[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

FINDLAY AND ANOTHER;

Ex parte THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS.

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SYDNEY, *Aug.* 17, 18; *Dec.* 1.

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

Industrial Arbitration (Cth.)—Conciliation and arbitration—Casual wharf clerks—"Attendance" money—Award—Variation—Application to conciliation commissioner—Proposals for payment—Power of commissioner—"Industrial matter"—Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*) *—Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *s.* 4.

An association of employers applied for a writ of prohibition to restrain a proceeding before a conciliation commissioner in which proceeding an order was sought varying an award applicable (*inter alia*) to the employment of casual wharf clerks. The variation claimed related to the payment of attendance money to casual wharf clerks who had attended the place of engagement and offered themselves for employment unsuccessfully. The application sought this variation in one of three different ways; the first required that the employer by whom the casual wharf clerk is next employed should be liable for the attendance money; the second that the employer by whom he was last employed should be so liable, and the third that all the usual employers in the industry in the given port should jointly and severally be liable for the attendance money.

Held, (1) That in respect of the first and second proposed variations the connection between the employment and the purpose of the payment was not remote or tenuous, and that the mere form of the provisions did not show that the subject matter could not be an "industrial matter" as defined in s. 4 of the *Conciliation and Arbitration Act* 1904-1952.

(2) That as the third proposed variation assumed to include all "employers in a port" independently of their being parties to the dispute and imposed the obligation upon them jointly and severally whether any of them employ the casual wharf clerk or not, it could not lawfully be adopted.

The fairness, justice or propriety of a claim has nothing to do with the question whether it is capable of forming a dispute as to an industrial matter.

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PROHIBITION.

By a summons dated 4th June 1953 the Federated Clerks' Union of Australia gave notice to, *inter alia*, the Commonwealth Steamship Owners Association, the members of the Oversea Shipping Representatives Association, the Broken Hill Pty. Co. Ltd., the Timber Merchants & Sawmillers Association, William Holyman & Sons Pty. Ltd. and the Victorian Employers' Federation, of its intention to apply on 25th June 1953 to G. A. Findlay Esq., a conciliation commissioner appointed under the *Conciliation and Arbitration Act* 1904-1952, for the further variation of the Clerks' (Shipping) Award 1948 by adding to Pt. I of the award a new cl. 21A as follows :—

"ATTENDANCE MONEY

21A. (1) This clause shall apply only to Casual Wharf Clerks whose usual occupation is that of Casual Wharf Clerk. (2) When an employer engages a Casual Wharf Clerk he shall be liable to pay to him a sum equal to four hours pay for each and every ordinary working day on which such Casual Wharf Clerk has offered himself for employment by employers in accordance with the practice prevailing in the port since the termination of his last employment as a Casual Wharf Clerk. (3) The sum so payable shall be paid to such Casual Wharf Clerk at the time prescribed for the first payment of wages to him by such employer. (4) No Casual Wharf Clerk shall be entitled under this clause to any payment in respect of any day on which he is offered employment as a Casual Wharf Clerk by an employer, in accordance with the practice prevailing in the port; or as follows :—

ATTENDANCE MONEY

21A. (1) This clause shall apply only to Casual Wharf Clerks whose usual occupation is that of Casual Wharf Clerk. (2) When an employer engages a Casual Wharf Clerk he shall become liable to pay to him a sum equal to four hours pay for each and every working day on which such Casual Wharf Clerk offers himself for employment by employers in accordance with the practice prevailing in the port between the day on which his employment with such employer terminates and the day on which he is next engaged as a Casual Wharf Clerk. (3) The sum so payable shall be paid to such Casual Wharf Clerk at the time or times on which he would have been entitled to receive his wages from such employer had his employment not been terminated. (4) No Casual Wharf Clerk shall be entitled under this clause to any payment in respect of any day on which he is offered employment as a Casual Wharf Clerk by an

employer in accordance with the practice prevailing in the port; or as follows:—

ATTENDANCE MONEY

21A. (1) This clause shall apply only to

(i) employers who are usually employers in the industry; and

(ii) Casual Wharf Clerks whose usual occupation is that of Casual Wharf Clerk.

