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evidence against him; but in the present action no admission by the motorist can be receivable as such, for the motorist is not the defendant and an admission forms no part of the facts which constitute the plaintiff's title to recover against the motorist. I express no opinion as to whether the flight of the motorist could properly be treated in an action against him as importing an admission, but in the present action it appears to me to add nothing of any significance to the case.

The jury were entitled to find for the plaintiff if they were reasonably satisfied of the facts constituting her case, and they might be so satisfied on any real balance of probabilities, slight though it might be. On the material before them, however, it seems to me that when all is said and done the true explanation of the collision was left wholly in the realm of conjecture. It provided them with no foundation that I can discern for reaching any state of mind which could properly be called a satisfaction. I am therefore of opinion that the learned trial judge was right in ordering that judgment be entered for the defendant.

The appeal, in my opinion, should be allowed and the order of *Gavan Duffy* J. restored.

Appeal dismissed with costs.

Solicitor for the appellant, *Norman M. Morrison.*
Solicitors for the respondent, *J. W. & F. Galbally.*

R. D. B.

[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPLICANT;
INFORMANT,

AND

KERR . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1955.

SYDNEY, *Aug.* 8, 9; *Oct.* 21.

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

Constitutional Law—Industrial arbitration—Conflict between State statute and Federal award—Motor spirit, oil and accessories—Sale thereof—Hours fixed by statute—Employees' hours for work—Provision in Federal award—Consistency—State statute—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 109—*Conciliation and Arbitration Act* 1904-1952—*Judiciary Act* 1903-1950, *s.* 40—*Factories and Shops Act* 1912-1954 (*N.S.W.*), *ss.* 105A, 107.

Section 105A (3) of the *Factories and Shops Act* 1912-1954 (N.S.W.) provides, so far as material, that if any shop for the sale of motor spirit, motor oil or motor accessories is opened on any day before the opening time fixed by or under that Act for such day in respect of such shop or is not closed and kept closed for the remainder of such day at and after the closing time fixed by or under that Act for such day in respect of such shop, or if in any such shop any motor spirit, motor oil or motor accessories was offered for sale after that closing time the shopkeeper and any person acting or apparently acting in the management of the shop shall be guilty of an offence under that Part of the Act.

K. was charged under s. 105A (3) of the *Factories and Shops Act* 1912-1954 (N.S.W.) that on a specified day he was acting or apparently acting in the management of a specified shop which was not on that day closed at 8.30 p.m. and continued closed for the remainder of that day for the sale of motor spirit, motor oil, or motor accessories as required by s. 105A (1) (b) of the Act but was open for such sale at 10.0 p.m. on that day. K. raised a defence that s. 105A was invalid because under s. 109 of the Constitution its provisions were inconsistent with the Metal Trades Award, which covered the employees at the shop and contained provisions relating to hours of work for day-workers, shift-work and overtime, made by a conciliation commissioner under the provisions of the *Conciliation and Arbitration Act* 1904-1952. This part of the cause was removed to the High Court under s. 40 of the *Judiciary Act* 1903-1950.

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Held that the provisions of the Metal Trades Award did not absolve the defendant on the specified day from observing s. 105A of the *Factories and Shops Act* 1912-1954 (N.S.W.) with respect to the specified shop for the sale of motor spirit, motor oil or motor accessories.

REMOVAL under s. 40 of the *Judiciary Act* 1903-1950.

On 21st January 1955, at Sydney, an information was laid by Frederick Ernest Clarke, an inspector under the *Factories and Shops Act* 1912-1954 (N.S.W.), that on Monday, 10th January 1955, Victor Kerr was the person acting or apparently acting in the management of a shop for the sale of motor spirit, motor oil or motor accessories which was not closed at 8.30 p.m. and kept closed for the remainder of that day contrary to the said Act.

The question arose and was argued during the hearing of that information as to whether s. 105A of the *Factories and Shops Act* 1912-1954 (N.S.W.) was inoperative as to the defendant.

On the motion of the informant that part of the cause, pursuant to s. 40 of the *Judiciary Act* 1903-1950, was removed into the High Court, the part so removed being the question whether by reason of the provisions of the federal Metal Trades Award made by Conciliation Commissioner Galvin on 16th January 1952, the defendant Victor Kerr was not on 10th January 1955, the date of the offence alleged in the information, bound to observe s. 105A of the *Factories and Shops Act* 1912-1954 (N.S.W.) with respect to the shop for the sale of motor spirit, motor oil and motor accessories known as Sydney Service Station and situated at 9 Flinders Street, Darlinghurst.

Further facts and the relevant statutory provisions appear in the judgments hereunder.

G. Wallace Q.C. (with him *A. F. Mason*), for the informant. The petrol station or the service station could not properly be said to be embraced in any of the callings referred to in the Metal Trades Award because no argument based on s. 109 of the Constitution could arise if the respondent is not caught or covered by the award which is said to be inconsistent with the *Factories and Shops Act* 1912-1954 (N.S.W.). The defendant is not a person who is covered by the Metal Trades Award, therefore there cannot be any question of conflict with s. 109. Clauses 11 to 14, both inclusive, in the award are the critical clauses. All the provisions in the award relating to hours of work are simply routine provisions appearing in all awards prescribing rates of pay and conditions of work and they do not purport to create or grant a privilege or right on the employer to work twenty-four hours. All they do is to provide

rates of pay and working conditions if the employer sees fit or can lawfully do so. There is not any grant of a right or privilege.

