[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION . . . . . } APPLICANT;

AND

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) } RESPONDENT.

H. C. OF A. 1935.

SYDNEY, *Mar.* 19, 20; *April* 8.

Rich, Dixon Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—State tramway employees—Award—Variation—Prescribed rates of wage—Employer authorized to deduct reductions imposed by State statute—Discrimination between married and unmarried employees—Validity—Industrial dispute—Ambit—Matters not in dispute—Method of wage adjustment—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 21AA, 28 (2), (3), 38 (*o*), (*oa*), 38B, 38D (1) (*c*), 39.

By an order made in September 1932 by the Commonwealth Court of Conciliation and Arbitration the wage rates prescribed by an award of that Court, made in 1927, which bound the applicant association and the respondent, were reduced by ten per cent. The award provided that adjustment of wage rates should be made according to the purchasing power of money index numbers contained in the "all houses" tables of the Commonwealth Statistician. In 1933 the Court ordered that a new method of wage adjustment be adopted. The award and orders were successively expressed to continue in force until otherwise ordered by the Court. Meanwhile, in 1931, the Legislature of New South Wales enacted that, subject to the Commonwealth Constitution, the wages of all employees of that State, which included members of the association, should be reduced by specified percentages. Concessions made in favour of married men and widowers with dependent children were not extended to unmarried men. Upon an application made in 1934 by the association for the rescission of the order made in September 1932, the Court ordered that the award be further varied, so far as it affected New South Wales members of the association, by (*a*) the termination of the operation of the ten per cent reduction of wages

generally; (*b*) the setting aside of the method of wage adjustment adopted in 1933, and the substitution therefor of a new method of wage adjustment by means of the "all items" retail price index number of the Commonwealth Statistician and a new base rate of wage calculated according to a prescribed formula; and (*c*) inserting in the award a new clause, numbered 35, which provided that the respondent "may in or from the rates of pay prescribed herein . . . to be paid to employees of the" respondent "make reductions or deductions not greater than a statute of the State now or at any time requires to be made generally in or from substantially similar rates of pay of employees of the State or of State instrumentalities." Under this order the wages which would have been payable had the award remained untouched were reduced; in a few instances the wages were reduced to an amount slightly less than the lowest amount conceded in the employers' log of demands.

Held:—

(1) That clause 35 was outside the ambit of the original industrial dispute, and was therefore invalid.

(2) That the provision relating to clause 35 was severable from the other terms of the order of variation.

(3) That for the purpose of determining the dispute the Commonwealth Court of Conciliation and Arbitration had power to introduce a method of adjusting the basic wage which differed from the rival methods of the parties.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*.

In a summons taken out by the Australian Tramway Employees Association under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and directed to the Commissioner for Road Transport and Tramways (N.S.W.), the questions for decision were (*a*) whether clause 4 of an order made by the Full Court of the Commonwealth Court of Conciliation and Arbitration on 17th April 1934, purporting to vary an award (1), by which both the applicant and the respondent were bound, made on 14th September 1927, was validly made; (*b*) whether the Full Court of the Commonwealth Court of Conciliation and Arbitration had jurisdiction to insert that clause; and (*c*) whether the clause was within the area or scope of the industrial disputes determined by the award.

On 24th January 1934 a summons was issued on behalf of the applicant association in which it sought an order from the Commonwealth Court of Conciliation and Arbitration, rescinding certain orders previously made by that Court whereby the wage rates

(1) (1927) 25 C.A.R. 597.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

prescribed by the award were reduced by ten per cent. The Court, on 17th April 1934, ordered and prescribed, by clause 1 of its order, that, except in certain cases not material to this report, the ten per cent reduction should no longer operate; by clause 2, that an order made by the Court on 5th May 1933 as to adjustment should no longer operate; by clause 3, that for clause 2 of the award there should be substituted a new clause 2 which provided that certain downward adjustments of wages in specified amounts should be made, that the amounts of the rates of wages prescribed in the award for adult employees should be adjusted by the following method according to the position and fluctuation (if any) of the "all items" retail price index numbers of the Commonwealth Statistician. Adjustment was to be based upon the equating of index number 1,000 with 81s. per week, the amount assessed upon that number of the Court's declared ordinary basic wage, and with a wage of 13s. 6d. per day; by clause 4, that there be added to the award a new clause as follows:—"35. Notwithstanding anything in this award, or in any undertaking given in connection therewith, any State of the Commonwealth, or any Commissioner or Commissioners of State Railways, or the Commissioner for Road Transport and Tramways (New South Wales), may in or from the rates of pay prescribed herein or undertaken to be paid to employees of such State, Commissioner or Commissioners, make reductions or deductions not greater than a statute of the State now or at any time requires to be made generally in or from substantially similar rates of pay of employees of the State or of State instrumentalities."

