[HIGH COURT OF AUSTRALIA.]

COLLINS . . . . . APPELLANT;
INFORMANT,

AND

CHARLES MARSHALL PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

H. C. OF A. 1955.

MELBOURNE, *May* 16, 17, 18, 19;

SYDNEY, *Aug.* 11.

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

Constitutional law (Cth.)—Judicial power—Appellate jurisdiction—Federal jurisdiction—State jurisdiction—Power of Parliament to create Federal court with appellate jurisdiction—In respect of matters set out in ss. 75, 76 *of Constitution—Only from orders etc. of lower courts exercising Federal jurisdiction—Power of Parliament to prescribe exceptions from jurisdiction of High Court to hear and determine appeals—Consistency between Federal and State laws—Award of conciliation commissioner—Dealing comprehensively with conditions of employment but not with long service leave—Long service leave outside jurisdiction of conciliation commissioner—State Act prescribing long service leave for, inter alia, persons covered by award—Validity—The Constitution* (63 & 64 *Vict. c.* 12) *ss.* 71, 73 (*ii.*), 76 (*ii.*), 77, 109—*Judiciary Act* 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 39 (2) (*c*)—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 13 (1) (*c*), 25 (*c*), 31, 48 (2), 51—*Factories and Shops* (*Long Service Leave*) *Act* 1953 (*No.* 5706) (*Vict.*), *ss.* 7, 9 (2), (4).

Section 31 of the *Conciliation and Arbitration Act* 1904-1952 provides:—(1) There shall be an appeal to the court from a judgment or order of any other court—(*a*) in proceedings arising under this Act (including proceedings under section fifty-nine of this Act or proceedings for an offence against this Act) or involving the interpretation of this Act; and (*b*) in proceedings arising under an order or award or involving the interpretation of an order or award, and the court shall have jurisdiction to hear and determine any such appeal. (2) Except as provided in the last preceding sub-section, there shall be no appeal from a judgment or order from which an appeal may be brought to the court under that sub-section.

Held that s. 31 was invalid on the ground that it conferred an appellate jurisdiction on the Court of Conciliation and Arbitration from State courts exercising State jurisdiction and on the further ground, as to sub-s. (1) insofar as it attempted to invest the Court of Conciliation and Arbitration with

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jurisdiction in excess of that in respect of matters arising under the Act, that it was not authorized by s. 77 (i.).

Per Taylor J.: The power conferred on Parliament by s. 73 of the Constitution to prescribe exceptions from the jurisdiction of the High Court to hear and determine appeals is to be exercised by reference to some characteristic of the judgment or order of the lower court (e.g. the fact that the order is interlocutory or the amount involved is insubstantial) and not by reference to the type of matter involved.

The *Tramways Case* [*No.* 1] (1914) 18 C.L.R. 54, at p. 76 and *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (1916) 22 C.L.R. 103, at pp. 117, 118, referred to.

The *Factories and Shops* (*Long Service Leave*) *Act* 1953 (Vict.), s. 7 (1) provides that every worker, as defined in the Act, shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer. Section 7 (2) (*a*) provides that a worker who has completed twenty years of continuous employment with his employer is entitled to thirteen weeks of long service leave and thereafter to an additional three and one-quarter weeks' long service leave on the completion of each additional five years of continuous employment with such employer. Section 7 (2) (*c*) provides that a worker who has completed ten but less than twenty years of continuous employment with his employer and whose employment is terminated by the employer for any cause other than serious and wilful misconduct or by the worker on account of illness, incapacity or domestic or any other pressing necessity justifying such termination is entitled to such amount of long service leave as equals one-eightieth of the period of his continuous employment. Section 9 (2) provides that where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly. Section 9 (4) provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and in one of a number of specified ways. On a prosecution against an employer for a breach of the Act it was proved that the employment in question was governed by the Metal Trades Award 1952 given by a conciliation commissioner pursuant to the provisions of the *Conciliation and Arbitration Act*. The award did not deal with the question of long service leave, which was outside the jurisdiction of the conciliation commissioner, but did deal comprehensively with conditions of employment generally including the subject of annual leave. Clause 19 (2) provided that an employee not attending for duty, subject to immaterial exceptions, should lose his pay for the actual period of such non-attendance, but did not prohibit the employer from allowing him his pay.

Held that there was no conflict between the Act and the award so as to render the Act inoperative by virtue of s. 109 of the Constitution.

APPEAL from the Metropolitan Industrial Court of the State of Victoria.

By information dated 26th November 1954, Gerald Alexander Collins, Inspector of Factories and Shops, charged Charles Marshall Pty. Ltd., a company incorporated in the State of Victoria, with having failed, on 12th February 1954, at Fitzroy in the said State, to grant to one Cyril Kemp, an employee of the company from 23rd September 1940 to 12th February 1954, the amount of ordinary pay in respect of the long service leave to which he was entitled, in contravention of the *Factories and Shops* (*Long Service Leave*) *Act* 1953 (Vict.).

On 28th February 1955, the information was heard before the Metropolitan Industrial Court at Melbourne constituted by Herbert Barton Wade, Esq., a stipendiary magistrate. The defendant contended that the employment of Cyril Kemp was governed by the Metal Trades Award (1) given by J. M. Galvin, Esq., a conciliation commissioner, in pursuance of the *Conciliation and Arbitration Act* 1903-1952 with which the *Factories and Shops* (*Long Service Leave*) *Act* 1953 was inconsistent and consequently inoperative. The Metal Trades Award dealt comprehensively with the industrial relations of those subject to it, but not with the question of long service leave. The portions of it canvassed in argument are set out in the judgments hereunder. The stipendiary magistrate delivered the following judgment—" In this case the Metal Trades Award has set out in a fairly comprehensive manner the relationship which shall exist between employers and employees to that award, and it has dealt particularly with holidays, rates of pay, &c. The *Factories and Shops* (*Long Service Leave*) *Act* 1953 (Vict.) if it operated, would, in my opinion, alter the terms as set out in the award. One point which struck me during the hearing was that under the terms of the award an employer may dismiss a man for malingering, inefficiency, neglect of duty or misconduct. That right is restricted by the Act. An employer would only be justified under the Act in dismissing an employee for serious and wilful misconduct. I think, therefore, that I must adopt the attitude that the State Act is inconsistent with the award, and that so far as the Metal Trades Award is concerned, it is inoperative. The information will be dismissed with ten guineas costs against the informant ".

On 10th March 1955 the High Court granted special leave to the informant to appeal from the decision of the stipendiary magistrate.

(1) (1952) 73 C.A.R. 324.

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Gregory Gowans Q.C. (with him *Dermot Corson*), for Cyril Kemp and seven organizations of employees. We apply for leave to intervene on behalf of Cyril Kemp and of seven organizations of employees bound by the Metal Trades Award 1952. Kemp has a special interest in securing the conviction of the respondent: see s. 18 of the *Factories and Shops* (*Long Service Leave*) *Act* 1953. In somewhat similar circumstances this Court has permitted intervention by unions. [He referred to *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1); *R.* v. *Findlay*; *Ex parte Victorian Chamber of Manufactures* (2).]

[DIXON C.J. We do not think that leave to intervene should be granted.]

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *K. A. Aickin*), for the appellant, on the question of the competence of the appeal. The proceeding in the Metropolitan Industrial Court did not arise under the *Conciliation and Arbitration Act* 1904-1952 or involve the interpretation of that Act within the meaning of s. 31 (1) (*a*). Nor did it arise under or involve the interpretation of an award within the meaning of s. 31 (1) (*b*). Section 31 is restricted to cases where the interpretation of an award, and only that, is involved. Alternatively it only takes in proceedings which cannot be decided without interpreting an award. [He referred to *Troy* v. *Wrigglesworth* (3); *Re Drew* (4).]

D. I. Menzies Q.C. (with him *A. P. Aird*), for the respondent, on the question of the competence of the appeal. Section 31 must be read so as not to apply to appeals to the High Court. If the section is to be regarded as an exception under s. 73 of the Constitution it cannot be regarded as being such where the question arises under the Constitution as well as under the *Conciliation and Arbitration Act* or an award. Alternatively, having regard to s. 76 (ii.) of the Constitution, s. 31 must be confined to proceedings arising under, but not involving the interpretation of, the Act. We do not contest the view that this Court has jurisdiction to hear and determine the appeal.

