[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

KELLY AND OTHERS;

Ex parte AUSTRALIAN RAILWAYS UNION.

THE QUEEN

AGAINST

KIRBY AND OTHERS;

Ex parte AUSTRALASIAN SOCIETY OF ENGINEERS.

Ex parte AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Ex parte MUNICIPAL OFFICERS' ASSOCIATION OF AUSTRALIA.

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SYDNEY, *Dec.* 1, 2, 17.

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

Industrial Law (Cth.)—Industrial arbitration—Court of Conciliation and Arbitration—Decision—Awards—Basic wage—Quarterly adjustment—Suspension—Variation of awards—Power of court—Industrial dispute—Existence—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*), (*xxxix.*)—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 34, 38, 48 (1), (2), 49—*Acts Interpretation Act* 1901-1950 (*No.* 2 *of* 1901—*No.* 80 *of* 1950), *s.* 15A.

Section 49 of the *Conciliation and Arbitration Act* 1904-1952 read in conjunction with s. 34, authorizes the Court of Conciliation and Arbitration of its own motion and without the consent of the parties to an award to vary its terms. It is incidental to the settlement of disputes by conciliation and arbitration that the court should be empowered to maintain a settlement so made in an expedient and satisfactory form adjusted to changed conditions.

Reg. v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (1953) 88 C.L.R. 125, discussed and explained.

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PROHIBITION.

In each of the abovementioned matters the prosecutor therein was granted by *Dixon* C.J. an order nisi for a writ of prohibition directed to the Judges of the Court of Conciliation and Arbitration restraining them from proceeding upon orders made by that court varying the relevant award (i) in the first matter mentioned above and in which the Australian Railways Union was the prosecutor, by inserting a new clause, 6A, in the Railways Metal Trades Grades Award 1953 directing that notwithstanding anything to the contrary contained in the award, an adult male employee (other than an apprentice) should be paid at a prescribed rate as a basic wage (non-adjustable), and (ii) in each of the other three matters, by, in effect, deleting therefrom the provisions providing for the periodic adjustment of the " basic wages " for adult males and adult females on price index numbers and thus giving effect to a decision of the Full Court of the Court of Conciliation and Arbitration made on 12th September 1953.

The grounds on which the writs of prohibition were sought being similar the applications were, on the return of the orders nisi, heard together.

Further facts appear in the judgment of *Dixon* C.J. hereunder.

R. M. Eggleston Q.C. (with him *D. Corson*), for the prosecutors. The court below claimed jurisdiction not for the purpose of resolving any matter then in difference between the parties, but jurisdiction based on there having been a past difference between the parties, to make an order with the object of avoiding industrial unrest in other industries in which the court had recently made an award on the application of the parties. Accordingly, the jurisdiction which the court exercised—the ground upon which the court exercised its jurisdiction—are material, not as being in themselves matters for prohibition, but as illustrating the kind of jurisdiction which the court purported to exercise in the case. If anything turns on the question of whether or not there was a dispute in fact still subsisting, it is clear that the court did not give the prosecutors any opportunity of calling evidence or investigating the position as to whether or not the parties were agreed. The court below concluded that the matter was settled for it by what it supposed to be a decision of this Court in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) to the effect that a dispute once settled by an award continues to exist as a basis for the making of further orders within its ambit, even

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

though it may be proved, in fact, that the parties have come to an agreement and do not desire the court's intervention. The process to which the parties were subjected in this series of cases was neither arbitration nor conciliation. To force on two unwilling parties who are in agreement as to what their relationship should be is not a process of conciliation and arbitration. The court proceeded on the basis that the agreement of the parties was irrelevant, and that even though the parties to an industrial dispute had settled their dispute by agreement and had no outstanding difference between them, the court, if it has previously made an award, but not otherwise, can alter the provisions of that award. Such a power would be a power independent of the present existence of any dispute. The kind of power which the court had in mind was a power to vary awards for the purpose of promoting goodwill in industry. There cannot be any logical basis upon which the court can ignore the agreement of the parties; ignore the fact that from the point of view of conciliating and arbitrating there was nothing left to do and yet nevertheless have regard to the ambit of the original dispute which is only relevant if the exercise of power can only be justified on the basis of settling a dispute in accordance with the constitutional power. The basis upon which the court below proceeded was a mixture of those two ideas, namely, that so long as an award is in existence the original dispute may continue to be settled by the variation, and that it is within Commonwealth power to authorize the court to vary awards for the purpose of promoting goodwill in industry, that is to say, for the purpose of securing uniformity in the court's awards whether or not the parties desired the variation. It is clearly established by *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (1) that the mere fact that the court, or a conciliation commissioner, has commenced to deal with a dispute, has heard the parties and taken hold of the dispute, does not give the court, or conciliation commissioner, jurisdiction to make an award if the dispute comes to an end before the award is made. The court in that case said that the regulation referred to in this case which requires that leave should be given before a withdrawal of an application, cannot enable the court to exercise a jurisdiction which it cannot exercise constitutionally. If the dispute has ceased to exist before an award is made, an award cannot be made. The power to vary awards must rest on the jurisdiction to settle disputes. If the foregoing be not so then the power to vary must be considered as an unlimited power exercisable whenever the court thinks it proper to do so.

(1) (1953) 88 C.L.R. 125.

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Either s. 49 of the *Conciliation and Arbitration Act* 1904-1952 must be read as containing a limitation that the exercise of the power must be relevant to the purposes for which the power was conferred, or it means that in exercising its power of variation the court is at large and is not limited at all by any relationship to the industrial dispute which is to be settled, or further settled. Terminating an award once made is proper if Parliament decides to abandon the system of arbitration, or if for some reason relevant to the exercise of its proper functions the Arbitration Court decides to terminate an award, but not proper if it decides to terminate an award as a means of achieving some ulterior object. The power to vary must be limited in such a way that it cannot be exercised in a case where the parties have no industrial dispute as to the subject matter of the variation, and are, indeed, in agreement co-operating in urging the court to leave them alone. It is not merely a question of eliminating a provision for adjustment. The parties' desire was that the wage should go up or down. The question is whether, having once got an award, the parties subject themselves to whatever variations the Arbitration Court thinks proper to impose for reasons unconnected with the existence of any difference or disagreement between the parties. The answer to that question must be that the Arbitration Court cannot validly have conferred upon it such a power. The court below considered that *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (1) was consistent with the existence of a dispute on the same subject, that the dispute was not settled by an award but continued to exist.

