[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE MEMBERS OF THE RAILWAYS APPEALS BOARD AND THE COMMISSIONER FOR RAILWAYS (N.S.W.); Ex parte DAVIS.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1956-1957.

1956, Sydney, *Aug.* 29, 30; *Nov.* 14, 15;

1957, Sydney, *Apr.* 15.

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

Constitutional Law (Cth.)—Conciliation and arbitration—Railway officers—Promotion—Senior officer passed over—Appeal provisions—Federal award—Salary limit on officers entitled to appeal—State Act—General right of appeal—Inconsistency—Validity of federal award—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (xxxv.), 109—*Railways Professional Officers Award* 1954 (*Cth.*), *cl.* 4A (ii) (*a*)—*Government Railways Act* 1912-1955 (*N.S.W.*), *ss.* 76, 86.

The applicant, an officer in the New South Wales Government Railways, sought a writ of mandamus to compel the Railways Appeals Board to hear his appeal against his being passed over by the Commissioner for Railways for promotion to a vacancy. The provisions of the *Government Railways Act* 1912-1955 (N.S.W.) relevant to the promotion in dispute were ss. 76 and 86. Sub-section (1) of s. 76 provides that such a vacancy shall be filled if possible by the promotion of some officer next in rank, position, or grade to the vacant office; sub-s. (3) provides that where the commissioner passes over the officer next in rank, position, or grade that officer shall be notified and the commissioner's decision shall not be carried into effect until the expiry of the time for lodging an appeal to the Appeals Board. Section 86 provides that where a decision has been made by the commissioner to promote an officer to fill any vacancy in any branch of the railway service and such officer is not the next in rank, position, or grade, any officer in the branch who has been passed over may appeal to the Appeals Board. The Appeals Board had refused to hear the appeal on the ground that they were precluded from so doing by cl. 4A (ii) (a) of the *Railways Professional Officers Award* 1954, made pursuant to the *Conciliation and Arbitration Act* 1904-1952. That clause provides:—"Promotion and reduction in consequence of a surplus of officers in any

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classification shall be governed by relative ability, suitability, record, experience and seniority. . . . No officer shall be entitled to appeal to the Railways Appeals Board if he is passed over for promotion to a position for which a salary of more than £1,356 per annum . . . is prescribed by this Part of this Award, and the decision of the 'Commissioner' in promoting or appointing an officer to fill any such position shall be final and conclusive." The position to which the applicant was seeking promotion was one for which a salary of more than £1,356 per annum was so prescribed. For the respondents it was contended that s. 86 was void under s. 109 of the Constitution for inconsistency with the clause of the federal award. For the applicant it was contended that the clause of the federal award was invalid. The Court examined the history of the industrial disputes out of which the award arose and held, *Fullagar* J. dissenting, that it was not possible to find any matter in difference to the settlement of which the clause destructive of the applicant's right of appeal was relevant incidental or appropriate. Hence there was no constitutional basis for the inclusion of cl. 4A (ii) (a) in the award and the writ of mandamus should issue.

MANDAMUS removed by s. 40A of the *Judiciary Act* 1903-1955 into the High Court from the Supreme Court of New South Wales.

Huia Albert Davis was on and before 5th November 1954 employed in the Department of Railways in the position of chief engineering survey draftsman of the Legal and Estates Branch. In the same branch of the said department one Norman Sydney White was also employed, his position being that of engineering survey draftsman and lower in rank and grade than that occupied by Davis. On 5th November 1954 the Commissioner of Railways decided to promote White to fill a vacancy which had occurred in the position of estate agent in the said branch, such position being senior in rank and grade to those held both by Davis and White. On 11th November 1954 Davis appealed to the Railways Appeals Board against the decision of the commissioner pursuant to s. 86 of the *Government Railways Act* 1912 as amended. When the said appeal came on for hearing the Railways Appeals Board determined that it had no jurisdiction to hear and determine it upon the ground that s. 86 of such Act gave way to the provisions of the federal *Railways Professional Officers Award* 1954 which precluded appeals in the case of positions carrying a salary of £1,356 per annum or more, as was here the case.

On 5th September 1955 Davis obtained from the Supreme Court of New South Wales a rule nisi calling upon the Commissioner of Railways and the members of the Railways Appeals Board to show cause why a writ of mandamus should not issue directed to such members commanding them to hear and determine the said appeal

upon the ground that the board erred in holding that it had no jurisdiction to hear and determine the same.

Upon the return of the rule nisi the Full Court of the Supreme Court (*Owen*, *Herron* and *Walsh* JJ.) considered that the matter involved questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales, and, having regard to ss. 38A and 40A of the *Judiciary Act* 1903-1955, refrained from dealing with the matter, which was accordingly removed to the High Court.

Sir *Garfield Barwick* Q.C. and *K. S. Jacobs*, for the applicant Davis.

K. S. Jacobs. There was no industrial dispute to support an award which had the effect of displacing the functions of the Railways Appeals Board under the *Government Railways Act* 1912-1953. There is no power in a conciliation commissioner to make an award resulting merely in the amendment or repeal of a section or provision in a State statute without substituting a provision covering the same field. Dissatisfaction *simpliciter* with the provisions of a State statute cannot be made the subject of a dispute. It is not open to the Commissioner of Railways to raise a dispute which has the effect of attacking the powers conferred and duties imposed on him by his incorporating statute.

At this stage the Court requested counsel for the respondent Commissioner of Railways to indicate the industrial dispute which had sufficient ambit to embrace cl. 4A (ii) (a) of the *Railways Professional Officers Award* 1954.

N. A. Jenkyn Q.C. (with him *H. Jenkins*), for the respondent Commissioner of Railways. The log of claims should be read against the background of the knowledge of the parties that there had been since about 1943 awards which covered the subject of provisions and reductions including rights of appeal. Clause 4A, when inserted in this award, merely reproclaimed an existing provision. At the time the dispute arose there existed in relation to those in receipt of less than £1,300 per annum a right of appeal, and what was sought by the log was the extension of the right of appeal in relation to promotion to those exceeding £1,300. This claim was resisted, and it was open to the conciliation commissioner to extend the right of appeal to all officers or to decline to extend it beyond the salary range of £1,350 in settlement of the dispute. Such an award would have been within the ambit of the dispute. In view of s. 16 of the *Conciliation and Arbitration Act* 1904-1955 this

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Court is precluded from examining the validity of this clause of the award.