A. D. G. Adam Q.C. (with him *C. I. Menhennitt*), for the Commonwealth of Australia to which leave was granted to intervene, not as a party, but in support of the argument only. Section 31 (2) of the *Conciliation and Arbitration Act* 1904-1952 does not repeal expressly

(1) (1944) 69 C.L.R. 476, at p. 482.
(2) (1950) 81 C.L.R. 537.
(3) (1919) 26 C.L.R. 305, at p. 309.
(4) (1919) V.L.R. 600, at pp. 606, 608.

or by implication s. 39 (2) (*c*) of the *Judiciary Act* 1903-1950. Consequently it does not apply to appeals brought by special leave of the High Court. [He referred to *The Commonwealth* v. *Limerick Steamship Co. Ltd. and Kidman* (1); *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2).] Legislation creating exceptions to the appellate jurisdiction conferred on the High Court by s. 73 of the Constitution must be clear and unambiguous. It is not sufficiently clear from the language of s. 31 (1) of the *Conciliation and Arbitration Act* that matters which involve the interpretation of the Constitution were intended to come within its scope. Under ss. 71 and 77 of the Constitution Parliament could create a court with appellate jurisdiction in respect of matters in s. 75 and s. 76 of the Constitution irrespective of whether the court appealed from was exercising Federal or State jurisdiction. [He referred to *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (3).] Under s. 77 (i.) of the Constitution Parliament may define the jurisdiction of a Federal court as appellate, original or both. [He referred to *Ah Yick* v. *Lehmert* (4).] Alternatively s. 77 (i.) of the Constitution read with s. 77 (iii.) authorizes Parliament to confer on a Federal court appellate jurisdiction with respect to State courts which are invested with Federal jurisdiction. The power given by s. 77 (iii.) includes the controlling of the jurisdiction invested thereunder in the matter of appeals. [He referred to *Lorenzo* v. *Carey* (5); *The Commonwealth* v. *Limerick Steamship Co. Ltd. and Kidman* (6); *The Commonwealth* v. *Kreglinger & Fernau Ltd. and Bardsley* (7).] Section 31 of the *Conciliation and Arbitration Act* 1904-1952, if beyond power, can be read down.

H. A. Winneke Q.C., in reply on the question of the competence of the appeal. Sections 71, 73 (ii.) and 74 of the Constitution disclose a clear intention that the High Court is to be the final court of appeal in Australia in all matters in which there is to be an appeal. Section 31 of the *Conciliation and Arbitration Act* must at least be read down so as to prevent it applying to appeals to this Court. Section 71 contemplates the creation of courts exercising original, not appellate, jurisdiction. The power to prescribe "exceptions" in s. 73 of the Constitution is a narrow one. It would not justify the exclusion of a court. [He referred to *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (8); *Federated*

(1) (1924) 35 C.L.R. 69, at p. 87.
(2) (1907) 4 C.L.R. 1087, at pp. 1138, 1139.
(3) (1938) 59 C.L.R. 556, at p. 586.
(4) (1905) 2 C.L.R. 593, at pp. 602 et seq., 611, 612.
(5) (1921) 29 C.L.R. 243, at pp. 249 et seq.
(6) (1924) 35 C.L.R., at pp. 89, 92, 115, 116.
(7) (1926) 37 C.L.R. 393.
(8) (1916) 22 C.L.R. 437.

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Engine Drivers' & Firemen's Association of Australasia v. *Colonial Sugar Refining Co. Ltd.* (1).] Section 31 of the *Conciliation and Arbitration Act* 1904-1952 cannot be justified under the power to prescribe " exceptions ".

C. I. Menhennitt, in reply. The Federal Parliament could validly establish a hierarchy of appellate courts exercising Federal jurisdiction. There is nothing in s. 77 of the Constitution to prevent an appeal to such a court from a State court exercising State jurisdiction provided that the matter is within those specified in s. 75 or s. 76. Under s. 76 (i.) a Federal court could be given original jurisdiction in matters arising under, or involving the interpretation of, the Constitution.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *K. A. Aickin*), for the appellant. Section 9 (5) of the *Factories and Shops (Long Service Leave) Act* 1953 provides that long service leave shall not be inclusive of annual leave occurring during the period when the long service leave is being taken. The distinction between annual and long service leave is also shown in the *Conciliation and Arbitration Act* 1904-1952, ss. 13 (1) (*c*), 25 (*c*). The conciliation commissioner did not have jurisdiction to deal with the subject of long service leave. There is no conflict between the provisions of the Victorian Act and the award. The Act does not prevent the termination of employment. It merely provides that certain consequences shall follow the termination. The *Conciliation and Arbitration Act* 1904-1952 in giving force and effect to awards necessarily confines their authority to the regulation of industrial relations which are in dispute. [He referred to *Ex parte McLean* (2).]

D. I. Menzies Q.C. (with him *A. P. Aird*), for the respondent. There are two sorts of inconsistency. [He referred to *Carter* v. *Egg & Egg Pulp Marketing Board (Vict.)* (3); *Colvin* v. *Bradley Bros. Pty. Ltd.* (4); *Wenn* v. *Attorney-General (Vict.)* (5).] In order to ascertain the intention of Parliament the Court must go beyond the award to the *Conciliation and Arbitration Act*. [He referred to *Ex parte McLean* (6); *Colvin* v. *Bradley Bros. Pty. Ltd.* (7).] The Metal Trades Award dealt not with particular matters but with conditions of employment generally. The *Factories and Shops*

(1) (1916) 22 C.L.R. 103, at p. 117.
(2) (1930) 43 C.L.R. 472, at p. 484 et seq.
(3) (1942) 66 C.L.R. 557, at pp. 573, 574.
(4) (1943) 68 C.L.R. 151.
(5) (1948) 77 C.L.R. 84.
(6) (1930) 43 C.L.R., at pp. 479, 483 et seq.
(7) (1943) 68 C.L.R. 151, at p. 163.

(*Long Service Leave*) *Act* 1953 (Vict.) enters the field covered by the award and confers rights and imposes duties different from those arising out of the award. The effect of the Act is to continue the employment notwithstanding the termination of the employment under the award. It is contemplated by s. 9 (5) that annual leave may accrue to a worker on long service leave. Section 14 reinforces that view of the operation of the Act. Clause 26 of the award provides for the keeping of records of pay etc. Sections 15 and 16 of the Act make further provision for the keeping of records. Section 11 of the Act, providing for a final appeal to the Industrial Appeals Court, is inconsistent with s. 29 (1) (*d*) of the *Conciliation and Arbitration Act*. We rely on s. 51 of the *Conciliation and Arbitration Act* only as showing the intention of Parliament that there should be no interference by a State with the settlement of an industrial dispute under the machinery provided by the Act. State legislation not dealing with an industrial matter might be regarded as consistent with an award provided there was no direct conflict. [He referred to *Clyde Engineering Co. Ltd.* v. *Cowburn* (1).] Although the *Conciliation and Arbitration Act* draws a distinction between long service leave and other sorts of leave that is only for the purpose of the division of business between the conciliation commissioners and the Court of Conciliation and Arbitration. A conciliation commissioner in making his award could take into account the fact that no claim was made for long service leave.

K. A. Aickin, in reply. It is conceded that s. 51 of the *Conciliation and Arbitration Act* is irrelevant. There is no evidence that the subject of long service leave was within the ambit of the dispute. Section 9 (2) of the *Factories and Shops* (*Long Service Leave*) *Act* recognizes and bases its operation upon the fact of the termination of employment. Under the award an employee who fails to work is not entitled to pay. His employer is not prohibited from paying him.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, WILLIAMS, WEBB, FULLAGAR AND KITTO JJ. This is an appeal by special leave from an order of a stipendiary magistrate constituting the Metropolitan Industrial Court of the State of Victoria. The order dismissed an information by the appellant against the respondent charging the latter with a breach of the provisions of the *Factories and Shops* (*Long Service*

(1) (1926) 37 C.L.R. 466.

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Leave) *Act* 1953 (No. 5706) (Vict.). It is an offence under s. 17 (1) (*d*) of that Act to contravene or fail to comply with any provision of the Act. Under s. 7 (1) and (2) (*c*) (i) a worker who has completed at least ten years but less than twenty years continuous employment with his employer and whose employment is terminated by his employer for any cause other than serious and wilful misconduct is entitled to long service leave on ordinary pay for a period equivalent to one-eightieth part of the period of his continuous employment. In consequence of s. 9 (2) and (4) he is deemed to take his leave when his employment terminates and must be paid his ordinary pay by his employer, either in full then and there or at the same times as it would have been paid if he were still on duty or in some other way agreed between them. The charge against the respondent company was that, having been the employer of a worker named Kemp for a period of some thirteen years ending on 12th February 1954, it failed to grant him the amount of long service leave to which he was entitled, in contravention of the Act. In fact the defendant company terminated Kemp's employment on 12th February 1954. Among the grounds upon which the respondent company relied by way of defence to this charge was the contention that the employment was regulated completely by an award made by a conciliation commissioner in pursuance of the *Conciliation and Arbitration Act* 1904-1952 (Cth.) with which the operation of the Victorian Act was incompatible so that as a result of s. 109 of the Constitution the material provisions of the Victorian Act were *pro tanto* invalid. The magistrate accepted this view and dismissed the information.

The Metropolitan Industrial Court was established at the beginning of 1937 under Act No. 4461 but it is now governed by s. 190 of the *Labour and Industry Act* 1953 which came into operation on 1st July 1954, that is to say after the date of the alleged offence and before the date of the information. It is a consolidating Act which also includes in Div. 4 of Pt. VIII the provisions of the *Factories and Shops* (*Long Service Leave*) *Act* 1953. Although the Metropolitan Industrial Court came into being after the passing of the *Judiciary Act* 1903 that would not prevent s. 39 of that Act applying to it: *The Commonwealth* v. *District Court of the Metropolitan District* (1). Because the defence accepted by the magistrate involved the interpretation of the Constitution, the magistrate exercised federal jurisdiction and upon that footing the appeal was brought under s. 73 (ii.) of the Constitution by special leave granted under s. 39 (2) (*c*) of the *Judiciary Act* 1903-1950. No

(1) (1954) 90 C.L.R. 13.

attempt was made to appeal as of right pursuant to s. 39 (2) (*b*) of the *Judiciary Act* because of s. 47 of the *Labour and Industry Act* 1953 (Vict.).