The applicant association claimed that the effect of clause 35, (*a*) in conjunction with the alteration of the basic wage of the award and the method of adjustment thereof as prescribed in the order of 17th April 1934, was to reduce the minimum rates of wages of certain employees below the minimum rates specified by the employers in the disputes within the cognizance of the Commonwealth Court of Conciliation and Arbitration; (*b*) was to allow discrimination between married and unmarried employees by applying different rates of wages to married and unmarried employees doing the same class and grade of work; and, also, that the clause delegated the power of fixing minimum rates of wages for

members of the association employed by the respondent otherwise than in accordance with the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1930.

The summons under sec. 21AA was referred by *Evatt* J. into the Full Court of the High Court, and it now came on for hearing.

Further material facts appear in the judgments hereunder.

J. A. Ferguson (with him *De Baun* and *Gee*), for the applicant. The variations, particularly the variation as contained in clause 35, takes the pay of certain employees covered by the award below the ambit of the industrial dispute which existed between the parties. By introducing a discrimination between married men and single men, and by making deductions according to variations in State law from time to time, clause 35 exceeds the limits of the dispute. Clause 35 is unconstitutional as not being an exercise of arbitral power, and also as amounting to a delegation of the arbitral power not authorized by the *Commonwealth Conciliation and Arbitration Act* or the Constitution. Although here the employees and the employers each presented a separate set of logs and both sets of logs were referred into Court, they were dealt with at the same time and together constitute one dispute (*Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1); *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2)). By its decision on the application made to it in 1934, the Commonwealth Court of Conciliation and Arbitration deliberately departed from the "Harvester Standard" and the method of the "all houses" tables in favour of a new and different standard, and a new method of computation, the all-items tables, which gave no result. In the future the "all houses" table will not form part of the "Harvester Standard." Calculated according to the new method, the basic wage was decreased by two shillings. It is not competent for the Court to go outside the ambit of dispute, nor may any part of the arbitral power be delegated except in accordance with the provisions of the *Commonwealth Conciliation and Arbitration Act* and the Constitution (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3);

(1) (1920) 28 C.L.R. 1.
(2) (1931) 45 C.L.R. 409.
(3) (1910) 11 C.L.R. 1, at pp. 32, 46, 61, 62.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Australian Insurance Staffs' Federation v. *Atlas Assurance Co.* (1)). With reference to the number of matters in dispute, see *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (2), *Australian Workers' Union* v. *Graziers' Association of New South Wales* (3) and *Federated Millers and Mill Employees' Association of Australasia* v. *Butcher* (4). The power of the Court to make provision in an award for reference to outside authorities, persons, or sources was dealt with in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (5). Clause 35, in its operation conflicts with the essential right of parties to be heard on all aspects of a dispute (*Australian Railways Union* v. *Victorian Railways Commissioners* (6)). On the question of arbitral power and its proper exercise, see *Little* v. *Newton* (7), and *Redman's Law of Arbitrations and Awards*, 3rd ed. (1897), p. 115. Clause 35 is outside the ambit of the dispute. It introduces a distinction between married men and single men not asked for, and also introduces an application of State law (that is, the *Public Service (Salaries Reduction) Act* 1930 (N.S.W.), the *Public Service (Salaries Reduction) Amendment Act* 1931 (N.S.W.), and the *Public Service Salaries Act (No.* 2) 1931 (N.S.W.)), not requested at any time.

Russell K.C. (with him *Chambers*), for the respondent. Upon the disputes raised by the rejection by the applicant association of the employers' log, and by the employers' rejection of the association's log, the wages respectively proposed were not comparable grade by grade, or class by class, as they were in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (8). The only lower limit of wages conceded by the employers was a basic wage equivalent from time to time to the "Harvester Standard" adjusted to accord with changes in the purchasing power of money. Clause 2 of the award of September 1927 was valid and left it open to the Court to vary the mode of adjustment. The order of April 1934 as to

(1) (1931) 45 C.L.R., at pp. 421, 423, 427, 433, 435, 438, 448.
(2) (1920) 28 C.L.R., at p. 11.
(3) (1932) 47 C.L.R. 22.
(4) (1932) 47 C.L.R. 246.
(5) (1911) 12 C.L.R. 398, at pp. 416, 430, 445, 455.
(6) (1930) 44 C.L.R. 319, at p. 384.
(7) (1841) 2 Man. & G. 351; 133 E.R. 781.
(8) (1931) 45 C.L.R. 409.

the basic wage and the method of computation was not in itself beyond the powers of the Court. The "Harvester Standard" will still be applied, computed in accordance with the "all items" tables. The addition, by clause 4 of that order, of clause 35 to the award was not of itself beyond the jurisdiction of the Court either as a delegation of its authority in New South Wales (*Whybrow's Case* (1)), or on the ground that differentiation of pay to married and single men followed as a consequence. Clause 35 is, therefore, bad or ineffective only if and so far as it brings any wage below a point offered by the employers as a minimum. The application by summons by the applicant association for a rescission of the order relating to the ten per cent reduction was within the jurisdiction of the Court; therefore secs. 28 (2), (3), 38 (*o*), (*oa*), 38B, 38D (1) (*c*) and 39 of the *Commonwealth Conciliation and Arbitration Act* applied and empowered the Court to rescind, either wholly or in part, that order conditionally. The ambit of an industrial dispute is created by each log. The Court had power to make the further order now under consideration (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3)). The Court may, in the public interest, for the purpose of settling an industrial dispute, go beyond any agreement; if it does not obtain an agreement it may go beyond any ambit laid down by the parties. When it is realized that of the 4,000 employees of the respondent there are only four or five single men who, as a result of the *Public Service Salaries Act* 1931, are in receipt of less than the basic wage and to an extent only of fourpence per week, this result of clause 35 may be thought too trivial to warrant a declaration of invalidity. It is competent for the Court to improve, and for any party before it to suggest the improvement of, the method of computing the standard wage (*Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (4); *Re the "Harvester Judgment Standard"* (5)). The award now carried on by the "all items"