(2) The employers in any port shall be jointly and severally liable to pay to each Casual Wharf Clerk a sum equal to four hours pay for each and every ordinary working day on which such Casual Wharf Clerk offers himself for employment by employers in accordance with the practice prevailing in the port and is not offered employment as a Casual Wharf Clerk by any of such employers in accordance with such practice prevailing in the port.

By making such other order as the Conciliation Commissioner thinks fit."

Upon the matter coming on to be heard before the conciliation commissioner, counsel who appeared for the Commonwealth Steamship Owners Association and other respondents objected to the jurisdiction of the commissioner to deal with the matter on the ground that the proposed variation did not relate to an industrial matter and therefore it was outside the power of the commissioner.

After hearing argument the commissioner said he was of opinion that he had jurisdiction to deal with one or other or all of the propositions embodied in the application made by the Federated Clerks' Union and that he intended to proceed.

During a short adjournment granted at his request counsel for the respondents obtained from *Fullagar* J. an order nisi for a writ of prohibition directed to the commissioner and the Federated Clerks' Union of Australia prohibiting each of them from further proceeding or dealing with the application for the insertion in the said award of a new clause relating to attendance money, on the grounds that the commissioner did not have any jurisdiction to adjudicate upon the application to vary the award because (i) the application was not concerned in any of the proposed alternative variations of the award with a dispute as to industrial matters within the meaning of the *Conciliation and Arbitration Act* 1904-1952; (ii) the application was not an application relating to employment or the relationship between employers and employees; and each variation sought in the application would be beyond the ambit of power conferred by the *Conciliation and Arbitration Act* 1904-1952.

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The order was made returnable to the Full Court of the High Court.

O. J. Gillard Q.C. (with him *P. H. N. Opas*), for the prosecutors. If an extended meaning of employer and employee be applied the matter would cease to be an industrial matter within the meaning of the *Conciliation and Arbitration Act* 1904-1952, and would be beyond constitutional power. In none of the claims does the relationship of employer and employee exist, nor in any of the claims can an industrial dispute with respect to an industrial matter be said to exist. This is an attempt to impose unemployment relief, or unemployment insurance under the arbitral power when such a power does not exist. The relationship of master and servant must be held to exist between the parties to the dispute before the conciliation commissioner can be seized of jurisdiction under the Act: see *R.* v. *Kelly*; *Ex parte Victoria* (1); *Reg.* v. *Foster*; *Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (2); *R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (3); *Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners Association* (4).

[DIXON C.J. referred to *Federal Council of the British Medical Association in Australia* v. *The Commonwealth* (5).]

Gregory Gowans Q.C. (with him *J. R. Kerr*), for the respondents. The meaning of the expression "industrial matters" is not confined in the manner suggested on behalf of the prosecutors. The claim is not merely confined to a matter in respect of things arising out of a contract of employment. The very words pertaining to the relationship of employer and employee are designed to include something beyond that. The claim is not one for the providing of unemployment insurance for persons in the industry. The concept of "industrial matters" extends to some claim in connection with matters which are pertinent to the employment. It extends to matters collateral to the employment; beyond or subsequent to the particular employment; and preliminary to the employment: see *Australian Tramway Employees Association* v. *Prahran & Malvern Tramway Trust* (6); *Federated Clothing Trades of the Commonwealth* v. *Archer* (7), and *McKernan* v. *Fraser* (8). The circumstances which form a background to this claim are related

(1) (1950) 81 C.L.R. 64, at pp. 81, 82, 84, 85.
(2) (1952) 85 C.L.R. 138, at p. 150.
(3) (1949) 78 C.L.R. 529, at p. 545.
(4) (1952) 86 C.L.R. 283, at pp. 296, 299, 301, 305, 307, 318-319, 329.
(5) (1949) 79 C.L.R. 201.
(6) (1913) 17 C.L.R. 680.
(7) (1919) 27 C.L.R. 207, at p. 209.
(8) (1931) 46 C.L.R. 343, at pp. 358, 359.