[DIXON C.J. referred to the *Waterside Workers' Case* (2).]

Powers J. in the *Waterside Workers' Case* (3), in effect, said no more than that if an award is merely carried on until the Arbitration Court thinks differently, that is all right, that is incidental. If it be carried on for a period although that court thinks differently that was direct legislation and that was what made s. 28 (2) invalid in his opinion. Subsequently to the *Waterside Workers' Case* (4) it was made clear that an award made in settlement of a new dispute could be dated back to the time when the new dispute arose. The *Waterside Workers' Case* (4) was no warrant for any proposition that the original dispute continued in force despite its settlement. To say that even if the misinterpretation of the judgments in that case by the court below had been correct the making of an award

(1) (1952) 85 C.L.R. 601, at p. 629.
(2) (1920) 28 C.L.R., at pp. 212, 248, 257.
(3) (1920) 28 C.L.R., at pp. 250, 251.
(4) (1920) 28 C.L.R. 209.

is consistent with the continuance of a new dispute was not to say as a matter of law the old dispute must be assumed to have continued and to provide a disagreement which is the basis of the variation of the award. It is one thing to say that despite the settlement which the Arbitration Court makes by its award, the parties can be treated as capable of being still in difference and therefore the court may be treated as not having exhausted its powers of settlement by making an award. It is another thing to say that as a matter of law the making of an award requires it to be held, irrespective of the facts, that the parties are still in difference, and requires it to be held that the court has power to make a variation whether or not the parties ask for it. The power to vary can only be based, if it is to be kept within constitutional power on a power to reopen the settlement for the purpose of making a better settlement of some difference between the parties, or a different settlement, but must be based on the existence, at the time when the variation is made, of a difference between the parties to which that variation is relevant. That was, under the former form of the section, the view which was taken as to the power of variation (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1)). If the parties are not at the moment in difference about that matter, then one cannot justify a variation of an award in order to give effect to some objective which the court considers desirable but which has nothing to do with any matter in difference between the parties at that moment. Observations about this were made in *Australian Tramway Employees Association* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (2). Since the passing of the amending Act of 1947 the Court considered in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres* (*Aust.*) *Ltd.* (3), matters of whether an application made to the Court was directed to the prevention or settlement of some particular industrial dispute. The limitation that the variation must be a variation within the ambit of the original dispute was introduced because of the Court's view that such a limitation must necessarily be implied into the power to vary, otherwise the power conferred would be beyond constitutional limits. The decisions of the Court referred to above to the effect that a power of variation must be confined within the same limits as the power to make awards are decisions that the Commonwealth Parliament cannot lawfully

(1) (1931) 45 C.L.R. 409, at pp. 421, 423.

(2) (1935) 53 C.L.R. 90, at pp. 103, 104.

(3) (1949) 78 C.L.R. 389, at p. 401.

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confer on the Commonwealth Arbitration Court power to vary awards otherwise than as orders made which are relevant and appropriate for the settlement of an existing dispute between the particular parties who are bound by the order. Support is lent to that view by the decision of the Court in *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (1) and its reaffirmation in *R.* v. *Kelly*; *Ex parte Victoria* (2); see also *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3).

[DIXON C.J. referred to *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (4).]

The decision in that case is a decision that to impose on parties who are unwilling to have the common rule imposed on them and who are not in fact in dispute, a rule which is imposed because of the difficulties that will arise if there be not the same rule in their case as is imposed in other cases in which there is a dispute, is not incidental to arbitration. The proposition now put forward by the court below is because there would otherwise be inconsistency between the rule which the parties want and are content to accept, and the rule which that court says shall be the correct rule as between other parties unconnected with those parties who have a dispute which the court has settled, and because such inconsistency is undesirable and because goodwill in industry will not be promoted if there are inconsistent rules of this kind, the court proposes to impose on those parties who are not in dispute a rule similar to that which was being imposed on the other parties. That proposition was advanced in *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (5) and rejected and its rejection was reaffirmed in *R.* v. *Kelly*; *Ex parte Victoria* (6). The power that the court below claimed to exercise was not one which could be validly conferred on the court. The decision in *R.* v. *Kelly*; *Ex parte Victoria* (2) indicates that the basis upon which the incidental power was rejected as a means of supporting an award made to bind persons who were not in dispute—award meaning a rule governing their industrial relations by whatever name called—on the ground that it would in some way be conducive to the prevention or settlement of disputes between other persons and therefore incidental to the exercise of the arbitration power. The reasons given by the court below for refusing to allow the withdrawal of the subject application relating to railway employees show that the court was endeavouring to make its decision in

(1) (1910) 11 C.L.R. 311.
(2) (1950) 81 C.L.R. 64.
(3) (1910) 11 C.L.R. 1, at pp. 36, 37.
(4) (1910) 11 C.L.R., at p. 315.
(5) (1910) 11 C.L.R., at pp. 317, 323, 324, 327-329, 340-342, 345, 346.
(6) (1950) 81 C.L.R., at pp. 79, 80, 82.

the *Basic Wage and Standard Hours Case* (1), suspending the quarterly adjustment provision, in effect, a common rule of all Federal awards.

S. G. Webb Q.C. and *E. H. St. John*, appeared for their Honours the personal respondents, and having submitted to any order the Court might think fit to make, were, upon application therefor, relieved from the necessity of further attendance.

