[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TRAMWAY AND MOTOR OMNIBUS EMPLOYEES ASSOCIATION . APPLICANT;

AND

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

H. C. OF A. 1935.

SYDNEY, *Oct.* 23-25; *Dec.* 17.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—State tramway employees—Award—Invalid variation—Further variation by Commonwealth Court of Conciliation and Arbitration—Original intention effectuated—Validity—Variation of award after expiration of period specified therein—Jurisdiction of Court—Retrospective operation of variation—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 28 (2), (3), 38 (*o*), 38B.

Held, by *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that sec. 28 (3) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 constitutes the sole measure of the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to alter the terms of an award during the period of its continuance in force under sec. 28 (2) of the Act; but, by *Dixon* J., that that is so only in respect of the original terms of the award.

Held, by *Latham* C.J., *Rich*, *Starke*, *Evatt* and *McTiernan* JJ., that sec. 28 (3) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 does not preclude the Court from altering the terms of the award so that the alteration shall operate from a date prior to the date of alteration; and, by *Dixon* J., that sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 enables the Court to affect rights which have accrued under an alteration made pursuant to sec. 28 (3) of the Act.

An award made by the Commonwealth Court of Conciliation and Arbitration in 1927 was expressed to continue for three years. Upon the expiration of that period the award was continued in force by virtue of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act*. Several alterations of the terms of the award were subsequently made. One, dated 17th April, 1934, introduced into the award a new clause, the effect of which, so far as concerned

employees in New South Wales, was to introduce provisions of State law prescribing for unmarried men a lower rate of wage than that for married men. This clause was, in April 1935, declared by the High Court to be invalid and severable (*Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)*, (1935) 53 C.L.R. 90), so that the respondent, the Commissioner for Road Transport and Tramways (New South Wales), became liable to pay a large sum of money by way of additional wages as from 17th April 1934. To avoid this liability the respondent applied to the Commonwealth Court of Conciliation and Arbitration for a further variation of the terms of the award. That Court, in July 1935, made an order of variation which excluded the respondent from the order of April 1934 as from the commencement of its operation, declared his liability for wages calculated according to the award unaffected by that variation during the period ended April 1935, as from that time prescribed a new method of wages adjustment, and provided against the repayment by employees of wages overpaid and against double payment by the respondent. The liability of the respondent was thus limited to the amount by which wages calculated by applying retrospectively the provisions of the order of July 1935 exceeded the wages actually paid.

Held that the order of variation made in July 1935 was valid.

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

In a summons taken out by the Australian Tramway and Motor Omnibus Employees Association—formerly the Australian Tramway Employees Association—under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 the questions for decision were:—(*a*) Whether a variation made by the Commonwealth Court of Conciliation and Arbitration on 12th July 1935, purporting to vary an award (1), as varied, by which both the applicant and the respondent were bound, was not invalidly made on the grounds:—(i) that it was neither relevant to the original dispute nor incidental or conducive to its settlement; (ii) that its effect was to lower the wages of certain employees in the industry in relation to the wages of other employees merely on the ground that they were employees of a State instrumentality; (iii) that its effect was to discriminate between the wages of employees of the respondent and those of other employees on the ground that the respondent was a State instrumentality; (iv) that its effect was to introduce for the first time in the industry discrimination between employees in the industry by

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

H. C. OF A. 1935.

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

lowering the wages of employees of the respondent covered by the award on the ground merely that the respondent was a State instrumentality; (v) that the dispute which the variation purported to settle was a dispute between the respondent and its employees covered by the award and no others as to whether reductions should be made in the wages of those employees similar to the reductions made in the wages of other employees by State legislation and that the dispute was neither inter-State in its character nor part of the dispute which the award purported to settle. (*b*) Whether the Full Court of the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make the variation. (*c*) Whether the variation was within the area or scope of the industrial disputes within the cognizance of the Commonwealth Court of Conciliation and Arbitration.

The award was made on 14th September 1927, came into force on 1st October 1927, and was expressed to continue for a period of three years. That period having expired on 1st October 1930, the award continued in force by virtue of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act*. Several alterations of the terms of the award were subsequently made. A variation made on 17th April 1934, introduced into the award a new clause, numbered 35, which provided for a wage discrimination between married and single men employed by the same employer. This clause was held by the High Court to be invalid but severable (*Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1)). Under the remaining clauses of the award there was a liability on the respondent Commissioner to pay to the tramway employees covered by the award the sum of £42,000 by way of additional wages for the period of eleven months commencing as from 17th April 1934. The number of employees covered by the award was 4,490. There were about 4,525 employees of the Commissioner not covered by the award whose wages during that period were actually reduced in a corresponding degree by virtue of State legislation. To avoid the liability referred to above the Commissioner applied to the Commonwealth Court of Conciliation and Arbitration for a further variation of the terms of the award. That Court

(1) (1935) 53 C.L.R. 90.