On the application for special leave the attention of this Court was directed to s. 31 of the *Conciliation and Arbitration Act* 1904-1952 as a provision which might seem to take the matter out of the appellate jurisdiction of this Court but which, as it was said, did not amount to an exception under s. 73 of the Constitution from this Court's appellate jurisdiction and moreover did not cover this case and in any event was invalid. On the hearing of the appeal the question whether s. 31 operated to deprive the appellant of the right which would otherwise exist to appeal by special leave to this Court was argued. Counsel for the appellant and for the respondent united in attempting to place upon the provision one meaning or another which would ensure that it would not have this effect. We thought it desirable however to hear counsel for the appellant in respect of certain of the constitutional grounds upon which he attacked the validity of s. 31 or sought to limit the application or operation it might otherwise receive. Counsel for the Commonwealth intervened to argue against one such ground, a ground going to total invalidity, but otherwise he stood aloof.

Section 31 is as follows :—"(1) There shall be an appeal to the Court from a judgment or order of any other Court—(*a*) in proceedings arising under this Act (including proceedings under section fifty-nine of this Act or proceedings for an offence against this Act) or involving the interpretation of this Act ; and (*b*) in proceedings arising under an order or award or involving the interpretation of an order or award, and the Court shall have jurisdiction to hear and determine any such appeal. (2) Except as provided in the last preceding sub-section, there shall be no appeal from a judgment or order from which an appeal may be brought to the Court under that sub-section."

The proceeding before the Metropolitan Industrial Court was not, of course, a proceeding " under " the *Conciliation and Arbitration Act* or " under " an order or award made pursuant to that Act. It was " under " the provisions of the *Factories and Shops* (*Long Service Leave*) *Act* 1953 as operating upon the case through the *Acts Interpretation Act* 1928-1950 (Vict.), s. 6. But the defence to which the magistrate gave effect called for a consideration of the character and scope of the award of the conciliation commissioner for the purpose of applying s. 109 of the Constitution to the *Conciliation and Arbitration Act* according to the principles expounded

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in *Ex parte McLean* (1). In this sense the "proceeding" may involve the interpretation of the award within the meaning of s. 31 (1) (*b*). It was for that reason that the proceeding before the Metropolitan Industrial Court appeared prima facie to fall within the description given by s. 31 of proceedings in which an appeal is to lie to the Court of Conciliation and Arbitration and not elsewhere.

There is a number of difficulties of a constitutional character in applying the section according to what might be considered the natural meaning of its terms. In the first place it is obvious that the words "appeal . . . from a judgment or order of any other Court" cannot include judgments or orders of this Court. For the High Court is the Federal Supreme Court under s. 71 of the Constitution; an appeal lies to it from any other Federal court under s. 73 (ii.); and under s. 75 (v.) its jurisdiction extends to awarding mandamus prohibition or injunction against judicial officers constituting other Federal courts. Parliament could not, and we may be sure did not, intend to include this Court in the expression "any other Court" in the opening words of s. 31 (1). In the next place sub-s. (2) cannot constitutionally operate to exclude from the appellate jurisdiction of this Court a judgment decree order or sentence of a Supreme Court of a State in a proceeding arising under the *Conciliation and Arbitration Act* or arising under an order or award or involving the interpretation of that Act or such an order or award, if the matter is one in which at the establishment of the Commonwealth an appeal lay from the Supreme Court to the Privy Council. For by s. 73 of the Constitution it is provided that no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council. If this means "lies as of right", such an appeal lay in effect in the case of every such Supreme Court, except that of Tasmania, where the judgment involved £500 or more. In the case of the Supreme Court of Tasmania the amount was £1,000: (see *Quick and Garran, The Annotated Constitution of the Australian Commonwealth* (1901), pp. 739, 740). It was suggested too that the language of sub-s. (2) of s. 31 is not very apt to express an intentional exercise of the power conferred on the Parliament by s. 73 of the Constitution to make exceptions from the subject matter of the appellate jurisdiction of this Court. It was contended that an interpretation of sub-s. (2) which treated it as not meaning to exclude an appeal to the High Court was

(1) (1930) 43 C.L.R. 472.

justified by these three considerations, namely the inapplicability of the phrase " any other Court " to the High Court, the incompetence of sub-s. (2) to exclude all appeals of the stated description from the Supreme Courts to the High Court and the use of general and not very apt language if an exercise was intended of the power to make exceptions. But if we are seeking the real meaning of the legislature, it is difficult to resist the impression of a general intention to confine all appeals of the description stated to the Court of Conciliation and Arbitration. For the same reason it is difficult to adopt the suggestion made by counsel intervening for the Commonwealth that sub-s. (2) is dealing only with appeals as of right to other courts so that it does not derogate from this Court's jurisdiction to grant special leave under s. 39 (2) (*c*) and presumably s. 35 (1) (*b*). It is therefore necessary to turn to the grounds which go to the validity of s. 31, either wholly or in part.

The first to be considered is an excess of the constitutional power in supposed reliance upon which it is assumed that the provision was enacted. It is assumed that, treating the Court of Conciliation and Arbitration as established under the power conferred by the words " such other Federal Courts as the Parliament creates " in s. 71 of the Constitution, the legislature sought to exercise the power conferred by s. 77 (i.) which, with respect to any of the matters mentioned in ss. 75 and 76, enables the Parliament to define the jurisdiction of any Federal Court other than the High Court. That of course implies that s. 77 (i.) was invoked on the footing that it applied to appellate as well as to original jursidiction of Federal courts. On any footing the jurisdiction which may be " defined " is restricted to the nine descriptions of " matter " contained in the five paragraphs of s. 75 and the four paragraphs of s. 76. Section 31 of the Act is based on none of these paragraphs with the exception of s. 76 (ii.)—matters arising under any laws made by the Parliament. It is conceivable that within a proceeding arising under the Act or an order or award or involving the interpretation of the Act or an order or award, a matter capable of satisfying one or more of the other paragraphs might be found. It might for example be a case in which an injunction was sought against an officer of the Commonwealth or a case in which the parties on the respective sides of the record in the primary court were residents of different States. But that would be an accidental feature of the proceedings, not one on which the appeal which s. 31 (1) attempts to give is based. There is in fact nothing in ss. 75 and 76 of the Constitution other than s. 76 (ii.) that lends any support to s. 31 of the Act. But the support it lends could not on any footing go far enough. It is limited to

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matters arising under any laws made by the Parliament. Now sub-s. (1) of s. 31 describes proceedings in terms which must bring into contrast " proceedings arising under the Act " not only with " proceedings involving the interpretation of the Act " but with " proceedings arising under an order or award " and finally with " proceedings involving an interpretation of an order or award ". " Proceedings " are not necessarily co-extensive with " matters " : see *Re Judiciary and Navigation Acts* (1), but the distinction can for the moment be put aside.

Clearly enough a matter or a proceeding may involve the interpretation of the Act or of an order or of an award, although the proceeding does not arise under the Act. This very case is an example and it may be said that almost always it will be so where the Act order or award is relevant only to some matter of defence to a proceeding based on some cause of action or ground which is prima facie independent of the Act order or award. Further, there is a difference between a proceeding arising under the Act and a proceeding arising under an order or award and this difference the language of s. 31 (1) marks. It may be supposed that if a proceeding can properly be said to arise under an award or order, it will usually be true that it can also be said that it arises under the Act. But there is not necessarily an invariable identity and an order or award of a conciliation commissioner or of the Court of Conciliation and Arbitration is not a law of the Commonwealth : *Ex parte McLean* (2). Where is to be found the legislative authority for conferring jurisdiction in matters arising under an order or award, as distinguished from under the Act ? Where is the legislative authority for conferring jurisdiction in matters which do not arise under the Act but which do involve the interpretation of the Act or of an order or of an award ? It cannot be found in the operation of s. 76 (ii.)—matters arising under any laws made by the Parliament—upon s. 77 (i.)—defining the jurisdiction of any federal court with respect (*inter alia*) to such matters. And it cannot be found elsewhere. It follows that independently of any other ground of invalidity so much of s. 31 (1) must be void as attempts to give an appellate jurisdiction to the Court of Conciliation and Arbitration in proceedings that do not arise under the *Conciliation and Arbitration Act* but do involve the interpretation of the Act or of an order or of an award or do arise under an order or an award. It follows that sub-s. (2) on its very terms cannot apply to such proceedings. This case, which at best involves the interpretation of the Act and

(1) (1921) 29 C.L.R. 257, at p. 265.

(2) (1930) 43 C.L.R. 472, at pp. 479, 484.

of an award, must therefore fall outside both sub-s. (1) and sub-s. (2) of s. 31.