[He was stopped on this point.]

B. P. Macfarlan Q.C. (with him *K. A. Cohen*), for the respondent. The question is whether by reason of the provisions of the Metal Trades Award made in 1952 the defendant Kerr was not bound by s. 105A. The award applies in this case. [He referred to *De Havilland Aircraft Pty. Ltd.* v. *Boyd* (1); the *Graphic Arts Award* (2) and *O'Toole* v. *Fairey Aviation Co. of Australasia Pty. Ltd.* (3).] There is not any significant difference between the two sub-ss. (1) and (2) of s. 105A of the *Factories and Shops Act* 1912-1941 and the two sub-sections substituted therefor by the Amending Act No. 42 of 1954. The effect of the amendments is that previous hours for petrol employees and trading are repealed; new hours are established by sub-s. (1) and power is given under sub-s. (2) to alter those hours from time to time as the case may be. Petrol stations do not come within schedule 8 of the Act. Section 107 has a bearing upon the case because when an award is being made the section provides that the court shall fix the hours of employment of persons engaged in the selling of petrol. The central provision of ss. 105A and 107 is sub-s. (2) of s. 105A which sets up an authority for the regulation of hours of employees engaged in the selling of petrol. Under s. 105A (2) the Industrial Commission is empowered to fix the hours which employees in this class of industry must work and upon the fixation of those hours the consequence is that the shops may only open and must close at the times which are the same as the working hours. In respect of persons engaged in this industry the working hours have been fixed by the Metal Trades Award, and, that being so fixed, any State statute which purports to give to any State authority the jurisdiction to make or alter those hours is inconsistent: see *Clyde Engineering Co. Ltd.* v. *Cowburn* (4).

[McTIERNAN J. referred to *Victoria* v. *The Commonwealth* (5).]

A rule of construction in relation to severability extending to inconsistency was stated in *Wenn* v. *Attorney-General (Vict.)* (6). It is completely irrelevant whether sub-s. (1) deals with any industrial relationship or does not. If sub-s. (2) is bad then sub-s. (1) fails. Whatever be the character of s. 105A, it operates to disturb

(1) (1948) 61 C.A.R. 735.
(2) (1953) 75 C.A.R. 138.
(3) (1953) *Industrial Information Bulletin*, p. 887.
(4) (1926) 37 C.L.R. 466, at pp. 487, 488, 490, 492.
(5) (1937) 58 C.L.R. 618.
(6) (1948) 77 C.L.R. 84, at pp. 119-122.

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or vary or impair settlements of an industrial dispute made under the Commonwealth Act, and to that extent it is inconsistent and invalid: see ss. 36-38, 48-50 of the *Conciliation and Arbitration Act* 1904-1952 (Cth.). When an award is made under this Act in settlement of a dispute as to the matters which are in dispute and which are settled, that Act intends to give full, complete and unhampered operation to the terms of that settlement. The effect of a settlement by award under that Act and the question of inconsistency in relation to a dispute which has been solemnly settled in that award were dealt with in *Cowburn's Case* (1); *Ex parte McLean* (2); *Stock Motor Ploughs Ltd.* v. *Forsyth* (3) and *Victoria* v. *The Commonwealth* (4). If the award treats as lawful certain conduct then the lawfulness of that conduct may not be varied or impinged upon by State legislation. The words used in *Cowburn's Case* (5) carry the matter beyond industrial conditions. The whole doctrine of inconsistency based on s. 109 of the Constitution is determined by the paramountcy of Commonwealth law. When a Commonwealth law is validly made there may be no variation of it. It may not be affected, may not be hindered, and may not be impeded. If the reason of s. 109 is to maintain the paramountcy of a valid Commonwealth law it must be irrelevant from what is the source that a conflicting State law derives. [He referred to *R.* v. *Brisbane Licensing Court; Ex parte Daniell* (6).] Most of the cases decided on s. 109 have dealt with the problem where the State law and the Federal law are both upon the same subject or within the same legislative character. The conflict was argued on different subject matters in *Stock Motor Ploughs Ltd.* v. *Forsyth* (7) and none of the judges in that case dissented from that view of s. 109 of the Constitution. Any law which impairs or affects the efficacy of a settlement is inconsistent with the Commonwealth law (*Stock Motor Ploughs Ltd.* v. *Forsyth* (8)). The respondent's argument is not precluded by anything said in *R.* v. *Kelly*; *Ex parte State of Victoria* (9).

G. Wallace Q.C., in reply. On the true construction of the award and of the Act in question there is, for various reasons, no question of inconsistency. With regard to s. 107 of the *Factories and Shops Act* 1912-1954 (N.S.W.) no inconsistency arises where there is merely an inconsistent intention between the State legislation and

(1) (1926) 37 C.L.R., at pp. 491, 526-527.
(2) (1930) 43 C.L.R. 472.
(3) (1932) 48 C.L.R. 128, at p. 136.
(4) (1937) 58 C.L.R., at p. 630.
(5) (1926) 37 C.L.R., at pp. 483, 490.
(6) (1920) 28 C.L.R. 23.
(7) (1932) 48 C.L.R., at pp. 133, 135.
(8) (1932) 48 C.L.R. 128.
(9) (1950) 81 C.L.R. 64.

