[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN BOOT TRADE EMPLOYEES' FEDERATION AND ANOTHER } PLAINTIFFS ;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS - - - - - } DEFENDANTS.

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1953.

MELBOURNE, *Sept.* 22, 23, 28, 29 ;

1954.

SYDNEY, *April* 7.

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

High Court—Practice—Declaration of right—Discretion of court—High Court Rules (*S.R.* 1952 *No.* 23), *O.* 26, *r.* 19.

Constitutional Law (*Cth.*)—*Industrial arbitration—Prohibition of certain actions by officers, etc., of industrial organizations—Advice to members during currency of award—Validity—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*)—*Conciliation and Arbitration Act* 1904-1951 (*No.* 13 *of* 1904—*No.* 58 *of* 1951), *s.* 78.

Section 78 of the *Conciliation and Arbitration Act* 1904-1951 provides as follows—"(1) An officer, servant or agent, or a member of a committee, of an organization or branch of an organization shall not, during the currency of an award—(*a*) advise, encourage or incite a member of an organization which is bound by the award to refrain from, or prevent or hinder such a member from—(i) entering into a written agreement ; (ii) accepting employment ; or (iii) offering for work, or working, in accordance with the award or with an employer who is bound by the award ; (*b*) advise, encourage or incite such a member to make default in compliance with the award ; (*c*) prevent or hinder such a member from complying with the award ; (*d*) advise, encourage or incite such a member to retard, obstruct or limit the progress of work to which the award applies by 'go slow' methods ; or (*e*) advise, encourage or incite such a member—(i) to perform work to which the award applies in a manner different from that customarily applicable to that work ; or (ii) to adopt a practice in relation to that work, where the result would be a limitation or restriction of output or production or a tendency to limit or restrict output or production. (2) The last preceding sub-section extends to advice, encouragement, incitement, prevention or hindrance in relation to employment or work with or for a particular employer or of a particular kind. (3) In a prosecution for a contravention of this section it is a defence to prove that there were reasonable grounds for the conduct charged, being grounds—(*a*) unrelated to

the terms and conditions of employment prescribed by the award; or (*b*) arising out of a failure or proposed failure by an employer to observe the award. (4) Notwithstanding the provisions of section one hundred and nineteen of this Act, a person who has committed an offence against this section shall not be charged before the Court. (5) In this section 'award' includes an order or award prescribing, directly or indirectly, terms and conditions of employment and made by the Court under any provision of the *Stevedoring Industry Act* 1949 (including section thirty-four of that Act) or made in pursuance of a law of the Commonwealth other than this Act by a prescribed tribunal empowered by that law to exercise functions or powers of conciliation or arbitration, and also includes provisions in force by virtue of any such order or award. Penalty: One hundred pounds."

An organization of employees and a branch secretary thereof brought an action against the Commonwealth and certain individuals claiming a declaration that s. 78 was invalid as being beyond the powers of the Commonwealth Parliament and an injunction restraining the defendants from enforcing its provisions in relation to any officer, servant or agent or member of a committee of the plaintiff organization or any branch thereof. No prosecution under the section was pending or threatened. The defendants did not challenge the *locus standi* of the plaintiffs or deny that they and each of them had a sufficient interest to maintain the action.

Held, by *Webb*, *Kitto* and *Taylor* JJ. (*Dixon* C.J. and *Fullagar* J. contra), that the case was not a proper one for the exercise of the Court's discretion to make a declaratory order.

Held, by *Dixon* C.J. and *Fullagar* J. (*Webb*, *Kitto* and *Taylor* JJ. expressing no opinion), that, subject to the reservation of the question of the validity of so much of s. 78 (1) as depends upon the words "agent" or "servant" and the question of the validity of so much of s. 78 (1) (*a*) as depends upon the words "or with an employer who is bound by the award", s. 78 is valid.

CASE STATED by *Fullagar* J.

The Australian Boot Trade Employees' Federation, an organization of employees registered under the *Conciliation and Arbitration Act* 1904-1951, and Gilbert Edward Hayes, the secretary of the Victorian branch thereof, commenced an action, on 7th November 1951, in the High Court of Australia against the Commonwealth of Australia, the Attorney-General for the Commonwealth of Australia and the Honorable Harold Edward Holt, the Minister of State of the Commonwealth of Australia in charge of the administration of the *Conciliation and Arbitration Act* 1904-1951.

The relevant portions of the statement of claim, as amended, were as follows:—"1. The firstnamed plaintiff has as one of its objects, the following, 'to improve protect and foster the best interest of its members in relation to their trade or occupation'.

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4. The firstnamed plaintiff is a party to and bound by an award made under the said Act, namely, the Footwear Manufacturing Industry Award. 5. Pursuant to the rules of the said organization and of the branches thereof, the secondnamed plaintiff Gilbert Edward Hayes and other officers of the said organization and of the branches thereof are bound to and do improve protect and foster the best interests of the members of the said organization as aforesaid. 6. In the course of performing their duties as such officers the said Gilbert Edward Hayes and such other officers as aforesaid are frequently called upon to advise and do advise the members of the said organization in relation to accepting and rejecting employment with employers bound by the said award. 7. If the provisions of s. 78 of the *Conciliation and Arbitration Act* 1904-1951 are valid officers of the said organization and of its branches including the said Gilbert Edward Hayes in carrying out their duties referred to in pars. 5 and 6 hereof will be liable to prosecution for the penalties provided for in the said section and the said officers including the said Gilbert Edward Hayes will thereby be impeded in or prevented from carrying out duties of their offices and the said organization will thereby be impeded in or prevented from carrying out its objects." The plaintiffs claimed—(a) "A declaration that s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is beyond the powers of the Parliament of the Commonwealth and invalid. (b) An injunction restraining the Commonwealth of Australia its Ministers of State officers and servants from enforcing the provisions of s. 78 of the *Conciliation and Arbitration Act* 1904-1951 in relation to any officer servant or agent or member of a committee of the said organization or any branch thereof."

By their defence the defendants admitted the allegations contained in pars. 1 and 4 of the statement of claim, denied those contained in pars. 6 and 7 thereof and pleaded to par. 5 thereof as follows:—"They admit that every officer of the organization is subject to a condition in carrying out the duties of his office to be implied from the purpose and nature of the organization that he act in his office in accordance with law and bona fide and according to his judgment to improve, protect and foster the best interest of the members of the organization and save as above admitted they deny each and every allegation contained in para. 5 of the statement of claim." The defendants pleaded in addition: "Neither of the plaintiffs herein has any *locus standi* to seek in this Court the relief claimed in the statement of claim."

The action was heard before *Fullagar* J. who, on 20th August 1953, in pursuance of s. 18 of the *Judiciary Act* 1903-1950, stated a

case for the opinion of a Full Court. The relevant portions of the case were as follows:—"VII. At the hearing counsel for the plaintiffs proposed to tender evidence which would, if accepted, have established that officers of the plaintiff organization, and in particular the plaintiff Gilbert Edward Hayes, in the course of the day to day performance of their duties as such officers and not in connexion with or as part of any industrial dispute extending beyond the limits of any one State, are called upon to advise members of the plaintiff organization in relation to their employment, and do advise or have advised such members—(*a*) to seek or accept employment with one employer bound by the award and not seek or accept employment with another on grounds such as that the employer recommended is offering over-award payments or other inducements such as canteens or superannuation payments or that the premises of employers not recommended are unnecessarily dirty or the facilities thereat are inadequate or that the tenure of employment with the employer not recommended is uncertain because of the seasonal nature of his production; (*b*) to change from one employer so bound to another on grounds such as that the existing employer had discontinued over-award payments or the prospects of promotion were better with the employer recommended; (*c*) to cease working for an employer so bound on grounds such as that the employer's premises were insufficiently heated; (*d*) to reduce the speed of work or to perform work in a manner different from that customarily applicable to such work because, for example, the speed of the work was endangering limbs or adversely affecting the quality of production or because of physical disabilities of a member; (*e*) to change their employment in order to work for employers who do not use incentive systems rather than work under an incentive system. VIII. Argument took place between counsel as to the admissibility of the evidence in question. In the course of this argument counsel for the defendants stated that he did not propose to challenge the *locus standi* of the plaintiffs or to deny that they and each of them had a sufficient interest to maintain the action, and he applied for leave to amend the defence by deleting the paragraph denying *locus standi* therefrom. I gave leave to make this amendment. I also gave leave to amend the defence by adding a paragraph to the effect that the allegations in the statement of claim, in support of which the evidence in question was tendered, were irrelevant and tended to prejudice and embarrass consideration of the real question raised by the action. IX. At the conclusion of argument I ruled that the evidence in question was inadmissible, but, at the request

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of counsel for the plaintiffs, I agreed to include in the case which I proposed to state for a Full Court a preliminary question as to the admissibility of the said evidence. X. A copy of the rules of the plaintiff organization, and a copy of the current award of Mr. Buckland, a Conciliation Commissioner, applying to the plaintiff organization, were tendered in evidence. The award was admitted in evidence during the hearing without objection, but the rules of the plaintiff organization were objected to and I ruled that they were inadmissible.