(1) (1910) 11 C.L.R., at p. 62.
(2) (1920) 28 C.L.R. 209, at pp. 216-218.
(3) (1920) 28 C.L.R., at p. 9.
(4) (1922) 16 C.A.R. 4, at pp. 12, 13.
(5) (1922) 16 C.A.R. 829, at pp. 830, 834, 835, 839.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

table is an award which includes the " Harvester Standard " or its equivalent. There was nothing to prevent a crossing over from one method to another, or from effecting an improvement in the method ; even if there were it was still within the ambit. Sec. 38 (*o*) shows that awards are tentative and provisional only (*Whybrow's Case* (1)). The ambit of a dispute is greater than the difference between two amounts. " Ambit " should be given a wide meaning, as in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (2). The award was made to operate " until further order or award." In granting the association's application relating to the ten per cent reduction it was competent for the Court to provide that reductions or deductions in amounts ascertained by reference to State legislation might be made from the rates of pay prescribed by the award. There is nothing in the *Commonwealth Conciliation and Arbitration Act* which prevents the Court from differentiating between married and single men. The Court has power to make necessary variations for matters newly arising ; it is in the Court's discretion to protect the public interest. *Australian Workers' Union* v. *Graziers' Association of New South Wales* (3) and *Federated Millers and Mill Employees' Association of Australasia* v. *Butcher* (4) are clearly distinguishable from *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (5), which is the only case in which it has been held that the ten per cent reduction was invalid as taking the award outside the ambit of the dispute. If the changes (*a*) in the basic wage made or to be made by the operation of the order of April 1934, and (*b*) by clause 4 of that order, which provides for the inserting of clause 35 in the award, are, or if either of them is, beyond the powers of the Commonwealth Court of Conciliation and Arbitration, the whole order is bad. If the change (*a*) is bad in relation to the whole range of wages in the award, then the whole of the order of April 1934 is bad (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (5)). If the change (*a*), or (*b*), is bad only in particular cases where the ambit of the disputes is exceeded, then, subject to *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (5), that order is

(1) (1910) 11 C.L.R., at p. 27.
(2) (1909) 8 C.L.R. 419.
(3) (1932) 47 C.L.R. 22.
(4) (1932) 47 C.L.R. 246.
(5) (1931) 45 C.L.R. 409.

invalid only in those cases and to the extent of the defect, that is, as to basic wage employees who are single men. If the invalidity of the clause is not limited to the few cases which may be outside the ambit of dispute then, because the offending clause is not severable, the order is bad as a whole. In that case the order should be set aside and the position which prevailed prior to the application restored. The subject matter of the clause and its general intention are within the powers of the Court.

J. A. Ferguson, in reply. The matter should be considered just as if in the first instance minimum rates had been established by the award at amounts lower than the employers proposed in the disagreement which caused the dispute and as if a different basic wage standard than the "Harvester Standard" as proposed had been introduced. Clause 35 was neither requested nor contemplated by the parties (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1)). The logs of demand did not indicate an intention to discriminate between married men and single men, nor did liberty to reduce rates of wage by reference to State legislation, actual or future, designed for that purpose, form part of the dispute. Legislation of that nature was unknown at the date when the original award was made. The Court's action in 1934 was really legislation, and was apart from any dispute. The Court considered it desirable to have (*a*) a new standard generally, (*b*) a new calculus, and (*c*) a possible substitution of unascertained rates of wage for the awarded rates by the conjoint action of two outside authorities. Those matters were never the subject of a dispute between the parties. The Court has abandoned the "Harvester Standard." Clause 35 presents difficulties of construction and application. One effect of the clause is that variations may, from time to time, be made in a Federal award by State legislation, without the parties to the dispute having an opportunity of being heard upon the matter. Clause 35 cannot be read as an exemption clause. It cannot be inserted so as to reduce rates of wages below the ambit. If desired that its terms should be introduced, the matter should form the subject of a new dispute. There is no connection between the

(1) (1931) 45 C.L.R., at pp. 427, 428.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

restoration of the ten per cent reduction and either (*a*) the new standard of basic wage, or (*b*) the new calculus, or (*c*) clause 35 as to State law in certain cases. The clauses in the order made in April 1934 are severable. Clauses 1, 2 and 3 can operate independently of clause 4, which inserted clause 35 into the award, and of each other. The various sections of the *Commonwealth Conciliation and Arbitration Act* referred to on behalf of the respondent are applicable only in respect of matters within the ambit of dispute.