the Federal legislation ; there has to be an exercise of power under a State Act. Section 107 is only on the statute book. There has not been any working under that section since 1948. Even in *Colvin* v. *Bradley Bros. Pty. Ltd.* (1) the order under s. 41 of the *Factories and Shops Act* 1912-1936 had in fact been made, and it was because that order had been made that the direct collision took place. Had the order not been made, the mere existence of s. 41 would not have given rise to any legitimate testing of the position at all : see also on that aspect : *Victoria* v. *The Commonwealth* (2) and *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (3). This was a prosecution under sub-s. (1) of s. 105A and not under sub-s. (2). Had it been a prosecution under sub-s. (2) different considerations would have arisen. The respondent's submission that sub-s. (2) of s. 105A goes because of the mere existence of s. 107 is contrary to principle and is good only if the respondent has been prosecuted for a breach of sub-s. (2). Section 107 is not self-operating, it only confers jurisdiction. Section 105A (2) has not had any direct impact on the facts of this case. The law on s. 109 of the Constitution is that the inconsistency only arises where the operation of two provisions come into collision directly or indirectly : see *Colvin* v. *Bradley Bros. Pty. Ltd.* (1) and *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (4). It is wrong to say that sub-s. (1) is dependent upon sub-s. (2) or sub-s. (3) although it is a transition period. In its terms it is an entirely independent provision.

The scheme of s. 105A and the wording of sub-s. (1) of that section shows that that sub-section is entirely independent. It does not commence with any introductory words making it reliant on sub-s. (2) ; sub-s. (2) does not come first as one would expect ; and the proviso to sub-s. (2) indicates that sub-s. (1) is to remain operative, in a sense at least, for all time and governs and restricts any times which may be fixed by an award should they exceed or vary the times laid down in sub-s. (1). Therefore, according to the ordinary rules of construction it is not correct to say that the scheme discloses that sub-s. (1) is interlocked with sub-s. (2) and dependent upon sub-s. (2) for its validity and operation. Section 107 is only inoperative to the extent that it may be inconsistent with this award, and it is fully operative residually. The effect of s. 105A (2) is that it deals only with awards which are lawfully made and which are not operative under s. 109 of the Constitution. Even if there be an interlocking—which is disputed—there is not any question of invalidity because sub-s. (2)

(1) (1943) 68 C.L.R. 151.
(2) (1937) 58 C.L.R., at pp. 630-632.
(3) (1942) 66 C.L.R. 557.
(4) (1942) 66 C.L.R., at pp. 573-576.

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and s. 107 remain operative to the extent permitted by s. 109. The absence of an " interpretation " or " reading down " provision does not affect the question. An argument based on an assumption in relation to s. 109 of the Constitution that s. 105A (1) detracted from or impaired or disturbed a settlement of an industrial dispute, goes too far and is not supported by authority and could have very far-reaching effects. No question of inconsistency legitimately arises because there has been an indirect attempt to establish an inconsistency under s. 109 of the Constitution by entering upon a forbidden field (*R.* v. *Kelly*; *Ex parte State of Victoria* (1)). The purpose of the State Act is not so much the test at all. The question is whether there is any inconsistency in fact under any of the principles and tests which have been enunciated. The whole award should be dealing with industrial disputes and industrial matters. It is directed towards laying down conditions of work and rates of pay. When it provided what should be the ordinary hours of work, the draftsman was directing his mind to the question of overtime and shift-work and rates of pay. To do that it was necessary for him to say what should be overtime rates, and what hours should be deemed to be overtime for the purpose of assessing overtime rates. That was all he was doing. Federal Parliament could not be assumed to cover, or enter a field in which it had no constitutional power to operate (*Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (2)). If there be any ambiguity in the matter of construction the Court should lean towards that construction which gives it operative effect. Sub-clause H (h) assumes the employer will observe the State law on another matter. It is not to the point that shift-work, in the full sense envisaged by the award, can or cannot be worked, because it is only permissive and certainly, at least, in the case of shift-work, one cannot spell out of this document any grant of a right to work it. There is not any disturbance, there is not any impairment at all, if one construes the award according to ordinary methods of construction; reads it as a whole and ascertains what it is endeavouring to do.

B. P. Macfarlan Q.C., by leave. The submission made on behalf of the appellant that s. 105A is a matter of regulating the social conditions, or purely State matter conditions within the State and cannot be touched in any way by a Federal authority was unsuccessfully put in *Cowburn's Case* (3). Section 105A is directed

(1) (1950) 81 C.L.R., at p. 83.
(2) (1942) 66 C.L.R., at pp. 568-581.
(3) (1926) 37 C.L.R., at pp. 471, 479.

directly, and so operates, to regulate the hours of persons who are employed in shops. That primary object is enforced by the 1954 amendment to that section. One must approach the construction of the award by a consideration of how it came to be made. The award, on its proper construction, does state that there has been a dispute as to whether there has been shift-work or overtime and other matters. That has been settled by the arbitrator's award; therefore any State law which says that the settlement of that dispute as to whether there shall be continuous shift-work of twenty-four hours is an impairment of the efficacy of the settlement which is given binding force by the Commonwealth *Conciliation and Arbitration Act* 1904-1952 itself.

Cur. adv. vult.

Nov. 21.

The following written judgments were delivered:—

DIXON C.J. I have had the advantage of reading the judgment of *McTiernan*, *Williams*, *Fullagar* and *Taylor* JJ. and I agree in it.

