of any one State, any basis for the provisions. It is true that the power covers matters incidental to the subject matter: cf. *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1). It was urged accordingly that in so far as the awards, orders and determinations were the outcome of the settlement of two-State disputes legislation to continue them in force was within s. 51 (xxxv.). The answer is that none of them can be regarded as an outcome of arbitration for the settlement of a two-State industrial dispute. The regulations under which they were made did not include any exercise of that power and did not conform with the conditions it imposes. They did not require arbitration. It was enough that the body "considered" and "determined". The second of these two words does not require an arbitral determination and the first requires nothing in the nature of a hearing or any analogous process. A dispute was not made indispensable. A "matter" was enough. Of course it was not required that the dispute or matter should extend beyond one State.

If the argument had any foundation to build from, it would still be necessary to make a severance of or distributive application of s. 3 (2) of the *Coal Industry Act* 1951 by the use of s. 15A of the *Acts Interpretation Act* 1901-1950. But there is nothing to work such a severance or distribution. For award by arbitration to prevent or settle a two-State industrial dispute is not any necessary part of the subject matter of the provision. The attributes of such a procedure are not present in any part of the connotation of the words "awards orders or determinations" to which s. 3 (2) refers as those words are employed. This is likewise true of s. 4 of the *Defence* (*Transitional Provisions*) *Act* 1950-1951 and of s. 8 (3) of the *Defence* (*Transitional Provisions*) *Act* 1946-1951 in so far as they relate to the awards, orders and determinations of the Central and Local Reference Boards.

The contention that these three several provisions in relation to such awards, orders and determinations are to be supported as valid exercises of the legislative power with respect to defence is based partly on a view of the intention or nature of the provisions and partly on a conception of what may be incidental to the power. The provisions are treated by the argument as fulfilling the purpose of holding in operation awards, orders and determinations made as a matter of war-time industrial regulation pending their replacement by valid regulations made either under the Commonwealth power with respect to arbitration for the settlement of two-State disputes or else State law. It is said that the expressions "until

(1) (1917) 23 C.L.R. 226.

H. C. OF A. 1951-1952.

ABERDARE COLLIERIES PTY. LTD. v. THE COMMONWEALTH OF AUSTRALIA.

Dixon J. McTiernan J. Williams J. Webb J. Fullagar J. Kitto J.

revoked by competent authority" contemplate authority established under State law, that is where Federal authority is absent or does not suffice. In s. 3 (2) of the *Coal Industry Act* 1951 we do not doubt that "competent authority" includes the tribunal and the local coal authorities which depend on the legislation of Commonwealth and State and in that sense covers State authority. But there is no warrant for supposing that any other State industrial authority is contemplated by s. 3 (2). More than the vague phrase "until revoked by competent authority" would be required as an expression of intention that a State authority should revoke or recall an exercise of power by a Federal body.

The truth is that s. 3 (2) is an attempt to carry over the prior awards, orders and determinations until an industrial authority established either under the law of the Commonwealth or by a combination of Commonwealth and State law, should vary or revoke them. Now in Queensland, to take one example, no combined authority exists and no Federal industrial authority can act except by arbitration to settle a two-State dispute. In the interpretation of s. 8 (3) of the *Defence (Transitional Provisions) Act* 1946-1951, there is no foothold for applying it to revocation by State authority. Sub-section (2) of s. 4 of the *Defence (Transitional Provisions) Act* 1946-1950 refers back to the provisions of the principal Act and so has no wider effect than, in s. 8 (3), the words "until revoked by competent authority" produce. It is therefore impossible to treat these provisions as so to speak handing the awards &c. over to the States to be dealt with as a system still operative.

So far as the argument depends on a conception of what is incidental to the legislative power with respect to defence it is less open to challenge in principle than in its application.

In principle, as we understand it, the basis of the argument is simply that it is competent to the Commonwealth Parliament under the defence power to maintain in force after the close of hostilities any existing war-time regulations for a time reasonably sufficient in the circumstances to enable the appropriate legislature or legislatures or appropriate authority or authorities to determine what course should be followed whether by way of continuance, variation, replacement or discontinuance of the regulation and that this is especially true in the case of a complex of industrial awards or determinations forming part of a general system of industrial regulation which according to recognized practice keeps every award or determination in operation until a new one is made.