Two further points which have not been discussed are involved in what precedes. One is that if s. 77 (i.) would suffice to empower the Parliament to confer appellate jurisdiction over State courts in matters arising under a law made by the Parliament, it is the appeal and not the original proceeding that must answer the description. It may often be a distinction without a difference. But it need not always be so. In a " proceeding under the Act " in the primary court the whole matter so far as it rests on the Act may be confessed and reliance may be placed wholly on matter in avoidance which has nothing to do with the Act or an order or award and to that alone the appeal may be addressed. Yet it seems certain that the court, the jurisdiction of which is defined in terms of s. 73 (ii.), can receive jurisdiction only in respect of what, when that court becomes seised of it, is a matter arising under the law of the Parliament. The same distinction between the character of the original cause and of an appeal from the decision thereof sometimes arises in connection with s. 76 (i.) under s. 39 (2) of the *Judiciary Act*. An ordinary proceeding in a court of petty sessions under State law may be decided without the intrusion of the federal Constitution or any other federal element. Thus there is no federal jurisdiction. On an appeal to general sessions or on an order nisi to review, an argument may be raised, for example, under one or other of ss. 90, 92, 109, 117 or 118 of the Constitution. At once the appeal becomes one in federal jurisdiction with all the consequences under ss. 39 (2), 40, 79 and 80 of the *Judiciary Act*. Section 31 (1), however, " defines " the jurisdiction by reference to what arises in the original proceeding. The other matter is the distinction already adverted to between a " matter " and a " proceeding ". It is a distinction which s. 31 (1) fails to make and it may be that if pursued to its logical consequences this failure might prove in itself fatal. It is enough to quote the following passage from the joint judgment in *Re Judiciary and Navigation Acts* (1) : " It was suggested in argument that ' matter ' meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention ; we do not think that the word ' matter ' in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right,

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

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duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one" (1).

But, independently of the foregoing considerations, s. 31 must be held to be ultra vires. It attempts to give an appeal from State courts although the State courts may not be exercising Federal jurisdiction whether conferred by s. 39 (2) of the *Judiciary Act* or by some other federal law. Indeed s. 31 entirely disregards the distinction between State and federal jurisdiction. The only basis that can be put forward for an attempt to clothe a federal court with appellate power over State courts exercising State jurisdiction consists in a combination of s. 71 and s. 77 (i.) of the Constitution. Taking the Court of Conciliation and Arbitration as a Federal court created under the words of s. 71 "such other federal courts as the Parliament creates", counsel intervening for the Commonwealth maintained that s. 77 (i.) enables the Parliament with respect to any matter within the nine categories mentioned in ss. 75 and 76 to confer appellate jurisdiction on that court. No constitutional reason exists, it is said, why the power should not extend to conferring jurisdiction to entertain appeals from a State court exercising Federal jurisdiction or State jurisdiction. In the course of his judgment in *Ah Yick* v. *Lehmert* (2), *Griffith* C.J. said: "Taking sec. 71 into consideration, sec. 77 (i.) means that the Parliament may establish any Court to be called a federal Court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either by way of appellate or original jurisdiction" (3). This dictum does of course give support for the argument. It does not draw the distinction between the State and the Federal jurisdiction of the court to be appealed from but it may be that the learned Chief Justice only had courts exercising Federal jurisdiction before his mind. The distinction is important because the view is open that when a State court is invested with original Federal jurisdiction under s. 77 (iii.) it may be done conditionally and one of the conditions may be that an appeal shall lie to some other court. Thus of s. 39 (2) *Isaacs* J. says in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (4): "The grant is expressed to be 'subject to the following conditions and restrictions'. Then follow four separate and distinct provisions. The first relates to the Supreme Court alone and applies, needless

(1) (1921) 29 C.L.R., at p. 265.
(2) (1905) 2 C.L.R. 593.
(3) (1905) 2 C.L.R. 593, at p. 604.
(4) (1907) 4 C.L.R. 1087.

to say, to federal jurisdiction only. The second relates to inferior Courts from which an appeal lies to the Supreme Court; the third to inferior Courts whether an appeal lies to the Supreme Court or not; the last to Courts of summary jurisdiction" (1). In *Attorney-General* v. *Sillem* (2), Lord *Westbury* speaks of a new right of appeal as "in effect a limitation of the jurisdiction of one court and an extension of the jurisdiction of another." It may be that in investing a State court with Federal jurisdiction the limitation may be imposed wherever the power to extend the jurisdiction of the other court exists. But does the Constitution contemplate the imposition by the Federal Parliament of such a limitation or condition on the jurisdiction or the finality of the jurisdiction of State courts exercising State jurisdiction? The Commonwealth Constitution is unlike the Constitution of the United States in the manner in which the relation of Federal judicial power to State courts is dealt with specifically. Section 73 (ii.) is very specific in defining the jurisdiction of this Court to hear and determine appeals from State courts. Section 77 (iii.) gives a specific power to invest State courts with Federal jurisdiction and s. 77 (ii.) a specific power to define the extent of the jurisdiction of a Federal court which shall be exclusive of the jurisdiction belonging to the courts of the States. On the face of the provisions they amount to an express statement of the Federal legislative and judicial powers affecting State courts which, with the addition of the ancillary power contained in s. 51 (xxxix.), one would take to be exhaustive. To construe the very general words of s. 71 relating to the creating of other Federal courts and of s. 77 (i.) relating to the definition of their jurisdiction as containing a power to establish a further appellate control of State courts exercising State functions would seem to be opposed to the principles of interpretation, particularly those applying to a strictly federal instrument of government. When the content of s. 73 (ii.) is examined two very important considerations telling against such an interpretation are seen. In the first place a new Federal court of appeal if brought into existence would clearly be a Federal court from which an appeal would lie to the High Court under s. 73 (ii.). It may be assumed that when that provision speaks of a court from which an appeal lies to the Privy Council that means lies as of right. If the court subject to the appeal to the supposed new Federal court of appeal was a Supreme Court of the State or a court whence an appeal lay as of right at the establishment of the Commonwealth, there would be a parallel right of appeal to the High Court. This

(1) (1907) 4 C.L.R. 1087, at p. 1143.

(2) (1864) 10 H.L.C. 704, at pp. 720, 721 [11 E.R. 1200, at p. 1208].

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would be true too if the primary court were exercising Federal jurisdiction. That would mean that alternative rights of appeal would exist from State courts to different Federal courts of appeal, one being subject to appeal in its turn to the other. It is true that the Parliament has a power of making exceptions from the subject matter of the appellate jurisdiction of the High Court, but the power is limited in the case of Supreme Courts in the manner already described and moreover after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s. 73. For example if the Inter-State Commission were established the power could hardly extend to excepting all judgments decrees orders and sentences of that body from the appellate jurisdiction of the Court. In any event it is the intention of s. 73 (ii.) that is important and according to that intention, until an exception were validly made, an appeal would lie to the High Court from courts which, on the hypothesis required, would be subject to an alternative appeal to the supposed new Federal appeal court. In the second place it is apparent from s. 73 (ii.) that the principle or policy which it embodies was to place the court that is supreme in the State judicial hierarchy under the appellate jurisdiction of the High Court and no other State courts, unless they were invested under s. 77 (iii.) with Federal jurisdiction. It would be incongruous with this principle to give at the same time a constitutional power to create other subordinate Federal courts to hear appeals from State courts exercising State jurisdiction.

If one turns to the situation under Art. III of the Constitution of the United States it is not difficult to see reflected in the more important variations from Art. III which appear in Chap. III of our Constitution an appreciation on the part of the framers of some of the difficulties encountered in the United States. Section 1 of Art. III corresponds with s. 71 in that it provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Section 2 then enumerates the matters or "cases" comprised within the judicial power:—"The judicial power shall extend to all cases in law and equity" and so on. The enumeration of "cases" though in different terms covers eight of the nine matters mentioned in our ss. 75 and 76, our s. 75 (v.), forming no part of Art. III but being inspired by the provision of the American *Judiciary Act* held invalid in *Marbury* v. *Madison* (1). Section 2 goes on to provide that in cases affecting ambassadors

(1) (1803) 1 Cr. 137 [2 Law. Ed. 60].

and the like and cases in which a State is a party the Supreme Court shall have original jurisdiction and in all others appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make.' But this has never been construed as an effective constitutional grant *per se* of appellate jurisdiction. "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes", per *Taney* C.J. for the court in *Barry* v. *Mercein* (1). In s. 73 the contrary course was taken of making a complete and effective grant to the High Court of appellate jurisdiction and defining its content and in ss. 75 and 76 of dealing specifically with the original jurisdiction the Court shall have and that which may be conferred upon it. Under the United States Constitution no Federal jurisdiction could exist in State courts. Yet it was obvious that in the course of exercising State jurisdiction State courts must often pass upon the validity, meaning and effect of the laws made by Congress and upon questions arising under the Constitution of the United States, particularly when the consistency of State law with that Constitution fell to be decided. By what proved a famous provision of the *Judiciary Act* passed in 1789 by Congress, s. 25, it was enacted that when such matters were drawn in question before State courts and decided against, to state it compendiously, Federal authority or interest or in favour of State authority or interest, then the judgment or decree, if of the highest court of law or equity of the State, might be "re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error". For some time States and State courts impugned the validity of this provision and denied the authority of writs of error directed to State courts under it. Virginia was notable in her resistance. In *Martin* v. *Hunter's Lessee* (2) the Supreme Court affirmed the validity of the provision in face of the express refusal of the Court of Appeal of Virginia to obey the mandate of its writ, but there was not a general acceptance of this jurisdiction until the judgment of *Marshall* C.J. in *Cohens* v. *Virginia* (3) prevailed. In no small measure the conclusion was based upon the paramountcy within their spheres of the organs of government of the United States, upon the fact that the judicial power of the United States was designed for the purpose of maintaining the

(1) (1847) 5 Howard 103, at p. 119 [12 Law. Ed. 70, at p. 77].
(2) (1816) 1 Wheat. 304 [4 Law. Ed. 97].
(3) (1821) 6 Wheat. 264 [5 Law. Ed. 257].