I wish to add for myself that, in the absence of an award made under the *Industrial Arbitration Act* 1940 (N.S.W.), as amended, which, if valid, would operate under sub-s. (2) of s. 105A of the *Factories and Shops Act* 1912-1954 (N.S.W.) to fix the opening and closing times of shops for the sale of motor spirit, motor oil or motor accessories, I fail to see what foothold exists for the argument advanced on behalf of the defendant. A valid award under the State *Industrial Arbitration Act* obtains an operation under sub-s. (2) of s. 105A of the *Factories and Shops Act* in virtue of the fact that it fixes the commencing and cessation of the ordinary hours of work by employees in shops for the sale of motor spirit etc. If there were such an award and by a federal award, such as the Metal Trades Award, made under the *Conciliation and Arbitration Act* 1904-1952 (Cth.), the hours of work of such employees or some of them were regulated, it is easy to understand that to that extent the supposed State award might be inoperative and "invalid" under s. 109 of the Constitution. That might well be the result of the application of the doctrine explained in *Ex parte McLean* (1). But of course the conclusion would be formed after an examination and comparison of the two awards. As it seems to me, it would only be when the conclusion had been formed that the argument upon which the defendant relies could begin. For it is only then that he would be able to say that by federal law sub-s. (2) of s. 105A had been deprived of some of its operation and that sub-s. (1) must by consequence fail in its apparent operation. It is only by such

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

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an argument that, to my mind, any place could be made for the application of s. 109 of the Constitution. I say this because the fixing of the hours of the opening and closing of shops is outside the province of federal industrial awards. That has been held in *R.* v. *Kelly*; *Ex parte State of Victoria* (1) and the distinction which the decision recognizes between hours of trading and hours of labour as subject matters of regulation has been carried into the interpretation of State enactments: see *Brownells Ltd.* v. *Ironmongers' Wages Board* (2).

There could therefore be no direct inconsistency with sub-s. (1) resulting under s. 109 from an award under the *Conciliation and Arbitration Act* of the Commonwealth.

The defendant's argument must therefore necessarily depend upon establishing a conflict by such an award with sub-s. (2). If that could be established, it would then be necessary that the consequent failure, to whatever extent it went, in the operation of sub-s. (2) should spell the failure either to a corresponding extent or perhaps altogether of sub-s. (1) of s. 105A. But even if the argument possessed a foundation which would support it up to this point, it would, in my opinion, fail at this point. For I do not think that the invalidity, partial or total, of sub-s. (2) would bring down sub-s. (1). It lays down a general rule which is to apply if sub-s. (2) is not set in operation. If federal law were to make it impossible to set sub-s. (2) in operation, it would be in accordance with the prima facie intention of the State legislature that sub-s. (1) should continue to apply. On ordinary principles, without the assistance of a severability clause, sub-s. (1) would survive the invalidity of sub-s. (2) of s. 105A.

It should be declared that the defendant was upon the date of the offence alleged bound to observe s. 105A of the *Factories and Shops Act* 1912-1954 with respect to the shop for the sale of motor spirit, motor oil and accessories known as Sydney Service Station. With that declaration the cause should be remitted to the Chief Industrial Magistrate's court.

McTIERNAN, WILLIAMS, FULLAGAR AND TAYLOR JJ. This matter comes before us in the course of the prosecution of the defendant, Victor Kerr, in the court of the Chief Industrial Magistrate for an alleged offence under s. 105A sub-s. (3) of the *Factories and Shops Act* 1912-1954 (N.S.W.). This sub-section, so far as material, provides that if any shop for the sale of motor spirit, motor oil or motor accessories is opened on any day before the

(1) (1950) 81 C.L.R. 64.

(2) (1950) 81 C.L.R. 108.

opening time fixed by or under this Act for such day in respect of such shop or is not closed and kept closed for the remainder of such day at and after the closing time fixed by or under this Act for such day in respect of such shop, or if in any such shop any motor spirit, motor oil or motor accessories is offered for sale after the said closing time, the shopkeeper and any person acting or apparently acting in the management of the shop shall be guilty of an offence under this Part of this Act. The day on which the offence was alleged to have taken place was Monday, 10th January 1955, and on that day s. 105A (1) (b) of the *Factories and Shops Act* required that the shop should be closed at 8.30 p.m. Before the magistrate evidence was given for the informant, an inspector appointed under that Act, that the shop which is known as the Sydney Service Station and which is situated at 9 Flinders Street, Darlinghurst, was still open for the sale of motor spirits at 10 p.m. One of the defences raised and argued before the magistrate, who has now reserved his decision, was that s. 105A of the *Factories and Shops Act* is invalid under s. 109 of the Constitution because its provisions are inconsistent with the Metal Trades Award made by a conciliation commissioner under the provisions of the Commonwealth *Conciliation and Arbitration Act* 1904-1952 (Cth.) on 16th January 1952. On 18th April 1955 this Court, on the application of the Attorney-General for the State of New South Wales, made an order pursuant to s. 40 of the *Judiciary Act* 1903-1950 that part of the cause be removed into this Court, the part so removed being the question whether by reason of the provisions of that award the defendant was not on 10th January 1955 bound to observe s. 105A of the *Factories and Shops Act* 1912-1954 (N.S.W.) with respect to the shop for the sale of motor spirit, motor oil and motor accessories known as Sydney Service Station, and situated at 9 Flinders Street, Darlinghurst.