to payment for actions done in the course of offering for employment, that is, preliminary to the employment. A claim which concerns itself with employer and employee relationships, as this claim does, is an industrial matter. There is nothing that suggests that payment of attendance money was not regarded as an industrial matter; it is something pertaining to the industry: see *Stevedoring Industry Act* 1947-1948, ss. 12, 14. The qualifying factor is an event arising before the employment commences. That circumstance, in the setting of the first claim does not divorce the "matter" from the relationship of employer and employee and it "pertains" to that relationship (*Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners Association* (1)). If, as here, the circumstance is not remote from or foreign to the employment, then the prima-facie connection of the matter with the employer and employee relationship is not severed; it pertains to it. The question of whether "industrial matters" extend to and include pension rights was discussed in *Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners Association* (2). Each of the three variants of the claim is within the concept of "industrial matter". The claim by the employee organization against the employers in the industry that acts of persons following the industry, constituting an offer for employment in that industry according to the practices in that industry for engaging casual wharf clerks should be paid for, pertains to employment in the industry. So also does a claim that of the employers who have the benefit of those practices the obligation to pay should attach to select classes. A claim that it should be a condition of employment of persons who follow the industry that the actual employer should make a payment for the actions of the employee in having offered for employment according to the practices of the industry in the past, is not remote from the employment so as not to pertain to it. A claim that it should be a condition of employment of persons who follow the industry that the actual employer should make a payment for the actions of the employee in the future in offering for employment according to the practices of the industry in the past is not remote from the industry so as not to pertain to the employment. Further, a claim against all usual employees pertains to the industrial relationship.

O. J. Gillard Q.C., in reply. The mere fact that employees are disputing with employers in respect of a matter does not make that matter an "industrial matter" or the subject of an "industrial

(1) (1952) 86 C.L.R., at pp. 296, 329.

(2) (1952) 86 C.L.R., at pp. 301, 306, 308, 318, 332.

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dispute" (*R.* v. *Kelly*; *Ex parte Victoria* (1)). *Australian Tramway Employes Association* v. *Prahran & Malvern Tramway Trust* (2) does not support the proposition submitted on behalf of the respondents, nor does *McKernan* v. *Fraser* (3) affect any such proposition. In order to ascertain the intention of the legislature regard may be had to other current legislation. In the *Stevedoring Industry Act* 1949 there is the setting-up of a system which is within the realm of industrial legislation but which is not an "industrial dispute": see *British Medical Association* v. *The Commonwealth* (4). The first scheme is outside the industrial relationship. The second and third schemes are concluded by the decision in *Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners Association* (5).

Cur. adv. vult.

Dec. 1.

The following written judgments were delivered:—

DIXON C.J. This is a motion to make absolute an order nisi for a writ of prohibition directed to a conciliation commissioner. The proceeding it is sought to prohibit is an application to the conciliation commissioner by the Federated Clerks' Union of Australia for a variation of an award which among other things governs the employment of casual wharf clerks. The application was made by a summons dated 4th June 1953 and it seeks to have inserted in the award a provision requiring the payment of attendance money to casual wharf clerks who have attended the place of engagement and offered themselves for employment unsuccessfully. For every working day on which the casual wharf clerk has so offered himself for employment without success he is ultimately to receive four hours' pay. Who is to pay it and when are questions to which three alternative solutions were put forward in the summons which the conciliation commissioner had before him.

The choices offered to him were first to require that the employer by whom the casual wharf clerk is next employed should be liable for the attendance money; second that the employer by whom he was last employed should be so liable, and third that all the usual employers in the industry in the given port should jointly and severally be liable for the attendance money. Each of the three alternative proposals is to apply only to casual wharf clerks whose usual occupation is that of casual wharf clerk.