I now state this case on the following questions—1. Ought I to have admitted the evidence to which objection was taken or any part thereof? 2. Is s. 78 of the *Conciliation and Arbitration Act* 1904-1951, or any part thereof, beyond the powers of the Parliament of the Commonwealth and invalid—(*a*) on the assumption that I rightly rejected the said evidence; (*b*) on the assumption that the said evidence was admitted and accepted? "

R. M. Eggleston Q.C. (with him *C. I. Menhennitt*), for the plaintiffs. The application of s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is very wide. It applies even to a cleaner employed by an organization. Under s. 70 of the Act an organization may consist of employers. The organization referred to in the introductory part of s. 78 (1) is not necessarily the same as that referred to in s. 78 (1) (*a*), so that the prohibition may apply to a servant of an organization of employers who advises a member of an employees' organization to refrain from working for a particular employer. The words in s. 78 (1) (*a*) " advise, encourage or incite " extend to even friendly persuasion. An organization may be a party to an award yet many of its members may, in fact, be working in classes of work or in areas where the award does not run. It is submitted that the two possible meanings of " in accordance with the award " are " in obedience to the terms of the award ", or " in accordance with the minimum conditions prescribed by the award ". If the first is the proper meaning, we do not quarrel with it. If the second is the proper meaning, it is submitted that it is not incidental to any federal power, and is invalid. The words " or with an employer who is bound by the award " likewise go outside any question of conciliation and arbitration or anything incidental thereto. [He referred to s. 78 (1) (*d*).] Where a dispute arises which is not an inter-State dispute settled by an award or an inter-State dispute capable of being settled by an award, the federal legislature has no power to penalise the adoption of " go slow " methods. This is on the assumption that the adoption of such

methods is not a breach of the award and is equivalent to a strike. Any assistance which the section might have obtained in the direction of validity by limiting it to some generalized activity of the kind which could be said to be the resorting to economic pressure rather than to arbitral processes is destroyed by sub-s. (2), which makes it quite clear that it has to be read as particular and individual in its operation. The legislature has been at pains to show that no ground will operate as a defence unless it is not only unrelated to the terms and conditions of employment settled by the award, but is also a reasonable ground. The section is to be supported, if at all, as incidental to the power to legislate for the establishment of conciliation and arbitration for the prevention and settlement of inter-State industrial disputes. The section merely takes as criteria some accidental features of a situation, viz., where a person advised happens to be a member of an organization which is bound by the award, where the employer happens to be an employer bound by an award, and where there happens to be a current award. In no case do any of the elements which have been chosen as the conditions of operation of the section have any necessary connection with inter-State industrial disputes. The persons to whom the prohibition is addressed need not be acting in the course of their duties as members of the organization of which they are officers, servants or agents. They need not be acting even within the limits of the industry for which the organization is registered. The work about which they are advising the employee may not be work which has any connection at all with any industry which is the subject of a Federal award. When that position is reached, no power to attach conditions or impose obligations on organizations which choose to be registered for the purposes of the Act can justify the imposition of obligations on individuals who are members of committees or office bearers in the organization. Some obligation might be imposed on such a person in relation to his activities in the organization. As to the other matter—" the promotion of the observance of awards "—once it is shown that this section prescribes conduct which is not in breach of any award and is not an incitement to a breach of any award, it is submitted that it goes outside the other permitted objective of ensuring the observance of awards of the Court.

[DIXON C.J. referred to *Luna Park Ltd.* v. *The Commonwealth* (1).]

In *Crouch* v. *The Commonwealth* (2) *Latham* C.J. said that the matter of making a declaration was discretionary. [He also

(1) (1923) 32 C.L.R. 596.

(2) (1948) 77 C.L.R. 339, at pp. 348-349.

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referred to the dictum of *Williams* J. in *Crouch* v. *The Commonwealth* (1).] In practice, this Court has usually exercised its discretion in cases where the question is whether Commonwealth legislation is beyond power, in the direction of saying that it is better that the question should be argued out on general considerations in the Full Court rather than be left to depend upon the accidents of a particular prosecution. [He referred to *Crouch* v. *The Commonwealth*, per *Dixon* J. (2); per *Williams* J. (1); *Morgan* v. *The Commonwealth*, per *Dixon* J. (3); *Federal Council of the British Medical Association in Australia* v. *The Commonwealth* (4); *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth*, per *Latham* C.J. (5).]

[FULLAGAR J. referred to *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (6) and *Bruce* v. *Commonwealth Trade Marks Label Association* (7).]

The legislation in this case is addressed to persons who happen to be occupants of office in a registered organization but is not in any way limited to their activities on behalf of the organization. That is made clear because the legislature has not attempted to confine the advice, encouragement, &c., to cases in which the person is advising the members of his own organization. The language of the section makes it clear that the intention is to attach general disability to persons who happen to be union secretaries in relation to advice given to members of some other organization or their own organization quite independently. There is no way of reading into this any limitation that it is advice given in connection with the activities of the organization or its members. Accordingly, connection between this section and the head of power in s. 51 (xxxv.) of the Constitution is not to be found in the activities of an organization or in any condition attached to registration of an organization under the Act, because the organization as such incurs no liability and is unaffected by the prohibition. If the connection existed it might justify the section as being incidental to the incidental power to provide for the registration of organizations under the Act. [He referred to *Australian Communist Party* v. *The Commonwealth*, per *Dixon* J. (8); per *McTiernan* J. (9); per *Fullagar* J. (10); per *Kitto* J. (11).] Nor is promotion of the observance of awards aided or assisted by the legislature. If the legislature has power to

(1) (1948) 77 C.L.R., at p. 359.
(2) (1948) 77 C.L.R., at p. 357.
(3) (1947) 74 C.L.R. 421. at p. 427.
(4) (1949) 79 C.L.R. 201.
(5) (1945) 71 C.L.R. 545, at p. 570.
(6) (1943) 67 C.L.R. 413.
(7) (1907) 4 C.L.R. 1569.
(8) (1951) 83 C.L.R. 1, at p. 204.
(9) (1951) 83 C.L.R., at p. 213.
(10) (1951) 83 C.L.R., at pp. 269, 270.
(11) (1951) 83 C.L.R., at pp. 283-284.