The owner of the service station is Mr. T. Leek. The premises are registered as an engineering factory. The defendant, Kerr, is one of his employees. The business which is all carried on under the one roof and is open day and night is an extensive one and includes the repairing and reconditioning of motor vehicles, welding, and the manufacture and repair of component parts of motor engines. It also includes the lubrication of motor vehicles, retailing petrol from eleven pumps, and selling motor oil and accessories. Mr. Leek gave evidence that, except for the office staff consisting of an accountant and two girls, the whole of the staff, which includes engineers and mechanics, eight employees engaged in the selling of petrol and oils and three men in the selling of accessories, works

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under the Metal Trades Award. The evidence is that the engineers and mechanics assist from time to time in the selling of petrol and oils. The Metal Trades Award is a very comprehensive document. It was faintly contended by Mr. *Wallace* that in respect of the employees engaged in the selling of motor spirits and oil the owner of the business is not bound by this award. If he is not, the question of inconsistency between the award and the *Factories and Shops Act* would not arise and the order removing this part of the cause into this Court should not have been made. As the informant is a State official and this part of the cause was removed into this Court on the application of the Attorney-General for the State of New South Wales it is a strange objection for Mr. *Wallace* to take. But it can be disregarded. Without going through the award in detail it is sufficient to say that it covers, with certain exceptions, the engineering, metal working and fabricating industries in all their branches and all industries allied thereto and that its incidence is wide enough to include employees so engaged. In the absence of any cross-examination of Mr. Leek on the subject or any evidence to the contrary his evidence should be accepted and the contention rejected.

The State law relating to the opening and closing times of shops for the sale of motor spirits, motor oil and motor accessories is contained in s. 105A of the *Factories and Shops Act* 1912 as amended, the latest amending Act being No. 42 of 1954 which came into force on 8th December 1954. Provisions specifically relating to the opening and closing times for such shops were first introduced into the principal Act by the *Factories and Shops (Amendment) Act* No. 34 of 1941 which came into force on 9th September of that year. This Act introduced s. 105A into the principal Act. Sub-section (1) of this section provided for the opening and closing times for such shops on Mondays to Saturdays inclusive and on Sundays and public holidays and for their being kept closed on the days observed as Christmas Day, Good Friday and Anzac Day. Sub-section (2) provided that where after the commencement of the *Factories and Shops (Amendment) Act* 1941, an award was made under the *Industrial Arbitration Act* 1940, as amended by subsequent Acts, fixing the commencing and cessation of the ordinary hours of work by employees in shops for the sale of motor spirit, motor oil or motor accessories in any shopping district or area or part thereof, the opening and closing times for such shops in any such shopping district or area or part thereof should be the times so fixed respectively for the commencing and cessation of the ordinary hours of work by such employees under such award : provided that nothing

in this section should operate so as to permit any shop for the sale of motor spirit, motor oil or motor accessories to be opened earlier than or closed later than the times prescribed by sub-s. (1) of this section as the opening and closing times respectively for such shop. The *Factories and Shops (Amendment) Act* 1954, No. 42 of 1954, which came into force on 8th December of that year amended s. 105A by omitting therefrom sub-ss. (1) and (2) and by inserting in lieu thereof two new sub-sections. By sub-s. (1) the opening and closing times for shops for the sale of motor spirit, motor oil or motor accessories, whether or not employees are employed therein, were altered so as to allow the shops to remain open for longer hours, the hours on Saturdays, Sundays and public holidays being between 7 o'clock in the forenoon and 6 o'clock in the afternoon and on all other days between 6 o'clock in the forenoon and half-past 8 o'clock in the afternoon provided that (as before) on the days observed as Christmas Day, Good Friday and Anzac Day such shops should be kept closed. The new sub-s. (2), like its predecessor, provides machinery for the alteration of these times for the opening and closing of such shops where an award is made under the *Industrial Arbitration Act* 1940, as amended by subsequent Acts, and is identical in language with the sub-section it replaces except that it provides that the times shall be altered in such shopping district or area or part thereof whether or not employees are employed in such shops. The Act of 1954 also provides that there shall be inserted at the end of s. 105A a new sub-s. (7) providing that the provisions of any law, other than this Act and any award referred to in sub-s. (2) of this section, to the extent to which it prohibits the sale of motor spirit, motor oil or motor accessories between the opening and closing times fixed by or under this Act for shops for the sale of motor spirit, motor oil or motor accessories, shall, as from the commencement of the *Factories and Shops (Amendment) Act* 1954, cease to be of any force or effect.

The evident purpose of the new sub-s. (7) was to substitute the new opening and closing times for such shops introduced by the new sub-s. (1) for any times that might have been fixed for shopping districts or areas or parts of areas by awards made under the *Industrial Arbitration Act* between 9th September 1941 and 8th December 1954 and to place the whole State as from that date, at least initially, on a uniform basis. The effect of s. 105A is therefore by the first sub-section to provide statutory times for the opening and closing of such shops on all the days of the year and to make it unlawful for such shops to remain open for the sale of such goods except between such times. But these times are not finally fixed