When the summons came on before the conciliation commissioner it was objected that to include any such provision in the award

(1) (1950) 81 C.L.R., at p. 85.
(2) (1913) 17 C.L.R. 680.
(3) (1931) 46 C.L.R. 343.
(4) (1949) 79 C.L.R., at pp. 243, 245, 252, 261, 275, 279, 280, 293.
(5) (1952) 86 C.L.R. 283.

was outside his power because it did not relate to an industrial matter. After hearing the objection discussed the commissioner announced that his opinion was that he had jurisdiction to deal with one or other or all of the propositions embodied in the application made by the Federated Clerks' Union of Australia and that he intended to proceed. The present order nisi for prohibition was then obtained. The grounds of the order nisi depend on the single contention that a dispute as to the adoption of any of the three provisions put forward in the alternative could not be an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1952 because it could not be a dispute as to an industrial matter as defined in that Act. Other grounds, if any exist, were put on one side. Apparently, before the issue of the summons formulating the three claims in the alternative, the question whether he could amend the award to some such effect had been before the conciliation commissioner and under s. 16 (2) of the Act and reg. 21 of the *Conciliation and Arbitration Regulations* he had made a reference to the Arbitration Court for the purpose of ascertaining his power. The Arbitration Court declined to determine the question either because of the form it took or perhaps because the facts were inadequately brought before that court. The conciliation commissioner said in the course of the hearing that he failed to find anything in the transcript of the proceedings before the Arbitration Court which would amount to a direction by that court that he should refer the question back to them and he understood that it was a matter entirely for his discretion whether he would do so. On this view it may be considered that the reference had lapsed or been impliedly withdrawn. Otherwise sub-s. (4) of s. 16 in its present form might prove a bar to the commissioner's proceeding. But this question was advisedly put aside by the parties. In the same way no point was made by the respondents to the order nisi concerning the possible effect of sub-s. (7) of s. 16. Nor was any question raised as to the ambit in fact of the actual dispute and its sufficiency to include any or all of the alternative claims.

The fate of the order nisi must therefore depend upon the question whether any of the claims in the summons relates to an "industrial matter" as defined by s. 4 of the *Conciliation and Arbitration Act* 1904-1952. There can be no industrial dispute cognizable under the Act except "as to industrial matters": s. 4. The expression "industrial matters" is defined to mean all matters pertaining to the relations of employers and employees and (without limiting the generality of that statement) to include a long list of matters specifically described. "The kind of relation-

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ship to which the definition in s. 4 of 'industrial matters' refers by the expressions 'employer' and 'employee' is, under another name, in substance the relation called at common law master and servant": *Reg.* v. *Foster*; *Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (1). But the word "employer" is now defined by s. 4 to mean any employer in any industry and to include any person who is usually an employer in an industry. The word "employee" has long been defined to mean an employee in any industry and to include any person whose usual occupation is that of employee in any industry. Of the list of specific matters contained in the definition of "industrial matters" the more material are pars. (*b*), (*c*), (*f*) and (*h*), which are as follows:— "(*b*) the privileges, rights and duties of employers and employees; (*c*) the wages, allowances and remuneration of persons employed or to be employed; . . . (*f*) the question whether monetary allowances shall be made by employers in respect of any time when an employee is not actually working; . . . (*h*) the mode, terms and conditions of employment".

Very little information has been placed before us as to the customary manner of engaging casual wharf clerks or as to the times places and occasions when and where they offer themselves for employment in any port. The existing award (cl. 21) provides that existing methods times and places of engaging casual wharf clerks in each port shall continue in operation, subject to alteration by mutual consent and to the right of any party to seek a variation. But we do not know what these existing methods times and places are. Nor do we know what are the general relations or connection of those whose usual occupation is that of casual wharf clerk with those who are wont to employ them, and whether the relationship varies in regularity with different employers and in different ports or whether it is always the result of chance and nothing more. The contention of the prosecutors is, in short, independent of the facts of particular places or cases. It therefore ignores the facts and fastens on the nature of the claims as revealed by the terms in which they are formulated. The contention simply is, that, whatever the circumstances, the liability to pay the casual wharf clerk four hours' pay for each and every working day on which he offered himself for engagement but was not engaged cannot pertain to the relations of employers and employees because it is an amount made payable only in respect of a period of no employment, payable because of the absence (on the days of unsuccessful offering) of any relation of employer or employee.