Dr. *E. G. Coppel* Q.C. (with him *C. I. Menhennitt*), on behalf of the Attorney-General of the Commonwealth of Australia, intervening by leave. The Attorney-General's argument rests entirely upon the proposition that the power to set aside or vary an award is one which finds its constitutional justification in a combination of pars. (xxxv.) and (xxxix.) of s. 51 of the Constitution. The power to set aside an award, contained in s. 49 of the Act, cannot depend for its existence upon proof that the parties are in disagreement; it derives its constitutional validity from the fact that it is incidental to the main power of settling disputes by conciliation and arbitration. The power to vary an award is of the same nature. A variation made while the award is current under s. 48 (1) of the *Conciliation and Arbitration Act* 1904-1952, does not settle a new dispute; it relates to the dispute which was the subject of the award. It was held in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (2) that the court had no jurisdiction during the period specified that an award was to continue to deal with a new dispute within the ambit of the dispute which the award settled. The power to vary is not a power to arbitrate but is a power incidental to the power to carry on the settlement under which the award was made (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (3); *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (4); *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (5)). In the Act as amended the power to vary in s. 49 is the only power in the Act and it has taken up whatever there was in ss. 28 (3) and 38 (*o*) of the Act prior to the amendment. Although now not so important as formerly an indication of how this Court has throughout treated the power to vary is shown in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victorian Railways Commissioners* (6);

(1) (1950) 68 C.A.R. 698.
(2) (1919) 27 C.L.R. 72, at pp. 80, 83.
(3) (1920) 28 C.L.R., at pp. 223, 229, 256.
(4) (1952) 85 C.L.R., at pp. 628, 629.
(5) (1931) 45 C.L.R. 409, at pp. 422, 439-440, 443.
(6) (1935) 53 C.L.R. 113, at pp. 139, 140.

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Australian Tramway & Motor Omnibus Employees Association v. *Commissioner for Road Transport & Tramways (N.S.W.)* (1), and *R.* v. *Blakeley*; *Ex parte Australian Theatrical & Amusement Employees Association* (2). The power to set aside an award does not plainly require that the parties must be in disagreement before that power can be validly exercised; it is an incident of the general subject matter though when it is being exercised it may not itself be part of the act of conciliating or arbitrating, but it is still within the subject matter as an incident of it. The power to vary which was formerly contained in s. 28 (3) of the *Conciliation and Arbitration Act* was held in the cases referred to above to be an incidental power in the strict sense, that is, because it did depend on s. 51 (xxxix.) of the Constitution. The power to vary which was formerly contained in s. 38 (*o*) of the *Conciliation and Arbitration Act*, which was held to depend upon and to be limited by the ambit of the dispute which the award had settled, must be regarded as an incident of the subject matter of conciliation and arbitration. It follows therefore that s. 49 of the Act as amended will be valid if it can fairly be said to be incidental to the arbitration power in either of the two senses referred to above. This power for variation may be used for two types of reason: one is to correct an error, in that it does not express what the arbitral tribunal wanted it to do and it was found it was not working in the way it was intended to work. The question whether or not the parties were again in disagreement would be quite irrelevant. The court would simply be varying an order to give effect to what it intended to say in the first place. The other use of it is because this was a settlement operating, it may be, for a period of some years to insure that the conditions prescribed corresponded to what the changing circumstances of the time might seem to the arbitrator to require which, of course, was a rather different use. There is nothing in the nature of s. 51 (xxxv.) of the Constitution which requires it to be said that the arbitral tribunal, having settled the dispute, must remain content with that settlement for so long as the award is current. The cases cited support the view that the power to vary is treated during the currency of the award as an incident of the very process of settling the dispute itself. In the opening words of the former s. 38 there was an express statement which itself confined the power to vary obviously within constitutional power; and it may well be that s. 49 should be read down and resort may have to be made to s. 15A of the *Acts Interpretation Act* 1901-1950, and in that way

(1) (1935) 54 C.L.R. 470, at pp. 491, 494, 501.

(2) (1949) 80 C.L.R. 82, at p. 102.

confine the power to vary, as it always has been confined by judicial decisions, to the ambit of the dispute settled by the award. In working out the doctrine that the power to vary is limited by the ambit of the dispute the court has reached the position that once an award is made the ambit of the dispute is fixed. The ambit is defined and it cannot be altered by anybody, neither by the court nor by the parties. The ambit cannot be widened, and it cannot be narrowed either, once an award has been made, and this is so accepting to the full the decision in *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (1) where this Court held that a conciliation commissioner had no power to make an award once the claimant organization had withdrawn the whole of its claims, there not being any counter log. It follows from the foregoing that constitutionally Parliament could give the arbitrator power to vary at any time and for any reason, provided that the ambit of the dispute is not exceeded. Provided that s. 49 is read down so that the power cannot be exercised beyond the ambit of the dispute it is constitutionally valid. The word "reason" in s. 49 does not mean "motive"; motive is utterly irrelevant. Nor does "reason" mean purpose. The words "for any reason" in that section do not enlarge the scope of the power. One could never by prerogative writ or any other process, set aside an award made in a dispute and, within the ambit of that dispute, merely by saying that the tribunal which made it was also desirous that a certain economic position should be achieved; it does not matter in the slightest whether they did or did not. The power to vary being an incident of the power to settle any purposive connection that may be constitutionally required is found there. [He referred to *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (2) and *Walsh* v. *Sainsbury* (3).] When the court is considering the making of an award, within the ambit of a dispute, it makes whatever provision it thinks is proper and the parties are compelled to abide by that settlement once the award is made (*Federated Millers & Mill Employees' Association of Australasia* v. *Butcher* (4)). There is a sharp distinction between what happens in the course of what leads up to the settlement with the award and what can possibly happen thereafter. The fact that uniformity is being sought by the Arbitration Court between these particular awards and other awards means no more than that the same general economic changes have convinced the

(1) (1953) 88 C.L.R. 125.
(2) (1925) 35 C.L.R. 449, esp. at p. 458.
(3) (1925) 36 C.L.R. 464, at p. 470.
(4) (1932) 47 C.L.R. 246, at p. 254.