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by the Act except to the extent that they cannot be enlarged. They can be altered, internally so to speak, in any shopping district or area or part thereof where an award is made under the *Industrial Arbitration Act* fixing the commencing and cessation of the ordinary hours of work by employees in such shops for particular shopping districts or areas or parts thereof. The times at which such shops in such districts or areas or parts thereof can then lawfully be kept open for the sale of motor spirits, motor oil or motor accessories then become changed to the times provided for in the award whether or not employees are employed in such shops. It was contended by Mr. *Macfarlan* that when sub-ss. (1) and (2) of s. 105A are read together they form a single inseverable scheme the central purpose of which is to empower the tribunals set up under the *Industrial Arbitration Act* to fix the ordinary hours of work for employees in shops in New South Wales engaged in the sale of motor spirits, motor oils or motor accessories. Accordingly the provisions of sub-s. (1) are of a transitional character and entirely ancillary to the provisions of sub-s. (2). Sub-section (1) in terms fixes the times for the opening and closing of such shops but these times are fixed so that, pending the making of awards under sub-s. (2), they will be the ordinary times for the commencing and cessation of work by employees in such shops. Both in sub-ss. (1) and (2) the times in question are the same whether or not employees are employed in the shops which on its face would appear to indicate that the legislation is principally directed to fixing the times at which such shops may open and must close. But, if this contention is right, this provision, contrary to its apparent intent, must be directed to protect shops which employ labour from being put at a disadvantage in comparison with shops which do not. The provision in sub-s. (2) that nothing in the section shall operate so as to permit any such shop to be opened earlier than or closed later than the times prescribed by sub-s. (1) as the opening and closing times respectively for such shop must also be intended to be a restriction imposed by parliament upon the power of the industrial tribunal to fix times for the commencing or cessation of the ordinary hours of work earlier or later than the times prescribed by sub-s. (1), although, since it applies to shops which do not employ labour, the legislation on its face would appear to be directed to preventing the tribunal enlarging the period during which shops may remain open.

Mr. *Macfarlan* then referred to the provisions of the Metal Trades Award and in particular to the provisions relating to hours of work for day-workers, to the provisions relating to shift-work

and to the provisions relating to compulsory overtime. With respect to day-work the award, cl. 11, provides that, subject to certain exceptions, the ordinary hours of work shall be forty per week to be worked in five days of not more than eight hours (Monday to Friday inclusive), and one day (Saturday) of not more than four hours; or five days (Monday to Friday inclusive) of eight hours each continuously except for meal-breaks at the discretion of the employer, between 7 a.m. and 5.30 p.m. on Monday to Friday inclusive, and 7 a.m. and noon on Saturday. With respect to shift-work the award, cl. 12, defines "afternoon shift" to mean any shift finishing after 6 p.m. and at or before midnight: "continuous work" to mean work carried on with consecutive shifts of men throughout the twenty-four hours of each of at least six consecutive days without interruption except during breakdowns or meal-breaks or due to unavoidable causes beyond the control of the employer: and "night shift" to mean any shift finishing subsequent to midnight and at or before 8 a.m. With respect to compulsory overtime, cl. 12 provides that an employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement. Mr. *Macfarlan* contended that the effect of these provisions is to authorize an employer to work afternoon shifts finishing not later than midnight, to work night shifts finishing subsequently to midnight and to work continuous shifts throughout the twenty-four hours of each day of at least six consecutive days. Accordingly, the award has fixed the hours at which employers are permitted to work their employees subject to variation or rescission in accordance with the provisions of the Commonwealth *Conciliation and Arbitration Act* and, these hours being so fixed, any State legislation, in this case sub-s. (2) of s. 105A of the *Factories and Shops Act*, which purports to give any State authority jurisdiction to make or alter the hours fixed by the Federal award is inconsistent therewith and invalid under s. 109 of the Constitution.

He then sought to take the further step and contend that, if sub-s. (2) is invalid, sub-s. (1) is so inseverably bound up with it that it must be equally invalid. In this connection it must be borne in mind that the law of New South Wales does not include any general reading-down section corresponding to s. 15A of the *Acts Interpretation Act* 1901-1950 (Cth.) and that the *Factories and Shops Act* does not include any special section to this effect. In support of these contentions Mr. *Macfarlan* relied strongly on the judgment of *Isaacs* J. in *Cowburn's Case* (1). His Honour said:

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

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"I may summarize my constitutional conclusions as follows: (1) The settlement of an inter-State industrial dispute on such terms as the Federal arbitrator thinks just cannot be prevented or impeded by any State law; (2) an award once validly made prevails over any inconsistent State law; (3) a State law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute" (1). The award in that case was, as he pointed out, an earlier edition of the present award. But the conflict discussed in that case was between the provisions of an award which prescribed a minimum weekly wage for a working week of forty-eight hours and for a deduction from this amount if an employee worked less than these hours (in that case four hours) and the *Forty-four Hours Week Act* 1925 (N.S.W.) which in effect provided that the whole of this wage should be paid if the employee worked forty-four hours. Accordingly the award provided that the employee should receive a certain sum if he worked for forty-four hours and the State Act provided that he should receive a larger sum if he worked for that period and there was a direct conflict and, as *Isaacs* J. said, a manifest and inescapable inconsistency between the two provisions. It is impossible to predicate any such direct conflict in the present case. In the first place no award has yet been made under the *Industrial Arbitration Act* and, so far as State law is concerned, the provisions of the first sub-section of s. 105A occupy the field. If such an award should be made in the future the question may then arise whether its provisions or any of them are inconsistent with the provisions of the Metal Trades Award. It is not possible to construe sub-ss. (1) and (2) of s. 105A in the manner for which Mr. *Macfarlan* contends without doing violence to their language. This language does not justify a conclusion that they are in essence provisions intended to authorize State tribunals to make awards prescribing the ordinary times for the commencement and cessation of work by employees in shops in New South Wales for the sale of motor spirits, motor oils or motor accessories. The power to make such awards is not even a power to make an award for New South Wales as a whole but only to make awards for parts of New South Wales although, if a sufficient number of awards were made, they could in combination cover the whole of the State. The language of the sub-sections seems to indicate an intention on the part of the legislature that if the shops were allowed to be open during the prescribed periods the reasonable needs of the public to obtain