reconsidered the matter and resolved, on 12th July 1935, that it was just and fair that an order should be made carrying out its original intention in respect of the period of eleven months that ensued upon the award. In the course of its judgment the Court said :— "This Court when giving its decision of 17th April, 1934, upon the union's application to rescind the ten per cent reduction order, intended only to grant that rescission subject to the introduction of a new basic wage and adjustment, and in the case of employers like the applicant Commissioner, also subject to the power to reduce in accordance with relevant State enactments, provided that the aggregate reduction did not bring the award rates down more than ten per cent below what they were until this Court's ten per cent reduction operated. The High Court's decision (1) that the proposed new clause is invalid so far as the applicant is concerned, clearly defeats the intention of our order. Mr. *Ferguson* on behalf of the union contended very strongly that the financial position of the New South Wales tramways had so improved since our first order that the Court should not, even in respect of the past period of eleven months now in question, endeavour to give effect to its intention. But we do not think that financial improvement is sufficient to justify us in departing from our original opinion that the financial position of employer parties who are State transport authorities demanded special relief. We are satisfied that in respect of State transport services we would not have been warranted in April, 1934, in granting the union's application except subject to some such provision as was intended to be made in the invalid clause . . . We are now concerned only with the eleven months which ensued upon our decision, during which period, in our opinion, it was fair that within the ten per cent limit the Commissioner should have the power, so far as it could be constitutionally given to him, to reduce the wages of his employees in the same way as the wages of other State employees were reduced by statute. We think we should now make such an order as will best carry out our intention in respect of the eleven months period. . . . In view of the fact that the order, with the proposed new clause 35 declared void, no longer fulfils this Court's intention as to the New South Wales

(1) (1935) 53 C.L.R. 90.

H. C. OF A. 1935.

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

tramways, we think the most appropriate course is to set aside the order, but only if at the same time we make such provisions to ensure fairness to all concerned as are within our jurisdiction in the proceedings before the Court. By setting aside the order we will reopen, so far as the New South Wales tramways are concerned, the union's application of 24th January, 1934, to rescind the ten per cent reduction order of 16th September, 1932. . . . We have given very serious consideration to the case and have concluded that the fairest action open to us is as follows :—As to this application of the Commissioner, the order of 17th April, 1934, is set aside . . . but subject to certain provisions as to payments and other matters which are inserted in the order now made. As to the union's reopened application to rescind the ten per cent reduction, the rescission is granted to come into operation as from the beginning of the first pay period to start in April, 1935, subject to provisions which will be inserted in the order of rescission as to the adoption of the new basic wage and its adjustment, and as to allowing the set-off referred to in the order to be made upon the Commissioner's application. Substantially the result of the orders now made to the tramway employees now in question is this. For work done before the beginning of the first pay period in April, 1935, they were and are entitled to award rates subject to the ten per cent reduction order of 16th September 1932 (1), as modified by the order of 29th May, 1933, but only thereto except so far as they have actually been paid more by the Commissioner. For work done since the beginning of that pay period, they have been and are entitled to the award rates free from the ten per cent reduction, but subject to the change made by the adoption of the new basic wage and method of adjustment. They will not have to make any refunds. For the reasons already stated no difference is made between married and single men as such, but where employees have actually received payments in excess of what would be due to them under the award as now varied, the Court thinks it fair to treat such payments generally as if made under a mistake of law and therefore as if not repayable. Such excess payments may happen to have been made only or chiefly in

(1) (1932) 31 C.A.R. 579.

cases of married men, but the provision made is general and does not discriminate."

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.

J. A. Ferguson (with him *Gee*), for the applicant. The order made by the Arbitration Court on 12th July 1935, is a variation of an award and as such, in order that it may be valid, must be within the ambit of the dispute in which the award was made in 1927. It is not within that ambit. It arises out of the attempt by the Arbitration Court to apply in the Federal sphere reductions imposed by the Legislature of New South Wales. This attempt was made, first, directly by way of the clause 35 which was declared invalid (*Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1)), and now indirectly by maintaining the ten per cent reduction in New South Wales only for this purpose. When this matter was previously before this Court (1), the Court followed *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2) and held that, although separate logs of demands were presented by the employers and the employees, there was nevertheless one dispute only, which ranged between the lowest term offered by the employers, that is, the basic wage on the Harvester standard, and the highest rate demanded by the employees. The invalid clause 35 provides the key to the subsequent history of this matter. An attempt has been made to engraft a determination in this local New South Wales dispute upon an award made in the original dispute, to which it is completely unrelated. The disputants here are entirely different from the disputants in the Federal dispute, who have no interest in the New South Wales dispute. The Federal Arbitration Court could not get cognizance of this new and intra-New-South-Wales dispute *per se*; hence the attempt to engraft it on the original Federal dispute by variation of that award. The only way it could have been done was by the Federal authority vacating the field in New South Wales wholly, in which case the State law would have had its own incidence and operation. Those State statutes had no relation to any particular industry, still less to the

(1) (1935) 53 C.L.R. 90.

(2) (1931) 45 C.L.R. 409.