Cur. adv. vult.

April 8.

The following written judgments were delivered :—

RICH J. The order of variation, dated 17th April 1934, purports to add clause 35 to the awards. In my opinion that clause is invalid and should be so declared.

The separate judgments of my brothers *Dixon*, *Evatt* and *McTiernan* have dealt with the matter so fully in arriving at the same conclusion that it is unnecessary for me to traverse the same ground.

It is unnecessary to answer the questions asked in the summons, as a declaration that the clause in question is invalid and inoperative will suffice. There should be no order as to costs.

DIXON J. The question for decision on this application is whether the Full Court of the Commonwealth Court of Conciliation and Arbitration had power to make an order of variation dated 17th April 1934. The award that it varied governs the tramway industry. It came into operation on 1st October 1927 and the specified period of its duration expired on 1st October 1930. It continues in force by virtue of sec. 28 (2) of the Act. The award, subject to some increases, prescribed as minimum wages those already payable under a prior award the fixed period of which expired on 31st March 1925. The prior award contained a clause, usual at the time when it was made, to the effect that the rates of wage to be paid should be proportionately reduced or increased according to the differences in the purchasing power of money index numbers published by the Commonwealth Statistician. The index

numbers intended to be referred to were those contained in tables commonly called the "all houses" tables. The award of 1st October 1927 provided that the adjustment of wages in this manner should continue until further order; its words were: "Such adjustments as now arrived at shall continue until further award or order."

On 22nd January 1931, the Commonwealth Court of Conciliation and Arbitration, after holding an inquiry at which the parties to many awards were heard, including that governing the tramway industry, announced a decision or determination to the effect that a list of awards, including the tramway award, should be varied by the reduction of all wages rates therein prescribed by ten per cent for twelve months and thereafter until further order. In the case of employees of the New South Wales Commissioner for Road Transport and Tramways this variation appears not to have taken effect until 16th September 1932, when the Court made an actual order reducing wages payable under the award by ten per cent, subject to a minimum of £3 10s. a week. The order was expressed to continue in force until otherwise ordered by the Court. On 5th May 1933, the Court of Conciliation and Arbitration made a further variation, the object of which was to discontinue the use of the "all houses" tables of the statistician and to adopt another method of adjustment.

In the meantime legislation had been enacted in various States for the reduction of wages of employees whether in the service of the State itself, or of corporate agencies of the State. In particular, the Legislature of New South Wales passed, first, the *Public Service (Salaries Reduction) Act* 1930 (No. 21, 1930) extended by the *Public Service (Salaries Reduction) Amendment Act* 1931 (No. 24, 1931), and then the *Public Service Salaries Act (No. 2)* 1931 (No. 29, 1931). In this reduction the New South Wales tramway service was included. The last Act contained a covering clause of the kind now so familiar requiring that its provisions should be construed subject to the Commonwealth Constitution. Subject to this clause, it enacted that the salary of every officer employed in the service of the Government of New South Wales or of certain of its agencies should be reduced by percentages which it set out. The reductions went from $8\frac{1}{3}$ per cent upwards. But in the application of the percentages

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

married men and widowers with dependent children received concessions in which unmarried men did not share. These provisions could not, as the award stood, apply to wages which it prescribed. For it was expressed in the customary way and amounted, according to the decisions of this Court, to an exhaustive statement of the minimum wage which by virtue of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 excluded any inconsistent operation of State law. (See *Clyde Engineering Co.* v. *Cowburn* (1); *H. V. McKay Pty. Ltd.* v. *Hunt* (2); *Ex parte McLean* (3).)

Early in 1934, the Australian Tramways Employees' Association applied to the Court of Conciliation and Arbitration for an order rescinding the various orders by which the ten per cent wages reduction had been applied to the award, including the order of variation of 16th September 1932 which had reduced by ten per cent the wages of New South Wales tramway employees subject to the proviso that the wages were not brought below £3 10s. a week. Upon this application the Full Court of the Court of Conciliation and Arbitration made the order of 17th April 1934, the validity of which we are now called upon to decide.

The order, so far as it affects New South Wales employees, did three things. First, it put an end to the operation of the ten per cent reduction of wages generally of tramway employees. Second, it set aside the new method of wages adjustment adopted on 5th May 1933 in substitution for the use of the "all houses" tables of the statistician; in lieu of that method, it introduced a method of adjusting wages by means of the "all items" retail price index numbers of the Commonwealth statistician and it established a rate or rates of basic wage as a fresh starting point, a rate arrived at after a fashion described by the Court in reasons which on the same day were given in a large number of matters heard together under the description "Basic Wage Inquiry 1934." Third, the order inserted the following clause in the award: "35. Notwithstanding anything in this award, or in any undertaking given in connection therewith, any State of the Commonwealth, or any Commissioner of State Railways, or the Commissioner for

(1) (1926) 37 C.L.R. 466. (2) (1926) 38 C.L.R. 308.
(3) (1930) 43 C.L.R. 472.