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paramountcy of the Constitution and laws of the United States, upon the manner of distribution of the judicial power which bestowed on the Supreme Court appellate power only over the greater and most vital part of the subject matter, and finally upon the impossibility of an interpretation which meant that the Constitution had "provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state of the Union": *Cohens* v. *Virginia* (1). It is, according to text writers, no more than an implied power: *Curtis, Jurisdiction of the United States Courts*, 2nd ed. (1896), p. 24; *Bunn, Jurisdiction & Practice of the Courts of the United States*, 4th ed., p. 138. The latter says: "This result was finally acquiesced in by the whole country, and is one of the many instances proving the commanding influence of Chief Justice *Marshall* and his associates. The power is an implied one, resting on the second clause of the sixth article of the Constitution, providing that the Constitution of the United States and the laws of Congress made under its authority shall be the supreme law of the land." In our Constitution all these difficulties have been met—(1) by conferring definitely a general appellate power upon the High Court over the courts of last resort in the States, (2) by authorizing the Parliament to invest courts of the States with Federal jurisdiction, (3) by giving an appeal to the High Court from all courts exercising Federal jurisdiction. It may be that the Australian scheme was defective but what has so far proved an effectual remedy for the defects was provided by the legislature in ss. 39 and 40 of the *Judiciary Act*. A consideration of the history of the matter in the United States and the different framework of the judicature chapter of our Constitution tends to confirm the view that appellate power over State courts exercising State jurisdiction cannot be conferred upon a Federal court by the Parliament. It is perhaps not unworthy of remark that Congress has not attempted to arm any court but the Supreme Court with authority to entertain appeals from State courts.

For the foregoing reasons s. 31 (1) is ultra vires and, of course, sub-s. (2) can have no operation. The Solicitor-General for Victoria on behalf of the appellant was prepared for the purpose of destroying s. 31 to advance a further argument, which he described as far-reaching. The argument was that constitutionally the Court of Conciliation and Arbitration could not be regarded as created under s. 71: (cf. *Postum Cereal Co.* v. *California Fig Nut Co.* (2)). As

(1) (1821) 6 Wheat. 264, at p. 377 [5 Law. Ed. 257, at p. 284].

(2) (1927) 272 U.S. 693, at pp. 700, 701 [71 Law. Ed. 478, at p. 481].

we were disposed to accept the view that in any case s. 31 could not validly operate to render the appeal incompetent, this argument was not heard.

As the appeal is competent it becomes necessary to deal with the question of substance which it raises. The award which the magistrate held to have the effect of rendering inoperative *pro tanto* the provisions of the *Factories and Shops* (*Long Service Leave*) *Act* 1953 (Vict.) is called the *Metal Trades Award*. It was made by a conciliation commissioner and was expressed to come into operation in February 1952 and remain in force for one year. The fixed period of the award has therefore expired and its operation is continued by s. 48 (2) of the *Conciliation and Arbitration Act*. The decision of the magistrate depended upon s. 109 of the Constitution. He did not advert to the provisions of s. 51 of the *Conciliation and Arbitration Act*. During the course of the argument these provisions were discussed but neither the appellant nor the respondent regarded them as supporting any conclusion which would not be arrived at under s. 109 alone. The State law has been held inoperative on the ground of inconsistency with the Federal law composed of the *Conciliation and Arbitration Act* and the award of the conciliation commissioner made thereunder. The inconsistency has been found in the co-existence of the two provisions. Before us the ground has been taken that it is impossible to obey both instruments in all respects simultaneously. But the chief ground relied upon is that Federal law has dealt with the industrial regulation of the relations between the employer and the worker completely, exhaustively or exclusively so as to show an intention that the award alone shall govern all the matters with which it is concerned. It is said that the State law, if valid, would deal with an industrial question falling within the field which Federal law itself exclusively or exhaustively governs. Both as an aid to this conclusion and as an independent reason for saying that the State Act is inoperative the respondent contends that in particular provisions of the State law there are inconsistencies with particular provisions of the Federal award. It will be seen that there are therefore two different aspects of inconsistency with which it is necessary to deal.

The basis of the application of s. 109 to a State law affecting industrial relations regulated by an award is not that the award is a law of the Commonwealth within the meaning of s. 109 but that the *Conciliation and Arbitration Act* constitutes the inconsistent Federal law inasmuch as it means that an award purporting to make an exhaustive regulation shall be treated as the exclusive determination of the industrial relations which it affects. " The award itself

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is, of course, not law, it is a *factum* merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award."—per *Isaacs* C.J. and *Starke* J., *Ex parte McLean* (1). The theoretical principles upon which the prior decisions of this Court dealing with the matter proceed were stated in the same case as follows :—" The view there taken, when analyzed, appears to consist of the following steps, namely :— (i) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorize awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law ; (ii) the Commonwealth *Conciliation and Arbitration Act* confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded ; (iii) sec. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation."—per *Dixon J.* (2).

The operation of s. 109 in the case of an industrial award presents many difficulties. For instance, the operation of the State law can only be excluded in its application to the particular individuals governed by the award. Further, when the award is kept in force after the period specified by the conciliation commissioner for its duration it is the Act which continues to give it effect. The intention or will of the arbitrator appears to be spent. The consequence seems to be that to the legislature there must be ascribed the intention of keeping in force an industrial regulation as an exclusive measure of the rights and duties of the parties bound thereby. Apparently the true doctrine is that in such a case the " extent of the inconsistency " is to be ascertained so far as time and persons are concerned by reference to the period during which s. 48 (2) of the Act keeps the award in force and by reference to the classes of persons bound by the award.

Section 51 of the *Conciliation and Arbitration Act* provides that when a State law, or an order, award, decision or determination of a State industrial authority is inconsistent with, or deals with any matter dealt with in, an order or award, the latter shall prevail,

(1) (1930) 43 C.L.R., at p. 479.

(2) (1930) 43 C.L.R., at pp. 484-485.

and the former shall, to the extent of the inconsistency, or in relation to the matter dealt with, be invalid. In terms this provision goes beyond any operation possessed by s. 109 because it relates not only to inconsistencies but to the valid application of State law to a matter dealt with in an order or award. It may be that no contrast was intended between the latter conception and the conception of actual inconsistency. But if a distinction is intended the extension seems unwarranted. The words in question did not occur in the section as it was first enacted. In its earlier form as s. 30, it is discussed in *Federated Saw Mill etc. Employes' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1), by *O'Connor* J. (2), by *Isaacs* J. (3), and by *Higgins* J. (4), and also in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (5), by *Isaacs* J. His Honour said :—" Sec. 30 has in itself no effect as a repeal or amendment of any State law or award. Any supersession or paramount operation by federal decision over State laws or awards must arise by virtue of the power that enables it to be made, and its own repugnancy to those laws and awards, and cannot be effected by means of their attempted direct repeal by the Federal Parliament " (6). The provision may be used as indicating an intention on the part of the Federal Parliament that the power of the arbitrator to determine an industrial dispute enables him to make an exhaustive provision completely governing matters within the ambit of the dispute to the exclusion of any other regulation. But it is difficult to support the provision as directly operating to amplify or extend s. 109. For the purposes of this case it may be ignored.

To ascertain whether the State *Factories and Shops* (*Long Service Leave*) *Act* 1953 is inconsistent with the Federal regulation that flows from the operation of the *Conciliation and Arbitration Act* upon the award it is necessary first to examine the award and then the State Act. The award applies to a number of employees' organizations and to very many employers and is of an extensive character. It deals separately with employees engaged in a large number of separate operations. It provides a basic wage for adult males and adult females which, of course, varies somewhat in amount from State to State and place to place. It then provides margins for skill for a very great number of classifications of employment. It deals in detail with the subject of apprenticeship in various trades, with special rates for particular work, hours of

(1) (1909) 8 C.L.R. 465.
(2) (1909) 8 C.L.R., at p. 509.
(3) (1909) 8 C.L.R., at p. 538.
(4) (1909) 8 C.L.R., at p. 547.
(5) (1910) 11 C.L.R. 1.
(6) (1910) 11 C.L.R., at p. 52.

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work, shift work, overtime and holidays. It deals also with a large number of other matters which arise out of the relation of employer and employee in the industries affected. There are three matters of particular importance for the purpose in hand. One is a clause which deals with the payment of wages; another is the clause which, under the heading of "contract of employment", provides that an employee not attending for duty shall, subject to an immaterial exception, lose his pay for the actual time of such non-attendance; and another is a clause making elaborate provision for annual leave. The period of annual leave is to be fourteen consecutive days allowed annually to an employee after twelve months' continuous service as an employee on a weekly hiring.