H. C. OF A. 1935.

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

tramway industry, or to any particular work. They were based upon percentage reductions according to whether a wage was high or low; they also took into account whether the men were single or married, or were widowers with children, and had no relation whatever to any particular job or industry. When the matter came before the Arbitration Court on the second occasion that Court dealt with the matter on the footing of making an order in substitution for the order which had failed under clause 35, for the purpose of applying to the award reductions substantially equivalent to those imposed by the State law. The Court did not apply its mind to what, if anything, in the ordinary industrial sense ought to be taken off the award within the ambit of the dispute. The fact that the original dispute was in respect of wages does not determine the matter; the question still is: What is the dispute which was sought to be dealt with in the award, and does the variation application relate to that same dispute? Under the guise of a variation there is brought before the Court a matter which was never part of the dispute, and something is sought to be done indirectly which could not be done directly (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary. Co. Ltd.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2); *Australian Insurance Staffs' Federation* v. *Atlas Insurance Co.* (3)). In addition to introducing a new general subject matter confined to New South Wales and alien to the original dispute as unconnected therewith, the order complained of introduces two grounds of discrimination between employees which were never in dispute between the parties to the Federal dispute: (*a*) That wage rates should be lowered in New South Wales because of the existence in that State of State legislation imposing special statutory deductions from the wages of State servants owing to the financial exigencies of that State, and that consequently tramway employees should be paid lower rates in New South Wales than elsewhere in Australia, and lower than the value of the work as work would demand; and (*b*) that State employees should be paid lower rates than non-State employees in other States because of special State legislation in at

(1) (1909) 8 C.L.R. 419, particularly at p. 450.

(2) (1910) 11 C.L.R. 1, at pp. 32, 37, 60, 61.

(3) (1931) 45 C.L.R., particularly at pp. 420, 421.

least one State, New South Wales. These grounds of discrimination, or indeed any ground of discrimination between employees—except in the relative status or rank or operations of the employees—were never a part of the original dispute. The order introduces a discrimination as to the method of calculating and reaching the Harvester standard during the eleven months between the date of the promulgation of clause 35, and the date when that clause was declared invalid. It was not part of the original dispute that there should be at the same time operative in different parts of the area two different methods of calculating the Harvester standard (*Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1)). The fact that different conditions apply in different places owing to different local circumstances does not affect the matter. The varying in the order of July 1935 of the system of arriving at the basic wages in New South Wales, which was the same system as for all the other States, cannot be justified on the ground that it was varied for the purpose of relieving the financial position in New South Wales. Rates of wage specified in an award must be ascertained in accordance with the system then known and applied from time to time. Sec. 38B of the Act does not, by virtue of its terms, extend any power to go beyond the ambit of the dispute. The order perpetuates in a modified way the discrimination between the wages of married and single men, as the married men are, in respect of the period of eleven months permitted to retain the whole of the wages paid to them under the order of April 1934, although in excess of the wages which would otherwise be due to them under the order of July 1935. The order is also outside the ambit of the dispute because the retrospective payment of wages was never part of the subject matter of the dispute. The dispute contemplated that wages for work done should be paid weekly, with a guarantee of two weeks, and that that should be regarded as a closed matter. Having regard to the nature of the claims, at no time could the Court make a variation retrospectively varying wages which had been paid. The variation made was not made in the proper exercise of arbitral power inasmuch as the mind of the Court was not directed to the extent, if at all, and the

(1) (1935) 53 C.L.R., at pp. 105, 110.

H. C. OF A. 1935.

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

conditions under which, reductions should be made in the wages of employees covered by the Federal award, including those within the State of New South Wales. The Court, in the first instance, attempted, by clause 35, to extend discretionary power to make reductions in the wages receivable under the Federal award to State authorities in respect of their servants, and, when that clause was declared invalid, substituted as a general measure in New South Wales, a ten per cent reduction as representing as nearly as might be the equivalent of the amount which might, but need not, have been withdrawn from the wages under clause 35. An order of the Arbitration Court is not good unless it is an exercise of the arbitral power conferred upon the Court. The Court cannot legislate; it must investigate the particular matter of inquiry. There was never an examination as to whether anything, and, if so, how much, should be taken off the wages of the Commissioner's employees. The re-imposition in New South Wales of the ten per cent reduction in wages accompanied by certain other clauses was not an act done in any respect in relation to the dispute between the parties settled by the award or pursuant to the condition of sec. 28 (3) of the Act, but was a method used to make applicable to the award, as far as possible, certain State wage reductions not based on the conditions of individual industries as such, but general in character, and using a form which it was thought might be a valid substitute for a previous invalid order. As the original or specified term of the award had expired, an order for variation could be made only pursuant to the power contained in sec. 28 (3), and subject to the conditions thereof. Though sec. 38 (*o*) gives a power of variation, which may be exercised during the specified term of the award, and it has been held that orders of variation made thereunder may be retrospective to the beginning of the award to correct errors &c. in the award, a different position arises as to the power conferred in sec. 28 (3), that is, when the award is being continued under the statute until a new award has taken its place (see *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1); *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2); *R.* v.

(1) (1920) 28 C.L.R. 209, at p. 223.
(2) (1931) 45 C.L.R., at pp. 419, 439-442.

Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; *Ex parte Victorian Railways Commissioners* (1)). During the currency of an award it may be varied either under sec. 38 (*o*), or, in a proper case, under sec. 28 (3) (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2)). Even if the decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (3) be correct as to the retrospective operation of the power conferred by sec. 38 (*o*), that decision does not necessarily apply to the operation of sec. 28 (3), under which the circumstances are entirely different. Here there is no power to make a retrospective order. The power to vary a statute-prolonged award is conferred by sec. 28 (3) only, and arises only where " the Court . . . is satisfied that circumstances have arisen which affect the justice of any terms of an award " (*Waterside Workers' Case* (4)). This is quite different from the mere correction of errors &c. in an award during its original term. Any action by the Court " in new circumstances " should naturally have a prospective operation, and not disturb past relations of the parties. This construction is confirmed by a consideration of the express provision for retrospective operation—within limits—in the proviso to sec. 28 (2); and the general principle that an alteration in the law, or a power to alter the law, is not assumed to have a retrospective operation unless clearly shown (*Reid* v. *Reid* (5)). Here the order purports to be retrospective both as to the period between April 1934 and April 1935 and from the latter date until July 1935. On this ground alone the order of variation is wholly bad. The variation was not properly made under sec. 28 (3) because (*a*) the Court did not give its mind to the determinations necessary to a valid order; (*b*) the condition of sec. 28 (3) had not arisen as the declaration of this Court was not a " circumstance " within the meaning of that sub-section; (*c*) no order can be made under sec. 28 (3) which alters the wages to which employees have become entitled under the award and Act for work done; and (*d*) no retrospective order can be made under sec. 28 (3). Upon the declaration

(1) (1935) 53 C.L.R. 113, at pp. 123, 126, 131, 140.
(2) (1925) 36 C.L.R. 442.
(3) (1920) 29 C.L.R. 106.
(4) (1920) 28 C.L.R., at p. 216.
(5) (1886) 31 Ch. D. 402. at pp. 408, 409.

H. C. OF A. 1935.

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

of this Court the respondent's employees became entitled, as from April 1934, under sec. 49A of the Act, to the moneys prescribed in the award, without the operation of clause 35, subject to the statutory limitation as to time.

Russell K.C. (with him *Chambers*), for the respondent. The declaration made by this Court in April 1935 did not destroy the power of the Arbitration Court to deal further with the award as varied, that is, the valid part could, nevertheless, be varied; the invalid part could be replaced; and any variation could be (i) retrospective; (ii) for a separate State or locality. The Arbitration Court has power to make retrospective orders. Its main consideration is justice. In order to achieve that its power extends "to the full correction of a proved error" (*R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (1)). The Arbitration Court intended to give some measure of relief to the respondent as to the quantum of wages payable to his employees, but the method adopted to give effect to that intention, namely clause 35, was a "proved error" which the respondent was entitled to have corrected. Evidence in respect of this matter was taken on both occasions it was before the Arbitration Court. The provisions of sec. 38 (*o*) apply for the whole duration of an award. When a matter is reopened, the rescission of a provision gives power to introduce the proper provision. The power of the Court to make retrospective orders and the reasons therefor were dealt with in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.* (2) (see also *R.* v. *Kidman* (3); *Gibson* v. *Mitchell* (4); *Marshall's Township Syndicate Ltd.* v. *Johannesburg Consolidated Investment Co. Ltd.* (5)). The object of sub-sec. 1 of sec. 28 is to impose a limit upon the Court (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (6)). Since that decision the powers of the Court have been amplified. There is no difference in the quality of an award during the five years under sec. 28 (1) and during the period of its extension under sec. 28 (2);

(1) (1920) 29 C.L.R., at p. 111.
(2) (1920) 28 C.L.R. 1, at pp. 10-12.
(3) (1915) 20 C.L.R. 425, at p. 456.
(4) (1928) 41 C.L.R. 275.
(5) (1920) A.C. 420.
(6) (1920) 28 C.L.R., at pp. 215, 216.

during that time it is subject to alteration under sec. 38 (*o*). The Court has power under secs. 28 (3) and 38 (*o*) to make retrospective orders. Here the Court availed itself of the power conferred by sec. 38B in order to prevent a further industrial dispute. It is competent for any party to apply to the Court under sec. 28 (3). The imposition of the ten per cent reduction upon the respondent's employees was an order made under sec. 28 (3) and was a circumstance newly arisen, that is, since the time limit in the award had expired; it had already been done in other States. In making an award the Court has power to make separate orders in respect of different States, and any variation may be by orders for separate States, localities, employers or classes of employers, or employees (*Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners* (2)). The Arbitration Court is endowed with judicial and quasi-legislative power (*Clyde Engineering Co. Ltd.* v. *Cowburn* (3); *Ex parte McLean* (4); see also *Australian Boot Trades Employees Federation* v. *Whybrow & Co.* (5); *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (6)). An Act which empowers the making of subsidiary industrial law must, of necessity, confer power to vary retrospectively, including the power to rectify anything that is wrong. The power to reopen enables the insertion of a new rule in place of a defective rule, which, having regard to the whole Act, may be retroactive (*Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (7)). Also the Court can under sec. 38B go beyond specific relief (*Alderdices's Case* (8)). The hardship entailed in the correction of an error may qualify the action of the Court, but it does not qualify its jurisdiction. The variation sought to be effected by clause 35 was imperfect *ab initio*. The imperfection, however, was established only in April 1935, by the

(1) (1909) 8 C.L.R. 465, at pp. 496, 513, 518, 543.
(2) (1935) 53 C.L.R. 113.
(3) (1926) 37 C.L.R. 466, and cf. p. 523.
(4) (1930) 43 C.L.R. 472, at p. 479.
(5) (1910) 10 C.L.R. 266, at pp. 314, 315, 320, 321.
(6) (1910) 11 C.L.R., at p. 24.
(7) (1928) 41 C.L.R. 402, at p. 426.
(8) (1928) 41 C.L.R. at p. 421.

