April 1936 as varied by the order of 8th September 1947, by which clause 4 (*j*) was inserted. But on the day of the commencement of that Act, namely, 22nd December 1947, an instrument appears to have been adopted by the new commission which, it is said, transmuted the award so varied into an order of the commission, with the consequence that the obligatory force of the provisions therein set out was exclusively derived from a new source, and one to which s. 29 (*b*) and (*c*) of the *Conciliation and Arbitration Act* are inapplicable.

It is unnecessary to say more about this order or purported order than that it was a general adoption of all orders, awards, agreements and directions from various authorities if in force at the commencement of the Act; that orders and awards made under the *Commonwealth Conciliation and Arbitration Act* 1904-1946 were included and that the direction in the order was that, except to the extent to which they were inconsistent with the *Stevedoring Industry Act* 1947, they should " continue to have effect as if the same were orders made by the Stevedoring Industry Commission under the last-mentioned Act ".

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This order must have derived whatever force it possessed at that time from s. 12 (1) (*b*) of the *Stevedoring Industry Act* 1947, for it could hardly be the fruit of arbitration by the commission, promulgated as it was on the very day the commission came into existence. It is, however, unnecessary to consider the extent of its operation, if any, at that time; for, as a matter of interpretation, it does not appear to mean to deprive the instruments to which it refers of any force they possessed or to change their character. Its purpose was to give them all the authority which the commission could confer, but not to the exclusion of the authority they already possessed or to the prejudice of the obligatory force belonging to them and of the means of enforcement which that carried. The attempt to continue them under the new authority caused no merger and amounted only to an endeavour to carry them on by an exertion of the new authority.

By the *Stevedoring Industry Act* 1949, which was proclaimed to commence on the day upon which the Royal assent was given to it, viz., 18th July 1949, the *Stevedoring Industry Act* 1947 was repealed. By s. 5 (3) (*g*), notwithstanding the repeal, orders of the commission and purported orders of the commission were continued in force as if made under that Act and the provisions relating to orders given by the Australian Stevedoring Industry Board set up by that Act were made applicable. But, assuming it to be effective, that could not alter the meaning of the order of the commission in relation to the awards of the Arbitration Court, and, as has already been said, no merger was intended. Part V. of the *Stevedoring Industry Act* 1949 restored to the Arbitration Court the power to settle by conciliation and arbitration industrial disputes in connection with stevedoring operations, but it provided that the powers given under Part V. should be exercised by a single judge. By s. 34 wide powers depending upon s. 51 (i.) of the Constitution were expressed to be conferred on the court (so constituted).

In purported pursuance, no doubt, of s. 34, the Judge, acting under Part V., on the very day of the commencement of the Act, made an order that the Waterside Workers' Award should continue in force and effect as amended or varied by the court and by orders of the commission under the regulations and of the commission under the Act. The order proceeded to say that the award continued in force and effect as aforesaid is binding on all employers and registered waterside workers, omitting all reference to the organization.

Possibly this order was not meant to affect the operation of the award with respect to the organization, but only to apply it to all registered waterside workers and their employers.

But whatever its effect, if any, in that and other respects, its only importance in the view of the case already expressed is in relation to what may seem a pure matter of form. Sub-section (6) of s. 34 says that the provisions of the Act relating to orders of the board shall apply to, and in relation to, orders of the court made under that section.

Orders of the board have the force of law. If it were assumed that as a result of the Judge's order of 18th July 1949 the award as varied took on the character of an instrument deriving authority only from the order under s. 34, then a question arises whether the orders of the Arbitration Court under s. 29 (*b*) and (*c*) made on 8th May 1952, that is to say, the orders it is sought to prohibit, are based on that view of the award.

Sub-section (3) of s. 29 of the *Conciliation and Arbitration Act* 1904-1951 expressly extends s. 29 (*b*) and (*c*) to orders made under s. 34 of the *Stevedoring Industry Act* 1949. It is therefore not a question of the absence of power to make an order on the footing that the award is no more than something incorporated by reference in an order made under that section. It is a question whether on that footing the orders as they are expressed could be supported.

An examination of the two orders of 8th May 1952 will show that the precise provision in the document is identified and the instrument is quite sufficiently described, whatever may be the source whence its obligatory force is derived.

Further, the issue of fact required by s. 29 (*b*) is exactly set out in the order made under that paragraph and the recital states that it has been proved.

The point turns wholly on the fact that the instrument is described as the Waterside Workers' Award. Even if it were correct that its force depended on the order of 18th July 1949 under s. 34 of the *Stevedoring Industry Act* 1949 and if, further, the description were due to a supposition that its force arose from s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1951 that would not matter for purposes of prohibition. The order would be within s. 29 (1) (*b*) and (*c*) and (3) and the supposition would be immaterial. For obviously the legal source of its obligation was not a matter on which the orders depended so long as the award was in truth obligatory.

The point therefore fails.

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The result of the foregoing reasons is that the order nisi for prohibition should be discharged with costs.

Order accordingly.

Solicitors for the prosecutor, *C. Jollie Smith & Co.*, Sydney, by *Maurice Blackburn & Co.*

Solicitors for the respondents, *Malleson Stewart & Co.*

Solicitor for the intervener, *D. D. Bell*, Crown Solicitor for the Commonwealth.

E. F. H.