The difficulty is to justify under this doctrine what has been done. It is over six years since hostilities stopped. In the meantime it is to be assumed that the boards have not been idle. Section 3 (2)

of the *Coal Industry Act* 1951 includes and necessarily includes instruments that purport to be and yet may not be, and in truth are not, in force, that is to say awards, orders and determinations of the third of the classifications we enumerated. There is no terminating date unless s. 4 of the *Defence* (*Transitional Provisions*) *Act* 1950-1951 is to be considered as fixing 31st December 1952 effectively notwithstanding s. 3 (2) of the *Coal Industry Act* 1951. If it were to be so considered how could it be supported as a reasonable period from the surrender of the enemy and from the beginning of the process of restoring the country to a peace-time footing? It is impossible to treat the provisions in question as an exercise of that part of the defence power which enables legislation for winding up a war organization of the community.

The question was raised from the bench whether it was possible to treat the dangers to our security which are now apprehended as giving an application to the defence power sufficiently wide to support the validity of s. 3 (2) of the *Coal Industry Act* 1951 or s. 4 of the *Defence* (*Transitional Provisions*) *Act* 1950-1951. The question was prompted in part by the third recital in Acts No. 78 of 1950 and No. 43 of 1951. But reliance on any such contention was disclaimed, as indeed, having regard to the character of the provisions actually in question and the substantive arguments advanced to support them, might be expected.

There is a curious point about the awards, orders and determinations mentioned in reg. 4A inserted by S.R. 1947 No. 42. They are covered by s. 29 of the *Coal Industry Act* 1946, a section not in question upon this demurrer. But because of reg. 4A they fall within the description of s. 3 (2) of the *Coal Industry Act* 1951. It can however have no greater validity in relation to these awards &c. than in relation to others. Nor can the awards and orders within reg. 2 (2) of S.R. 1944 No. 48 fare any better.

For the foregoing reasons we think that in Queensland the awards, orders, determinations and decisions made by the central reference board and the local reference board no longer have any binding force. But on this demurrer we think it is enough simply to order that the demurrer be overruled.

Demurrer overruled with costs.

Solicitors for the plaintiffs, *Dawson, Waldron, Edwards & Nicholls.*

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

J. B.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

GALVIN AND ANOTHER;

EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

H. C. OF A. 1952.

MELBOURNE, *March* 19-21; *June* 13.

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

Industrial Arbitration (Cth.)—Award—Validity—Consistency with Act—Industrial dispute—Ambit of dispute—Award prohibiting organizations from being concerned in any ban, limitation or restriction upon performance of work in accordance with award—Conciliation and Arbitration Act 1904-1951 (*No.* 13 *of* 1904—*No.* 58 *of* 1951), ss. 42, 78.

Section 78 of the *Conciliation and Arbitration Act* 1904-1951 provides:—"(1) An officer, servant or agent, or a member of a committee, of an organization or branch of an organization shall not, during the currency of an award—(*a*) advise, encourage or incite a member of an organization which is bound by the award to refrain from, or prevent or hinder such a member from—(i) entering into a written agreement; (ii) accepting employment; or (iii) offering for work, or working, in accordance with the award or with an employer who is bound by the award; (*b*) advise, encourage or incite such a member to make default in compliance with the award; (*c*) prevent or hinder such a member from complying with the award; (*d*) advise, encourage or incite such a member to retard, obstruct or limit the progress of work to which the award applies by 'go slow' methods; or (*e*) advise, encourage or incite such a member (i) to perform work to which the award applies in a manner different from that customarily applicable to that work; or (ii) to adopt a practice in relation to that work, where the result would be a limitation or restriction of output or production or a tendency to limit or restrict output or production."

An award contained the following provision:—"No organization party to this award shall in any way, whether directly or indirectly, be a party to, or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award."

Held that there was nothing in s. 78 to indicate any legislative intention that no responsibility should be placed on organizations in relation to restrictions on the performance of work in accordance with an award; and, accordingly, the award provision was not inconsistent with the Act.