H. C. OF A. 1935.

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

decision of this Court. The order made by the Arbitration Court in July 1935 was one which it could have made in April 1934 upon the application then before it. The order of July 1935 has a retrospective effect. It does not contain in the prescribed wages the former defect of discrimination between married and single employees; that distinction has been abandoned. It was always within the power of the Arbitration Court to grant a qualification for any one State on any rescission it might make. The Arbitration Court properly applied itself to the question before it. The Court fully observed its judicial duty of considering the rights of the parties. It considered, amongst other things, the finances of the New South Wales tramway service, and the finances of New South Wales as the scene of that tramway system. The order that certain overpayments need not be refunded is no part of the order prescribing wages. It deals truly with money paid under mistake of fact and cannot impair the validity of the order. Assuming that severability of the former clause 35 was justified under secs. 9A and 9B of the *Acts Interpretation Act* 1904-1932, the order as to refunds is, *a fortiori*, likewise severable. [He was stopped on this point.]

The allegation as to discrimination between employees in New South Wales and elsewhere, cannot be sustained.

[LATHAM C.J. It will not be necessary for you to argue further on that point. There is nothing invalid in retaining the reduction in one State and restoring the amount of the reduction in other States.]

Circumstances newly arisen affected the justice of the terms of the award and caused the imposition of the ten per cent reduction. It was likewise in respect of the order of April 1934. At that time the State legislation was a further new circumstance which, in New South Wales, affected the justice of any of the ten per cent reduction. The discovery in April 1935, of the invalidity of clause 35 was a further circumstance. Those circumstances entitled the Court to act under sec. 28 (3). Should the order of July 1935 nevertheless be held bad on any ground of discrimination this Court should declare that the authority of the Arbitration Court extends to the making of a retrospective order within the limits of the dispute and adjusted to the new circumstances.

Ferguson, in reply. Even though it had the financial position of the State and of the tramway service before it, the Arbitration Court did not direct its mind as to what amounts should be taken off the wages prescribed in the award. It directed its mind as to how it could bring about a reduction similar in amount to that imposed in clause 35. The cases referred to on behalf of the respondent are in respect of general propositions which have very little bearing on the particular matter under discussion here. An incidental power does not involve retrospectivity naturally or necessarily; on the contrary it rejects retrospectivity (*Broadcasting Co. of Australia Pty. Ltd.* v. *The Commonwealth* (1)). It is impossible to say it was part of the dispute that in one area two means of ascertaining the basic wage and the adjustment thereof should operate at the one time.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 which has been referred to the Full Court by *Evatt* J.

The question raised by the summons is, in substance, whether the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make an order of 12th July 1935, which varied the award made in disputes of which the Court obtained cognizance in 1925.

The facts which show the nature and ambit of the relevant dispute or disputes are set out in the statement of facts and the judgments delivered in *Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2). In that case the High Court considered a variation of this award which had been made by the Arbitration Court on 17th April 1934. This Court held that so much of the order of variation as introduced or authorized a discrimination between the rates of pay for married and single men was invalid because such a discrimination was outside the scope of the original industrial dispute. It was held that such a provision was neither relevant to that dispute nor incidental or conducive to its settlement.

(1) (1935) 52 C.L.R. 52, at p. 60.

(2) (1935) 53 C.L.R. 90.

H. C. OF A. 1935.

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

Latham C.J.

Rates of pay generally under the award had been reduced on account of the general financial emergency. Applications for restoration of the former rates were made on behalf of the employees. After considering the general financial situation and the position of the various employers as well as that of the employees, certain restorations were made. In the case of the tramways authority of New South Wales (the respondent in the case cited (1) and in this case) the Arbitration Court made a special order which was based upon two main considerations. The first was the financial position of the State of New South Wales and the second was the fact that the Parliament of New South Wales had by 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) made certain reductions in wages of State employees which applied to about one half of the tramway employees, but not to the other half of such employees, whose rates of pay were regulated by the Federal award. (In July 1935 the former class contained 4,525 and the latter class 4,490 employees.) The Arbitration Court expressed its views upon this matter on 17th April 1934 in "The Basic Wage Inquiry," dealing with applications for the rescission of previously made percentage reductions in prescribed wage rates. Their Honors Chief Judge *Dethridge* and Judge *Drake-Brockman* said: —"Impressive evidence was given of the difficulties confronting State railways because of the enormous deficits these undertakings are still incurring, and are likely to continue incurring for a long time. Evidence also showed that State governments, largely because of these railway deficits, are finding the balancing of their budgets an almost insuperable problem. We were consequently urged, on behalf of the Governments or Commissioners for Railways to refrain from making any order in respect of wages which would increase the financial peril of the States. The Court thinks that the community of a State is to be regarded as virtually the real employer of persons engaged in the transport service of that State. If that community is in financial danger, it is entitled through its Legislature, subject to any restrictions arising out of Commonwealth enactment,

(1) (1935) 53 C.L.R. 90.

to meet that danger by making reductions in the remuneration of its employees. Employees in general of the State can fairly claim that the State Legislature should not require them to make sacrifices out of proportion to those required from the rest of the community. And if the Legislature demands more from State employees than the community thinks is fair, the legislators responsible may be ejected from office. 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 Arbitration Court accordingly included in its order of variation a clause which enabled the present respondent to apply to employees who were under the Federal award reductions not greater than those made by the statute in the case of employees who were not under the Federal award. This clause of the order of variation was held by the Court to be invalid for the reason stated.