prohibit advice to a unionist as to certain matters it would equally have power to prohibit the unionist from doing that thing. Judged from that point of view this is an attempt to attach to a unionist the disability of being unable to obtain advice from his or some other union official. The essence of the constitutional power is that it can only be exercised by a particular specialised process of conciliation and arbitration. *Stemp* v. *Australian Glass Manufacturing Co. Ltd.* (1) emphasized that the justification for the exercise of the incidental power was that it made some contribution to the operation of conciliation and arbitration for the prevention of an actual industrial dispute then contemplated. In *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (2) it was pointed out that s. 6A had the effect of preventing people from repudiating an award, and that that was the limit of incidental power. When the legislature goes further and adds new obligations which it deems desirable, but which have nothing to do with the existence of an industrial dispute or the possibility of its settlement by conciliation and arbitration, it is merely supplementing and not complementing the grant of power. [He referred to *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.*, per *Barton* J. (3); per *Isaacs* J. (4); per *Higgins* J. (5); *Stemp* v. *Australian Glass Manufacturers Co. Ltd.*, per *Barton* A.C.J. (6); per *Isaacs* J. (7); per *Higgins* J. (8); per *Gavan Duffy* and *Rich* JJ. (9); per *Powers* J. (10); *Metropolitan Coal Co. of Sydney Ltd.* v. *Australian Coal & Shale Employees' Federation*, per *Barton* J. (11); *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union*, per *Isaacs* and *Rich* JJ. (12); per *Higgins* J. (13); *Walsh* v. *Sainsbury*, per *Knox* C.J. and *Starke* J. (14); per *Isaacs* J. (15); per *Higgins* J. (16); *Waddell* v. *Australian Workers' Union* (17); *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association*, per *Evatt* and *McTiernan* JJ. (18).] Section 6A of the *Conciliation and Arbitration Act* 1904-1928 merely prohibited the particular kind of action directed to impairing the authority of the award so far as the award went. [He referred to *McDonald* v. *Newbecker* (19).] Parliament has sought

(1) (1917) 23 C.L.R. 226.
(2) (1925) 35 C.L.R. 449.
(3) (1910) 11 C.L.R. 311, at p. 323.
(4) (1910) 11 C.L.R., at pp. 337-338.
(5) (1910) 11 C.L.R., at pp. 342, 345.
(6) (1917) 23 C.L.R. at pp. 234, 235.
(7) (1917) 23 C.L.R., at p. 239.
(8) (1917) 23 C.L.R., at p. 243.
(9) (1917) 23 C.L.R., at p. 247.
(10) (1917) 23 C.L.R., at p. 248.
(11) (1917) 24 C.L.R. 85, at p. 91.
(12) (1925) 35 C.L.R. 449, at pp. 456, 457-458.
(13) (1925) 35 C.L.R., at pp. 459, 461.
(14) (1925) 36 C.L.R. 464, at p. 470.
(15) (1925) 36 C.L.R., at p. 483.
(16) (1925) 36 C.L.R., at p. 487.
(17) (1922) 30 C.L.R. 570.
(18) (1936) 54 C.L.R. 626, at pp. 648, 649.
(19) (1926) V.L.R. 404.

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to make the minimum prescription of the award a maximum prescription, despite the fact that the arbitral authority has never attempted to make it a maximum and may have expressly said: " This is a minimum rate only ". It is submitted " reasonable " in s. 78 (3) has no reference to the extent of legislative power because the word " reasonable " in the section applies not only to grounds unrelated to the terms and conditions of employment, but also to grounds arising out of the failure or proposed failure by the employer to observe the award. In either case, the grounds must be reasonable grounds, and the expression " reasonable " applies both to those which are unrelated and those which are directly concerned with the failure of the employer to observe the award. It is submitted that the proper view is that it means " reasonable " in relation to matters unrelated to the terms and conditions of employment and in a non-industrial sense. The legislature intended in sub-s. (3) because of the natural meaning of the word " reasonable ", by these words, " being grounds unrelated ", &c., to set up reasonableness as a separate standard, undefined and with no relation to the industrial situation . There is no warrant for limiting the word " reasonable " to matters relating to any industrial matter. Broadly speaking, there are four classes of prohibition in s. 78. The first is against advising a member of an organization which is bound by the award to refrain from accepting employment in accordance with the award. It is submitted that a section which imposes first of all a prohibition on union secretaries, or on anyone else, in relation to advice given upon grounds related to the terms and conditions of the award, but which are not in any way inconsistent with the full observance of the terms and conditions of the award, in the cases to which they apply, is beyond the incidental power. Moreover, a prohibition which prevents a union secretary from giving advice to a member on grounds unrelated to the terms and conditions of the award is bad and it does not matter that the legislature chooses to limit the prohibition to cases in which the advice is unreasonable. Whether the advice is reasonable or unreasonable has nothing to do with the head of Federal power and if the penalty is a penalty for giving unreasonable advice on non-industrial matters, it is in excess of power. The second prohibition is against advising men to refrain from working or accepting employment with an employer who is bound by the award. There are reasonable grounds for so advising the employee, but if the grounds are unreasonable, however unconnected with the award and however much the adviser has acted in good faith, then an offence is committed. Whatever the meaning of " reasonable ",

it is clear that what the legislature is concerning itself with is advice to a person not to work when the award imposes no obligation on him to work, when he is free to work or not to work as he pleases. There are many cases in which a particular union operates under award conditions in respect of one sphere, and under State wages boards or public service conditions or other prescribed conditions in respect of another sphere, and it may be part of union policy to advise persons to work for one particular employer rather than another in a sphere which is not covered by the award, yet in cases in which the particular employer, although his operations are not covered by the award, is a person bound by the award in another connection. The prohibition extends beyond any industrial relationship in which federal power can operate. The third prohibition is that contained in s. 78 (1) (*d*) against advising a member of an organization to retard, &c., the progress of work to which the award applies by " go slow " methods. It is submitted that the authorities already referred to indicate that the limitations of the powers of the Federal Parliament preclude any prohibition of strikes in respect of a dispute not capable of being settled by an award of the federal arbitral authorities or not already settled by an award. The fourth prohibition is that contained in s. 78 (1) (*e*) against advising a member of an organization to perform work to which an award applies in a manner different from that customarily applicable or to adopt a practice in relation to such work where the result would be a tendency to limit or restrict output. The vice of par. (*e*) is that it selects work to which the award applies as the sole criterion of its application, without any regard to whether there is any relation to any existing dispute either pending or settled. It prevents the union secretary from giving any advice in relation to such a matter if the advice is related in any way to the terms and conditions of employment prescribed by the award, where the effect would be to limit or restrict output or production or where there would be a tendency to limit or restrict output or production. Such a prohibition as in the case of the third prohibition, being an attempt to attach to the employment *pro tanto* conditions which are the direct effect of legislation and not the effect of any exercise of authority by the arbitrator, is in excess of federal power. If s. 78 be invalid, it is not possible to read it down. The legislature might have chosen a number of ways of limiting the section so as to maintain the relationship with the process of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State; but what it has done is to select a number of criteria,

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none of which is sufficient, to relate the power to industrial matters. Into which of these criteria additional elements would have to be written so as to bring the section within power is quite uncertain. [He referred to *Pidoto* v. *Victoria*, per *Latham* C.J. (1); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*), per *Latham* C.J. (2).] The evidence which was tendered was admissible because it shows that the operation of the legislation on an everyday situation and not a remote or fanciful example, will have the effect of hampering activities which union secretaries carry on, in circumstances in which it can be said that there is no necessary relationship with any question of inter-State industrial disputes. [He referred to *Attorney-General for Alberta* v. *Attorney-General for Canada* (3); *Jenkins* v. *The Commonwealth* (4); *Australian Communist Party* v. *The Commonwealth*, per *Dixon* J. (5); per *McTiernan* J. (6); per *Williams* J. (7); per *Webb* J. (8); per *Fullagar* J. (9); per *Kitto* J. (10).]