(1) (1952) 85 C.L.R. 138, at p. 153.

It is pointed out that in the case of wharf labourers attendance money depends on the exercise of a specific statutory power, viz., s. 34 (1) of the *Stevedoring Industry Act* 1949, and involves the machinery of the *Stevedoring Industry Charge Assessment Act* 1947, the *Stevedoring Industry Charge Act* 1947-1952, and ss. 41 and 14 (*b*) (iii) of the *Stevedoring Industry Act* 1947-1948 and ss. 41 and 13 (*e*) of the *Stevedoring Industry Act* 1949. Moreover attendance money originated in an order made under reg. 62 of the *National Security* (*Shipping Co-ordination*) *Regulations* because, as it was said, attendance at a pick-up had been made compulsory. All this is pointed to as evidence of the impossibility of using an award as a means of imposing a liability to pay attendance money. It may be doubted whether the true inference is that an opinion prevailed which denied the possibility of conferring by award a right to attendance money. But be that as it may, the question we must decide depends altogether on the nature of each of the alternative claims and upon the definition of " industrial matter ". The material paragraph of the first of the claims is expressed to require that when an employer engages a casual wharf clerk he shall be liable to pay to him a sum equal to four hours' pay for each and every ordinary working day on which such casual wharf clerk has offered himself for employment by employers in accordance with the practice prevailing in the port since the termination of his last employment as a casual wharf clerk. There are three other paragraphs to this claim and their effect is to limit the provision to those whose usual occupation is that of a casual wharf clerk, to make the first payment of wages by the employer the occasion of payment of the attendance money, and to make it a condition that the casual wharf clerk has offered himself for employment in accordance with the practice of the port.

Now the first thing to be noticed is that the provision sought by this claim would impose upon an actual employer an obligation in that capacity to add an amount of money to the ordinary pay of the employee and to pay it to him in his capacity of employer.

But it is not necessarily true that all claims for money payments made by employees upon employers in their respective capacities " pertain to the relations of employers and employees ". What the payment represents must also be considered and if that has nothing to do with those relations it may not fill the description. " The words ' pertaining to ' mean ' belonging to ' or ' within the sphere of ', and the expression ' the relations of employers and employees ' must refer to the relation of an employer as employer

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with an employee as employee" : *R.* v. *Kelly* ; *Ex parte Victoria* (1). The possibility of an indirect, consequential and remote effect upon the relations is not enough (1). But our conception of what does arise out of the relations or is connected with them includes much that is outside the contract of service and its incidents and the work done under it. For example the needs of the employee form the basis of wage fixation and they are worked out by reference to the cost of living of a married man with two children. Conditions affecting the employee as a man who is called upon to work in the industry and who depends on the industry for his livelihood are ordinarily taken into account. An example is found in the very award which it is sought to amend. There is a provision requiring an additional payment to casual tally clerks of one twenty-fifth of the rate for ordinary time on each occasion payment is made and it is described as "an annual leave loading". An employee though casual is paid for the time occupied in travelling from his home. He is reimbursed unusual fares expended in reaching his work. These are all simple matters but they illustrate the fact that the situation in which the employee, even the casual employee, stands in relation to his calling may sometimes provide the ground of a claim for payment by the employer and it will fill the description of an "industrial matter". Further, on the very definition of "employer" and "employee" the relations between those who are usually employers and employees in the industry are included. In the *Australian Tramways Employes' Association* v. *Prahran & Malvern Tramway Trust* (2), *Isaacs* and *Rich* JJ. say :— "Read *secundum subjectam materiam*, as words in every document must be, the word 'employment' in relation to industrial disputes has a large meaning. It certainly includes in this place, the state of employment, the acts of service rendered by an employé during his engagement, the performance of his part in the industry. The 'terms' of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The 'conditions' of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment. And the words 'employers' and 'employés' are used in the Act not with reference to any given contract between specific individuals, but as indicating two distinct classes of persons co-operating in industry, proceeding harmoniously in time of peace, and contending with each other in time of dispute. As the statutory definition