(1) (1926) 37 C.L.R., at p. 499.

such goods would be met. The proviso to sub-s. (2) that an award cannot enlarge this period although it may restrict it in particular shopping districts, areas or parts of areas supports this conclusion. But it is all guesswork. There is nothing in the language of sub-ss. (1) and (2) to suggest that they are intended to form one inseverable scheme so that the invalidity of any part would destroy the validity of the whole. It is not possible to construe the first sub-section of s. 105A, even if it can be said to be a transitional provision, as incidental to and inseverably bound up with the second sub-section and, therefore, if the latter be invalid under s. 109 of the Constitution, also invalid. An attempt was made to forge a link between what was said by *Dixon* J. (as he then was) in *Wenn* v. *Attorney-General (Vict.)* (1) in relation to very different circumstances and the present circumstances. He said: " . . . while s. 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute. The same thing is put in another way by saying that every part of a completely interdependent and inseparable legislative provision must fall within 'the extent of the inconsistency'. No doubt s. 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact. The burden of establishing interdependence in such a case is necessarily upon those who assert it in view of the words of s. 109, and perhaps it is not a light one " (2).

But there is nothing in the language of s. 105A to indicate that the Parliament of New South Wales would not have enacted the first sub-section if it had known that the second sub-section could be invalid. The indications are all the other way because, to give the first sub-section a clear run in the first instance, a new sub-s. (7) was added by the Act of 1954 depriving of any force or effect any existing State law relating to the opening or closing times of shops for the sale of motor spirit, motor oil or motor accessories which might otherwise compete with it. Further, the second sub-section could not of itself produce any direct inconsistency with the Metal Trades Award because of itself it has no immediate operation. It merely gives an overriding effect in a limited area to an award made under the *Industrial Arbitration Act*. Until an award is made

(1) (1948) 77 C.L.R. 84, at pp. 121, 122.

(2) (1948) 77 C.L.R., at p. 122.

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a similar but converse position would exist under s. 109 of the Constitution to that which existed in *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (1) whilst the powers conferred by the *Egg Control Regulations* made under the *National Security Act* 1939-1940 remained unexercised. If any such intention as that contended for could be attributed to the Parliament of New South Wales it would have to be the strange intention that, if by any possibility an award which might possibly be made under the *Industrial Arbitration Act* for a shopping district or area or part of an area could be invalid because it was inconsistent under s. 109 of the Constitution with a Federal award made under the *Conciliation and Arbitration Act*, not only the award but the whole of the two sub-sections should collapse. But a State award, even if valid, would only supersede sub-s. (1) for a particular shopping district, area or part of an area leaving the sub-section still operative throughout the rest of the State and an invalid award would have no effect upon the sub-section and would leave it completely operative throughout the State.

There is nothing which would justify the Court in not attributing to the first sub-section of s. 105A a completely independent operation irrespective of any constitutional difficulties that an award made under the second sub-section might encounter. The truth is that the defendant can only hope to call in aid s. 109 of the Constitution if it is possible to hold that the first sub-section of s. 105A is inconsistent with the Metal Trades Award because " its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute " : (per *Isaacs* J. in the passage already cited (2)). " When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid " : (per *Dixon* J. in *Victoria* v. *The Commonwealth* (3)). But sub-s. (1) of s. 105A does none of these things. The Metal Trades Award is not itself a law of the Commonwealth. It is the *Conciliation and Arbitration Act* which gives the force of law to its provisions and even then the operation of a State law can only be excluded by s. 109 of the Constitution in its application to the particular individuals governed by the award. The employer of the defendant is one of these individuals and the defendant is entitled to rely on the whole of the immunity from State law that his employer derives from the paramountcy of the award under s. 109 of the Constitution. The provisions of the award relating to

(1) (1942) 66 C.L.R. 557.
(2) (1926) 37 C.L.R., at p. 499.
(3) (1937) 58 C.L.R. 618, at p. 630.

the ordinary hours of work and to shift-work—afternoon, night and continuous shift-work—are provisions made in the settlement of industrial disputes between the parties to the award on these matters. But to produce an inconsistency between these provisions and the State law contained in sub-s. (1) of s. 105A of the *Factories and Shops Act* it would be necessary to construe the award as intending to confer upon the employer the right to work his employees during these hours notwithstanding any State law restricting the periods during which shops could be open. There is the decision of this Court in *R.* v. *Kelly*; *Ex parte State of Victoria* (1) that the trading hours of an employer are not the same subject as the working hours of an employee and that a dispute on the former subject is not an industrial dispute as defined in s. 4 of the *Conciliation and Arbitration Act*. It is pointed out that matters indirectly affecting work in an industry are not matters as to which there can be industrial disputes and that "In the case of Commonwealth legislation with respect to the same subject matter any such extension would seem inevitably to involve an excess of the power conferred by s. 51 (xxxv.) of the Constitution" (2). There can be a collision under s. 109 of the Constitution between a Commonwealth law on one subject and a State law on another but such a collision is less likely to occur than it is where the two laws are dealing with the same subject matter. An award under the *Conciliation and Arbitration Act* operates to settle disputes between the parties as to the terms and conditions upon which the employer shall employ the employee. It is not addressed to the question whether it is lawful for the employer to carry on his business continuously each day and night or in certain periods of the day or night. It does not purport to confer on the employer the right to open his shop and sell his goods in periods during which it is required by State law to remain closed. If it did purport to do so, it would exceed constitutional power, and it is only between a valid Commonwealth law and a State law that there can be any inconsistency. The award is only concerned with the question of the terms and conditions upon which the employer can work his employee when it is lawful for him to do so. Accordingly the provisions of sub-s. (1) of s. 105A of the *Factories and Shops Act* do not alter, impair or detract from the operation of the award. There is no enumerated power specifically conferred upon the Commonwealth by s. 51 of the Constitution to fix the periods when shops shall be opened and closed, so that it is a subject with respect to which the power