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Arbitration Court that in each one of a large number of awards a similar variation has become appropriate. To regard that as in some way a misuse of power is quite wrong. Similarly, the fact that the court regards the present as an appropriate time to make that variation in a large number of awards, or it may be in all awards unless some special reason is shown to the contrary, does not mean that the court is endeavouring to impose a common rule. The questions of common rule have nothing to do with the matter.

R. M. Eggleston Q.C., in reply.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

DIXON C.J. These are four orders nisi for writs of prohibition directed to judges of the Court of Conciliation and Arbitration. The writs sought prohibit the court from proceeding upon orders varying awards, the orders of variation being to the same effect though apparently not in the same form. The grounds on which the writs are sought are similar and the parties found it convenient to deal with the cases together.

One writ of prohibition is sought by the Australian Railways Union as prosecutor; it relates to an order varying Pt. I of the Railways Metal Trades Grades Award 1953, which affects the operation of Pt. III upon the respondent, the Commissioner for Railways, New South Wales. The second writ of prohibition is sought by the Australasian Society of Engineers as prosecutor; it relates to an order varying Pt. I of the same award, which affects the operation of Pt. II upon the respondent, the Victorian Railways Commissioners. The third writ of prohibition is sought by the Australian Theatrical and Amusement Employees' Association as prosecutor; it relates to an order varying the Theatrical Employees (Stadiums) Award and it affects the respondents New Leichardt Stadiums Pty. Ltd., Stadiums Pty. Ltd. and possibly others. The fourth writ of prohibition is sought by the Municipal Officers' Association of Australia as prosecutor; it relates to an order varying an award which affects the Transport Department of the respondent, the Brisbane City Council.

The purpose of the orders of variation was to give effect to a decision of the Full Court of the Court of Conciliation and Arbitration given on 12th September 1953 deciding that there should be no longer quarterly adjustments of the basic wage according to retail price index numbers. The orders of variation with which

these orders nisi are concerned have not been drawn up, so far as appears, and their form when drawn up may not follow the summonses on which they are based. But it is to be noticed that in each of three of the four cases the variation as framed in the summons simply deleted the provisions appearing in the award providing for the adjustment of the basic wage. In the fourth case, that of the Commissioner for Railways, New South Wales, it directed that, notwithstanding anything to the contrary contained in the award, an adult male employee should be paid at a prescribed rate as a basic wage (non-adjustable). The prosecutors maintained that in the circumstances that existed the Court of Conciliation and Arbitration had no jurisdiction to make the orders of variation in question.

The circumstances relied upon are not precisely the same in the four cases, and it is necessary to state briefly the facts material to the prosecutors' contention in respect of each case separately.

It appears that the Commissioner of Railways of New South Wales was not an applicant before the Full Court of the Court of Conciliation and Arbitration in the proceedings which resulted in the decision of 12th September 1953. The commissioner, however, after that decision did lodge an application for a variation of the Railways Metal Trades Award 1953 to give effect to the decision. The specified period for the operation of this award is three years from 12th April 1953. When the application was called on the commissioner asked leave to withdraw it. The court was informed that the commissioner sought to withdraw his application on the instructions of the Government of New South Wales. The court refused leave to withdraw the application. Counsel for the prosecutor then submitted that there was no difference or disagreement between the parties concerning it or any matter before the court and there was therefore no jurisdiction to make the order, citing *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (1). Similar arguments had been advanced to the Arbitration Court in other cases, which, however, are not the subject of the present orders nisi. The arguments had been overruled.

In the case of the Victorian Railways Commissioners the officer of the Australasian Society of Engineers who appeared as its advocate stated that there was no dispute between the employers and the union; from conversations with the officers of the commissioners he was aware that the employers proposed to continue the adjustments of the basic wage. He relied upon the same grounds

(1) (1953) 88 C.L.R. 125.

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for the contention that in these circumstances the court had no jurisdiction to vary the award.

In the case of the Australian Theatrical and Amusement Employees' Association, as in the case of the Victorian Railways Commissioners, the court acted of its own motion.

With many other cases these cases were placed in a list. The Industrial Registrar gave notice to the parties of the day on which they would be considered. Counsel in other cases had submitted that the Arbitration Court had no power to make the variations and that there was no dispute between the parties. In the case of the Theatrical and Amusement Employees' Association the employers did not appear and they made no application. The argument for the now prosecutors was that no disagreement or dispute existed or appeared to exist, and that there was no foundation for the intervention of the Arbitration Court. It was further submitted that if the court had before it any materials or information other than that already appearing on which the asserted jurisdiction was based or on which the exercise of such jurisdiction proceeded the prosecutor was entitled to be informed. The Theatrical Employees (Stadiums) Award was in operation by virtue of s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1952, its specified period having expired on 1st February 1953.

In the case of the Municipal Officers' Association of Australia both the Brisbane City Council and the union opposed the making of the variation. For the Brisbane City Council it was said that to make the variation would produce an anomaly in the service of the council because the greater number of employees were governed by State awards containing provisions for cost of living adjustment. The award as varied was in operation by virtue of s. 48 (2) of the Act, its specified period having expired on 30th March 1951.

In all four cases the ultimate reason for the prosecutors' denial of the jurisdiction of the Court of Conciliation and Arbitration is that no industrial dispute existed at the relevant time for the settlement of which the order of variation was or could be made. But the argument in support of the orders nisi was presented in a number of forms and by a number of steps. It was assumed that each of the original awards had been made in settlement of a two-State industrial dispute over which the court had jurisdiction. It was assumed also that the provision in the award which would result from the order of variation, if it had formed an original part of the award, might have been within the ambit of the original dispute. But it was denied that it was any longer within any existing area of difference between the parties. For the parties