Sir *Garfield Barwick* Q.C. then resumed the argument for the applicant. Section 16 of the *Conciliation and Arbitration Act* does not prevent this Court from examining the validity of the award. This is a proceeding in the original jurisdiction of the Court and the legislature cannot bind this Court by a provision such as s. 16 from examining the validity of an award where the inquiry is on constitutional grounds.

Upon the argument resuming on this date counsel for the Commissioner of Railways sought an adjournment to put in evidence on the subject of the ambit of the dispute. This application was opposed by counsel for the applicant, but was granted by the Court upon the terms which appear in the last paragraph of the joint judgment. The matter was adjourned to the November sittings of the Court.

Nov. 14, 15, 1956.

Sir *Garfield Barwick* Q.C. The matter actually in dispute was whether there should be an additional appeal tribunal to hear appeals where appeals were not heard by appeals boards in the States, and what was done was to attempt to qualify the right of appeal to the Appeals Board, first by giving the Commissioner of Railways a right of veto and secondly by limiting the right of appeal to those below a certain salary range. The orders so made travelled well outside the ambit of the dispute before the conciliation commissioner. It was suggested in the course of the original discussion that a new dispute had arisen, but the conciliation commissioner did not consider himself determining a new dispute but settling the original dispute which had come to him after there had been conferences between the parties. The new dispute, if there ever was one, had no inter-State element, but none of the parties realised that they were starting a new dispute with the New South Wales Railways Commissioner alone. So much for the ambit of the dispute. Neither of the parties could raise a dispute as to the sufficiency or propriety of the State appellate provision, though if they could get a valid dispute about something else a federal award might be obtained which by inconsistency would displace the State provision. A State functionary who is depending for his existence and authority on a State statute cannot make his dissatisfaction with that instrument a cause of dispute. The federal award could not directly repeal or qualify the State enactment. It might make an inconsistent provision, but it could not directly repeal qualify or amend the State statute, and this is what was here sought to be done.

N. A. Jenkyn Q.C. and *R. M. Eggleston* Q.C. (with them *H. Jenkins*), for the respondent Commissioner of Railways.

R. M. Eggleston Q.C. If an organisation raises a dispute with an employer about promotion appeals it thus raises two questions: (a) the principle of promotion and (b) how effect shall be given to the principle in a particular case. The whole basis of this series of disputes in relation to promotions has been the desire of the professional officers to take away from the railways commissioner the rights conferred upon him in relation to promotions by the first award. The State legislation provided two principles of promotion: ss. 76, 77. Once the system of promotion found in those two sections is set aside the jurisdiction of the Appeals Board as such becomes inoperative. Once s. 76 (i) goes, then s. 86 being entirely concerned with appeals against the failure to fulfil s. 76 (i) also goes. The original amendment to the award did not take away the right of appeal to the Appeals Board but in fact conferred one where none had previously existed in the award.

[DIXON C.J. It may not be correct to say that s. 86 goes because of its dependence upon s. 76 because the award uses the tribunal set up under s. 87 and to which an appeal is given by s. 86.]

The tribunal is used, not the jurisdiction, and there only to a limited extent. [He then dealt in detail with the history of the dispute and referred to the log dated 1st June 1942 served by the Association of Railway Professional Officers of Australia on the railway commissioners for the various States excluding Queensland, the *Professional Officers (New South Wales Railways and Tramways) Award* dated 21st June 1943, the *Senior Officers, New South Wales Railways, Award* dated 13th September 1946, *Variation of Senior Officers, New South Wales Railways, Award* dated 12th June 1947, amended log of claim "Salaries and conditions" served by Association of Railway Professional Officers of Australia on 24th September 1949.] This last log created a dispute as to the method of promotion and how such method should be applied including the question of appeals. [He then referred to the *Variation of the New South Wales Railways and Tramways Professional Officers Award* dated 17th September 1951, the application by the Commissioner of Railways (N.S.W.) for variation of *Professional Officers (New South Wales Railways and Tramways) Award* 1943 made on 11th October 1951.] This latter application was a mere procedure step; the dispute had arisen by reason of a claim made by the organisation. [He referred to the log of claims dated 17th February 1953 made by the Association of Railway Professional Officers of Australia on

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the various railway commissioners excluding Queensland.] This claim for rescission of the existing award put in issue the scheme of promotion and appeals contained therein, and the claim should be looked at in the light of the industrial relationships of the parties. No difficulty arises as to the Commissioner of Railways under the *Government Railways Act* 1912 as amended. The test as laid down in *Australian Railways Union* v. *Victorian Railways Commissioners* (1) is the existence of a dispute in fact. The dispute in fact is quite independent of the power of the parties to concede or to reject the claim. When the log was presented it was understood by the parties that the question of the right of appeal in respect of promotions was in issue and was to be determined by the conciliation commissioner in default of agreement. The conciliation commissioner understood this to be one of the matters in dispute before him. The dispute was an inter-State dispute, the Commissioner of Railways having employees in Queensland and New South Wales. It is not true to say in absolute terms that a demand that a State Act shall cease to apply cannot be the subject of an industrial dispute, because every claim seeking conditions inconsistent with State legislation necessarily is in form a demand that the State Act shall not apply.

[McTIERNAN J. Will you give the cases in which it has been decided or from which it can be inferred that this question of promotion and appeal is an industrial matter ?]

The cases are *Commissioner for Railways (N.S.W.)* v. *McCulloch* (2), which shows that a decision as to promotion is in itself a decision as to conditions of employment, these being included in the definition of " industrial matters ", and *McVicar* v. *Commissioner for Railways (N.S.W.)* (3). The application for mandamus should fail.

K. E. Wild (solicitor) appeared for the members of the Railways Appeals Board. No argument was addressed to the Court on their behalf.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

April 15, 1957.