If the variation made on 17th April 1934 had been valid the respondent would have been bound to pay about £42,000 less in wages during the period April 1934 to March 1935 than if the variation had not been made, and the employees, married and single respectively, would have been entitled under the award only to about the same rates of pay as the employees not under the award. When that variation was declared invalid the respondent sought to obtain a valid variation which would as nearly as possible bring about the same result. The Arbitration Court granted the application, repeating the reasoning upon the merits of the case to which reference has already been made. The question which now arises is whether this variation is valid.

In the order of 12th July 1935, which embodies the challenged variation, the Court in clause 1 set aside as from the time when it was made the order of 17th April 1934 in respect of the respondent Commissioner. Thus this order is set aside as from a past date.

The Court then in clause 2 dealt with the period beginning with the end of the last pay period in April 1934 and ending with the beginning of the first pay period that commenced in April 1935—

H. C. OF A. 1935.

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

Latham C.J.

a period of about eleven months. In respect of this period it is declared that the Commissioner was and is bound, so far as such payments have not been made, to make payments under the award as if the order of 17th April had never been made.

The effect of these two provisions, standing by themselves, would be to continue the award rates of wages subject to a general ten per cent reduction which was made in September 1932 as modified by a subsequent order, that is, without the degree of restoration made by the valid part of the order of 17th April 1934. In the meantime, however, both married and single men have since April 1934 in fact received higher pay than would be due under an award so varied—the married men more than the single men.

Clause 4 deals with those payments—which became over-payments under this variation (if it is valid)—by providing that the Commissioner is to forego any claim for a refund, and by providing for a set-off of such excess payments against claims, if any, made for wages under the award. The result is that any employee who, on the basis of the variation of the award now in question, has been overpaid is not required to refund the excess payment. Thus the married men, who have in fact been paid more than the single men, are declared to be entitled to retain this excess. The clause, however, makes no reference to either married or single men.

Clause 5 is designed to prevent the single men from receiving from the Commissioner the moneys which would be due to them if the order of 17th April 1934 remained unchanged except that the invalid clause was struck out. It is sought to accomplish this result by providing that in respect of any claim for work done during the eleven months period the payment therefor is to be treated for the purposes of sec. 49A of the *Commonwealth Conciliation and Arbitration Act* as not having become due until the date of the order (12th July 1935). Sec. 49A gives a right to sue for wages due under an award only within nine months from the payment becoming due. Thus the time within which an action can be brought for the wages due is extended, but clause 4 contains another provision enabling the Commissioner to set off against any such claim the amount of excess payments already made. The result is that the single men under this provision cannot, except to an amount of about £3,000, recover

the amount of wages that would otherwise be payable to them in consequence of the discrimination in favour of married men and against single men having been declared to be invalid.

Clause 6 of the order of variation rescinds the ten per cent reduction as from April 1935, and other clauses introduce a new method of calculating the basic wage by reference to the " all items " retail price index numbers of the Commonwealth Statistician.

Several objections are taken to the jurisdiction of the Court to make this order.

In the first place it is said that the Arbitration Court is endeavouring to do indirectly what this Court has said it cannot do directly. This objection is based on the fact that the effect of the order is to allow married men to retain sums paid as wages which single men are prevented from recovering, and it is pointed out that, under this variation, the Commissioner avoids the payment of nearly the whole amount of £42,000 by which it was intended that his wages bill should be reduced under the invalid clause of the variation of April 1934. The objection made, however, cannot be sustained. The fact that the same, or approximately the same, pecuniary result in relation to employer and employees is reached under this order as under the earlier invalid order has no bearing on the validity of the later order. The later order must be considered in its own terms. It makes no reference to married or single men, and is not open to the objection which this Court held to be fatal to part of the earlier order.

It is conceded that the rates of wages which result from the order in question are not lower than the employers originally offered or higher than the employees originally claimed. Thus no such objection exists as that which was dealt with in the case of *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1).

It is further objected that the order interferes with the rights vested in employees, by reason of the order of April 1934, to receive higher rates of pay than in fact they can obtain under this latest variation. This objection should be considered apart from that based upon retrospectivity. The objection, so considered, does not appear to be well founded. Industrial arbitration includes, as an

(1) (1931) 45 C.L.R. 409.

H. C. OF A. 1935.

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

Latham C.J.

ordinary element, interference with vested rights (especially contractual rights) and the substitution of new rights therefor.

Another objection is that the award, as varied, differentiates between the Commissioner for Road Transport and Tramways (New South Wales) and his employees on the one hand, and other employers and employees on the other, and that accordingly the award does not prescribe "an Australian standard" in the former case. It is difficult to formulate this objection in terms of precision. Where an award prescribes different standards in the case of different employers or different groups of employers, the description of one standard rather than another as "an Australian standard" is a matter of choice, determined by the desires and the point of view of the person who applies the descriptive epithet.