The log of claims giving rise to the dispute which was settled by this award contained, *inter alia*, a claim that: "No organization shall for the purpose of enforcing any demand concerning any matter expressly provided for in this log upon any employer whatsoever who is a party to this log, order or incite or encourage any of its members, or permit any of its officers to do or omit to do any thing in connection with the work to be done by any employee in the course of employment covered by this log so as to tend to prevent or delay or hinder the working or using of any factory shop machine or plant or the carrying on by any such employer as aforesaid of the work of any factory shop or job or undertaking."

Held that the form of relief given by the award provision was within the ambit of the dispute.

ORDER NISI for prohibition.

A log of claims was served by the Metal Trades Employers' Association, an organization of employers, upon the Amalgamated Engineering Union, Australian Section, an organization of employees. The relevant claim was contained in cl. 28 (b) of the log, the text of which is set out in the headnote.

A dispute arising from this log was heard by Mr. Galvin, a conciliation commissioner under the *Conciliation and Arbitration Act* 1904-1951. In the course of the hearing it transpired that certain unions within the organization of employees were at that time permitting their members to resort to direct action as a means of achieving their aims. On 21st June 1951 the conciliation commissioner, on his own motion pursuant to s. 49 of the *Conciliation and Arbitration Act* 1904-1950, ordered that cl. 18 of the Metal Trades Award 1941 be varied by inserting therein a sub-clause, and proceedings were commenced by the Amalgamated Engineering Union for an order nisi for a writ of prohibition directed to the conciliation commissioner to restrain his order being put into force.

On 16th January 1952, before the order nisi for prohibition was granted, the conciliation commissioner promulgated a new award, and thereupon the Metal Trades Award 1941 as varied by the order made by the conciliation commissioner on 21st June 1951 went out of operation. The new award contained a provision similar to the sub-clause inserted by the order of variation, and was as follows:—"19. *Contract of Employment.* . . . *Prohibition of Bans Limitations and Restrictions.* (ba) (i) No organization party to this dispute shall in any way, whether directly or indirectly, be

H. C. OF A. 1952. THE QUEEN v. GALVIN; EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award. (ii) An organization shall be deemed to commit a new and separate breach of the above sub-clause on each and every day in which it is directly or indirectly a party to such ban, limitation or restriction ".

On 23rd January 1952 *Dixon* C.J. granted an order nisi for a writ of prohibition upon the ground that the said order was made without jurisdiction inasmuch as (1) it was outside the ambit of any industrial dispute to which the persons affected thereby were parties; and (2) it prejudicially affected the prosecutor and other parties notwithstanding that they were not parties to the proceedings before the conciliation commissioner and that no due opportunity was given to them to be heard before the making thereof. By subsequent amendment the following grounds were added:—(3) it was outside of any power vested in the commissioner, and (4) the order ceased to be operative by reason of the provision of the *Conciliation and Arbitration Act* [*No.* 2] 1951.

On the return of the order nisi the High Court declined to entertain further the application for a writ of prohibition in respect of the spent order, but, because of the similarity between the provision in the new award and that in the order of variation, treated the matter as an application for an order absolute in the first instance for a writ of prohibition in respect of the provision in the new award.

M. J. Ashkanasy Q.C. (with him *C. Turnbull*), for the prosecutor. The relief granted by cl. 19 (ba) of the *Metal Trades Award* was not proper, having regard to cl. 28 (b) of the log of claims. [He referred to *Seamen's Union of Australasia* v. *The Commonwealth Steamship Owners' Association* (1) and *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2), where similar provisions were in question.] Clause 28 (b) of the log is limited by a reference to purpose. Clause 19 (ba) of the award is in fact a general prohibition and thereby gives relief which is different in kind from that claimed by the log. Clause 19 (ba) of the award is invalid because the Legislature has shown an intention, by the *Conciliation and Arbitration Act* 1904-1951, ss. 59, 62, 78 and by the *Crimes Act* 1914-1950, s. 5, to fully cover the field. See per *Dixon* J., *The Seamen's Union Case* (3). Section 78 of the *Conciliation and Arbitration Act* 1904-1951 is a statutory taking over of the order in the *Seamen's Union Case* (1) as the

(1) (1936) 54 C.L.R. 626.
(2) (1951) 82 C.L.R. 208.
(3) (1936) 54 C.L.R., at p. 646.

standard. [He referred to *R.* v. *The Metal Trades Employers' Association*, per *Latham* C.J. (1), per *Dixon* J. (2), per *McTiernan* J. (3), per *Webb* J. (4), per *Kitto* J. (5) and to *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers*, per *Dixon* J. (6).]