The following written judgments were delivered :—

DIXON C.J., WILLIAMS AND KITTO JJ. This matter comes before us as a cause in which the proceedings have been transmitted pursuant to s. 40A (2) of the *Judiciary Act* 1903-1955 from

(1) (1930) 44 C.L.R. 319.
(2) (1946) 72 C.L.R. 141, at pp. 159, 160, 161, 162.
(3) (1951) 83 C.L.R. 521, at p. 534.

the Supreme Court of New South Wales where the cause was pending, it appearing to that court that there arose a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State.

The proceeding is a rule nisi granted by the Supreme Court for a prerogative writ of mandamus directed to the members of the Railways Appeals Board commanding them to hear an appeal by the applicant Davis, an officer of the railways department, against a decision of the Commissioner of Railways to promote an officer named White over Davis. The rule nisi called upon the members of the Appeals Board and the commissioner to show cause against the issue of the writ. The members of the board appeared only formally and the actual contest was between Davis and the Commissioner of Railways.

The duty which it is the purpose of Davis to enforce by means of the writ is said to lie upon the Appeals Board by reason of the operation of certain sections of the *Government Railways Act* 1912-1955 (N.S.W.). Section 76 deals with promotions in any branch of the railway service to a vacancy not open to competitive examination. Sub-section (1) provides that such a vacancy shall be filled if possible by the promotion of some officer next in rank, position or grade to the vacant office, and that no such officer shall be passed over unless the head of his branch, in writing, so advises the commissioner. By sub-ss. (2), (3) officers are divided into two classes. In the case of such salaried officers as are prescribed a proposal to fill a vacancy in the office must be referred to a promotions committee formed under the Act: in the case of other officers a decision to promote an officer to fill the vacancy who is not next in rank position or grade must be notified to any officer who is to be passed over and he is to be given an opportunity to appeal. Section 86 provides in terms that where a decision has been made by the commissioner to promote an officer to fill any vacancy in any branch of the railway service and such officer is not the next in rank, position or grade any officer in the branch who has been passed over may appeal to the Appeals Board. The board, which is provided for by s. 87, consists of three members, a chairman possessing legal qualifications appointed by the Governor in Council, an officer of the railway service appointed by the commissioner who is not a member of the appellant's branch and an officer, who is a member of his division, elected by the officers of that division. The board not only hears appeals by officers passed over for promotion, it hears also appeals by officers punished by heads of branches for misconduct or breach of rule by-law or regulation: see ss. 82, 87 and

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91A. Every decision of the board is final and conclusive, unless it imposes punishment involving dismissal or reduction in rank, position, grade or pay, in which case there is a further appeal to the commissioner : s. 93.

It appears that on 5th November 1954 the Commissioner of Railways decided to promote White to a vacancy which had occurred in the position of estate agent in the Legal and Estates Branch of the Railways Department. Davis, like White, was an officer of that branch but he was higher in rank position and grade than White. He appealed to the Railways Appeals Board against the decision to promote White.

An award made under the *Conciliation and Arbitration Act* 1904-1952 (Cth.) called the *Railways Professional Officers Award* 1954 contained clauses dealing with promotions and the redress open to officers passed over in favour of others. As varied this award purported to exclude an appeal where the vacant position carried a salary of more than £1,356 per annum and the salary of the estate agent exceeded that amount. After more than one postponement to allow of an attempt to appeal to the Arbitration Court against the material clauses of the award, an attempt which in the event failed, Davis's appeal to the Appeals Board finally came on to be disposed of. That board adhered to the view which they had already intimated and upon which they had acted in other cases, that the State legislation relating to appeals against promotion gave way to the provisions of the federal award and that consequently they possessed no authority to entertain appeals of the description within which Davis's appeal fell. Accordingly they declined to hear it. The rule nisi was then obtained by Davis from the Supreme Court on the ground that the Appeals Board was wrong in deciding that they could not hear and determine the appeal. On the return of the rule nisi before the Supreme Court it appeared that on behalf of Davis it was conceded that if the material provisions of the award validly operated according to their terms his application could not succeed. But it was contended that the provisions could not so operate and the validity of the award was to that extent impugned. So too was that of s. 16 of the *Conciliation and Arbitration Act* 1904-1955 in so far as it purported to protect the award from examination by a court to determine its constitutional validity. The Supreme Court held that these contentions brought the case within ss. 38A and 40A of the *Judiciary Act* 1903-1955 and before us no argument to the contrary has been advanced.

The issue between the parties in this Court has been the operation of the *Railways Professional Officers Award* 1954 as varied to exclude

Davis's appeal from the authority of the Appeals Board and this issue depends on the meaning and validity of the provisions of the award which are relied on. It is a question arising under s. 109 of the Constitution as applying when a federal industrial award is found to be in collision with the provisions of State law: *Ex parte McLean* (1). Such an industrial award as we are concerned with cannot be constitutionally valid unless it is made under an authority conferred in the exercise of the legislative power with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. That means, speaking in general terms, that the award must be relevant to a two-State dispute between the parties, or, to express the same thing in other ways, reasonably incidental to the settlement of the difference between them or appropriate to that end. An award deals with many industrial subjects and this general statement applies to each separate term or provision of the award relating to any distinct subject. That is to say the same kind of connexion must appear between the distinct subject of dispute and the term or provision. There must be a relevance or an appropriateness. If the validity of the material provisions of the award now in question is to be supported, it must be possible to find within the subjects of an inter-State dispute which the award professes to settle some matter in difference to the settlement of which the clauses destructive of the applicant's right of appeal are relevant incidental or appropriate. That such a subject of dispute is to be found the applicant Davis denies. It is the Commissioner of Railways who affirms that it existed.

It is not unimportant to keep in mind which party it is that sets up the invalidation under s. 109 of the Constitution of the provisions of the State Act giving the appeal. It is the State Commissioner of Railways who himself is established by the Act and derives his powers from it. The actual industrial dispute in settlement of which the *Railways Professional Officers Award* 1954 was professedly made was the product of a log of claims delivered in February 1953 under the direction of the Federal Council of the Association of Railway Professional Officers of Australia, a registered organisation, to the respective railway authorities of the States of New South Wales, Victoria, South Australia, Western Australia and Tasmania. These authorities failed or refused to concede the demands contained in the log, and as a result of a notification pursuant to s. 14 (3) of the *Conciliation and Arbitration Act* 1904-1952 by the secretary of the organisation the dispute came

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

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before a conciliation commissioner. Ultimately an award was made but advisedly no new provisions were at first included with reference, *inter alia*, to promotion; the provisions of the immediately preceding award were repeated pending further consideration. Those representing the parties entered upon a discussion of this and other matters, but finally on 5th November 1954 the commissioner gave his determination as to promotion. A variation was made in the material clauses of the award and the efficacy of these clauses as varied to exclude the applicant's appeal under State law is the matter in question.