It has long been settled, however, that an award of the Commonwealth Court of Conciliation and Arbitration is not made invalid by reason of prescribing differing wages or working conditions in different places. The original award in this case contained differing provisions in respect of employees in different places. It is obvious that this must frequently be done in respect of working conditions, and there is no reason which can be suggested to support the view that what can be done in respect of clauses relating to working conditions cannot be done in respect of clauses relating to the amount or the method of ascertainment or the adjustment from time to time of wages. (See *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1); *Australian Tramway Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2).)

It is also objected that the basis of a differentiation in the new variation is a distinction between State employees and non-State employees, because only the employees of the New South Wales Commissioner are State employees in the tramway enterprises dealt with in the award. In fact the order does not draw a distinction between State employees and others as such. The distinction is between persons employed by the Commissioner and persons employed by other employers in the same industry. This in fact happens to be a distinction between employees in New South Wales and employees

(1) (1909) 8 C.L.R., at pp. 513, 515, 543. (2) (1935) 53 C.L.R., at p. 107.

in other States. It also happens, as already stated, to be a distinction between employees of a State authority and other employees. There is no general principle which forbids the provision of differing terms in an award for employees of different employers.

But the particular point is made that such a discrimination was "never a part of the original dispute." In the original dispute (it is said) no such differentiation was suggested in the claims of either employers or employees. It is true that a variation of an award cannot be made as a variation unless it could properly in substance have found a place in an original award. But the Arbitration Court is not limited, in making an award, to saying simply "Yes" or "No" to claims made by one or other of the parties. Such a principle would result in absurd consequences. Sec. 38B of the Act expressly provides: "In making an award or order, the Court or a Conciliation Commissioner shall not be restricted to the specific relief claimed by the parties to the industrial dispute, or to the demands made by the parties in the course of the dispute, but may include in the award or order any matter or thing which the Court or Commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further industrial disputes." But, in exercising this wide jurisdiction, the Court must deal with the dispute—and not with matters outside the dispute or not relevant to the dispute. This rule prevented this Court from upholding the discrimination between married and single men, which was obviously not in the minds of any of the parties to the dispute and which is not such an ordinary circumstance relevant to industrial relations that it would be assumed to be recognized by all parties as a possible and natural means of founding a differentiation in wage rates or working conditions. Such a discrimination could not reasonably be regarded as inherent in the subject matter of the claims made. But matters such as the place or State in which employees work, or the financial or other conditions under which employers carry on business—these are ordinary elements affecting industrial relations, and the Court was entitled to take them into account, if it thought proper, in making its original award—as in fact it did to quite some extent in making different provisions for New South Wales, Melbourne, Adelaide, Hobart, Launceston,

H. C. OF A. 1935.

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

Latham C.J.

Geelong, Ballarat and Bendigo, and thereby in fact differentiating between employees by reference to their employers. There is the same justification for making such a differentiation in a variation of the award as in the original award. It may further be noted that the employees' claim, as made in 1925, which constituted one side of the dispute, did make special claims in relation to "all employees in the employ of a State Government tramway service" for special benefits by way of holiday passes. The award did not grant these claims, but this reference to the origin of the dispute shows that it cannot be accurately said that any ground of discrimination between State employers and non-State employees was never a part of the original dispute.

Much of the argument before us was addressed to the strongly pressed objection based on the retrospective character of the variations made. The original award came into force on 1st October 1927, and provided that it should continue for a period of three years thereafter. It therefore expired on 1st October 1930. It has been continued in force by sub-sec. 2 of sec. 28 of the Act. It is urged that sec. 38 (*o*), so far as it confers power on the Arbitration Court to vary its orders and awards, does not apply to an award while it is continued in force beyond its specified period by virtue of sec. 28 (2). (See discussions of this question in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1), and in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Australian Railways Union*; *Ex parte Victorian Railways Commissioners* (2).) It is, however, not denied that sec. 28 (3) applies in such a case, but it is denied that sec. 28 (3) gives power to make a retrospective variation. Sec. 28 (3) is in the following terms:—"Notwithstanding anything contained in this Act, if the Court or a Conciliation Commissioner is satisfied that circumstances have arisen which affect the justice of any terms of an award, the Court or Conciliation Commissioner may, in the same or another proceeding, set aside or vary any terms so affected. The powers conferred by this sub-section shall not be construed as limiting in any manner any power conferred on the Court or a Conciliation Commissioner

(1) (1931) 45 C.L.R., at pp. 441-443, by *Evatt* J.

(2) (1935) 53 C.L.R., at p. 126, by *Rich* J., p. 131, by *Starke* J., and p. 140, by *Dixon* J.

by any other provision of this Act." It was held in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (1) by *Knox* C.J. and *Gavan Duffy* and *Starke* JJ. that "the power to vary is given by sec. 38 (*o*) in terms not restricted by any qualification or condition, and we can see nothing to justify the insertion, by way of construction, of a limitation to the effect that no such variation shall have any effect before the date of the order by which it is made." *Isaacs* and *Rich* JJ. agreed and referred (2) to "justice" being "the main consideration" in the application of the power to vary given by sec. 38 (*o*). It is difficult to suggest any reason why the power conferred by sec. 28 (3) should be limited in the manner suggested by the argument submitted. It is true that in an earlier form sec. 28 did not contain either the proviso to sub-sec. 2, or sub-sec. 3, and the argument was then available that sub-sec. 2 positively continued the award in force without possibility of variation. (See *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (3).) But sub-sec. 3 begins with the words "Notwithstanding anything contained in this Act." No limitation upon the power conferred by sub-sec. 3 can therefore be spelled out from sub-sec. 2 or from any other part of the Act.