were either in express accord that an adjustment of the minimum wage in accordance with index numbers should form part of the regulation of their industrial relation or at all events they were tacitly in accord and certainly not in difference on the matter. Further, so it was argued, the Court of Conciliation and Arbitration was limited, in making variations of an award, to the constitutional purpose of arbitrating for the preventing and settlement of industrial disputes. The absence of any difference or dispute upon the question of basic wage adjustment made it impossible to justify the proposed variation as one made for a constitutional purpose. Then it was urged that when s. 49 of the Act authorized the court to vary the terms of an award if for any reason it considered it desirable to do so, the words " for any reason " contained in the section could not be literally construed. Upon a literal construction they would enable the court to go outside the constitutional purpose. The words " for any reason " must be restrained by construction to the purpose of preventing or settling industrial disputes. The fact was, said the prosecutors, that the Court of Conciliation and Arbitration had introduced the variation complained of not for the purpose of preventing or settling any industrial dispute between the parties to the award, but entirely for reasons of policy of an economic and not of an industrial character. Further, the positive agreement of the parties in all, or at all events in some, of the four cases withdrew the subject from the area of dispute as it might have existed before the original awards were made. On the authority of *Reg.* v. *Blackburn* (1), it was therefore maintained that however wide the area of the original dispute might have been upon this particular matter, this area had been so reduced that an order for variation was no longer competent.

In my opinion it was within the power conferred upon the Arbitration Court by s. 49 of the Act to make the four orders of variation of which the prosecutors complain and there is no ground for a writ of prohibition.

It is too late to deny that the legislative power derived from s. 51 (xxxv.) of the Constitution does not extend far enough to enable the legislature to give to the Arbitration Court a power of varying an award within the limits of the original industrial dispute, and that is so whether the variation is made during the period specified in the award for its operation or during the period thereafter whilst it remains in operation by virtue of s. 48 (2). The award is in operation as a settlement or determination of the dispute and, within the limits arising from the subject matter and

(1) (1953) 88 C.L.R. 125.

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the boundaries of the dispute, the court may revise or review the settlement it has made. Section 49 of the Act, which confers the power to set aside any terms of an award and the power to vary it, does not distinguish between the specified period of the operation of an award and the period when it is continued in operation until a new award is made. There is nothing to necessitate such a distinction. But the reason for reviewing or revising the terms of an award may be found in changing circumstances as well as in a reconsideration of the wisdom or expediency of the provision independently of any change brought by time and the longer an award is kept in force, the greater is the likelihood of circumstances changing so as to make a variation necessary or expedient. That the provision is valid which continues the operation of an award after the expiry of its fixed term is of course well established. From that conclusion it follows almost as a corollary that the Arbitration Court may be empowered to vary the terms of the award in order to give it a reasonable application to altered conditions. It must be incidental to the prevention and settlement of industrial disputes by arbitration to empower the arbitral tribunal to vary any of its awards so long as it is in operation, not only to correct or improve upon the provisions it contains independently of change of circumstances, but also to meet altered conditions. It is true that the power must be exercised in respect of the subject constitutionally described as conciliation and arbitration for the prevention and settlement of industrial disputes. But that subject includes all that is incidental thereto, and to maintain a settlement made by award of an industrial dispute in an expedient and satisfactory form adjusted to changed conditions must be incidental to the subject. Variations cannot go beyond what is appropriate to the general purpose of the settlement of the industrial dispute and continuing the settlement in force. That means that the limits set by the scope and nature of the original dispute cannot be transcended. In the original settlement of an industrial dispute, so long as those limits are observed, the arbitral tribunal is at liberty, in deciding what kind of award it will make for the purpose of determining the dispute, to take into account the social and economic effects that may be produced. While an arbitral tribunal deriving its authority under an exercise of the legislative power given by s. 51 (xxxv.) must confine itself to conciliation and arbitration for the settlement of industrial disputes including what is incidental thereto and cannot have in its hands the general control or direction of industrial social or economic policies, it would be absurd to suppose that it was to proceed blindly in its work of

industrial arbitration and ignore the industrial social and economic consequences of what it was invited to do or of what, subject to the power of variation, it had actually done. This is equally true of the exercise of the power of variation itself, and it is true whether the exercise of that power is addressed to bettering a provision of the award independently of changes in circumstance or to adjusting the settlement made to changes of circumstance.

The argument that in the present cases the Arbitration Court has not directed the exercise of its power to vary the settlement of an industrial dispute or disputes but to general economic policy seems to me to disregard, or at all events to give an inadequate application to, these considerations. The variations made are *ex hypothesi* within the ambit of the original disputes settled by the awards now varied and the variations themselves are of a description which the Arbitration Court might lawfully consider to be calculated to adjust the settlement made by the award to existing conditions or in the case of more recent awards to bring it into accord with what that court might now regard in the light of experience as having been a more expedient settlement in the first instance. To say that the Arbitration Court has in effect made a common rule and that constitutionally no power can be conferred upon it to make a common rule is to confuse the conception of a common rule, a thing of a legislative nature, with the consistent application of a principle of decision to a number of cases *inter partes* considered all to fall within the application of the principle. No doubt the adjustment clauses which stood in these very awards were of a pattern uniform with those found in countless other awards. But because the Arbitration Court adopted on this matter a provision in common form for wage adjustment and inserted it in the greater number of the awards delivered, it did not make a common rule. And now by uniformly departing from the provision, it makes no common rule. In both cases it proceeded from dispute to dispute. In neither case were the formulation of a principle and its consistent application to the cases falling within it incompatible with the lawful use of the authority to arbitrate for the prevention and settlement of industrial disputes, including in that authority the maintenance of the settlement over a period of time in a shape considered appropriate to changed circumstances.

The attack made upon the expression in s. 49 " if for any reason it (the Arbitration Court) . . . considers it desirable to do so " is based on the literal meaning of those words. Literally they are capable of an operation which would allow of the use of the power

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for purposes or motives that would go beyond the subject matter of s. 51 (xxxv.) and what is incidental thereto. But it is not in accordance with principle to construe such general words as meaning to go outside legislative power and indeed s. 15A of the *Acts Interpretation Act* 1901-1950 does not permit it. The words " any reason " must be understood as meaning any reason which is relevant to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State and what is incidental thereto. What the Arbitration Court has done does not, in the view already expressed, go beyond the limits imposed by this interpretation of s. 49.