The material provisions of the award as varied occur in Pt. II of that instrument, a part applying only to the Commissioner of Railways of New South Wales and to officers filling certain descriptions that are set out. The positions held by White and by Davis respectively are included, as well as that of estate agent. Clause 4A (ii) is headed "*promotion and reduction*" and, omitting an immaterial exception, it is as follows:—"(a) Promotion and reduction in consequence of a surplus of officers in any classification shall be governed by relative ability, suitability, record, experience and seniority . . . : Provided that in considering an officer's ability, suitability, record and experience, regard shall be had to the nature and quality of his service in the armed forces of Her Majesty the Queen. The reason for passing over any senior officer for promotion to a higher position or for reducing any senior officer in the event of a surplus of staff shall be stated in a recommendation by the Head of the Branch to the Commissioner. If an officer considers he has been improperly passed over for promotion to any position provided for" (in certain clauses) "for which a salary of less than £1,356 per annum (which amount is to be increased or decreased as the case may be, by any basic wage fluctuations or award marginal variations subsequent to the date of this variation), is prescribed by this Award, he may appeal to the Railways Appeals Board or to the Commissioner. If he appeals to the said Appeals Board and a decision is given in his favour, it shall not become effective unless and until it is approved by the said 'Commissioner' whose decision shall be final and conclusive. No officer shall be entitled to appeal to the Railways Appeals Board if he is passed over for promotion to a position for which a salary of more than £1,356 per annum (which amount may vary in the manner specified in the above paragraph of this clause) is prescribed by this Part of this Award, and the decision of the 'Commissioner' in promoting or appointing an officer to fill any such position shall be final and conclusive."

To sub-cl. (i) of cl. 4B there is a proviso which in spite of its position and its form contains a statement that is probably intended to operate positively and generally over the whole of Pt. II of the award. It includes a direction that where any provision of the *Government Railways Act* 1912 as amended conflicts with any specific provision made in this part of this award the latter shall prevail. This direction may conceivably be taken into account if any question arises as to the intention of the award to make an exhaustive or exclusive provision on the subjects with which it deals. But it cannot operate of its own inherent force to invalidate the State enactment. That must be left to s. 109 of the Constitution. (As to what was s. 51 of the *Conciliation and Arbitration Act* 1904-1955 and is now s. 65 of the Act of 1904-1956 it is enough to refer to what was said in *Collins* v. *Charles Marshall Pty. Ltd.* (1).)

The post of estate agent is remunerated at more than £1,356 per annum and there can be no doubt that the prohibition contained in the award as varied against appealing in the case of promotion to such a post is directly inconsistent with s. 86 of the State statute. Moreover it seems fairly clear that the basis of promotion prescribed by cl. 4A (ii) of the award is quite different from that contemplated by s. 76 of the Act. When you turn to the log of claims forming the basis of the industrial dispute for the settlement of which the award was made, you do not find it easy to identify any specific demand or demands the refusal of which would provide an industrial dispute whose ambit would justify the provisions of cl. 4A (ii) creating these inconsistencies. Seeing that the log is that of the organisation and that it is the Commissioner of Railways who is setting up the inconsistencies, perhaps this difficulty should not be a matter for surprise. But on the commissioner's behalf two main answers to the difficulty were put forward. The first is that to take the log of demands and interpret it without regard to the history of the industrial regulation of the topic in respect of the New South Wales Railways and the immediately previous situation is to misunderstand the true significance of the material claims in the log. The second answer given is that after the dispute resulting from the log came before the conciliation commissioner the parties met in negotiation and that by the course of their discussions the ambit of the dispute was changed or enlarged so that at all events in the end it sufficed to support the material provision of the award as varied. Although logically these contentions may be alternatives they mean in effect that the story must be told from beginning to end before it is possible

(1) (1955) 92 C.L.R. 529, at pp. 548, 549.

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to say that the relevant part of the award lacks a sufficient foundation. In any case the first of the two contentions cannot be considered without an examination of the course of industrial regulation with reference to promotion and appeals against promotion in the case of railway professional officers in New South Wales. It is accordingly desirable to give a brief account of what had happened before the delivery of the log of claims and then to examine its terms and state what occurred during the subsequent negotiations. The history begins with an award made by the Commonwealth Court of Conciliation and Arbitration during the war. It was made under the authority of the *National Security* (*Industrial Peace*) *Regulations* as well as of the *Conciliation and Arbitration Act* (Cth.) and it therefore did not depend for its validity on the legislative power conferred by s. 51 (xxxv.) of the Constitution. This award, which was dated 21st June 1943, came into operation in July 1943 and was expressed to remain in operation for the duration of the war or until 30th June 1946, whichever was the shorter term, and unless varied or rescinded for a further two years. So far as the subject of promotion goes the award dealt with it and other conditions of employment by taking up and incorporating a New South Wales instrument of industrial regulation published in August 1940. The provision so incorporated dealt with classification promotion and seniority. It required that the officers should be graded in the different classes by the commissioner. This having been done, promotion from class to class was to be in order of seniority provided the senior officer was suitable for the higher grade position. At the time when these provisions were incorporated in the award an officer could appeal under s. 86 of the *Government Railways Act* 1912-1941 against the adoption or confirmation of the advice or decision of the head of his branch with regard to his right to promotion and the appeal was to the Railways Commissioner. But otherwise there was no appeal. Within a few weeks, however, by Act No. 23 of 1943 (N.S.W.) the Appeals Board was established and s. 86 was amended to its present form giving an appeal to an officer passed over where the commissioner decides to promote an officer to fill a vacancy in a branch of the railway service and such officer is not next in rank, position or grade. Section 76 had long since taken its present form and it remained untouched. It would seem, therefore, that during the currency of the award dated 21st June 1943 in its first condition there was no clash of substance between the award and ss. 76 and 86. The substance was the same even if the manner in which the effect of s. 76 was rewritten in the text incorporated in the award meant that the latter text must be

taken to exclude that of s. 76. This award was in effect but not in terms supplemented by an award made by the same judge on 13th September 1946. The *National Security* (*Industrial Peace*) *Regulations* had not been repealed. Indeed so far as legislative action could go they were maintained until 31st December 1952: *Defence* (*Transitional Provisions*) *Act* 1946-1951: cf. Act No. 104 of 1952 and in particular s. 11 (1).