R. M. Eggleston Q.C. (with him *A. P. Aird*), for the respondent, the Metal Trades Employers' Association. Clause 19 (ba) of the award grants relief which was proper having regard to the dispute. The clause is limited (1) to organizations and (2) to bans, limitations or restrictions. Bans, limitations or restrictions have a common characteristic in that they are consciously imposed. Arbitration is not limited to the precise differences between the parties. [He referred to *Australian Tramway Employees Association* v. *The Commissioner for Road Transport and Tramways (New South Wales)*, per *Dixon* J. (7), per *Evatt* and *McTiernan* JJ. (8); *The Seamen's Union Case*, per *Latham* C.J. (9), per *Rich* J. (10), per *Dixon* J. (11); *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch*, per *Rich* J. (12), per *Dixon* J. (13), per *McTiernan* J. (14); *R.* v. *Metal Trades Employers Association*; *Ex parte Amalgamated Engineering Union*, per *Latham* C.J. (15); *R.* v. *Blakeley; Ex parte Australian Theatrical and Amusement Employees Association* (16).]

The Court or a conciliation commissioner has power to include provisions in an award, which will prevent the frustration of the award: the *Conciliation and Arbitration Act* 1904-1951, s. 42. *The Seamen's Union Case* (17) established the power: per *Latham* C.J. (18). Clause 19 (ba) was inserted as the price of the award.

[DIXON C.J.: It is not expressed as a condition.]

The Legislature has not impliedly prohibited the enactment of cl. 19 (ba). [He referred to *R.* v. *Wallis* (19); *Commonwealth* v. *The Limerick Steamship Co. Ltd.* (20) and *Walsh* v. *Sainsbury* (21).]

[DIXON J. referred to *Matthews* v. *City of Prahran* (22).]

(1) (1951) 82 C.L.R., at p. 234.
(2) (1951) 82 C.L.R., at p. 245.
(3) (1951) 82 C.L.R., at p. 257.
(4) (1951) 82 C.L.R., at p. 259.
(5) (1951) 82 C.L.R., at p. 260.
(6) (1949) 78 C.L.R. 529, at pp. 549, 550.
(7) (1935) 53 C.L.R. 90, at pp. 106, 107.
(8) (1935) 53 C.L.R., at p. 110.
(9) (1936) 54 C.L.R., at p. 638.
(10) (1936) 54 C.L.R., at p. 641.
(11) (1936) 54 C.L.R., at pp. 646, 647.
(12) (1938) 60 C.L.R. 507, at p. 526.
(13) (1938) 60 C.L.R., at pp. 538, 540.
(14) (1938) 60 C.L.R., at p. 543.
(15) (1949) 78 C.L.R. 366, at pp. 373 et seq.
(16) (1949) 80 C.L.R. 82.
(17) (1936) 54 C.L.R. 626.
(18) (1936) 54 C.L.R., at p. 639.
(19) (1949) 78 C.L.R. 529.
(20) (1924) 35 C.L.R. 69.
(21) (1925) 36 C.L.R. 464, at pp. 470, 471.
(22) (1925) V.L.R. 469.

H. C. OF A. 1952.

THE QUEEN v. GALVIN; EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

June 13.

M. J. Ashkanasy Q.C. in reply. The Legislature has impliedly prohibited the enactment of cl. 19 (ba) of the award. [He referred to *Morton* v. *Union Steamship Co. of New Zealand Ltd.* (1).]

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J., WEBB, FULLAGAR AND KITTO JJ. This proceeding began as an order nisi for a writ of prohibition directed to a conciliation commissioner to restrain an order of variation made on 21st June 1951 being put into force.

The order nisi was made on 23rd January 1952 on an application made some time before and stood over for a further affidavit ultimately made on 18th January 1952. In the meantime on 16th January 1952 the conciliation commissioner promulgated a new award, which had been under consideration. That award came into force as on and from the first pay period to commence in February 1952 and thereupon the previous award, varied by the order which it was sought to prohibit, went out of operation. It had been maintained in force by the provisions of s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1951 only " until a new award has been made ", an event which may be considered to have taken place as early as 16th January but certainly no later than the first pay period in February 1952.