(1) (1950) 81 C.L.R. 64.

(2) (1950) 81 C.L.R., at p. 85.

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to legislate is reserved to the States by ss. 106 and 107 of the Constitution.

For these reasons the question asked in the order of 18th April 1955 should be answered by saying that the provisions of the Metal Trades Award did not absolve the defendant on 10th January 1955 from observing s. 105A of the *Factories and Shops Act* 1912-1954, with respect to the shop for the sale of motor spirit, motor oil or motor accessories known as Sydney Service Station and situated at 9 Flinders Street, Darlinghurst.

WEBB J. The question here is whether s. 105A (1) of the New South Wales *Factories and Shops Act* 1912-1954 is invalid or inoperative as being inconsistent with the Metal Trades Award made by a conciliation commissioner under the *Conciliation and Arbitration Act* 1904-1952. This question, as part of a cause, was removed to this Court under s. 40 of the *Judiciary Act* 1903-1950 on the application of the Attorney-General of New South Wales. The cause arises out of an information for a breach of s. 105A (1) (b) alleged to have been committed on 10th January 1955, at Darlinghurst, Sydney.

Section 105A provides, *inter alia* :

"105A. (1) The opening and closing times for shops for the sale of motor spirit, motor oil or motor accessories shall, whether or not employees are employed therein—(a) on Saturdays, Sundays and public holidays, be seven o'clock in the forenoon and six o'clock in the afternoon respectively . . . (b) on all other days, be six o'clock in the forenoon and half past eight o'clock in the afternoon respectively . . . (2) Where . . . an award is made under the Industrial Arbitration Act, 1940, . . . fixing the commencing and cessation of the ordinary hours of work by employees in shops for the sale of motor spirit, motor oil or motor accessories . . . the opening and closing times for such shops . . . whether or not employees are employed therein, shall be the times so fixed respectively for the commencing and cessation of the ordinary hours of work by such employees under such award : Provided that nothing in this section contained shall operate so as to permit any shop for the sale of motor spirit, motor oil or motor accessories to be opened earlier than or closed later than the times prescribed by subsection one of this section as the opening and closing times respectively for such shop. . . . (7) The provisions of any law, other than this Act and any award referred to in subsection two of this section, to the extent to which it prohibits the sale of motor spirit, motor oil or motor accessories between the opening and closing times

fixed by or under this Act for shops for the sale of motor spirit, motor oil or motor accessories, shall, . . . cease to be of any force or effect ".

At the " shop " in question petrol was on Monday, 10th January 1955, sold after 8.30 p.m. by employees who are treated as having been covered by the Metal Trades Award, but who if all the facts were known might not have been covered by it. However, for the purpose of these proceedings, I assume the award applied to them.

Whether a State law is inconsistent with a federal law and so invalid under s. 109 of the Commonwealth Constitution depends on the nature of the respective laws. Federal industrial awards are limited to the settlement of inter-State industrial disputes, i.e., disputes between employers and employees about industrial matters as defined by the *Conciliation and Arbitration Act*, and the definition must in turn comply with the Commonwealth Constitution which refers only to industrial disputes in the strict sense. Before a valid award can be made, the conciliation commissioner must have before him an inter-State dispute as so defined. A dispute between employers and employees as to what the trading hours should be, as distinct from the working hours of employees is not such a dispute : see *R.* v. *Kelly* ; *Ex parte Victoria* (1) and *Brownells Ltd.* v. *Ironmongers' Wages Board* (2). So that no federal industrial award can extend to trading hours fixed by a State law and bring about an inconsistency between a State and Commonwealth law under s. 109, rendering the State law invalid. Now s. 105A fixes trading hours as distinct from working hours of employees, although it does not use the term " trading hours " but speaks of " opening and closing times ", and goes so far as to make those times coincide with ordinary working hours fixed by a State industrial award, except that the trading hours of " shops " for the sale of petrol cannot be extended by a State award. Then s. 105A maintains the distinction between trading hours and working hours of employees, and so a federal award has no effect on trading hours under s. 105A (1) and never can have any. Even if s. 105A had made the trading hours coincide without any exception, those hours would still not be identical with the ordinary working hours of employees. They are quite distinct things. They are fixed by different legislation and for different purposes. It is the State award that the federal award would invalidate if the working hours had been fixed by a State award (*Clyde Engineering Co. Ltd.* v. *Cowburn* (3)). We were told that no such State award has been made. So in any event

(1) (1950) 81 C.L.R. 64.
(2) (1950) 81 C.L.R. 108.
(3) (1926) 37 C.L.R. 466.