As has already been said, the award is that of a conciliation commissioner. An important consideration arises from the fact that a conciliation commissioner has no power in relation to long service leave with pay. This is a matter for the Conciliation and Arbitration Court. At the date when the award was made s. 13 (1) (*c*) of the *Conciliation and Arbitration Act* provided that a conciliation commissioner shall not be empowered to make an order or award . . . (c) providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay or long service leave with pay. But by sub-s. (2) of s. 13 it was provided that sub-s. (1) should not prevent a conciliation commissioner from including in an order or award provisions for annual or other periodical leave with pay or sick leave with pay, being provisions to the same effect as provisions contained in an order or award which is superseded by the first-mentioned order or award. Presumably the awards which were superseded by the Metal Trades Award coming into force in February 1952 did include a provision relating to annual leave and it is that which accounts for the presence in the existing award of the clause relating to the subject. Section 25 of the *Conciliation and Arbitration Act* provides that the court may, for the purpose of preventing or settling an industrial dispute, make an order or award . . . (*c*) providing for, or altering a provision for, annual or periodical leave with pay, sick leave with pay or long service leave with pay. The contention that the State Act is inconsistent with the Federal industrial regulation resulting from the award cannot but suffer a handicap from the circumstance that the authority making the award, namely the conciliation commissioner, had no power to deal with the very subject to which the State Act is directed. The court in which the power resides has made no order or award upon the subject. Indeed there is no reason to suppose that the subject was within the area of the

original dispute for the settlement of which the award was made. We know nothing about that dispute. The logs of claims are not in evidence. It is, of course, to be presumed prima facie that the award before us is validly made and that involves an inference that the dispute which it settled was as wide in its ambit as the terms of the award. But it involves no further inference.

The State Act deals with the whole subject of long service leave as it affects employees and employers in Victoria. Section 7 (1) of the Act provides that every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer. A worker is a person who is employed by an employer to do any work for hire or reward, including an apprentice: s. 2 (1). "Ordinary pay" means remuneration for a worker's normal weekly number of hours of work calculated at his ordinary time rate of pay as at the time of the accrual to the worker (or his personal representative) of the entitlement concerned (that is, of the entitlement to annual leave): s. 2 (1). The continuous employment by an employer of a worker who is employed by him at the commencement of the Act shall, for the purposes of the Act, commence at the actual date, before the commencement of the Act, of such employment: s. 4 (1). A break in the period of service because of service with the naval, military or air forces is not to be counted: s. 3 (5) (*a*). The Act begins so to speak with a primary period of long service leave to which a worker is to be entitled and it is subject to variations if his employment is terminated before he takes his leave. After a worker has completed twenty years of continuous employment with his employer he is entitled to thirteen weeks of long service leave and thereafter to an additional three and a quarter weeks' long service leave on the completion of each additional five years of employment with such employer: s. 7 (2) (*a*). But if a worker has completed more than twenty years' continuous employment with his employer and his employment is terminated by the employer for any cause other than serious and wilful misconduct or if the worker on account of illness, incapacity or domestic or any other pressing necessity justifiably terminates his employment, he is entitled to such amount of long service leave as equals one-eightieth of the period of his continuous employment since the last accrual of entitlement to long service leave: s. 7 (2) (*b*). If a worker has completed at least ten but less than twenty years of continuous employment with his employer and his employment is terminated by the employer for any cause other than serious and wilful misconduct or it is terminated by the worker for any of the causes

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already mentioned, he is entitled to such amount of long service leave as equals one-eightieth of the period of his continuous employment: s. 7 (2) (*c*). In the present case Kemp fell within the last category. He had been employed, counting his military service, for about thirteen and a half years by the respondent company. Section 8 makes provision for the death of a worker before or while taking leave to which he is entitled. Amounts representing his ordinary pay varying with the period of leave to which he is entitled are to be paid to his personal representative. Section 9 (1) provides that when a worker becomes entitled to long service leave under the Act such leave shall be granted by the employer as soon as practicable having regard to the needs of his establishment. This is qualified by provisions enabling the date to be postponed or advanced and by an exception postponing the obligation until the end of 1954. Sub-section (4) of s. 9 provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid in one of the following ways:—"(*a*) In full when the worker commences his leave; or (*b*) At the same times as it would have been paid if the worker were still on duty . . . (*c*) In any other way agreed between the employer and the worker—and the right to receive ordinary pay in respect of such leave shall accrue accordingly."

The provision which deals with Kemp's actual case is sub-s. (2) of s. 9 which is as follows:—" Notwithstanding anything in the last preceding sub-section where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly." It will be seen that this provision is based upon the condition that the actual employment of the worker is for some reason terminated before he takes his long service leave. Kemp's service was actually so terminated. The sub-section then requires that he shall be deemed to have commenced to take his leave on the date of such termination of employment and provides that he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly. It is to be noticed that it does not say that the worker shall be deemed to be employed by the employer. No doubt in the ordinary case of an employee taking long service leave his employment continues. But in the special case dealt with by sub-s. (2) of s. 9 the very basis of its operation

is the termination of his employment. It is concerned only to see that he obtains advantages which otherwise the termination of his employment would destroy and for that purpose says that he shall be deemed to commence his long service leave at the end of his employment and then shall be entitled to be paid ordinary pay, that is to say in the manner specified by sub-s. (4). Section 14 (1) of the Act provides that no worker shall during any period when he is on long service leave engage in any employment for hire or reward. It is by no means clear that this provision operates in the case of a person to whom the benefit of long service leave is preserved by sub-s. (2) of s. 9. In the first place, the definition of " worker " makes that word mean any person employed by an employer etc. *Ex hypothesi* a person deemed to commence long service leave by sub-s. (2) of s. 9 is not employed. Be that as it may, however, the provision is not of direct importance in relation to the present case. The failure of an employer to comply with the provisions of the State Act which have been mentioned becomes an offence by virtue of s. 17 (1). Any amount due and owing by an employer to a worker or his personal representative under the Act remains due and owing until paid and is treated as arrears of pay for the purposes of the provisions of the law which enable a court before whom an offence is established to make an order for their payment: s. 18.

It is not easy to see why the award should be treated as covering so extensive a field as to exclude the operations of provisions like those contained in the State Act. It may be an exhaustive statement of the relations of employer and employee in the industries concerned upon the matters which it determines or regulates. But long service leave is an entirely distinct subject matter, one to which the award is not and cannot be addressed. It cannot be addressed to the subject matter because it is one outside the authority of the conciliation commissioner who made the award. Plainly there is no attempt in the award to deal with that subject matter. Whether the conciliation commissioner in making any of the provisions which the award contains took into his consideration the fact that he could not deal with long service leave does not appear. It does not appear whether long service leave was sought by the log of claims and, if so, whether the claim was dealt with by the Court of Conciliation and Arbitration which alone had authority over it. But whatever his thoughts on the subject of long service leave may or may not have been, they can have no relevance. Long service leave simply is not a subject within the purview of the award. When the award is examined in detail it discloses no real conflict between any of its provisions and those of the State Act.

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

The State Act is entirely concerned with prescribing conditions entitling an employee to long service leave with pay and with providing for its commencing period and the rate of pay in respect of the period and with making ancillary and incidental provisions. All these are matters which are concerned not with the general conditions governing employment, not with the performance of work, but with a period of paid suspension from duty. The award has nothing to say against suspension from duty and payment to the workman during a period of suspension. Annual leave is an entirely distinct conception from long service leave. If by any chance a period of annual leave coincided with a portion of the period of long service leave there would be no conflict between the clause in the award entitling the worker to annual leave and the sections of the Act entitling him to long service leave. At least both could be concurrently observed. No doubt under the award an employee is not entitled to pay unless he attends for duty. Clause 19 (2) provides that an employee not attending for duty, subject to certain exceptions, shall lose his pay for the actual time for such non-attendance. This does not mean that the employer is prohibited from allowing him his pay. It merely means that he loses his right or title to pay under the award.

There are provisions in the State Act for the settlement by courts of petty sessions of disputes in relation to long service leave including a dispute as to the rate of ordinary pay and there may be an appeal to the Industrial Appeals Court from the decision of the court of petty sessions: see ss. 10, 11, and 12 of the Act. But these provisions do not affect the operation of the award in any way and are concerned only with the ascertainment of the benefits to be received under the State Act. In cases, therefore, which, unlike that of Kemp, relate to long service leave without a break in the employment, there is no opposition between the award and the Act. In a case like Kemp's, where the employment is terminated, the award has nothing to say with respect to the subsequent relations of the employer and the employee. If the relationship is terminated the award no longer operates. There is nothing in the award, therefore, which could affect s. 9 (2) of the Act.

For these reasons the appeal should be allowed, the order of the Metropolitan Industrial Court should be set aside and the information should be remitted for rehearing.

TAYLOR J. I agree that s. 31 of the *Conciliation and Arbitration Act* 1904-1952 does not render this appeal incompetent. The order appealed from was made by a magistrate in the exercise of Federal jurisdiction since, in the manner already referred to, the matter

before him involved the interpretation of the Constitution and, in respect of matters of this character, the several courts of the States have, within the limits of their several jurisdictions, been invested with Federal jurisdiction. Accordingly the order was one from which, subject to the valid prescription of any relevant exception, an appeal lies to this Court pursuant to s. 73 of the Constitution.

Neither party was concerned to argue that the appeal does not lie but, in the course of argument, there was some discussion whether s. 31 of the *Conciliation and Arbitration Act* could properly be regarded as constituting the prescription of an exception or exceptions having the effect of destroying the jurisdiction of this Court, initially given by s. 73 of the Constitution, to hear appeals of this character. This is a question which depends to some extent upon considerations relevant generally to the problem of the validity of s. 31 and it is convenient to make some general observations upon the relevant provisions of Chap. III of the Constitution.

Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal courts as the Parliament creates, and in such other courts as it invests with Federal jurisdiction. The expression " the judicial power of the Commonwealth " is of course adequate to describe both original and appellate jurisdiction. By s. 73 the High Court is invested with jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of any justice or justices exercising the original jurisdiction of the High Court and of any other Federal court or court exercising Federal jurisdiction and of the Supreme Court of any State. Section 75 confers original jurisdiction upon the High Court in a number of matters none of which is relevant to a consideration of this case whilst s. 76 specifies an additional group of matters in respect of which Parliament may confer original jurisdiction upon the High Court. The only matters specified in the latter section to which reference need be made are matters " arising under this Constitution or involving its interpretation " and matters " arising under any laws made by the Parliament ". Thereafter s. 77 is in the following terms : " With respect to any of the matters mentioned in the last two sections the Parliament may make laws—(i) Defining the jurisdiction of any federal court other than the High Court : (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States : (iii) Investing any court of a State with federal jurisdiction ". Concerning this

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section two observations should be made at once. The first is that s. 77 (iii.) is the "sole source of power to confer Federal jurisdiction on State courts" (per *Dixon* and *Evatt* JJ. in *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1)). Likewise sub-ss. 77 (i.) and (ii.) express the full measure of the power to confer jurisdiction on any Federal court other than the High Court and to prescribe the extent to which the jurisdiction of any such Federal court shall be exclusive of that which belongs to or is invested in the courts of the State. In each case the relevant powers are exercisable only with respect to "any of the matters mentioned in the last two sections" and, of those matters, those which are relevant to the present inquiry are the two categories to which reference has already been made.

Coming now to s. 31 of the *Conciliation and Arbitration Act* we find that it purports to do two things. In the first place it purports to create a right of appeal to the Court of Conciliation and Arbitration from "any other court"—which expression in its context includes State courts—in "proceedings" of any of four specified characters. Secondly, it provides that there shall be no other appeal from a judgment or order in proceedings of any of the specified characters. The first step, if legally justifiable at all, is justifiable only pursuant to s. 77 (i.) of the Constitution as the "definition" of the jurisdiction of the Arbitration Court as a Federal court whilst the second, in so far as it purports to declare that the jurisdiction of the Arbitration Court is to be exclusive of that of courts of a State, can be justified only, if at all, as the definition of the extent to which the appellate jurisdiction of that court shall be exclusive of that which belongs to or is invested in the courts of the State. These considerations immediately direct attention to the character of the matters in respect of which such provision is made, for unless they are matters which are mentioned in s. 75 or s. 76 there is no constitutional foundation for the provisions of s. 31. The four categories specified by the last-mentioned section are: (1) proceedings arising under the Act; (2) proceedings involving the interpretation of the Act; (3) proceedings arising under an order or award; and (4) proceedings involving the interpretation of an order or award. Quite apart from the difficulties which arise from the use of the word "proceedings" it is clear that neither matters involving the interpretation of the Act nor matters involving the interpretation of an order or award, by virtue of that character alone, fall within the specification of matters contained in ss. 75 and 76. Nor, I should think, do matters "arising under an

(1) (1938) 59 C.L.R. 556, at p. 586.

order or award ". Matters of these descriptions may on occasions, of course, present other features which would bring them within the purview of those sections as they would, for example, if they arose between residents of different States, or if any such matter should also involve the interpretation of the Constitution or if it arose under any laws made by Parliament, but the descriptions which have been selected by s. 31 are quite inappropriate, in the main, to describe matters in respect of which the High Court is given original jurisdiction under s. 75 or in respect of which it may be conferred upon it by s. 76. This being so they are not matters with respect to which Parliament may make laws either defining the jurisdiction of the Arbitration Court or defining the extent to which the jurisdiction of that court shall be exclusive of that which belongs to or is invested in the courts of the State. I doubt if it is possible to read the section down in any way but, whether this be so or not, it is beyond doubt that there could not be any residual operation of the section capable of application to matters, such as the present, which do not arise under the Act but which answer the description of " proceedings involving the interpretation of an order or award " and, possibly, the interpretation of the Act. Accordingly, I am of the opinion that the appeal is competent.

These observations take no account of two other problems which were discussed during the course of the appeal. The first of these was concerned with the provisions of s. 73 of the Constitution, the provisions of which I have already set out. The question involved in this problem is whether s. 31 of the Act constitutes an exception within the meaning of the opening words of s. 73. If it was intended by the words of the section to prescribe an exception—which I very much doubt—the basis chosen for the exception, it seems to me, was quite inappropriate. Given an operation co-extensive with its literal terms, s. 31 would except from the jurisdiction of the High Court appeals from judgments and orders given or made in *proceedings* concerned with the matters specified, that is, those arising under the Act or involving its interpretation or arising under or involving the interpretation of an order or award. In effect the condition for the operation of the excepting words is to be found in some feature of the proceedings in which a judgment or order has been given or made and not in any characteristic of the subject matter of the suit or in the relevant judgment or order itself. But what s. 73 appears to permit is legislation prescribing that appeals from judgments, decrees, orders and sentences of a specified class or classes shall be excepted from the appellate jurisdiction of the High Court. Primarily the High Court is to have jurisdiction to

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hear appeals from all judgments and orders of any court exercising Federal jurisdiction. But exceptions from the jurisdiction to entertain appeals from such judgments or orders may be made. That is to say that it is permissible to except from the jurisdiction appeals from specified judgments or orders. To me the language of s. 73 is more appropriate to authorize the prescription of exceptions by reference to specified characteristics of judgments or orders of courts exercising Federal jurisdiction rather than by reference to some feature of the proceedings, incidental or otherwise, in which any such judgment or order has been given or made. To conclude otherwise would be to entertain the view that appeals in specified types of *matters*, or indeed in any and every class of matter, might be made the subject or subjects of exception and such a view is clearly inconsistent with the substance of the section. But the prescription of exceptions dependent upon some characteristic of the judgment or order of the lower court, for example, the fact that the order is interlocutory only or the fact that the judgment or order is insubstantial, would be in keeping with recognized conceptions and the language of the section appears to be more appropriate to such an understanding of its provisions. The same opening words authorize the prescription of exceptions with respect to appeals to the High Court from *all* judgments, decrees, orders and sentences of "any other Federal Court" and of "the Supreme Court of any State" though in the case of appeals from the latter tribunals the authority of Parliament is qualified by the second paragraph of s. 73. In the application of the provisions of the section to such cases there is again discernible the notion that the exceptions which may be prescribed are those prescribed by reference to some characteristic of the judgment or order of the lower court and not by reference to the type of matter in which they may be given or made. This conception is, I think, particularly noticeable in the transitional provisions of the last paragraph of s. 73. These observations express a view of Parliament's authority to prescribe exceptions which is much narrower than that entertained by *Isaacs* J. (the *Tramways Case* [*No.* 1] (1) and to which *Gavan Duffy* and *Rich* JJ. subscribed in *Federated Engine Drivers' & Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (2). But in this case it was assumed that the decision of the Court in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (3) concluded the point which they were called upon to consider. In the latter case,

(1) (1914) 18 C.L.R. 54, at p. 76.
(2) (1916) 22 C.L.R. 103, at pp. 117, 118.
(3) (1916) 22 C.L.R. 437.

however, the "exception" under consideration bore no relation to the nature of the proceedings in the lower court but was solely concerned with the period of time within which an appeal to the High Court should be instituted. Even if such a provision could not be justified as "regulation" it would be justifiable as an exception on the views which I have expressed. Those views would furnish an additional ground for holding that this appeal is competent but holding the opinion, as I do, that s. 31, insofar as it purports to prohibit appeals of this nature to this Court, is invalid for other reasons, it is unnecessary to express a final view on this point.

The second problem which I mentioned is concerned with the question whether the expression "jurisdiction", which is used three times in s. 77 of the Constitution, refers to both original and appellate jurisdiction. If it does then Parliament may create Federal appellate courts in addition to the High Court and it may declare that the appellate jurisdiction of such courts shall be exclusive of "that which belongs to or is invested in the Courts of the State". On the other hand if it does not then s. 31 (1) of the *Conciliation and Arbitration Act* must be invalid for the only constitutional provision upon which it may be rested is s. 77 (i.). It is clear, however, from a survey of the provisions of Chap. III that the High Court is the supreme appellate tribunal within the Commonwealth and that if other federal appellate courts may be created they will be subordinate to the High Court. It is equally clear that, pursuant to s. 73, the High Court would have jurisdiction to hear and determine appeals from judgments and orders of any such court and that, notwithstanding the creation of any such court, the High Court would continue to have jurisdiction to hear and determine appeals from judgments and orders of any other federal court and from the Supreme Courts of the States and from any court exercising Federal jurisdiction. In each case the jurisdiction of the High Court would be subject only to such exceptions and regulations as Parliament might prescribe. These and other considerations which arise upon examination of Chap. III tend to support the contention that the provisions of s. 77 (i.) were intended to relate to original jurisdiction only and that it was not intended to authorize the Parliament of the Commonwealth to create a hierarchy of Federal courts with appellate courts interposed between Federal courts exercising original jurisdiction and State courts exercising original federal jurisdiction on the one hand and the High Court on the other. But in my view the language of s. 77 does not admit of any such restricted meaning. Nor, indeed, has