In consequence the Court of Conciliation and Arbitration felt free to treat an application to vary the old award as an occasion for making a new award by way of supplement to the old. The purpose was to cover more senior officers. With respect to them it embraced in the one award the members of the Federation of Salaried Officers of Railways Commissioners and the members of any other registered industrial organisation as well as the members of the Association of Railway Professional Officers of Australia. The award was called the "*Senior Officers New South Wales Railways Award*". It included the office to which Davis seeks promotion, viz. "Estate Agent, Legal Estates Branch", though the office he holds was governed by the older award. The new award was to commence on 1st July 1946 and continue during the currency of the award of 21st June 1943. The importance of the instrument for present purposes is that it introduced the provision displacing seniority as the governing factor in promotion. It gave finality to the commissioner's decision. "Promotion", the award said, "... shall be governed by relative ability, suitability, record, experience and seniority ...: Provided that in considering an officer's ability, suitability, record and experience regard shall be had to the nature and quality of his service in the Armed Forces of H.M. the King. The reason for passing over any senior officer for promotion to a higher position ... shall be stated in a recommendation by the Head of the Branch to the Commissioner whose decision upon the matter shall be final." The award provided for a board of reference and subsequently a report was made by the board concerning, among other things, the right of appeal of officers passed over for promotion. As a result the judge varied the foregoing provision as from June 1947 by removing the last words "whose decision upon the matter shall be final" and adding instead the following paragraph:—"If an officer considers he has been improperly passed over for any position carrying less than £1,300 per annum he may appeal to the Railways Appeals Board or to the commissioner. If he appeals to the Appeals Board and a decision is given in his favour, it shall not become effective unless and until it is endorsed by the commissioner. In respect of any matter arising out of this

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clause the commissioner's decision shall be final." We are not informed which party pressed for the respective portions of the foregoing clauses. But we do know that, in a log of claims delivered on 1st June 1942 before any of these awards or variations was made, the association sought (i) a triennial classification of officers in grades or classes by a board of reference, (ii) promotion from class to class in order of seniority subject to the senior man being suitable for the higher position, and (iii) the determination of suitability by the board of reference. The demand was for a separate board of reference for each State on which the department and the association should be equally represented, and there were express claims that the board of reference should classify officers in grades and classes, hear and determine all appeals by officers regarding their classification and inquire into and report to the department their opinion on any recommendation for the promotion of an officer not next in order of seniority. It is probably safe to assume, therefore, that the primary case for the organisation, considered as a whole, was that promotion should be by seniority where possible and that an appeal to a tribunal on which there was a representation of salaried officers should be open if a senior was passed over for promotion. If that was the case of the organisation it would, of course, be satisfied by the provisions of the State Act.

Early in 1948 the organisation prepared another log of claims covering wages and conditions and served it on the commissioners of the various States. Conferences seem to have taken place and a year later this log was replaced by a log of revised claims dated 24th March 1949. A little later this revised log was further amended in material respects. The result may be stated shortly as follows. Notwithstanding that the document described itself as a log of claims, it was drawn in the form of an award. Comments have before been made in this Court upon the difficulties arising from this course when the claims are afterwards relied on as having promoted a dispute and as having defined its ambit. But for present purposes it perhaps does not matter except to explain the first clause, which is to the effect that the award, i.e. expected award, rescinds all previous or existing awards made by the Arbitration Court between the railway and transport authorities mentioned of the respective parts of Australia and the organisation. The " award " is to bind the same bodies and the organisation and its members. There is a claim that in each State a classification committee for professional officers should be formed composed of an agreed chairman or the industrial registrar and of two professional officers representing the railway authority and two

representing the organisation. It should act by a majority and its functions should include the immediate and then the triennial classification of the positions of officers. At first the claim as to appeals was expressly confined to the consideration and determination by the classification committee of an appeal by an officer who, in any State, is not provided for by an appeals board constituted by State legislation on which professional officers are represented. But by amendments of the log a complete change was made in the basis sought for promotion and perhaps for this reason there was a restatement of the position as to appeals. It was now claimed that to the proposed classification committee a function should be given of determining lines of promotion within a department and of altering such a line of promotion if necessity should arise or of declaring that no fixed line of promotion existed. Within a line of promotion the order of seniority should be determined by years of service within the line and where there was no such line by years of service within the branch. If, at the date of the award sought, a recognised line of seniority existed within a line of promotion it was not to be altered because of the award. An officer passed over for promotion must be notified, it was claimed, and should be entitled to lodge an appeal with the head of his department who must then refer it to the Appeals Board constituted by the State legislature if professional officers are represented thereon. That board's decision was to be final. If no such appeal board had been constituted by the State legislature, the classification committee should perform the function. It will be seen that now there is a claim for an express clause for the utilisation of the State Appeals Board where it is constituted with the desired representation. This may have been done because it was felt that the State legislation (e.g. in New South Wales) might not cover an appeal where under federal law a line of promotion was established, instead of the mere seniority contemplated by State law. On the other hand the claim for the utilisation of the Appeals Board may be nothing but an instinctive filling out of the tenor of the demand to be expressed. The contention made before us for the Commissioner for Railways was that the claims and the failure to accede to them created a dispute as to what should be the basis or method of promotion and as to the way of obtaining a decision as to the right promotion to any given vacancy according to that basis or method. This, according to the contention, must include the question whether the State board should be authorised to perform this federal task falling outside, as it did, the duty under State law of dealing with appeals on a quite different basis of promotion.