Inasmuch as the award containing the provisions placed therein by the order of variation under attack had no longer any prospective operation this Court on the return of the order nisi declined to entertain further the application for a writ of prohibition in respect of the spent order.

But it appeared that the new award included a provision similar to that made in the order of variation which was the subject of attack. The Court therefore treated the matter as an application for an order absolute in the first instance for a writ of prohibition in respect of the provision of that award. The necessary parties being before the Court and ready to proceed, the question whether such a prohibition should issue was then argued.

The provision of the award which is attacked forms part of cl. 19, a clause headed " Contract of Employment ". The provision is par. (ba) and it falls under a subheading " Prohibition of Bans Limitations and Restrictions ". Paragraph (ba) is as follows :—(i) No organization party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban,

(1) (1951) 83 C.L.R. 402, at pp. 410, 412.

limitation or restriction upon the performance of work in accordance with this award. (ii) An organization shall be deemed to commit a new and separate breach of the above sub-clause on each and every day in which it is directly or indirectly a party to such ban, limitation or restriction. The first objection made to the provision is that the subject with which it deals forms part of a field now occupied by s. 78 of the *Conciliation and Arbitration Act* 1904-1951, a section enacted by the *Conciliation and Arbitration (No. 2) Act* 1951. It is said that the section is meant as an exhaustive statement of what the liabilities are to be for seeking by advice encouragement or incitement, to induce men to refrain from work under an award or to make default in compliance with the award or limit work. The contention is that the provision of the award is inconsistent with s. 78 because it assumes to deal with a subject on which the section has laid down the law exhaustively. The section relates to the conduct of officers, servants, agents and members of committees of organizations or branches of organizations. It makes it an offence punishable by fine not exceeding £100 for such a person to advise, encourage or incite a member bound by an award to adopt any of certain courses. These courses it is unnecessary fully to enumerate. It is enough to say that they include refraining from accepting employment offering for work or working in accordance with an award, hindering other members from doing so, making default in complying with an award, retarding, obstructing or limiting the progress of work, and adopting practices limiting output or production. An offender is to be prosecuted in courts other than the Arbitration Court and a specific defence is provided if there be reasonable grounds for the conduct charged unrelated to the terms and conditions of employment prescribed by the award or arising out of an employer's failure or proposed failure to observe the award.

The argument fails, if for no other reason, because s. 78 does not deal with the liability of organizations as such at all, but is confined to individuals who are officers, servants or agents or members of committees of organizations and of branches. There is nothing in s. 78 to indicate any legislative intention that no responsibility should be placed on organizations in relation to restrictions on the performance of work in accordance with an award. The section is entirely consistent with the view that the legislature intended that question to be left completely to the arbitrator, if he chose to deal with it, where having regard to the ambit of the dispute it was within his authority to do so.

H. C. OF A. 1952.

THE QUEEN v. GALVIN; EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

Dixon C.J. Webb J. Fullagar J. Kitto J.

The second ground upon which the provision contained in par. (ba) of cl. 19 of the award was said to be outside the authority of the conciliation commissioner is that it goes beyond any matter forming part of the industrial dispute before him.

The dispute arises from a log of claims made by the respondent the Metal Trades Employers' Association, an organization of employers, and served upon (*inter alios*) the prosecutor, the Amalgamated Engineering Union, Australian Section, an organization of employees. Clause 28 of this log contained a number of paragraphs dealing with conduct tending to prevent hinder or delay the working of factories or machines or the carrying on of the work of any factory or undertaking. Paragraph (b) made the relevant claim, which is as follows:—(b) No organization shall for the purpose of enforcing any demand concerning any matter expressly provided for in this log upon any employer whatsoever who is a party to this log, order or incite or encourage any of its members or permit any of its officers to do or omit to do anything in connection with the work to be done by any employee in the course of employment covered by this log so as to tend to prevent or delay or hinder the working or using of any factory, shop, machine or plant or the carrying on by any such employer as aforesaid of the work of any factory shop or job or undertaking.