P. D. Phillips Q.C. (with him *R. L. Gilbert*), for the defendants. The defendants do not object to the determination of the validity of s. 78 of the *Conciliation and Arbitration Act* 1904-1951 on the ground of absence of *locus standi* or lack of interest in the plaintiffs. They do not contend that the discretion should be exercised against the plaintiffs although they know of no affirmative reason why it would be convenient to have the matter determined in this way. It is submitted that s. 78 is valid. It covers ground which to some extent had been covered by previous provisions of the *Conciliation and Arbitration Act*. [He referred to the *Commonwealth Conciliation and Arbitration Act* 1904-1928, s. 8, enacted by Act No. 13 of 1904, amended by Act No. 31 of 1920, s. 4, repealed by Act No. 43 of 1930, s. 6; and to the *Conciliation and Arbitration Act* 1904-1950, s. 78, enacted by Act No. 43 of 1930, s. 46, as s. 58BA, renumbered by Act No. 10 of 1947 to become s. 78, repealed and substituted by Act No. 18 of 1951, s. 11.] Section 78 prohibits advice against working in accordance with the award or directed against the observance of the award. Broadly the section is a means of protecting a settlement. The expression "reasonable grounds" in s. 78 (3) means no more than genuine reasons unrelated to the terms and conditions of the award. It is within power to prohibit

(1) (1943) 68 C.L.R. 87, at pp. 110, 111.
(2) (1943) 67 C.L.R. 413, at pp. 418, 419.
(3) (1939) A.C. 117.
(4) (1947) 74 C.L.R. 400.
(5) (1951) 83 C.L.R., at pp. 200, 201.
(6) (1951) 83 C.L.R., at p. 206.
(7) (1951) 83 C.L.R., at pp. 224, 225.
(8) (1951) 83 C.L.R., at p. 245.
(9) (1951) 83 C.L.R., at p. 267.
(10) (1951) 83 C.L.R., at pp. 276, 277.

economic pressure, strikes, &c., directed to disturbing the settlement made in the arbitration of an inter-State dispute. In *Walsh* v. *Sainsbury* (1) there was a single-State strike against an award, which was treated as properly the subject of constitutional prohibition. The following matters bring s. 78 within constitutional power: (a) the persons selected are officials or servants of organizations who, because of the fact of the registration of their organizations under Commonwealth legislation, are built up into an influential position in their particular sphere; (b) the persons in respect of whom the duty is limited are persons who enjoy privileges by reason of the exercise of constitutional power, namely, members of organizations with an award; (c) the duty not to incite or encourage is in respect of employers working under the award; (d) the only conduct which is prohibited is the advice or incitement to have recourse to economic pressure directed against the settlement. If an award provides a minimum rate of wages, an organization of employees which has been unsuccessful in its attempts to gain a higher minimum before the arbitral tribunal may, acting on the basis that there are more jobs available than men offering, discourage its members from taking employment with any employer who will not pay more than the minimum with a view to raising the minimum *de facto*. This situation is that which arose in *Waddell* v. *Australian Workers' Union* (2). Such conduct is a direct attack on the fixation of the minimum rate.

[FULLAGAR J. referred to *H. V. McKay Pty. Ltd.* v. *Hunt* (3).]

Section 78 does not command the employee to accept work at the minimum rate but it does command the union official, &c., not to intrude into the sphere of the free choice of the employer and employee in making bargains. In that way the settlement is protected. Evidence may be tendered in constitutional cases to show that the law has no connection with power. That sought to be tendered here does not elucidate for the Court factors unknown to it which would show either the connection or the disconnection of the legislation with power.

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

Cur. adv. vult.

April 7.

The following written judgments were delivered :—

DIXON C.J. The suit in which this case was stated for the opinion of the Full Court was brought by an organization registered under Pt. VI. of the *Conciliation and Arbitration Act* 1904-1952

(1) (1925) 36 C.L.R. 464.
(2) (1922) 30 C.L.R. 570.
(3) (1926) 38 C.L.R. 308.

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and by a branch secretary with the object of obtaining a declaration that s. 78 of that Act is beyond the constitutional powers of the Commonwealth and void. Whether the section or any part of it is beyond the powers of the Parliament is the principal matter upon which the opinion of the Full Court is asked by the case stated. Section 78 penalizes a considerable number of different acts described in language which is not always very definite or exact. It is therefore neither safe nor wise to attempt to cover, in any pronouncement upon its validity, every part of the field of its intended application or of whatever application, whether intended or not, it may be sought hereafter to fasten upon it.

But in its main features I think that it is a valid law of the Commonwealth, and upon that ground I think that the suit should be dismissed. There are certain reservations that it is better to make expressly lest particular points that seem doubtful but not to require decision are thought to be covered by the general conclusion I have stated, but these will appear.

Section 78 was placed in the Act in 1951 by Act No. 18 of that year in substitution for a previous provision on the same subject of a much more restricted character and limited operation. That provision was inserted as s. 58BA by Act No. 43 of 1930.

The first sub-section of s. 78 sets out in five paragraphs, lettered from (*a*) to (*e*), the conduct which it prohibits. The paragraphs are preceded by the prohibition which enumerates the persons prohibited and states a condition, on which the prohibition depends, applicable to all the paragraphs that follow. The persons are an officer, servant or agent of an organization or a member of the committee of an organization or branch of an organization. By definition " organization " means organization registered in pursuance of the Act : s. 4. The condition stated is expressed by the words " during the currency of an award ". It is to be noted, and it is an important matter, that nothing is said about any connection between the organization and the award. As will be seen each of the paragraphs that follow introduces " the award " as an element in the definition of the conduct it forbids. But the prohibition applies to an officer, servant, agent or committeeman of an organization or branch although it is not a party to the award to which the provision refers. Paragraph (*a*) then proceeds to make punishable certain acts of the officer servant or agent or committeeman concerning the course which may be taken with reference to employment or work by " a member of an organization which is bound by the award ". Here again it need not be the same organization as that of the officer servant or agent or committeeman, although

of course it may be. It is made punishable for any of those persons to advise, encourage or incite the member or to prevent or hinder him from (i) entering into a written agreement; (ii) accepting employment; or (iii) offering for work, or working, in accordance with the award or with an employer who is bound by the award. What is meant by this formula? Must the advice, the encouragement, the incitement, the prevention or the hindrance be directed to the fact that the agreement, the employment or the work will be " in accordance with the award " or will be " with an employer who is bound by the award " as the case may be? Or is it enough to advise, encourage or incite the member to refrain from, or to prevent or hinder him from, entering into the agreement or accepting the employment or offering for the work or working, if it turns out that the agreement, employment or work was or would have been in accordance with the award or with an employer bound by the award? The former seems the better interpretation. It means that the ground or reason of the advice, encouragement, incitement, prevention or hindrance must be that the agreement, employment or work was in accordance with the award or with an employer bound by the award as the case may be. But what does " in accordance with the award " mean? Does it mean in compliance with or in obedience to the award? If so the expression can apply only where the award requires that a man enter into an agreement, requires that he accept employment or requires that he offer for work or that he work. That seems an unlikely intention. " In accordance with " usually means " in harmony with, in conformity with, in agreement with ", and that seems to be the meaning in par. (*a*). Before passing from this paragraph it should be noticed that the alternative " or with an employer who is bound by the award " would be unnecessary except to cover cases where the agreement, the employment or the work was governed by no clause in the award so that the agreement, employment or work could not be said to be " in accordance with the award ". Stated in another way which perhaps is more precisely in conformity with the interpretation adopted above, it would be unnecessary except to cover cases where it was not because the agreement, employment or work was in accordance with the award that the advice, &c., was given against entering into the relation in question, but because the employer, even although the award was silent as to the particular agreement, employment or work, was nevertheless an employer bound by the award. It may be a question whether a provision made for cases of such a description is sufficiently within the reasoning upon which the constitutional validity of the substance

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of s. 78 rests. The two ensuing paragraphs, viz., pars. (*b*) and (*c*), consist of simple provisions based on advice, encouragement and incitement not to comply with an award and prevention and hindrance from complying with it. The validity of these paragraphs could not be and was not contested.

The prohibition contained in par. (*d*) is against advising, encouraging or inciting the member of the organization to retard, obstruct or limit the progress of work to which the award applies by "go slow" methods. The meaning of this is probably clear enough. It will be noticed, however, that the advice, &c., which it forbids is advice, &c., directed expressly at retarding, obstructing or limiting the progress of work. The fifth and last paragraph of sub-s. (1), viz., par. (*e*), also deals with restricting output but unlike par. (*d*) it deals with it as a consequence of the thing advised, encouraged or incited and not as the immediate object of the advice, &c. The things which an officer, servant, agent or committeeman of an organization during the currency of an award is forbidden to advise, encourage or incite a member of an organization to do are (i) to perform work to which the award applies in a manner different from that customarily applicable to that work or (ii) to adopt a practice in relation to that work, where (and this condition governs both cases) the result would be a limitation or restriction of output or production or a tendency to limit or restrict output or production. It will be seen that under both (i) and (ii) it is necessary that the award should apply to the work. That, I think, means that it should be work in reference to which the award prescribes either wages or conditions or both or, if it does not do that, the performance or conduct of which it regulates in some degree. No doubt the words "customarily applicable" and "practice" are capable of an indefinite or flexible operation, but a penal provision receives a restrictive rather than an extended interpretation and in any case it is not correct to describe a procedure as customary or as a practice unless it is followed with regularity.