(1) (1950) 81 C.L.R. 64, at p. 84. (2) (1913) 17 C.L.R. 680.

of 'employee' includes 'any person whose *usual* occupation is that of employé in any industry,' what we have said is manifest. In addition, the Act not only makes provision for organizations, but is almost entirely dependent for its working upon organizations at least of employés, who do not cease to be employés simply because for a time they are out of active employment. This is no mere accidental circumstance" (1).

In the present instance the connection between the employment and the purpose of the payment is not remote or tenuous. Attendance by the casual wharf clerk to offer his services is something he does regularly in accordance with the custom of the industry and the calling he follows. That is the hypothesis. It is the preliminary condition of his actual employment which he must necessarily perform. It is the procedure laid down by custom so that a supply of labour may be made available to the employers and obtained.

It is important to hold firmly in mind that the fairness justice or propriety of a claim has nothing to do with the question whether it is capable of forming a dispute as to an industrial matter, which is the sole question that is before this Court. To say that it is unfair and unreasonable to ask a succeeding employer to pay a casual clerk in respect of occasions when he failed to secure engagement is to throw no light on the question whether the demand pertains to the relations of the casual clerk and the employer. How the claim ought to be disposed of is not a matter for this Court. All that we can decide is whether it can fall under the authority of the conciliation commissioner to deal with it.

The specific reference in par. (*f*) of the definition of "industrial matter" to monetary allowances in respect of time when an employee is not actually working cannot be ignored. No doubt this paragraph was included in order to cover the case of "permanent" employees remunerated according to time actually worked. But it recognizes that payment for idle time lost is an industrial matter and there is no limit of place or circumstance in the words used. Once again the extended definitions of "employer" and "employee" must be applied, and that means that an existing relation of master and servant at the time the employee was not actually working cannot be essential to par. (*f*). All these considerations make it difficult to see any logical reason why the subject of the claim must fall outside the definition of "industrial matter". What circumstances affecting this or that employer or this or that port may conceivably show we cannot speculate. It is enough to say that the mere form of the provision set out in the first

(1) (1913) 17 C.L.R., at pp. 693, 694.

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alternative does not show that the subject cannot be an industrial matter.

This is also true of the second alternative claim. The principal paragraph of the claim is as follows :—" When an employer engages a Casual Wharf Clerk he shall become liable to pay to him a sum equal to four hours pay for each and every working day on which such Casual Wharf Clerk offers himself for employment by employers in accordance with the practice prevailing in the port between the day on which his employment with such employer terminates and the day on which he is next engaged as a Casual Wharf Clerk ".

It will be noticed that in this clause there is nothing to require the casual wharf clerk to attend and no limitation of time within which he must do so to render his last employer liable.

Correspondingly it is true that there is no limitation in the first alternative provision ensuring that a long interval shall not have elapsed since the clerk last presented himself for engagement. It is no doubt true that an interval might be so long as to show that the last unsuccessful offering of the employee was too remote for the purposes of the definition of " industrial matter ". But it must be borne in mind that the alternative provisions are limited to those whose usual occupation is that of wharf clerk and in any case the criticism is one which goes only to the kind of provision that may be included in the award and not to the impossibility of including any provision at all in consequence of the claims.