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The next step was an order of variation made on 17th September 1951 and a further order of variation made on 18th September 1952. They are expressed as variations of the original award of 21st June 1943. It is not to the purpose to inquire into their actual or intended jurisdictional basis. It is enough to say that the variations repeat *totidem verbis* the provisions placed in the *Senior Officers (N.S.W.) Railways Award* concerned with promotion and appeals which are discussed above. The result was that the position Davis occupied and that to which White has been promoted were both comprised in an award in which promotion was expressed to depend on relative ability, suitability, record, experience and seniority, and in which an appeal to the State Appeals Board was expressed to be given for a position carrying less than £1,300 per annum, and then subject to the commissioner's approval of the decision. The inclusion of these provisions was in effect the result of an application dated 11th October 1951 made by the Commissioner for Railways for the very clauses. This was further supported by the delivery of a demand to the organisation by the New South Wales Railways Commissioner. It seems to have been a note of a series of claims covering a number of matters. As to promotions and appeals its substance was the same as the clauses adopted in the award. It was dated 12th March 1952 but bore the marking " without prejudice " because, so it was said, the organisation was told that, if it was not agreed, the commissioner would seek further restrictions on rights to promotion and to appeal. From 18th September 1952 when the conciliation commissioner made his order of variation adopting these provisions there was no change in the position until 17th February 1953, the date borne by the log of claims referred to in the earlier part of this judgment as producing the industrial dispute in settlement of which the award now in question was professedly made.

This log of claims took the form of a proposed award for which a demand was made on the railway commissioners of the States. It was restricted to officers engaged in a professional capacity by a railways department and to members of the organisation. It demanded that the order of seniority of officers prior to the date of the (proposed) award should be preserved at its commencement and that future promotions should be governed according to qualifications within the terms of the award. The log sought a classification committee in each State consisting of two professional representatives of the commissioner and two of the organisation with a chairman to be agreed or the industrial registrar. The classification committee was to classify the officer within six months

and thereafter triennially and to determine qualifications for reclassification. The log asked that in classifying an officer the committee should primarily examine his professional ability to fulfil the duties of his office and, at its discretion, take cognisance of his experience record and suitability. There was a proviso as to his war service. Among the functions over which it was to have " jurisdiction " was the duty " to consider and determine an appeal by an officer, who in any State, is not provided for by an Appeals Board constituted by State legislation, and on which professional officers are represented ". A provision was included that where it is proposed that an officer shall be passed over for promotion the department shall first notify him in writing outlining the reasons for his being passed over. There was a general clause or claim that any privileges and concessions at present granted to officers and not specifically referred to elsewhere should be continued. The opening clause in the proposed award was that the award rescinded all previous or existing awards. It appears that after the service of this log upon the various railways commissioners a number of conferences took place between the representatives of the New South Wales Commissioner, and no doubt of other commissioners, and the president and secretary of the organisation. The latter said that the organisation was pressing for the rescission by the new award of the existing rule prescribed with reference to promotion and reduction by the award of 18th September 1952. The representative of the New South Wales commissioner took up the position that the existing provisions as to promotion and reduction must be written into a new award and there must be no right of appeal to the Railways Appeals Board. The officers of the organisation insisted that its demand was that there should be a right of appeal in every officer and no limitation to those earning a salary of no more than £1,300 per annum and that the existing rules as to promotion should be rescinded. These discussions took place while the dispute arising from the log was before the conciliation commissioner. Apparently they formed part of an attempt to agree on the conditions which the conciliation commissioner might adopt in the variation he would make in his first award which, for the time being, simply incorporated former conditions. When he took the matter up again he described this particular matter, among those on which they had failed to agree, as " the salary or schedule beyond which no right of appeal should exist in the filling of, or promotion of officers to, senior positions ".

After the conciliation commissioner had adopted the clauses now in question the organisation sought leave to appeal from the decision

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and also sought a variation to overcome it. It also sought leave to appeal to the Arbitration Court from the refusal of that application. But the failure of those proceedings does not seem to affect the matter.

Involved as the course of this history has been, it is no doubt true that it serves to explain the existing situation and to give a better understanding not only of the material clause in the award but of the elements forming that part of the dispute to which the clause is supposedly directed. But after all the whole question concerns the limitation in point of amount which the clause purports to place on appeals to the State appeals boards. The history of the industrial measures with respect to promotion and appeal should not be allowed to obscure the fact that the limitation must rest for its validity upon the existence at the time the clause was adopted of an industrial dispute to the settlement of which it was incidental, appropriate or relevant.

The course of events preceding the delivery of the log of claims dated 17th February 1953 may help to show the significance of the demands which the log formulates. But after all the delivery of the log is the first step in the creation of the dispute and what occurred earlier does not supply any of the actual elements of a dispute in respect of the subject matter upon which the power to make the award must depend. It must not be overlooked that part of the history relates to a period when the authority to make an industrial award on such a subject depended not on the existence of a dispute but on the *National Security* (*Industrial Peace*) *Regulations*. It was then that the clause now at variance with the State Act took root and developed. This may explain why the necessity has been neglected of considering how far the clause adopted later could find the support of an industrial dispute of sufficient ambit. But now the validity of the clause depends on discovering enough to justify it in the industrial dispute in the creation of which the delivery of the log of 17th February 1953 was the first step. No one would expect to find in the document itself an express claim directed to the creation of an industrial dispute as to the resort to be allowed to the State Appeals Board, and none is to be found in fact. For the commissioner it is said, however, that from the beginning the purpose of the organisation of professional officers was to take away from the railways commissioner his uncontrolled freedom of choice in making promotions. It is said, further, that there has been a dispute continued intermittently as to the principle or basis upon which promotions should be made and to such a dispute it must be an ancillary question how and by what means adherence to the principle or basis is to be secured. Further, if so, it is claimed that

that involves the degree to which the commissioner's discretion shall or shall not be controlled by resort to some other body and it involves the question what body it is to be.