But the question remains whether the foundation of the Arbitration Court's jurisdiction to exclude the provisions for adjusting the basic wage was destroyed by the fact that the parties to the industrial dispute, or those of them affected by the particular variations which it is sought to prohibit, were in accord on that matter and not in dispute about it. I do not think that the decision of this Court in *Reg.* v. *Blackburn* (1), has any application once an award is made settling a dispute. The jurisdiction of the court has then been exercised and the award operates because at the point of time it was made an industrial dispute existed extending beyond the limits of one State and because the award was relevant or appropriate to the settlement of that dispute. I cannot see how the validity of that award so made can be affected by the parties afterwards ceasing to dispute about its subject matter. But that perhaps is not the precise question here. What took place here is the preservation or the reaching of an accord between the parties as to the retention of a term included in the original award made in settlement of the dispute. That I think clearly is not touched by the decision in *Reg.* v. *Blackburn* (1). But does it disable the court from making a variation because to do so would be in opposition to the common desire of the parties? It is perhaps wise to limit the answer to the particular case. For in questions concerning the artificial conceptions which have promoted the growth of the jurisdiction of the Arbitration Court strange and unexpected combinations of fact are apt to present themselves. The particular cases before us possess certain features that should be noted. In the first place in none of them do the parties by any means desire that the award as a whole shall go and be replaced by their agreement. In the next place, the original claims or demands in reference to wages are not withdrawn, still less are all the demands in the

(1) (1953) 88 C.L.R. 125.

log. In the third place, what the parties are in accord about is the retention in the award itself of the clause relating to wage adjustment, the award which is the instrument of the Arbitration Court resting for its force upon its authority. It appears to me that these considerations in themselves cannot exclude the court's powers over the terms of its own instrument. But the central point of the objection made by the prosecutors on this score is that their accord on the subject of retaining the wage adjustment provision shows that the Arbitration Court, in excluding wage adjustment, cannot have been exercising its power in order to arbitrate, in order to conciliate, or in order to prevent or settle an industrial dispute. For there was complete concord on the very question so far as the parties went. This may seem a striking point, but if so it is only because it leads the mind away from the consideration upon which the use of the power to vary made by the Arbitration Court depends. That consideration is that it is part of the function committed to the Arbitration Court to adjust a subsisting settlement of an old dispute maintained in operation by s. 48 (1) or (2) of the Act to changing circumstances and to do so for the purpose of continuing the settlement in force in a form it considers appropriate, not simply because it contents the parties, but because taking into account economic and other consequences, it is, whilst within the ambit of the old dispute, the form of settlement which as things stand the court considers it may most properly continue in force.

It is because the Arbitration Court's power is of this kind that s. 34, which authorizes the court to exercise its powers of its own motion, may be applied to s. 49 without detracting from the constitutional validity of either section.

For these reasons I think that the attack on the validity of the orders of variation fails.

It is only necessary to add that as the validity of the orders does not in my view depend on any facts matters or things not openly canvassed during the hearing of the applications to vary, in addition to those placed before the Arbitration Court at the hearing which resulted in the general decision of 12th September 1953, no separate question arises from the suggestion that the Arbitration Court may have acted on materials of which the parties should have been informed. No such materials appear to have been before the Arbitration Court and nothing existed to which the parties were not fully alive that could affect the decision of the jurisdictional question.

In my opinion the orders nisi for writs of prohibition should be discharged.

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WEBB J. I would discharge the orders nisi for prohibition.

An award is the settlement of the particular inter-State industrial dispute. But in most cases the settlement includes factors of which the weight or value fluctuates, e.g., wages, of which the purchasing power rises and falls with the cost of living. So the power to vary an award is a practical necessity if the settlement is to continue to be effective. Sections 34 and 49 of the *Conciliation and Arbitration Act* 1904-1952 give the necessary power to the court and the conciliation commissioners to vary an award. These sections have the same effect as if the award itself validly contained those provisions for its variation.

As the power to vary an award is not judicial power there is no reason why the court or a conciliation commissioner should not be authorized to make any variation of an award that appears necessary to maintain its effectiveness as a settlement, and do so without an application by a party, or the consent of the parties. After all, the continued effectiveness of the settlement is as much the responsibility of the court or of the conciliation commissioner who makes the award as of the parties to the award. But before a clause providing for an adjustment of wages with changes in living costs is inserted it must be sought by a party or consented to by the parties, unless the clause confines the adjustment within the range or ambit of the original dispute, that is to say, within that range or ambit of which the limits were fixed by the original claim or claims and the rejection thereof or replies thereto. Any terms may be inserted or deleted or modified within the range or ambit of a new dispute or with the consent of the parties, as there is nothing to prevent an existing award from being altered in that way if that course is preferred to an additional award.

Then the court or a conciliation commissioner may decide that to maintain an award as an effective settlement a term or terms of the award should be deleted or varied; and it is for the court or the conciliation commissioner alone to make the decision. It might happen that the decision would be made under a misapprehension of law or fact, but that would not necessarily render the decision invalid. It was submitted by Mr. *Eggleston* for the prosecutors that the decision challenged in these proceedings was admittedly made for the sake of uniformity in awards; whereas in the proper exercise of the arbitration power each dispute should be settled on its own merits and within its own range or ambit; and that what is appropriate for the settlement of one dispute may not be appropriate for the settlement of another dispute. But as the adjustment for any award in question has not been shown to

have been beyond the range or ambit of the dispute settled by the award, this Court should not interfere.

It was pointed out by *Isaacs* and *Rich* JJ. in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (1), that an award would effect a perpetual settlement of the dispute if Parliament did not otherwise provide. But, as Dr. *Coppel* for the Commonwealth suggested, a perpetual settlement of an inter-State industrial dispute would be something fantastic. Section 48 therefore imposes a limitation, which is a limitation *sub modo*, on the duration of an award. The power of Parliament to enact s. 48 is unquestioned.

FULLAGAR J. In these cases I am in complete agreement with the judgment of the Chief Justice, and I have nothing to add.