In sub-s. (1) it will be seen that single persons are dealt with. At none of the three points involving persons is a plurality required. One officer, servant, agent or committeeman can commit an offence unaided by any colleague. It is enough if he advises, encourages or incites one member of the organization bound by the award that is current. Only one employer need be involved or affected. As if to emphasize the last point sub-s. (2) provides that sub-s. (1) shall extend to advice, encouragement, incitement, prevention or hindrance in relation to employment or work with or for a particular employer or of a particular kind.

The effect of sub-s. (1) is qualified by sub-s. (3) which provides an affirmative defence to a charge of offending against the section. Sub-section (3) provides that in a prosecution for a contravention of the section it is a defence to prove that there were reasonable grounds for the conduct charged, being grounds (*a*) unrelated to the terms and conditions of employment prescribed by the award; or (*b*) arising out of a failure or proposed failure by an employer to observe the award. The words "being grounds" introduce a qualification, or two alternative qualifications, of the words "reasonable grounds". It is not enough that the grounds were reasonable grounds. As well as being reasonable they must be grounds which also are of one or other of the two descriptions contained in pars. (*a*) and (*b*). No standard or standpoint to judge what is reasonableness is supplied. Presumably what is meant is that when the conduct charged is considered with reference to the respective interests of the three parties concerned and their mutual relations, viz., the organization, the employer and the member of the organization bound by the award, the grounds must appear reasonable in the circumstances. But then, further, the grounds must be unrelated to the terms and conditions of the award or if they are so related they must arise from some failure to observe the award on the part of the employer, actual or proposed. The manner in which the sub-section is framed seems to concede that there may be advice, incitement, encouragement, prevention or hindrance with respect to the matters described in sub-s. (1) based on grounds which are unrelated to the terms and conditions of employment prescribed by the award but which nevertheless are not reasonable grounds. If the defence afforded by sub-s. (3) had rested simply on proof that the grounds of the advice, &c., were not related to the award, it might have been considered tantamount to confining the section to incitements to conduct directed against the award. It would then have become harder to dispute the connection of the section with conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. But as it is, the forms of conduct which sub-s. (1) seizes upon as elements of the offence are not confined to cases where they have no relation to the terms and conditions of an award. It covers cases where there is no such relation but the grounds of the conduct are not reasonable. It is hardly necessary to say that to confine the conduct of which complaint may be made to cases where the grounds are unreasonable, leaves untouched the question whether it falls under the legislative power with respect to conciliation and arbitration, &c., and what

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is incidental thereto. But, even so, there is not enough support for the contention that the provisions which form the substance of s. 78 are not incidental to the subject of conciliation and arbitration for the settlement of inter-State industrial disputes and so are ultra vires.

In considering what is incidental to that legislative power with its notorious peculiarities we must be guided less by our own *a-priori* notions of what might satisfy a true application of principle than by the very definite course of authority in this Court. It is enough to refer to *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (1); *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (2); *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (3) as explained and applied in *Walsh* v. *Sainsbury* (4) and *Federated Ironworkers' Association of Australia* v. *The Commonwealth* (5).

It is unnecessary to trace again the chain of reasoning by which these cases establish that it is incidental to conciliation and arbitration for the prevention and settlement of inter-State industrial disputes to provide for the registration, incorporation and regulation of industrial organizations and for some supervision of their affairs including the election of office bearers. It is likewise unnecessary to restate the grounds upon which it was considered to be incidental to the same subject matter to prohibit a strike or a lock-out on account of an industrial dispute extending beyond a State and a strike or a lock-out in relation to an industrial dispute settled by an award.

It is, however, important to notice that the validity of the respective provisions forbidding these two varieties of strike or lock-out was supported on almost entirely distinct grounds. Strikes and lock-outs on account of industrial disputes the legislature might prohibit because, settlement by compulsory arbitration being an end for which s. 51 (xxxv.) provides, the achievement of that end might be prevented, hampered or overturned if resort were permitted to the forcible course of strike or lock-out as a means of compelling the concession of industrial demands. But to strike or to lock-out in relation to an industrial dispute settled by an award is to attempt to ignore or frustrate the settlement and enforce the terms sought in the dispute by the *ultima ratio* of industrial conflict. To forbid this is within the power of the legislature because to do so

(1) (1908) 6 C.L.R. 309.
(2) (1917) 23 C.L.R. 226.
(3) (1925) 35 C.L.R. 449.
(4) (1925) 36 C.L.R. 464, at pp. 470, 483.
(5) (1951) 84 C.L.R. 265.

conduces to the maintenance of the settlement made by the award and to its enforcement.

The grounds for holding the respective prohibitions of the two classes of strike and lock-out to be incidental to the legislative power are almost entirely distinct but not quite. The point of contact lies in some considerations that seem to apply alike to both classes. They are stated in the following passage in the judgment of *Higgins* J. in *Stemp's Case* (1) :—" The tribunal must be unconstrained, free to award what seems to be just and right; and it must not be left to fear that if the stronger side do not get what it wants, it will take it by stoppage of work, or by closing the works. Anyone who is at all familiar with the working out of problems under the Act must know that the two methods of strike and of reason, of might and of right, cannot operate together. *Silent leges inter arma*; and so, too, if economic pressure is to be used, the processes of the tribunal will generally be futile " (2). But with this there is again a point of contact in the reasoning given by *O'Connor* J. in the *Jumbunna Case* (3) for holding the provisions for the registration, incorporation and control of industrial organizations to be valid. For the part that must be played by such bodies as a means of making the arbitral settlement effective enters into that reasoning. They must represent individuals and " the ever-changing body of workmen that constitute the trade ", and must be able to bind and to persuade them. Obedience must be enforced against these representative bodies. But they in turn must have power to control, by the enforcement of rules, and to influence members.

Section 78 appears to me to be sufficiently supported by very much the same basis of constitutional power. That basis comprises, as has been seen, two elements, viz., the part which industrial organizations play in the system and the importance of protecting the arbitral settlement of disputes from defeat, impairment or circumvention, in other words of ensuring the practical efficacy of awards. These elements combine to support the substantial validity of s. 78. It is true that it is not the organization itself but the officer, servant or agent or committeeman of an organization or its branch that is made the object of the prohibitions it expresses. But that is because, in the view of the legislation, the positions they occupy give them an authority and an influence in the industrial sphere likely to make their advice, encouragement or incitement specially effective and give them an opportunity not possessed by

(1) (1917) 23 C.L.R. 226.
(2) (1917) 23 C.L.R., at pp. 244-245.
(3) (1908) 6 C.L.R., at pp. 358-360.

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others for preventing or hindering the action of individuals in relation to employment and work. At the same time their position is conceived to carry a particular responsibility in the system because it is through them that the organization must speak and act and perhaps decide. It is convenient here to make a reservation. The word " agent " is capable of a very wide application. " No word is more commonly and constantly abused than the word ' agent '. A person may be spoken of as an ' agent ', and no doubt in the popular sense of the word may properly be said to be an ' agent ', although when it is attempted to suggest that he is an ' agent ' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading " ; per Lord *Herschell*, *Kennedy* v. *De Trafford* (1). Perhaps the word " agent " is used in s. 78 (1) to mean a person authorized to act on behalf of the organization and acting within the scope of that authority when he advises, encourages, incites, &c. If so the word may not go too far. But all I desire to say about it is that for the purpose of this case stated I do not feel called upon either to construe or to decide the validity of so much of sub-s. (1) as depends upon the word " agent ". It seems evident that even if the word " agent " could have no valid operation, it would be treated as severable from the rest of the sub-section.