Road Transport and Tramways (New South Wales), may in or from the rates of pay prescribed herein or undertaken to be paid to employees of such State, Commissioner or Commissioners, make reductions or deductions not greater than a statute of the State now or at any time requires to be made generally in or from substantially similar rates of pay of employees of the State or of State instrumentalities."

The base rate adopted as a fresh starting point was for Sydney £3 7s. a week. It was fixed by reference to a number of considerations which are referred to in the reasons of their Honors Chief Judge *Dethridge* and Judge *Drake-Brockman*, who formed the majority of the Court. His Honor Judge *Beeby*, who dissented from the actual method followed, discusses some of the same matters. Among the considerations upon which the majority of the Court acted, it appears that weight was given to the amounts of wage which would result from using as theretofore the rate fixed in the *Harvester Case* (1) of seven shillings a day in Melbourne in 1907 and applying the statistician's tables, both the "all houses" as was long the practice, and the "all items" which seemed a better practice. But the "Harvester wage" was by no means the sole or decisive consideration. It is not correct, I think, to treat the majority judgment as doing no more than prescribing a new means of applying the "Harvester" wage. It established an independent base rate, not a rate produced by a method of calculation from the "Harvester" rate. Their Honors the Chief Judge and Judge *Drake-Brockman* say in their joint judgment: "Having regard to the economic position of the Commonwealth, to the principles that have been indicated as accepted by the Court for the assessment of its basic wage, and to the information gained in connection with the determinations of itself and of State authorities in respect of a basic wage, we have concluded that the basic wage for the metropolitan districts should be of the following amounts." There are then set out the respective base rates for the six capitals with the corresponding index number in a table of "all items" price index numbers. The weekly rate given for Sydney is that already stated, £3 7s. This rate meant a reduction of the base rate which would have prevailed

(1) (1908) 6 C.L.R. 41.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

but for the deduction of ten per cent. The Court was, of course, fully alive to this consequence and took it into account in removing the ten per cent reduction. In introducing the new clause relating to the reduction of wages by or under State law, the Court was guided by the consideration that the employees in the industry were, in effect, in the employment of the States, which had, in the exercise of their legislative powers, reduced the remuneration of all employed in the State services. After referring to the fairness of the claim that those in the service of States should not be called upon to make greater sacrifices than their fellow citizens, the reasons of the majority proceed :—" But should the State legislature think fit to reduce or make a deduction from the remuneration generally of the employees of the State, those engaged in its transport services have no moral claim to escape a reduction or deduction equal in degree to that imposed generally upon other employees of the State in similar grades. All that they are entitled to is that they be treated no worse. The Court does not think that, so far as Government transport services are concerned, it should refrain from making variations similar to those made in other industries. But it thinks it may assume that State Legislatures will not make deductions from the wages of employees of the State greater than are needed to enable the country to meet its difficulties. It has therefore decided to relax such restrictions of the legislative power of the State in respect of employees in its transport services as may arise from the existence of a Federal award covering such employees. At the same time it will protect those employees from any greater levy than that imposed upon other State employees of similar grade not covered by Federal awards."

Each of three things done by the variation order of 17th April 1934, which is attacked in these proceedings, operated to reduce the wages which would have been payable had the award of 1st October 1927 remained untouched. In combination, the establishment of the new basic wage, the adoption of the " all items " tables and the permission to make deductions authorized by State law, produced a very considerable reduction of the old award rates. But the award of 1st October 1927, prescribing those rates, was founded upon an industrial dispute which arose or was raised at a

time when the Court habitually fixed base rates by reference to the "Harvester" standard and by means of the "all houses" tables.

Sir *Charles Powers*, as President of the Court, had added to the base rate a sum of three shillings which, in default of anything more descriptive, came to bear his name. But, except for this addition which was not invariably made, employer and employee had come to regard it as a matter of course that the base rate would be calculated from the "Harvester" standard. Accordingly, the Australian Tramways Employees Association now asserts that the standard for fixing the basic wage and the statistician's tables or mechanism for applying it were never in dispute between it and the various Commissioners. The award of 1927 was based in part at least upon claims formulated by the Commissioners, and in these claims basic wage and margins were put forward. An adjustment from them by the old means would produce wages for the relevant period in 1934 above many of the rates paid under the variation. Upon these grounds, it is contended that the order of variation travels outside the dispute. In any event it is said that the new clause permitting deductions by reference to State law is neither within the dispute nor the authority of the industrial arbitrator.