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it been so understood. In *Ah Yick* v. *Lehmert* (1) the High Court was squarely faced with the question whether s. 39 of the *Judiciary Act* 1903 validly operated to confer jurisdiction upon the court of general sessions in Victoria to hear and determine an appeal from a conviction before a magistrate in respect of an offence against s. 7 of the *Immigration Restriction Act* 1901 (Cth.). Section 39 (2) of the *Judiciary Act* 1903 provided that " The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions ". It was clear that the only possible source of constitutional authority for this provision was s. 77 of the Constitution and speaking of the contention that this section did not authorize Parliament to invest new Federal courts or State courts with Federal appellate jurisdiction *Griffith* C.J. said : " Whether the Court of General Sessions had jurisdiction to entertain this appeal depends upon the terms of the Constitution and of the *Judiciary Act* 1903. The Constitution (sec. 71), provides that : ' The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction.' I pause there to remark that judicial power is an attribute of sovereignty which must of necessity be exercised by some tribunal, that that tribunal must be constituted by the sovereign power, and that the limits within which the judicial power is to be exercised by the tribunal must be defined. In the case of the High Court, the extent to which that court may exercise judicial power is defined by the Constitution ; in the case of other Courts it is not defined by the Constitution, and must, again of necessity, be defined by the Commonwealth law which creates those Courts or invests them with federal jurisdiction. The term ' federal jurisdiction ' means authority to exercise the judicial power of the Commonwealth, and again that must be within limits prescribed. Then ' federal jurisdiction ' must include appellate jurisdiction as well as original jurisdiction. The whole scheme of the Constitution assumes that the judicial power includes both in the case of the High Court, and from the history of the Constitution and the practice in English-speaking countries, it must be taken for granted that the judicial power was known by the framers of

(1) (1905) 2 C.L.R. 593.

the Constitution to include both, and that those framers intended that the judicial power might be exercised by Courts of original jurisdiction or by Courts of appellate jurisdiction. Then sec. 73 of the Constitution defines the appellate jurisdiction of the High Court. Amongst other matters of appellate jurisdiction the High Court is authorized to hear appeals from all Courts having federal jurisdiction, 'with such exceptions and subject to such regulations as the Parliament prescribes,' and none have been prescribed which affect the present case. Sec. 75 defines and enumerates five classes of cases in which the High Court has original jurisdiction, and sec. 76 four others in which Parliament may confer original jurisdiction upon the High Court. In all other matters, as at present advised, I think the High Court has no original jurisdiction, and cannot, *quâ* High Court, have it. Then sec. 77 provides that Parliament may make laws—'(i.) Defining the jurisdiction of any federal Court other than the High Court,' and '(iii.) Investing any Court of a State with federal jurisdiction.' Now, the power to create a federal Court depends upon sec. 71. The judicial power exists as an attribute of sovereignty, and, so far as it is not left to the High Court, it is for the Parliament to say what jurisdiction each Court shall have. Taking sec. 71 into consideration, sec. 77 (i.) means that the Parliament may establish any Court to be called a federal Court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either by way of appellate or original jurisdiction. Sub-sec. (iii.) must receive a precisely similar interpretation. Parliament may invest any Court of a State with authority to exercise federal judicial power, again to the extent prescribed by the Statute. There is nothing to restrict that judicial power to original jurisdiction any more than to appellate jurisdiction, and there is no reason why there should be a restriction. There can be no doubt that Parliament might think fit to invest one Court exclusively with original jurisdiction, another with appellate jurisdiction, and another with both. There is nothing to limit that power. Any power that falls within the words 'federal jurisdiction' may be conferred on any Court which Parliament thinks fit to invest with federal jurisdiction" (1). With this view *Barton* J. agreed whilst *Isaacs* J. in the *State of New South Wales* v. *The Commonwealth* (2) expressed a similar opinion. The same view seems to me to be implicit in the reasoning of the Court in *Lorenzo* v. *Carey* (3) and to be expressly

(1) (1905) 2 C.L.R., at pp. 602-604.
(2) (1915) 20 C.L.R. 54, at p. 90.
(3) (1921) 29 C.L.R. 243.

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accepted by the observations of *Starke* J. in *The Commonwealth* v. *Limerick Steamship Co. Ltd. and Kidman* (1). I do not understand it ever to have been said that s. 77 of the Constitution extends so far as to authorize the Parliament to create new Federal appellate courts with a *general* jurisdiction, either exclusive or otherwise, to hear and determine appeals from State courts exercising State jurisdiction. But if it should be suggested the answer is clear. The constitutional authority to create new federal courts is limited. The extent of the jurisdiction which Parliament may confer on any such court is determinable solely by reference to the matters mentioned in ss. 75 and 76. Within the same limits, and not otherwise, Parliament may define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the State. To create a new federal court as an exclusive appellate court from State courts exercising a *general* State jurisdiction would at one and the same time exceed both the power to create new Federal courts and the power to define the extent to which the jurisdiction of any such court should be exclusive of that which belongs to or is invested in the courts of the State. But the views which I have expressed may, perhaps, be taken to suggest that Parliament may create a new federal court with jurisdiction to hear and determine appeals from judgments or orders of State courts in matters answering to the descriptions contained in ss. 75 and 76 even in the absence of legislation investing those courts with federal jurisdiction in such matters. In the latter circumstance the judgments or orders in question would be given or made in the exercise of State jurisdiction. But if upon a literal reading of s. 77 such a course be thought to be permissible, sufficiently cogent reasons to the contrary, which have been judicially recognized, readily present themselves upon an examination of the Federal structure erected by the Constitution. Moreover the existence of a right of appeal to the High Court from orders of State courts in such matters, other than the general right of appeal from the Supreme Courts of the several States pursuant to s. 73, depends, not upon the character of the matters involved, but upon whether or not the orders or judgments appealed against have been made in the exercise of Federal jurisdiction, or, in other words, upon whether the court from which the appeal has been brought has exercised Federal or State judicial authority. This, of course, depends in turn upon the extent to which Parliament has seen fit to exercise its legislative authority under s. 77 (iii.) and not merely upon a consideration of the matters with respect to which

(1) (1924) 35 C.L.R., at pp. 114, 115.

legislative authority has been conferred by that section. I see no reason to suppose that similar considerations should not apply with equal force in considering the extent to which any new or existing federal court may be invested with appellate jurisdiction. Indeed, to conclude otherwise would be to permit direct interference with the exercise by the courts of the States of State judicial functions, and such a notion is, as I have already said, inconsistent with the maintenance of Federal and State judicial authority under the Federal system erected by the Constitution. These considerations are not displaced by asserting that the substance of the matters specified in ss. 75 and 76 determined their selection as matters appropriate for the exercise of Federal jurisdiction and, therefore, that in considering whether jurisdiction to hear and determine appeals in such matters from inferior courts of the State may be conferred upon a new or existing Federal court, it is unnecessary to distinguish between orders and judgments made or given in the exercise of Federal jurisdiction and those made in the exercise of State jurisdiction. It may, of course, be said that the order of any such inferior court will produce exactly the same result in the matter and have precisely the same legal effect whether made in the exercise of one type of jurisdiction or the other. But, in my view, although s. 77 (i.) may authorize the creation of new appellate tribunals, it does not authorize Parliament to invest any Federal court with jurisdiction to entertain appeals from the orders and judgments of State courts made or given in the exercise of State judicial authority, even though such orders and judgments have been made or given in any one of the matters specified in ss. 75 and 76. Indeed, it is difficult to see how it can be said that such an appellate jurisdiction would constitute part of the judicial power of the Commonwealth and the provisions of s. 77 (i.) must be taken to be limited by this concept.

The appeal being competent, it becomes necessary to consider whether the existence of the Metal Trades Award in the form in which it was proved to exist at the time of the appellant's dismissal from his employment operated to preclude him from obtaining the benefits to which, otherwise, he would have been entitled under the *Factories and Shops (Long Service Leave) Act* 1953 (Vict.). The provisions of the award and of the Act have already been analyzed and the opinion expressed that there is no conflict between their respective terms. I agree with this conclusion basing my opinion upon the view that the award does not in any way deal with the subject of long service leave nor can it be regarded as an exhaustive declaration of the conditions binding upon the parties with respect

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to service and employment in the industries specified in the award. At the most it is exhaustive only so far as it purports to deal with those matters which were in dispute between the parties and it is quite silent on the question of long service leave. It is, I think, quite clear that the Act does not purport to, or in fact, cover any part of the ground covered by the award and in so far as the respondent's argument is based on the contrary proposition it must fail. Nor do the provisions, speaking in their respective fields, conflict with one another. Perhaps the strongest illustration of their supposed conflict is to be found in a comparison of cl. 19 (*c*) and s. 9 (4) of the Act. The former provides that an employee not attending for duty shall, with certain immaterial exceptions, lose his pay for the actual time of such non-attendance whilst the latter provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid to him in one of three specified ways. It was strongly contended that these provisions were repugnant to one another, the former being said to mean that an employer bound by the award shall not be bound to pay the prescribed wages to an employee who does not attend for duty whilst the act provides that he shall be so bound during any period of long service leave. There is, however, no such inconsistency. The two provisions deal with quite different subject matters, the former being intended merely as a provision restricting the rights of employees to receive wages *by force of the award*, with certain irrelevant exceptions, to wages payable for work done. I agree that the appeal should be allowed.

Appeal allowed with costs. Discharge the order of the stipendiary magistrate constituting the Metropolitan Industrial Court of the State of Victoria whereby the information was dismissed.

Remit the information for rehearing. Costs of the former hearing to be dealt with by the magistrate disposing of the information.

Solicitor for the appellant, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitors for the respondent, *Moule, Hamilton & Derham.*

Solicitor for the Commonwealth of Australia, intervening, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.