A somewhat analogous question may be raised about the word " servant ", which perhaps might be pressed to include even messengers, cleaners and other employees of an organization whose employment gave them no position in the industrial sphere. Perhaps s. 15A of the *Acts Interpretation Act* 1901-1950 applies so that such persons must be excluded from the denotation of the word. But again the separate application and operation of the word is not a matter with which I feel called upon to deal on this case stated.

In the same way I shall exclude from my decision the meaning, effect and validity of so much of par. (*a*) of sub-s. (1) as depends upon the words " or with an employer who is bound by the award ". Why I do so appears inferentially from what I have already said about the words. The three immediately foregoing points seem to me not only separate but, once the validity of s. 78 considered generally is upheld, to have no sufficient residual importance to the plaintiffs to make it proper to attempt to decide them in the abstract with no concrete facts before us to test the application of the words in question.

But dealing with sub-s. (1) (*a*) generally I can see no sufficient reason for denying to the provision the character of a law incidental

(1) (1897) A.C. 180, at p. 188.

to conciliation and arbitration for the prevention and settlement of inter-State industrial disputes. The substance of the provision is that even though each member of an organization may decide as he likes whether or not he will enter into an agreement, accept employment, offer for work or work in accordance with an award, he is not to be subjected to the advice, encouragement or incitement not to do so of an officer or committeeman of his own or any other registered organization and perhaps of a servant or agent of such an organization. Once it is seen that constitutionally, as incidental to the subject matter of s. 51 (xxxv.), the legislature may provide against any impairment of the operation and practical efficacy of awards by officials of registered organizations using the opportunity their positions give them of influencing individuals bound by an award in the course they may take industrially, then there appears no prima-facie reason why sub-s. (1) (*a*) should not be regarded as addressed to this purpose and as not going beyond it in any essential respect. The fact that it deals with parties individually in the manner already described does not carry it beyond or outside the purpose. For if the provision dealt only with advice, incitement or encouragement to men collectively it would be likely to fail in its object. But many possible examples of acts or conduct on the part of officials were suggested which it was said fell within not only the letter but the true legal meaning of s. 78 (1) (*a*) and yet were quite outside the reasoning on which the validity of the provision is supported. Many of these examples are placed outside the application of s. 78 (1) (*a*) by the construction which I think it should receive so that it covers only cases where the ground or reason of the advice, encouragement, incitement, prevention or hindrance is that the agreement employment or work is in accordance with the award. Many others are met by the fact that they would fall under sub-s. (3), that is, unless it were found wrongly as a fact in the particular case that the grounds were not reasonable. Examples of advice to a member to accept employment with one employer rather than another, the employment in both cases being in accordance with the award, are not I think within par. (*a*) and it does not matter if the grounds of the advice may be considered to be related to the terms and conditions of the award because the employer preferred gives more in pay or conditions than the award prescribes. It is said that advice to a man not to work or accept given employment because his personal circumstances make it disadvantageous or prejudicial to him could come within s. 78 (1) (*a*). It is difficult, however, to imagine such a case which would do so if the advice is given bona fide in his interest.

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It is perhaps impossible to say that no combination of circumstances will come within s. 78 (1) (*a*) (as it is construed in the earlier part of this judgment) which is not excluded by sub-s. (3) and yet is outside the scope of the legislative power. But such cases if they occur may well be found to be relieved from the operation of the sub-section as a result of the application of s. 15A of the *Acts Interpretation Act* 1901-1950. Of the validity of pars. (*b*) and (*c*) there is no question. The " member " referred to in par. (*d*) must be a member of an organization bound by the award and therefore bound himself. The award must apply to the work. The advice to him, the encouragement or the incitement, must be to use " go slow " methods and so retard, obstruct or limit the progress of work. To do this may well have been considered by the legislature to mean that practically the intended operation of the award is defeated. The connection with the legislative power is perhaps less evident in par. (*e*) because the purpose of restricting or reducing work below what is recognized as fair and normal does not appear necessarily to be the basis of the advice, &c. Paragraph (*e*) refers in terms rather to the result. But again the member advised, &c., must be bound by the award and the award must apply to the work. Then the tenor of the advice, &c., must be the desertion of a custom or the adoption of a practice which would result in the limitation of output or production or a tendency thereto. I think that it means that the advice, encouragement or incitement, or perhaps I should say the adviser, encourager or inciter, must contemplate this result. To desert a custom or adopt a practice involves something systematic. It all spells a detraction from the practical operation of the award and on the whole I think it was competent to the legislature to adopt the provision as a means of preventing officials of an organization contributing to the indirect impairment of the settlement made of the dispute.

The fact that a provision is made to apply according to objective facts and is framed to leave no room for escape does not take it outside power if it is calculated to effect the purpose upon which its validity depends. In the case of pars. (*d*) and (*e*) as in the case of par. (*a*) illustrations were given of possible circumstances which were said to be hit by the provisions but yet to be outside any fair application of the legislative power. The same observations as have already been made in dealing with par. (*a*) apply to these illustrations.

The foregoing reasons have led me to the conclusion that the plaintiffs cannot succeed in showing that s. 78 is in substantial respects invalid.

Whether for the purpose of establishing their *locus standi* to sue for a declaration of right or for the purpose of showing the kind of action on the part of a secretary of an organization that might possibly be affected by the provisions of s. 78 does not appear, but the plaintiffs tendered evidence of certain things that the officers of the plaintiff organization did in the day to day performance of their duty. Their *locus standi* to claim the relief sought was, however, conceded during the course of the hearing of the suit. The evidence was rejected, but as the plaintiffs sought to rely upon it in connection with their attack upon the validity of s. 78, the case stated raised the question of its admissibility. Questions of the admissibility of evidence in matters of constitutional validity always seem to me to depend on the bearing of the facts it is sought to prove upon the interpretation of the legislation attacked or its connection with legislative power invoked to support it. Here it is difficult to see how the facts proved by the evidence bore on either of these matters. But as I am of opinion that the provision attacked ought not to be held ultra vires with or without the evidence there is nothing to be gained by pursuing the question of admissibility.

As I have said, the Commonwealth conceded the *locus standi* of the plaintiffs to sue for a declaration of right. That does not deprive the Court of its discretion to refuse such relief. But holding the opinion I do as to the validity of s. 78 and feeling very little embarrassed in forming it by the abstract nature of the question presented by the suit, I see no reason to refuse to pronounce that opinion in response to the question in the case stated.

I think that question 2 in the case stated should be answered that in no substantial respect entitling the plaintiffs to relief is s. 78 of the *Conciliation and Arbitration Act* 1901-1951 beyond the powers of the Parliament of the Commonwealth and invalid. To question 1 it should be stated that in view of the answer to question 2 it becomes immaterial. The costs of the case stated should be reserved for the judge disposing of the suit.

WEBB J. I would refuse a declaration and injunction and answer the questions in the case accordingly.

Even if the Court were convinced that s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is beyond power and invalid to the extent claimed by the plaintiffs, still it would not follow that a declaration to that effect should be made and an injunction granted. That would depend on practical considerations which I think do not arise here. No prosecution is threatened and none appears

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likely while the activities of union officials fall short of deliberate attempts to undermine industrial awards; and counsel for the plaintiffs made it clear that no such attempts had been made or were contemplated by the plaintiffs. In any event if such attempts were made it is unlikely that the necessary evidence to warrant prosecutions would be forthcoming, except in isolated cases, seeing that for successful prosecutions the co-operation of the employees against their union officials would generally be required.

There is then no likelihood of s. 78 being put in force against the plaintiffs and so there is no ground for a declaration and injunction.

FULLAGAR J. In this case I have had the advantage of reading the judgment of the Chief Justice. Finding myself in agreement with that judgment, I am prepared to assent to the order proposed by his Honour. I think, on the whole, for three reasons, that the questions asked by the case stated ought to be answered. In the first place, no objection was raised by any of the defendants at any stage directed to the discretion of the Court to entertain, or refuse to entertain, a suit for a declaration of invalidity, and the case was stated not merely with the consent, but at the request, of counsel for all parties. In the second place, suits not glaringly dissimilar in character have been entertained on very many occasions in the past. In the third place, I entertain, after full argument, a clear opinion that s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is a valid exercise of constitutional power, and I cannot see any very strong reason for declining at this stage to reveal this opinion. To say this is not, of course, to commit oneself in advance on every question that can possibly arise in the future as to the construction or valid operation of s. 78.