The second alternative in seeking to place the obligation upon the last employer until the casual wharf clerk is next engaged fastens on the existence of the relation of employer and employee as a source of liability that is to continue notwithstanding that the contractual relation and the work has ended. In this it differs from the first alternative. But the difference, important as it may be on the question of substance submitted to the conciliation commissioner, does not necessarily remove it from the operation of the considerations already discussed as those upon which the application to the definition of " industrial matter " depends.

The third alternative claim stands in an entirely different situation. It is only necessary to set it out to show that it is untenable. The claim is as follows :—" (1) This clause shall apply only to (i) employers who are usually employers in the industry ; and (ii) Casual Wharf Clerks whose usual occupation is that of Casual Wharf Clerk. (2) The employers in any port shall be jointly and severally liable to pay to each Casual Wharf Clerk a sum equal to four hours pay for each and every ordinary working day on which such Casual Wharf Clerk offers himself for employment by employers

in accordance with the practice prevailing in the port and is not offered employment as a Casual Wharf Clerk by any of such employers in accordance with such practice prevailing in the port".

It will be seen that it assumes to include all "employers in a port" independently of their being parties to the dispute and imposes the obligation upon them jointly and severally whether any of them employ the casual wharf clerk or not. These features are enough to show that it could not lawfully be adopted.

But as it has not been made to appear that either of the other two claims is necessarily outside the authority of the conciliation commissioner it follows that the order nisi for a writ of prohibition must be discharged.

WEBB J. I agree with the reasons for judgment of the Chief Justice.

A claim for attendance money of the kind asserted here could, I think, be the subject of an inter-State industrial dispute within s. 51 (xxxv.) of the Commonwealth Constitution. As to the possible scope of such a dispute see *George Hudson Ltd.* v. *Australian Timber Workers' Union* per *Isaacs* J. (1) and per *Starke* J. (2), and *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association* per *Isaacs* J. (3) and *Starke* J. (4). But does this dispute about payment for attendance at pick-up places, when such attendance does not lead to an engagement, come within the definition of "industrial matters" within s. 4 of the *Conciliation and Arbitration Act* 1904-1952? I think it does. If the definition of "employer" was not always wide enough for this purpose, as to which I express no opinion, it has, I think, now been made so, as it has been enlarged by s. 3 of the *Conciliation and Arbitration Act* 1952 to include any person who is usually an employer in an industry. The definition of "employee" already included a person whose occupation is usually that of an employee in an industry.

The number of matters "pertaining to the relations of employers and employees", to repeat the words of s. 4 was, I think, increased by the enlargement of the definition of employer, if that number were capable of increase.

Attendance at pick-up places can be regarded as being for the benefit of employers and employees alike, subject to provision for compensation to employees where that is appropriate, having regard to the times and place of attendance prescribed. In any event such attendance is required for the efficient working of the industry.

(1) (1923) 32 C.L.R., at p. 435.
(2) (1923) 32 C.L.R., at p. 453.
(3) (1925) 35 C.L.R., at p. 540.
(4) (1925) 35 C.L.R., at p. 549.

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The employers know where to go to get labour and the employees know where to find work. I think then that it would be to take too narrow a view to hold that, as between employers and employees who are usually such, payment for attendance at pick-up places does not pertain to their relations when the attendance does not result in an engagement.

For the time being it must be assumed that if compensation is awarded it will be fair to the employers called upon to pay it.

I would discharge the order nisi for prohibition.

FULLAGAR J. In this case I have had the advantage of reading the judgment of the Chief Justice, and I find it sufficient to say that I agree with it.

KITTO J. I also concur in the judgment of the Chief Justice.

TAYLOR J. I agree with the reasons appearing in the judgment of the Chief Justice and have nothing to add.

Order nisi for writ of prohibition discharged with costs.

Solicitors for the prosecutors, *Malleson, Stewart & Co.*, Melbourne, by *Allen, Allen & Hemsley.*

Solicitors for the respondent Federated Clerks' Union of Australia, *Boyland, McClelland & Co.*

J. B.