As to the log of 17th February 1953, the contention for the railways commissioner is that the classification committee thereby sought was to make a classification in which professional ability experience and past record, as well as war service, were to be criteria and that these were the " qualifications " to be determined in the triennial reclassification asked for. It was said that a wide interpretation attached to the claim that the classification committee should have jurisdiction to consider and determine an appeal by an officer who in any State is not provided for by an appeals board constituted by State legislation and in which professional officers are not represented. The contention was that it referred to the absence of the jurisdiction of such an appeals board not only where State legislation of the kind described did not exist but also where it did exist but had been, or was believed to have been, rendered inoperative by inconsistent federal award. That is an interpretation which the claim will not bear. It is not consistent with the terms in which it is expressed. If light is to be obtained from the previous history of the claim, it will be remembered that it was included in the like claims made in the log of 1949 before it was amended. There it seemed plainly to refer to the absence of State legislation of the kind described.

It is impossible to treat the log as meaning anything but that the organisation wished to rely on the appeal given by State law wherever under State law the appeal is to a tribunal on which professional officers are represented. The claim for classification according to the meritorious qualifications mentioned cannot be treated as in itself a claim that promotions shall not be made according to seniority where possible. Again if the past is to be looked at, it does not seem likely that it was the intention of the organisation to put forward such a claim.

We are not here concerned with the question of the basis or principle on which promotions are to be made except in so far as it is the foundation of the contention that if the federal award validly prescribes relative ability, suitability, record, experience and seniority as the basis then s. 86 of the *Government Railways Act* becomes inapplicable or that at all events it is incidental to such a provision in the award to go on to limit the application of the section.

The argument is that s. 86 gives no appeal except to correct the action of the Commissioner for Railways in applying the criteria of

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promotion prescribed by s. 76. In support of this contention reliance is placed upon the reference in s. 86 and s. 76 (3) to " rank, position, or grade ", the words of s. 76 (1). This argument depends on the application of s. 109 of the Constitution to the State provisions. Section 109 invalidates a State law " to the extent of the inconsistency ". On the assumption that the restatement by the award of the grounds of promotion operates to invalidate s. 76 (1) with reference to officers covered by the award does the inconsistency extend into s. 86 ?

The paramount intention of s. 86 seems to be to give an appeal from the Commissioner for Railways on a question of promotion if a senior officer is passed over. Is that intention completely dependent on the rule laid down in s. 76 ? Of course the legislation assumed the existence of that rule. But that in itself is not enough to justify the inference that its existence was an indispensable condition of the appeal. Rather it would seem that the appeal was given because, notwithstanding the prima facie rule, the commissioner could pass over the senior officer. The intention to provide the senior officer with a right to resort to another tribunal seems to grow not so much out of the rule laid down to govern the choice of the man to be promoted as the desire to have an outside discretion if the result is not the promotion of the senior officer. On the whole, therefore, the better view appears to be that s. 86 is not involved in the inconsistency between s. 76 and the provision of the award concerning the grounds or basis of promotion which would exist on the footing that the latter is valid as within the ambit of the dispute. It is said that if the basis or principle of promotion may be changed it follows that as an incidental matter a limit may be placed on the right of appeal under State law. That, however, must depend on the true nature of the subject in dispute. If the whole question of promotion is in dispute it may include the machinery by which it is done. But the one thing which cannot be found in the log of claims is a demand in relation to promotion as a general topic. To assume that the criteria of promotion may validly be changed by the award is not to assume that there is a claim throwing open for the exercise of the arbitral authority more than the criteria of selection.

On behalf of the commissioner it was sought to give a somewhat surprising effect to the general claim with which the log begins, namely the claim that the proposed award should rescind all previous or existing awards. Reliance was placed on this introductory clause as meaning that each existing industrial provision should be repealed independently of the others, so that the commissioner's failure to accede to it meant that the parties were in dispute about the

retention of the existing provision concerning appeals as a distinct or separate subject. But quite plainly it has no such effect; it is merely a demand that the new award shall supersede the old and become the exclusive statement of the industrial matters with which it deals. So far no support appears for the view that the industrial dispute in the creation of which the service of the log was a first step is of sufficient ambit to authorise the provision restricting the right of appeal to offices bearing a salary of not more than £1,356 per annum.

There remains, however, the contention that the dispute was redefined and extended by the discussions which took place afterwards between the representatives of the commissioner and of the organisation. These discussions were conducted for the purpose of settling a dispute which by the regular procedure had been brought before the conciliation commissioner. The discussions consist of negotiations for an award carried on with the view of composing an industrial difference said to amount to an arbitral dispute which had already arisen. The course which they took may show what the respective parties desired but it ought not to be considered as anything more than an interchange of proposals between officers representing the disputants with a view of arriving at an agreed settlement and a better understanding of the points upon which agreement was impossible and the award of the tribunal was therefore necessary. To treat the discussions as giving rise to a new industrial dispute or as extending an old one is to give them an aspect which they do not truly bear.

These discussions bring out pointedly a difficulty in the case of the Commissioner for Railways which ought not to pass without notice. It is obvious that it is his and not the organisation's desire that the arbitral award shall limit the right of appeal which s. 86 of the *Government Railways Act* confers on officers passed over for promotion. If there be a claim that this should be done it is his not the organisation's. The commissioner derives his authority from the statute to manage and control the New South Wales Railways. He is incorporated but only as a servant or agent of the State. Section 86 is simply a limitation of his authority or perhaps more accurately a transfer of his prima facie authority to other servants of the State for final exercise. What is his status to make industrial claims on the organisation as to such a matter? The question has no connexion with the long since settled controversy about the possibility of raising a dispute in disregard or defiance of State law or of making an award inconsistent with State law. Nor does it relate to the authority of the commissioner

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to receive or make claims on behalf of the "Government Railways of New South Wales" that are inconsistent with the law of the State. Still less does it touch the fact that industrial disputes must often be considered simply as *de facto* industrial events and dealt with accordingly. The present case is a special one. For the hypothesis is that, where the question really is as to the place where the final authority is to reside on the particular question of promotion, a claim of the commissioner that a restriction should be imposed upon an appeal from his authority granted by statute may create an industrial dispute. Further, according to this conception, if the organisation does not accede to his demand the dispute would be with respect to the management of the railways of the State and in settlement of the dispute the commissioner has thus created it is supposed that his official authority may be thus amplified by federal award.