KITTO J. In these cases I agree in the judgment of his Honour the Chief Justice and I have nothing to add.

TAYLOR J. *Reg.* v. *Kelly & Others.* In this matter the prosecutor seeks to make absolute an order nisi for the issue of a writ of prohibition addressed to the respondents prohibiting them and each of them from further proceeding upon an order made on 22nd October 1953, by the Commonwealth Court of Conciliation and Arbitration. This order purported to have the effect of inserting in the Railways Metal Trades Grades Award 1953, a new clause in the following terms :—" 6A. Notwithstanding anything to the contrary contained in this part of this Award an adult male employee (other than an Apprentice) employed by the Commissioner for Railways, New South Wales, shall be paid at the rate of 40/4d. per day as a basic wage (non-adjustable) being the amount which the Court declares to be just and reasonable without regard to any circumstance pertaining to the work upon which or the industry in which he is employed ".

An application to secure such a variation was, in the first place, instituted by a summons, dated 7th October 1953, issued on behalf of the respondent Commissioner for Railways but before the hearing thereof his representative intimated to the court that it was not desired to proceed with the application and that, in view of negotiations which had been carried on between the parties, leave was desired to withdraw it. Such leave was refused and thereafter the matter proceeded and the order referred to was made. It should be stated that the purpose of the application, as originally made,

(1) (1919) 27 C.L.R. 72, at p. 83.

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was to delete from the award in question the provision for periodical adjustment of the basic wage so as to bring the award into line with decisions of the court in relation to other awards.

The substance of the objection which is raised by the prosecutor is that the Arbitration Court, in purporting to vary the existing award in the absence of any dispute or disagreement or difference between the parties, exceeded its jurisdiction. Its functions in relation to the making of awards and of orders having the effect of varying existing awards, it was said, are essentially arbitral and, since it is of the essence of arbitral power that it is exercised to compose differences or disagreements and determine disputes between parties, those functions are not exercisable where the parties are not in dispute. There was, in the present case, no dispute between the parties as to whether the existing award should be varied. It is true that the respondent commissioner had made an application for variation but it is equally true that he desired to withdraw this application before it came on for hearing. There is no other evidence that any dispute arose concerning the existing award and, accordingly, it is claimed that at the time of the making of the order which the prosecutor attacks in these proceedings there was no dispute or disagreement between the parties concerning the subject matter of the application. It is, of course, quite clear that this was so, but for reasons to which I shall advert presently the existence of such a dispute or disagreement was not a condition precedent to the exercise of the power of the Arbitration Court to vary the existing award.

In postulating the broad proposition concerning the circumstances in which arbitral power may be exercised counsel for the prosecutor referred to the recent decision in *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union* (1). But I hasten to say that the decision in that case is no authority for the broad proposition contended for. It was recognized in that case that the measure of the power of a conciliation commissioner to make an award was to be found in the provisions of the *Conciliation and Arbitration Act* 1904-1952. Reference to the provisions of that Act—and particularly ss. 36, 37 and 38—showed quite clearly that his authority was to make awards in the determination of disputes. This being so, the existence of a dispute was said to be a condition precedent to the exercise of the award-making power. As was said in that case "the power given to Conciliation Commissioners is . . . a power to inquire into and investigate industrial disputes and failing agreement between the parties to determine them by the making of orders

(1) (1953) 88 C.L.R. 125.

or awards". In those circumstances the majority of the Court was unable to see how the power to make an award in determination of a dispute can be exercised "when no dispute has existed or at a time when a previously existing dispute has come to an end". It is, or should be, unnecessary to say that that case did not state any new principle; it is based on a proposition which is both elementary and fundamental and its application in *Blackburn's Case* (1) led inevitably to the conclusion that the conciliation commissioner had no power to make an award in the terms of that proposed by him. But neither that case nor the broad proposition advanced by the prosecutor in this case is relevant to a consideration of the power to vary an existing award. This power is conferred by s. 49 of the Act in the following terms:—"The Court may, with respect to a matter referred to in section twenty-five of this Act, and a Conciliation Commissioner may, subject to section thirteen of this Act, if for any reason it or he considers it desirable to do so—(*a*) set aside an award or any of the terms of an award; or (*b*) vary any of the terms of an award".

A perusal of the section renders immediately apparent a clear distinction between its provisions and those of s. 38. The latter section authorizes the determination of disputes by the making of orders or awards whilst the former purports to confer a power to vary existing awards. In either case the power is exercisable by the court on its own motion or on the application of any party to an industrial dispute (s. 34). But it is not in terms, a condition precedent to the exercise of the power to vary an existing award that a new dispute should have arisen or that there should be an existing disagreement or difference concerning any term of the award. If then s. 49 is valid there can be no doubt that the Arbitration Court had power to make the variation in question.

Counsel for the prosecutor, however, contended that unless s. 49 is read down in such a way as to involve the conception of some new dispute between parties as a condition precedent to the right to vary an existing award it must be taken to exceed the legislative power of Parliament. This contention, of course, is based on the general proposition to which I have already referred. I have no doubt, however, that the prosecutor's contention on this point should not be accepted. The retention by the Arbitration Court of a power to control and supervise an award made in settlement of an industrial dispute is not foreign to the conception of industrial arbitration and I see no reason to doubt the validity of a power, exercisable independently of any new dispute between the parties,

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to vary awards from time to time as circumstances may require and so make effective control and supervision by the court of its awards.

The argument of the prosecutor in my view confuses the incidence of arbitration proceedings with the dispute which invokes the jurisdiction of the Arbitration Court in the first place. Once its jurisdiction is invoked the court may formulate an award in settlement of the dispute and it is for the court to determine what terms and conditions the award shall contain. So long as those terms and conditions deal with matters within the ambit of the dispute it is of no consequence to say that neither party desired the inclusion of any particular term or condition; their agreement or disagreement on such matters have no bearing on whether the court may include them. And if this is the position when an award is originally made why should it be regarded as an excess of legislative power to invest the court with the power to vary those terms from time to time whether or not a new dispute or disagreement arises?