The jurisdiction of the Court of Conciliation and Arbitration to award rates of pay and industrial conditions arises only when an industrial dispute extending beyond the limits of any one State is brought within its cognizance. It can make no award except in the course of or for the purpose of settling such a dispute. The terms of the award must, therefore, be relevant to the dispute or its settlement. What the Court can award must depend upon the nature and the subject matter of the dispute. In a dispute about wages the parties by their demands or otherwise may define the greatest amount claimed, on the one hand, or, on the other hand, the amount conceded. In such a case the award cannot be of an amount outside these limits. It must be relevant, and it is relevant neither to the dispute nor to its settlement to prescribe a wage lower than that conceded or higher than that demanded. This principle applies not merely to the initial award but also to its subsequent variation, whether during the specified period of its duration or afterwards while it continues in force under sec. 28 (2). All this appears to me to be settled by

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

the decisions of this Court, *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1), *Australian Workers' Union* v. *Graziers' Association of New South Wales* (2) and *Federated Millers and Mill Employees' Association of Australasia* v. *Butcher* (3). But, as the last two cases show, a downward limit upon the wages which may be prescribed by an award is not imposed in the absence of a definite and unconditional concession of a rate of pay.

In the present case a paper dispute was raised at or near the expiration of the specified period of the prior award. On 16th March 1925, the Commissioners addressed a demand to the Australian Tramways Employees Association for alterations in wages and conditions then existing. They asked that their log should take the place of existing awards, agreements and practices. The log set out a list of wages expressed as basic wage plus an addition or margin, sc., for skill. But the list was preceded by the formulation of a demand as to the basic wage. No doubt the primary object of this term was to exclude the "*Powers* 3s." It was expressed as follows: "They" (the Commissioners) "desire that all wages should be based on the equivalent from time to time of the 'Harvester Standard'—such equivalent to be ascertained according to the purchasing power of money figures of the Commonwealth Statistician without any addition thereto, and they are desirous that such wages should be based on the figures of the Commonwealth Statitician for the respective places where their employees are respectively employed, and that all wages should be adjusted quarterly according to the increase or decrease in the purchasing power of money." To this demand the employees' association replied that the executive was not prepared to accept the terms but was ready to meet the Commissioners, and, further, that the association would serve a log of wages and conditions. Its log of demands was served on 3rd April 1925. The minimum wages which the log sought were not expressed in terms of basic wage and margin or addition like those specified in the employers' log. For each class or grade of employee a weekly wage rate was claimed in a single money sum. Nothing was said about a method of adjustment with changes in

(1) (1931) 45 C.L.R. 409. (2) (1932) 47 C.L.R. 22.
(3) (1932) 47 C.L.R. 246.

the cost of living. But the rates claimed were very much in excess of those prescribed by the expiring award and it is quite obvious that they were not consistent with the adoption of the "Harvester Standard" without the addition of some further sum. The "*Powers* 3s." and a liberal enlargement of the margins if added to the prevailing equivalent of the "Harvester Standard" would hardly suffice to make up the amount claimed.

What then is the nature or character of the dispute as affecting the fixation of the base rate and the adoption of a method of adjusting wages with changes in the cost of living? The two demands or logs do not, in my opinion, supply a foundation for two industrial disputes. They are the formulations of rival claims about the same matter of controversy—the rates of pay and conditions to govern the parties in their existing industrial relations. It is from these rival claims that the nature and extent of the dispute between them must be ascertained. But, in using the documents for that purpose, care must be taken to read them as the parties at the time would themselves have done. The situation in which they stood must be remembered and the practice then prevailing must be taken into account. The log of the employers did not specify definite money sums as the minimum wage rates proposed. It recognizes that adjustable rates must be adopted. It accordingly contained a demand for a mode of computation. The point of the employers' demand was evidently to exclude from the computation of a base rate any addition to the amount produced by the "Harvester Standard." The log specified in money margins to be added for skill in the various grades or classes. The "Harvester Standard" meant, of course, a rate of £2 2s. a week in 1907 in Melbourne and involved the use of statistical tables of changes in the cost of living to bring that standard to the required time and place. The tables are not named but the log may be taken to contemplate the use of those then habitually applied, the "all houses" tables.

The answering log of the employees throws into dispute the results which such a system of computation would produce. It seeks much higher results and implies, therefore, a departure from the system of computation. But, although it is silent upon the actual point of departure, it does not follow that at that time it

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

would be understood to mean to abandon completely the "Harvester Standard" or the "all houses" tables. It might be treated as implying that an addition should be made to the wage calculated from that standard in order to produce the base rate to which margins would be added. But, whether this explanation would be given to the log or not, the two logs combine to throw into dispute the base rate and at least some factors in its calculation. It is not a dispute in which employees demand a rate specified in money and the employers concede a lower rate specified in money. It is a dispute about the manner of calculating a rate. It may be assumed that in the calculation both parties are prepared to adopt two factors; that they treat as common to both methods the "Harvester Standard" and the "all houses" statistical tables. But one confines the calculation to these factors and so produces results that the other will not have. To produce more favourable results the other at least introduces an additional factor. To see whether the order of variation is within the limits of the dispute, I think it should be considered as if part of the original award. If, in the first instance, the award had adopted the "all items" statistical table for the purpose of adjusting wages and had fixed an index number for Sydney in 1927 with a correspondence to that actually taken by the order, its validity would, in my opinion, have depended simply on its relevance to the settlement of such a dispute. Putting on one side the clause relating to reductions under State law, it would have amounted to the adoption of another method of computing the base rate about which the parties were in disagreement. The parties being in difference about the mode of producing the base rate, why should not the arbitrator establish a third method as a relevant and appropriate means of settling the difference? The answer that the parties may be assumed to be in agreement about two factors in the computation both of which the arbitrator abandons, does not seem sufficient. The one party is content with these factors only if they comprise the whole formula. The other is not content with such a formula. No doubt the reason for the respective attitudes of the parties lies in their views of the monetary consequences produced by the formula. But it is nevertheless a dispute not about the money sums but the means of producing