It must be kept in mind that the organisation, so far as appears, has made no demand in derogation of s. 86. By virtue of what authority could the commissioner make such a claim in his representative or official capacity? No doubt in the view of the facts that is adopted in this judgment the question does not present itself for decision, but it should not pass unnoticed.

At one stage of this matter the Commissioner for Railways relied on s. 16 (1) of the *Conciliation and Arbitration Act* 1904-1955 as precluding this Court from examining the validity of the material clause of the award but ultimately reliance was not placed upon it.

The result is that the provisions of s. 86 were operative in the present case and the appeal of Davis should have been entertained. Accordingly the rule nisi for a mandamus should be made absolute.

It is desirable to add that an adjournment of the hearing of this matter was granted on 30th August 1956 on the application of the Commissioner of Railways on an undertaking on his part to abide any order this Court might make as to the costs of the adjournment and the costs made unnecessary and an undertaking that in the event of the applicant Davis ultimately succeeding in his appeal before the Appeals Board the commissioner would, so far as he has legal capacity to do so, see that the consequent increase in the remuneration of Davis for the duration of time which the adjournment involved was made up.

McTIERNAN J. In my opinion the rule nisi for a mandamus should be made absolute.

I agree with the reasons given by the Chief Justice, *Williams* and *Kitto* JJ.

The right of an employer to raise an employee to a higher grade or position is not one of the " industrial matters " expressed in s. 4 of the *Conciliation and Arbitration Act* 1904-1955. Whether the promotion of an employee engaged in industry is truly an " industrial matter " depends upon the construction of s. 4. If the Parliament intended promotion to be an " industrial matter " the omission to mention it expressly is strange, having regard to its importance. Whether there can be an " industrial dispute " on the question whether the employer himself or a board should decide whom the employer should promote or on the question of the matters which ought to govern promotion are questions that may concern all employers in industry. I reserve my opinion on the question as to the nature and extent of the power of a conciliation commissioner to control promotion in industry if it is in truth an " industrial matter ". Had the industrial dispute in the present case been so formalised that it fell within the jurisdiction of the conciliation commissioner to include in the award, as varied, the provisions upon which the present case turns, I think that it would have been necessary to decide whether those provisions so far as they concern promotions are *ultra vires* the *Conciliation and Arbitration Act*.

FULLAGAR J. The somewhat complicated history of the awards and orders which have led up to this application for mandamus is set out in the judgment of the Chief Justice and *Williams* and *Kitto* JJ., and it is unnecessary for me to repeat it. The case has seemed to me to be one of very considerable difficulty, but I have reached the conclusion that the conciliation commissioner had jurisdiction to include in his award the provision relating to promotions and appeals against promotions, on which the Commissioner for Railways relies. And I think it follows that the order nisi for mandamus should be discharged.

When the association served its log of 17th February 1953, there was in existence an award which, as varied, contained the very provision which is now in question. The log, which in accord with common practice was framed in the form of a proposed award, demanded the " rescission " of " all previous or existing awards ". It did not include the provision now in question, but it did include provisions for the setting up of " classification committees ", which were to have power (*inter alia*) " to consider and determine an appeal by any officer who in any State is not provided for by an appeals board constituted by State legislation ". I am inclined to think that this should be construed as including appeals against promotions,

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but I do not think the question is of any importance. The log demanded the rescission of an existing award which did contain the provision in question, and it demanded an award which did not contain the provision in question. If, in the course of the "settlement" of the dispute created by rejection of the log, the Commissioner for Railways demanded the retention of the clause in question in the new award to be made, I should have thought that the question whether it should be retained or omitted was a question within the ambit of the dispute. And this is exactly what the Commissioner for Railways did do, as appears from what the conciliation commissioner said in giving his final decision on 5th November 1954. It is to be remembered that the provisions relating to "cognisance" of disputes, which received a technical interpretation from the majority of the Court in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1) disappeared from the Act in 1947.

That the Commissioner for Railways should be able, through the jurisdiction of the federal arbitration tribunal, to obtain for himself wider powers and discretions than are committed to him by the State Act under which he lives and moves and has his being, may well seem an anomaly. But, when once it is decided (as it has been decided) that a federal award prevails over an inconsistent State law, I can see no sound legal reason for saying that he cannot effectively achieve this result.

The order nisi should, in my opinion, be discharged.

TAYLOR J. The reasons given in the joint judgment make it clear that the rule nisi should be made absolute and, were it not for the fact that I wish to make some brief observations concerning the provisions of cl. 4A (ii) of the *Railways Professional Officers Award* 1954, I would be content merely to express my concurrence.

The first observation which I wish to make is that, assuming the clause in question deals exclusively with "industrial matters" within the meaning of the *Conciliation and Arbitration Act* 1904-1952, I find difficulty in understanding how, in the circumstances, it was possible for the Commissioner for Railways to become a party to an industrial dispute with respect to them in so far as they were, already, the subject of express statutory provision in Div. 3 (*Promotion*) and Div. 5 (*Appeals*) of Pt. VIII of the *Government Railways Act* 1912 as amended. The difficulty involved in this notion has already been adverted to and, as pointed out in the joint judgment, it should not pass unnoticed.

(1) (1938) 60 C.L.R. 507.

Again, I have grave doubts whether a dispute concerning the principles upon which the promotion of officers in the railway service should be determined can be said to be a dispute as to an industrial matter within the meaning of the *Conciliation and Arbitration Act* and I wish to reserve my opinion on this point.

Finally, I again find difficulty in understanding how an award made under federal statutory authority can operate to confer authority upon or vest functions in an administrative tribunal constituted by or under State legislation. This, of course, is what cl. 4A (ii) (a), in part, purports to do and this circumstance may well constitute an independent ground for thinking that the rule nisi should be made absolute.

Rule absolute with costs to be paid by the Commissioner for Railways.

Solicitor for the applicant, *V. Everitt.*

Solicitor for the respondent Commissioner for Railways, *Sydney Burke*, Solicitor for Railways.

Solicitor for the respondent members of the Railways Appeals Board, *F. P. McRae*, Crown Solicitor for New South Wales.

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

R. A. H.