Consideration of the numerous authorities bearing on the extent of the power to vary an existing award discloses nothing contrary to this view. Indeed, they are consistent only with it. For many years it has been firmly established that the power to vary an existing award may, in general, be exercised only within the ambit of the dispute which originally formed the basis for the exercise of the court's power to make the award. But if the creation of some new dispute should properly be regarded as a condition precedent to the exercise of the power to vary it is difficult to see how this principle came to be established for it would be natural to look to the ambit of the new dispute to measure the extent of such power. Indeed, in cases where a new dispute has arisen the power of the court to vary an existing award will be extended if the ambit of that dispute travels outside that of the old dispute. As *Dixon* J. (as he then was) said in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1): "Sub-sec. 3 of sec. 28" (of the *Commonwealth Conciliation and Arbitration Act* 1904-1930) "empowers the Court, if it is satisfied that circumstances have arisen which affect the justice of any terms of the award, in the same or another proceeding to set aside or vary any terms so affected. No doubt the Court of Conciliation and Arbitration could have set aside the term prescribing minimum rates altogether, and, if a new dispute existed relating to the lowering of wages, it might, in a proceeding in that dispute, have acted under the sub-section by ordering a reduction below the limits of the original

(1) (1931) 45 C.L.R. 409.

dispute. But unless warranted by a new dispute, I do not think a variation of the old awards can be made under the provisions of sub-sec. 3 if the variation goes beyond the limits imposed by the old dispute upon the Court's power to make an award " (1).

But, as that passage indicates, the power to vary is exercisable whether a new dispute has arisen or not and *Evatt* J. adverted to this circumstance in the same case. He said :—" The authority conferred by sec. 28 (3) may be exercised before or after the determination of the period specified in the award ; but the exercise of the power is treated as distinct from the making of a new award in settlement of a new dispute. As a matter of construction, therefore, it is reasonably clear that the object of sec. 28 (3) is to enable the Court of Arbitration to exercise the power to set aside or vary, only in relation to the industrial dispute, which is and may be called ' old ' in that it is regarded as being ' settled ' by the award, but which is treated as still surviving, because such settlement may be revised and its terms altered. The power in sec. 28 (3) may be exercised in such manner as the Court of Arbitration thinks fit—notwithstanding anything contained in the Act, and the Court proceeding may, but need not be, the same as that in which the award was originally made. But the jurisdiction is still referable to the dispute in settlement of which the Court made its old award " (2).

Again, in *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Victorian Railways Commissioners* (3), *Dixon* J. (as he then was), speaking of the power to vary existing awards conferred by s. 28 of the Act as it stood at that time, said : " In the absence of a new dispute, its " (the Court's) " power is confined to sec. 28, which means sec. 28 (3) so far as concerns the declaration of new industrial terms. This power enables it only so to alter and modify the existing award as to make its application just and fair pending the making of an entirely new award in a new dispute. It does not enable it to proceed to make *de novo* a fresh regulation of industrial relations. The award is kept alive under sec. 28 (2), not by force of an arbitral decision, but by direct legislative enactment which operates notwithstanding that by arbitral decision a period of duration has been fixed for the award and that that period has expired. The authority to do this has been considered to belong to the Legislature because to hold an existing industrial regulation in force during the interval between arbitral decisions made in the settlement of disputes

(1) (1931) 45 C.L.R., at pp. 428, 429.
(2) (1931) 45 C.L.R., at p. 440.
(3) (1935) 53 C.L.R. 113.

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appeared to be fairly incidental to the subject matter of s. 51 (xxxv.). To empower the Court of Conciliation and Arbitration to make alterations in the terms of the award so kept alive seems a further incident of the power, because, if it is right to retain in force by direct enactment an expired award, it is a reasonable consequence that, in case of unfairness or hardship, the Court should be allowed to exclude or modify the operation of the terms or conditions found inappropriate" (1).

It is true that *Dixon* J. was speaking of the power of the court to vary the provisions of an award continued in force by virtue of s. 28 (2) after the expiration of the period specified in the award but his observations apply, at least with equal force, in considering the nature of the court's power to vary current awards. Indeed, if it be permissible under the legislative power to provide for the statutory continuance in force of awards after the point of time where otherwise they would have expired and to invest the court with the power to vary awards so continued, it is obviously within legislative power to invest the court with the power to vary awards as occasion requires during their normal currency. It has never been doubted that this power is not dependent for its exercise upon the creation of some new dispute, nor should that view now be entertained. Abundant authority might be cited, if it were necessary, to establish that the existence of a new dispute or disagreement has never been regarded as a condition precedent to the exercise of the court's power to vary an existing award; the ground upon which this view rests indicates that the creation of such a power is within legislative authority and it is now much too late to assert otherwise.

This being so, no additional objection can be based on the circumstance that the power is exercisable by the court on its own motion.

The further contention was raised that the power to vary is conferred in terms which are far too wide. The provisions of s. 49, conferring as they do a power to vary the terms of an award "if for any reason" the court "considers it desirable to do so", is said, literally, to authorize the power to be exercised upon considerations or for reasons extraneous to the relevant legislative head of power. I doubt if, upon its true construction, this is so, but even if it were that conclusion would not assist the prosecutor. The validity of the section would be preserved by a process of reading down and the order which is attacked would still be within the statutory power.

(1) (1935) 53 C.L.R., at p. 141.

For the reasons given I am of the opinion that the order nisi should be discharged.

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The questions raised in these applications are in all respects similar to the questions raised for consideration in the previous case, but the facts disclose that at no time in any of these matters was any application made to the Arbitration Court by any party for a variation of an existing award. For the reasons already given, however, this is not a material circumstance ; the Arbitration Court was entitled of its own motion to make the orders complained of and the orders nisi should therefore be discharged.

In each case order nisi discharged.

Solicitors for the prosecutors, *Maurice Blackburn & Co.*, Melbourne.

Solicitor for the respondents and the intervenant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.