them. The conception of a basic wage, as it had developed in Australia, involved variation according to place as well as variation according to time. A dispute upon the subject of its ascertainment cannot be reduced to a mere difference between two fixed sums. It is a dispute about a process, not a product. In my opinion, it follows that the arbitrator may settle it by fashioning a new process if he thinks it will settle the dispute. The limits of his action are not determined by the amount which in the event may be produced by the rival processes.

The clause relating to the reduction of wages by State law presents independent difficulties. Apparently its object was to remove the barrier which upon this subject the existence of the award presented to the operation of State law. According to the doctrine established by the decisions of this Court an award, as an industrial regulation of the matters with which it deals, obtains from the *Commonwealth Conciliation and Arbitration Act* a complete and exclusive operation. Accordingly no State law can consistently with the statute regulate the same subject matter. (See *Ex parte McLean* (1).) But, if an award means to regulate the conduct of the parties only in so far as State law does not control them, it appears to me that there can be no inconsistency between Federal and State law. I do not think there is anything in the *Commonwealth Conciliation and Arbitration Act* which prevents the Arbitration Court confining its awards to the area left free by State law. Accordingly, if clause 35 of the award, the clause introduced by the challenged order of variation, did no more than express an intention that the award should be subject to State law, I should see no objection to it. But clause 35 is framed in language which is said to have a very different effect. In the first place, it is expressed in permissive form : " Any Commissioner . . . may . . . make reductions or deductions." This is said to confer a discretion. Next, it is said it refers not to the identical wages which State law of its own force affects but to " substantially similar rates of pay of employees of the State or of State instrumentalities." Lastly, the qualification contained in the word " generally " is emphasized. On all three grounds, it is contended that the provision does not simply make way for the

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

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

operation of State law, but assumes to empower the Commissioners to make discretionary reductions analogous to those authorized by the general provisions of State law. The language of the provision presents difficulties of construction, but, if it were not for one consideration, I should have doubted whether it ought to be treated as doing more than allowing State law to operate of its own force. That consideration is that the reductions or deductions, according to the terms of the provision, are to be made from the rates of pay prescribed in the award as varied. Now, as I read the provisions of the New South Wales statute, No. 29 of 1931, it operated on the salaries payable on 7th August 1931, the date of its commencement, and effected a reduction of the prescribed percentages of those salaries. This does not mean that the percentage is not reflected in all the variations of those salaries brought about by adjustment provisions or otherwise. But it does mean that the statute of its own force could have no direct application to rates of pay established for the first time by the order of the Court of Conciliation and Arbitration made on 17th April 1934. The language of the clause, therefore, operates not to allow the direct application of State law, but to apply it by analogy and by force of the clause itself. Unfortunately for the validity of the provision this involves a discrimination between married and unmarried men that is outside the scope of the original industrial dispute. Yet the discrimination is made by force of the clause itself.

As the clause is drawn, therefore, it is invalid. Having regard to the history of the variations, I do not think its invalidity destroys the whole order.

I think a declaration should be made that clause 4 of the order of variation, dated 17th April 1934, which purports to add to the awards a clause numbered 35 is invalid and inoperative.

EVATT AND MCTIERNAN JJ. The applicant and respondent are bound by an award which was made on 14th September 1927 by the Commonwealth Court of Conciliation and Arbitration. The award was varied by an order made by that Court on 17th April 1934. The appellant proceeds by summons under sec. 21AA

of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for a determination of the question whether the latter order is valid.

The main question is whether the order challenged is within the ambit of the industrial dispute which was settled by the award, because the *Insurance Case* (1) decides that no award or order can be validly made unless in settlement of the industrial dispute. The many discussions of this subject have been crystallized in the following observations of *Rich* J. in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2) :—

> "But at no time had there been any doubt that the existence and the ambit of a dispute determine the power of the Court of Conciliation and Arbitration to embody its will in an award. To go outside matters in a dispute and to regulate wages or conditions otherwise than by a decree which is fairly incident to composing the difference between the parties is neither to arbitrate nor to settle an industrial dispute."

The ambit of the dispute is to be ascertained by reference to the logs or claims of the disputants which were exchanged by them at the time of the original dispute. The employers' log set out that they desired that the pre-existing award should be determined, and that the rates and conditions now specified should apply. The applicant association refused to agree to these rates and conditions, and, in their counter log set out the wages and conditions which they desired. Now, as *Rich* J. has said,

> "where employers and employees exchanged logs, whatever might be the precise order of time in which the respective logs were delivered it does not seem to me to be possible to take the artificial course adopted by the Court of Conciliation and Arbitration when the alleged disputes were referred into Court and treat each log as creating a separate dispute consisting of a disagreement arising from failure to answer the demands or requests it contained. The exchange of rival views between employers and employees on the same subject matter creates one and not two disputes or controversies" (3).