This claim is directed against the use by the organization of its authority or influence to stop or hinder work by its members. It brings into the ambit of the dispute the question of the course to be taken on that subject. But the prosecutor says that it does so only in a limited way. It is limited to cases where the order, incitement or encouragement of the organization is actuated by the purpose of enforcing on an employer any demand concerning any matter expressly provided for in the log. The contention is that the provision contained in par. (ba) of cl. 19 of the award disregards this limitation and therefore deals with something different in kind.

An award cannot give a form of relief that is not relevant to a matter in dispute, that is not reasonably incidental or appropriate to the settlement of that part of the dispute and that has no natural or rational tendency to settle the particular question in dispute. But the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated.

The principle is formulated by s. 42 of the *Conciliation and Arbitration Act* 1904-1951, although in language which may possibly be read too widely because of the words "which the court or commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further . . . disputes". These words might be taken to allow a more remote or tenuous connection with the dispute than is requisite as a matter of objective fact.

But in the present case the question is whether by dropping the expression of purpose the commissioner has given relief of a kind different in substance from that claimed. To drop the reference to purpose was no doubt wise, because an issue as to the purpose of a corporate body is one which ought not to be set as a criterion of liability, so troublesome and uncertain is the ascertainment of the fact likely to be.

The substantial grievance forming the basis of the claim in the log was the incitement or encouragement by an organization of conduct prejudicial to regular work in accordance with the terms and conditions sought.

The clause in the log described in terms chosen by the claimants the precise relief considered sufficient to deal with the grievance. The award chooses another form of relief in some ways wider, in some ways narrower. But when the matter is examined and the distinction is observed between the substantive question and the precise form of relief, what the award does appears sufficiently relevant to the dispute arising from the claim, and to be reasonably incidental to its settlement.

The order nisi should be discharged and the application for an order absolute in the first instance for prohibition refused. The prosecutor should pay the costs of the order nisi and of the application.

McTIERNAN J. In my opinion the order nisi should be discharged.

The Amalgamated Engineering Union and the Metal Trades Employers' Association and other registered industrial organizations of employees and employers are parties to an award made on 16th January 1952 by the conciliation commissioner, Mr. Galvin, who is a party in the present proceedings in this Court. The award purports to be made in settlement of industrial disputes between the parties to it. These disputes resulted from the rejection of logs of claims. One of these logs was served by the Amalgamated Engineering Union upon the Metal Trade Employers' Association and rejected by it. Another log was served by the

H. C. OF A. 1952.

THE QUEEN v. GALVIN; EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION.

McTiernan J.

same organization of employers upon the Amalgamated Engineering Union and rejected by it. The logs covered rates of pay, hours of work and conditions of employment. The present award contains provisions regulating these matters, and a clause numbered 19 (ba). The Amalgamated Engineering Union in these proceedings challenges only this clause. It is in these terms:— "(i) No organization party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award. (ii) An organization shall be deemed to commit a new and separate breach of the above sub-clause on each and every day in which it is directly or indirectly a party to such ban, limitation or restriction."

The clause is limited to an organization. If the Amalgamated Engineering Union broke the prohibition imposed upon it by the clause, it would be liable to the penalty provided in the *Conciliation and Arbitration Act* 1904-1951 for a breach of an award. The conduct prohibited by the award is also prohibited by s. 78 of the Act, but this section does not apply to an organization. It is limited to the officials of an organization, who are therein enumerated. As the section does not extend to the organization itself, the Amalgamated Engineering Union would not be liable to the penalty provided in s. 78, if it were guilty of any conduct to which cl. 19 (ba) of the award extends. Upon the limitation of s. 78 to officials of an organization, an argument against the validity of cl. 19 (ba) is founded. The argument is that the clause is inconsistent with the Act, with an intention to be implied in s. 78. A conciliation commissioner, of course, is not competent to insert in an award anything that is contrary to the express or implied intention of the Act. The inconsistency which is urged depends upon there being in s. 78 an implication that, as only the officials enumerated in the section are made liable if they engage in the direct action which is prohibited, and the organization is omitted, it was not the intention of the Act that an organization should be liable to any penalty if it engaged in any direct action to which s. 78 extends.

A similar argument was advanced in the case of the *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1). In cll. 77 and 78 of the award in question in that case there were prohibitions similar in nature and purpose to cl. 19 (ba). These clauses, unlike cl. 19 (ba) applied both to the union and employees. The employers' log of claims and the award the

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