What was claimed by the statement of claim was "a declaration that s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is beyond the powers of the Parliament of the Commonwealth and invalid." This appeared to me to be a claim for a declaration that s. 78 was wholly invalid, and *not* for a declaration or declarations that the section did not apply, or could not validly apply, to particular acts or things. On this view I held that the evidence tendered by the plaintiffs was inadmissible, and on this view I am still of the same opinion. I acceded, however, later to the request of counsel for the plaintiffs that I should insert in question 2 the words "or any part thereof". Apart from those words I should have thought that the only legitimate subject for debate would have been whether the general nature of the provisions of s. 78 was such that they fell within the "incidental power" as expounded in such cases as

Stemp v. *Australian Glass Manufacturers Co. Ltd.* (1). Having regard to numerous precedents, I can see no objection to dealing with such a question in the present action: indeed, I should have thought that the Court was almost bound to deal with it. It is a different matter if what is sought is a declaration that particular acts, which are done or proposed to be done, lie outside the scope of the section. There may be objections to entertaining such a suit: see, e.g. *Bruce* v. *Commonwealth Trade Marks Label Association* (2) and *Luna Park Ltd.* v. *The Commonwealth* (3): but, if it is entertained, it would seem necessary, or at least desirable, that evidence should be received with regard to the acts, done or proposed to be done, which are said to lie outside the scope of the section. It is a different matter again if the substance of what is sought is general advice as to the scope of the section and the extent of its valid operation. I should have thought that only in rare circumstances, if ever, should such a suit be entertained.

I think that the insertion in question 2 of the words " or any part thereof " and the general course of argument in the Full Court tended to give to the suit a wider scope than I had attributed to it at the hearing before me. When it is regarded in that wider aspect, objections to entertaining the suit at all do, of course, suggest themselves. Nevertheless, for the reasons given above, I think, on the whole, that the questions should be answered.

KITTO J. The proceeding before us is the hearing of a case stated by *Fullagar* J. under s. 18 of the *Judiciary Act* 1903-1950 (Cth) at the request of the parties to an action pending in this Court. The plaintiffs are an organization of employees registered under the *Conciliation and Arbitration Act* 1904-1952, and the secretary of its Victorian branch. The defendants are the Commonwealth, the Attorney-General of the Commonwealth, and the Minister in charge of the administration of the Act. Two questions are submitted for decision by the Full Court. In effect they are (1) whether certain evidence tendered on behalf of the plaintiffs and held by his Honour to be inadmissible should have been admitted wholly or in part; and (2) whether s. 78 of the Act, or any part thereof, is beyond the powers of the Parliament of the Commonwealth and invalid, (a) on the assumption that the evidence rejected is inadmissible, and (b) on the assumption that that evidence is admissible and is accepted.

(1) (1917) 23 C.L.R. 226.
(2) (1907) 4 C.L.R. 1569.
(3) (1923) 32 C.L.R. 596.

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The question whether s. 78 is wholly or partially invalid is the substantial question in the action, as appears from the pleadings which the case stated sets forth. The relief claimed by the plaintiffs consists of a declaration of the invalidity of that section, and an injunction restraining the Commonwealth, its Ministers of State, officers and servants from enforcing its provisions in relation to any officer, servant or agent or member of a committee of the plaintiff organization or any branch thereof.

By par. 6 of their defence the defendants denied the *locus standi* of the plaintiffs to seek in this Court the relief they claimed ; but at the hearing of the action before *Fullagar* J., counsel for the defendants said that he did not propose to challenge the *locus standi* of the plaintiffs or to deny that they and each of them had a sufficient interest to maintain the action. Accordingly par. 6 of the defence was deleted by leave. Upon the hearing of the case stated, however, the question was raised from the Bench whether the action provided an appropriate occasion for the making of a declaration as to the validity of s. 78, either in its entirety or in any, and if so in what, part or parts. On this question the attitude adopted by counsel for the defendants was, in effect, that while they were prepared to argue fully all questions of validity which the plaintiffs' arguments might raise, and did not desire to urge that the Court should refrain from deciding those questions in this action, they were unable to see any answer to the suggestion that a more expedient course would be to leave the decision of all such questions until they should actually arise in concrete instances.

Section 78 as it now stands was inserted in the Act by the *Conciliation and Arbitration Act* (*No.* 2) 1951 (No. 18 of 1951.) It forbids, on pain of a penalty of £100, a wide variety of conduct on the part of an officer, servant or agent, or a member of a committee, of an organization or branch of an organization, during the currency of an award. Its prohibition in respect of two classes of conduct was conceded to be valid, namely, those described in pars. (*b*) and (*c*) of s. 78 (1) by the words " advise, encourage or incite such a member " (i.e., a member of an organization which is bound by the award) " to make default in compliance with the award ", and " prevent or hinder such a member from complying with the award." These two descriptions of conduct show, clearly enough, that the section is concerned, partly at least, with the protection of awards as effectual settlements of industrial disputes to which the Act applies ; but the argument for the plaintiffs is that in its other prohibitions the section travels beyond this topic and beyond the frontiers of legislative power.

These other prohibitions all apply to advice, encouragement, or incitement, in relation to employment or work, whether with or for a particular employer or of a particular kind or not. As has been stated, they are imposed upon persons described as occupants of certain positions, the nature of which is such that they offer special opportunities for exerting influence upon members of organizations. The organizations referred to are those to which the Act accords special advantages. The conduct prohibited is such only as occurs during the currency of an award; and it is conduct towards a member of an organization which is bound by that award, affecting him in relation either to the award, to the work to which it applies, or to an employer upon whom it is binding.

But although, superficially at least, the section wears the appearance of an enactment directed to the maintenance of awards, the plaintiffs contend that when its provisions are analysed they are found to have an operation of an entirely different character, for on their true construction they preclude, if valid, many forms of conduct in which union officials are likely to engage in the normal discharge of their functions and which the Commonwealth Parliament has no constitutional power to forbid. It was in support of this contention that the evidence was tendered which *Fullagar* J. held to be inadmissible. At the threshold of the case, however, is the question whether s. 78 is a provision upon which it is expedient that this Court should give a decision in the present action. The claim for an injunction could not possibly succeed, I should think, for s. 78 does not admit of enforcement in any other manner than by prosecution for a contravention of its provisions, and a person charged with contravening any such provision which is invalid has in that very fact all the protection he needs against a conviction. So far as I am aware it has never been held that a person's apprehension that, if he does an act which in the future he may desire to do, he will be charged with an offence and will be put to trouble and expense in establishing a constitutional answer to the charge, affords by itself any ground for an injunction. On the contrary, it is well recognized that an injunction to restrain criminal proceedings will not be granted upon a ground which may be set up as a defence in those proceedings; for the court will assume that all valid defences will be given full weight by the tribunals in which those proceedings take place: *Kerr* v. *Corporation of Preston* (1).

This being so, the action is in truth one for a declaration, in which no consequential relief can be granted. The action is not

(1) (1876) 6 Ch. D. 463, 466.

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for that reason incompetent: see High Court Rules, O. 26, r. 19; but the Court has a discretion to give or withhold a decision according as the interests of justice appear to require. "The Court", said *Latham* C.J. in *Crouch* v. *The Commonwealth* (1) "has a discretion to determine whether a declaration as to the rights of a plaintiff shall be made without giving consequential relief: see cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 19, pp. 215, 216. As a general rule the Court would not make a declaration so as, in effect (though not in form), to intercept proceedings in a criminal court by passing upon the validity of a statute or regulation with an offence against which an accused person was charged. If the accused relied upon the invalidity of an enactment he could raise his contention as a defence in the criminal proceedings" (2). It is *a fortiori* where there is no question relating to past conduct or to events which have happened, and the plaintiff's purpose in the proceedings is simply to obtain a decision as to whether there is any conduct of a kind in which he may wish to indulge (and, if so, what that conduct is), which falls within the terms of a statutory prohibition but is not validly prohibited thereby.