This and the other judgments in the *Insurance Case* (1) make it clear that in the present case the subject matter of industrial dispute between the parties is to be gathered from the two logs, interpreting both as they would reasonably be understood by the parties to whom they were addressed. (Cf. *Insurance Case* [*No.* 2] (4).)

The employers' log proposed that all wages should be constructed on a common basic wage, and that marginal additions, varying with

(1) (1931) 45 C.L.R. 409.
(2) (1931) 45 C.L.R., at p. 421.
(3) (1931) 45 C.L.R., at pp. 422, 423.
(4) (1934) *Sheehan's Bulletin*, vol. VIII., p. 83.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Evatt J. McTiernan J.

the class of work performed, should be made to that base. The actual figure at which they desired that this minimum or basic wage should be fixed was not specified in the log, but it did state what the employers meant by the basic wage, and how they required it to be ascertained. The log stated

> "that all wages should be based on the equivalent from time to time of the 'Harvester Standard'—such equivalent to be ascertained according to the purchasing power of money figures of the Commonwealth Statistician without any addition thereto, and they are desirous that such wages should be based on the figures of the Commonwealth Statistician for the respective places where their employees are respectively employed, and that all wages should be adjusted quarterly according to the increase or decrease in the purchasing power of money."

A typical instance of the actual rate of wages which the employers said they desired is as follows: "Conductors at the rate of basic wage plus 6d. per shift of 8 hours."

Therefore, the employers' log concedes the general principle that a minimum wage should prevail, and proposes a method for adjusting it from time to time so as to give all employees at least a livelihood equivalent to the "Harvester Standard." On the other hand, the employees' log claims that "the minimum weekly rate of wages to be paid to employees" should be the amount respectively allocated to various classifications of employees.

Whilst the dispute which arose as a result of the opposing wage claims of employer and employee did not extend to anything *lower* than the "Harvester Standard," it does not follow that the Court could not alter the long accepted method of ascertaining that standard. After a close consideration of the various judgments and orders, we reach the conclusion that the Court's resort to the "all items" table was for the purpose of maintaining the "Harvester Standard" as an Australian standard and was not for the purpose of lowering it, although the Sydney standard, regarded separately, was lowered. The result is that clauses 2 and 3 were validly inserted in the order now attacked.

But clause 35 of the award, which is introduced into the award by clause 4 of the order of variation, stands in a very different position. It authorizes the employer to make any deduction from the wages otherwise payable under the award, so long as the

amount of the deduction does not exceed a sum ascertainable solely by reference to State legislation. Although the employer's log conceded the principle that every employee should receive at least the amount necessary for the enjoyment of the "Harvester Standard" of living, clause 35 permits that standard to be lowered, and in a number of instances it has been lowered. By engrafting upon the award the provisions of the legislation reducing the salaries of public servants in the State of New South Wales, clause 35 also enables the employer to effect a discrimination upon the ground of marriage, &c., between members of the union in a manner quite disconnected from the inter-State industrial dispute of which alone the Federal tribunal had cognizance. In our opinion, the inclusion of clause 35 was neither relevant to the industrial dispute, nor incidental or conducive to its settlement. We do not accept the argument that clause 35 is bad because it works a delegation of the arbitral power to the State Legislature. This is not a case of delegation at all. The sole measure of the authority committed to the employers by clause 35 is that which a State Legislature has enacted or may enact, irrespective of the question whether the resulting wage has ever been, or is, a subject of dispute between employer and employee. Clause 35 is bad because it does not fall within the ambit of the dispute. The decision of *Evatt* J. in the *Insurance Case* [*No.* 2] (1) is quite distinguishable because there the right given by the award to fix the salaries of higher paid employees was a definite part of the industrial dispute.

The invalidity of clause 35 should not be regarded as destroying the order of variation for a number of reasons. The clause, by its own terms, need not be operative in any State at all, or in more States than one. It is in no sense a *general* condition of the industry in which the inter-State dispute arose. Its form and the manner of its introduction negative the suggestion of any relation between its terms and the other clauses of the order of variation, for it is impossible to believe that the Court considered that the wages of employees in the industry should be lowered in relation to other employees, merely because the employer was a State or State

(1) (1934) *Sheehan's Bulletin*, vol. VIII., p. 83.

H. C. OF A. 1935.

AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

instrumentality. The conclusion is that clause 35 is severable from all the other terms of the order of variation which apply to the industry generally.

It should therefore be declared that clause 4 of the order of variation of April 17, 1934, is invalid.

Declare that clause 4 of the order of variation dated 17th April 1934 which purports to add to the award a clause numbered 35 is invalid and inoperative. No order as to costs.

Solicitors for the applicant, *McCoy, Grove & Atkinson.*

Solicitor for the respondent, *F. W. Bretnall,* Solicitor for Transport.

J. B.