In the course of the hearing it has become clear that s. 78 is by no means free from difficulties of construction. Naturally, the plaintiffs have sought at every point to attribute to the section as wide an operation as possible, in order to show that it reaches beyond the limits of legislative power, while the defendants have contended for a substantially narrower interpretation. In the event of a prosecution a reversal of roles might be expected, and the meaning of the section could be decided in the normal course of the judicial process of determining whether and how an enactment applies to a person actually and not hypothetically concerned, by reason of ascertained and not supposititious facts. To interpret a statute in the air ought, I think, to be regarded as a course not to be adopted without some positive justification. As the Court remarked in *Carter* v. *Potato Marketing Board* (3): "It is seldom, if ever, desirable to decide any question of constitutional validity *in abstracto* and independently of the facts" (4). Undoubtedly cases can arise, and in the past they have arisen from time to time, in which the course of resolving questions of validity in anticipation of events, prima-facie unsatisfactory though it is, appears to be desirable because the circumstances provide reasons in its favour which outweigh the objections to it. But I do not find it possible to take that view in this case. The plaintiff's

(1) (1948) 77 C.L.R. 339.
(2) (1948) 77 C.L.R., at p. 348.
(3) (1951) 84 C.L.R. 460.
(4) (1951) 84 C.L.R., at p. 478.

submission that a reason for making a declaration as to validity should be found in the fact that otherwise persons interested will have to suffer prosecution before they can have the construction and validity of s. 78 decided is a submission to which, in my opinion, no countenance should be given. It appears to me highly desirable that exegesis of the section and pronouncement as to the validity of its several provisions should await an occasion or occasions when the Court can grapple with specific problems concerning it in relation to situations which have actually arisen.

For these reasons I am of opinion that the action ought not to be entertained, and that therefore the questions asked in the case stated should not be answered. Nothing I have said should be taken as indicating that I have formed an opinion that any part of s. 78 is invalid.

TAYLOR J. In the suit in which the case in this matter was stated the plaintiffs sought a declaration that s. 78 of the *Conciliation and Arbitration Act* 1904-1951 is beyond the powers of the Parliament of the Commonwealth and invalid. They also sought an injunction restraining the defendant Commonwealth, its Ministers of State, officers and servants from enforcing the provisions of that section in relation to any officer, servant or agent or member of a committee of the organization or any branch thereof.

The plaintiff organization is an organization of employees registered under the Act and the second-named plaintiff is the secretary of the Victorian branch of the organization. As the basis for a claim for a declaratory decree the statement of claim alleged that, in the course of performing their duties as officers of the organization, the plaintiff Hayes and other officers of the organization are frequently called upon to advise, and do advise, the members of the organization in relation to accepting and rejecting employment with employers bound by the relevant award. In par. 7 it was further alleged that if the provisions of s. 78 are valid officers of the organization, including the plaintiff Hayes, in carrying out their duties referred to in pars. 5 and 6 of the statement of claim, will be liable to prosecution for the penalties provided for in the said section and that the said officers, including the plaintiff Hayes, will thereby be impeded in or prevented from carrying out duties of their offices, and that the organization will be impeded in or prevented from carrying out its objects.

I have made this mention of the allegations contained in the statement of claim because of the nature of the relief which is

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sought and because it is, I think, a matter of importance to decide whether this is a proper case for the making of a declaratory decree.

Section 78 contains a number of provisions and any inquiry as to its validity must in the circumstances of this case be preceded by the ascertainment of the precise meaning of every part of it. For, unlike the situation which generally presents itself in cases where relief of a similar nature is sought, the contentions of the parties in this case as to the meaning and effect of the section differ widely. The construction of the section is a matter which is attended by considerable difficulty and, not unnaturally, counsel for the plaintiffs sought to maintain a construction which would give to it an extremely wide operation. Such a construction would aid the contention that the section involves such a degree of interference with union activities as to make it proper for this Court to make a declaratory decree, and, further, it would support the main contention of the plaintiffs that the section travels outside the relevant legislative power. It was made clear to us, however, that the case of the plaintiffs was not thought to depend solely on the adoption of the wide construction contended for and, while I agree that this may be so, I cannot help but feel that unless such an interpretation be given to the section no real or substantial interference with union activities is involved.

It is not the case in this suit that the allegations in par. 7, to which I have referred, are admitted. Further, the allegations contained therein are of a very general nature and, in the light of the argument of counsel and all the material before us, must be taken to have been made on the assumption that the true meaning and effect of the section is in accordance with the contention advanced at the hearing on the plaintiffs' behalf. As at present advised, however, I do not think that the section has the wide meaning contended for. It is, in my opinion, subject to some, at least, of the limitations suggested by counsel for the Commonwealth and this being so, I am far from satisfied that the section involves any interference with union affairs of such a nature or to such a degree as to make it proper for this Court to exercise its power to make a declaratory decree.

This point was discussed during the course of the argument and we were referred to a number of cases in which declaratory decrees have been made. It is true that there have been a number of such cases but, so far as I can see, it is equally true that declaratory decrees have been made only in suits where it was clear that there was a substantial and immediate interference with a plaintiff's rights. We were referred, among others, to the case of *Bank of*

New South Wales v. *The Commonwealth* (1), but in that case a declaratory decree and consequential relief by way of injunctions was sought by the plaintiff banks to prevent an admitted threatened and imminent seizure and consequent complete loss of their respective businesses. The same broad proposition is true of the circumstances in which a declaratory decree was made in the case of *Federal Council of The British Medical Association in Australia* v. *The Commonwealth* (2). In that case the questions involved were raised on demurrer and it was admitted on the pleadings that the defendant Commonwealth "threatened and intended to prevent and hinder the plaintiff doctors from and in practising and carrying on their professions and to hinder them in the proper medicinal treatment of their patients" by the enforcement of the provisions of the *Pharmaceutical Benefits Act* 1947-1949 (Cth.) and the regulations made thereunder. That very substantial interference with the practices of the plaintiff doctors was the direct and immediate effect of the legislation was apparent and that the allegation was well founded was borne out by the view of the majority of the Court that the Act imposed a form of civil conscription. *Crouch* v. *The Commonwealth* (3) to which we were also referred, is a further illustration of the type of case in which the Court thought it proper to make a declaratory decree. Again, in that case, it was apparent and admitted on the pleadings that the immediate effect of the legislation was to prevent the plaintiff from carrying on his business. There have been many cases of this type, but I am unaware of any case where the mere possibility or risk of future interference with a plaintiff's rights has been recognized as an appropriate basis for the exercise of the jurisdiction to make a declaratory decree. That is, undoubtedly, a form of relief which may be granted or withheld at the discretion of the court and in my view it should not be granted in such a case. The discretion to make such a decree clearly ought not to be exercised where the rights of parties are not involved and where, accordingly, the question is of academic interest only. The condition necessary for the exercise of this discretion, though satisfied, where rights are immediately and substantially threatened is not satisfied where the plaintiff's apprehension rests merely on a possibility or risk that unlawful interference with his rights may occur at some future time. This case, I think, falls into the latter category. Indeed the vital dispute between the parties is as to the meaning and effect of s. 78. Counsel for the defendants was not concerned to justify the section on the interpretation ascribed to

(1) (1948) 76 C.L.R. 1.
(2) (1949) 79 C.L.R. 201.
(3) (1948) 77 C.L.R. 339.

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it by counsel for the plaintiff whilst the attack of the latter on the section would be deprived of a very great deal of its substance if the construction advanced for the defendants be correct. But considering, as I do, that the meaning and operation of the section is not nearly as wide as that for which the plaintiffs contended, I am of the opinion that this is not a case for the making of a declaratory decree.

In the circumstances of this case I should perhaps add that I am by no means satisfied that any substantial provision of s. 78 is invalid.

Declare that the Court in the exercise of its discretion ought not to entertain this action. Accordingly the Court does not answer the questions in the case stated.

Costs of the case stated reserved for the Justice disposing of the action.

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

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

R. D. B.