Is there then any reason why sub-sec. 3 should be construed as not giving power to make a retrospective variation? The provision is general in its terms, and the reasons which led to the decision of the Court in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (4) with respect to sec. 38 (*o*) apply with equal force to the construction of sec. 28 (3). The only limitation contained in the sub-section is that to be found in the words "If the Court or a Conciliation Commissioner is satisfied that circumstances have arisen which affect the justice of any terms of an award." It would be difficult to confer a wider charter. It should need no argument or authority to show that the correction of what on reconsideration is believed by the Arbitration Court to have been a mistake may, in order to do justice, have to

(1) (1920) 29 C.L.R., at p. 110.
(2) (1920) 29 C.L.R., at p. 111.
(3) (1920) 28 C.L.R. 209.
(4) (1920) 29 C.L.R. 106.

H. C. OF A. 1935.

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

Latham C.J.

be made retrospectively. Whether this is so in a particular case is entirely a question for the decision of the Arbitration Court.

It has been contended, however, that the Arbitration Court did not, upon the occasion of the variation, consider whether circumstances had arisen which affected the justice of the award, but that it confined its attention to the discovery of some means of bringing about the result which it had been intended to make by the variations of April 1934. The High Court is not a Court of Appeal from the Arbitration Court and, in any event, it would require the strongest evidence to justify a decision that the Arbitration Court had not taken into account circumstances affecting the justice of the matter which was before it for consideration. In this case, however, the reasons of the Arbitration Court have been placed before us. It is true that the Arbitration Court wished to achieve as nearly as possible the same result as it had intended to achieve by the whole of the variation made in April 1934. But it clearly appears that the Court desired to do this because it considered that the variation was a variation which was required by changed circumstances, in justice to the employers, to the employees as between themselves, and to the community of New South Wales. The latest variation expressly included provisions which the Court said would, so far as its jurisdiction extended, "ensure fairness to all concerned." It therefore appears that the condition prescribed by sec. 28 (3) has been satisfied in this case.

The order should be that it is declared that the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make the variation of 12th July 1935, and that such variation was validly made. Such a declaration answers all the questions raised by the summons.

RICH, EVATT AND MCTIERNAN JJ. This summons calls into question the validity of the order of variation made on July 12, 1935. The original award was made by Judge *Beeby* on September 14, 1927, came into force on October 1, 1927, and was expressed to continue for a period of three years. The period having expired on October 1, 1930, the award was continued in force by virtue of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act*,

which carries on the award "until a new award has been made." Several alterations of the terms of the award were subsequently made, one, dated April 17, 1934, introducing a new clause 35 into the award. The operation of this clause was fully analysed in the prior decision of the Court (1). The effect of the declaration then unanimously made by the Court was that clause 35 (which introduced into the award a wage discrimination between married and single men employed in the same grade), should be regarded as having been made without jurisdiction, and as having been void *ab initio*. This decision left standing the remaining clauses of the award, which, if left unaltered, would have compelled the respondent employer to pay a large sum of money, by way of additional wages as from April 17, 1934. To avoid this liability, the respondent applied to the Arbitration Court for a further alteration of the terms of the award; and the validity of that alteration (made on July 12, 1935) is now challenged by the appellant. The questions have been ably argued on both sides. It is convenient to discuss the grounds of objection in order.

(I.) The main contention of the appellant is (*a*) that sec. 28 (3) constitutes the sole measure of the Arbitration Court's power to alter the terms of an award during the period of its continuance in force under sec. 28 (2), and (*b*) that sec. 28 (3) confers no power upon such Court to make any alteration of an award which will have the effect of depriving persons of accrued benefits to which the award in its existing form entitles them. With the first part of this contention we agree. Such a view of sec. 28 (3) was adopted by *Isaacs* and *Rich* JJ. in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2), by *Evatt* J. in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (3), and by *Dixon* J. in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Australian Railways Union*; *Ex parte Victorian Railways Commissioners* (4). But with the second part of the contention we are unable to agree. The power in sec. 28 (3) is to "set aside or vary" any of the terms of the award which have become unjust in operation as a result of new

(1) (1935) 53 C.L.R. 90.
(2) (1920) 28 C.L.R. 209.
(3) (1931) 45 C.L.R., at pp. 439-442.
(4) (1935) 53 C.L.R., at p. 140

H. C. OF A. 1935.

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

Rich J. Evatt J. McTiernan J.

circumstances arising. This power may operate so as to produce extensive alterations in an award, as was pointed out by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ., in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Australian Railways Union*; *Ex parte Victorian Railways Commissioners* (1). If the power of the Court in sec. 38 (*o*) to "vary its orders and awards," authorizes the making of retrospective orders (as has been expressly decided in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (2)), there is no adequate reason for confining orders made under sec. 28 (3) to those which can operate only *in futuro*.

We therefore hold that, in applying sec. 28 (3), the Arbitration Court was not precluded from altering or taking away rights accruing to the employees under the existing award. The first contention therefore fails.

(II.) It is also contended that the order now challenged represents no more than the settlement of a dispute confined to New South Wales, which dispute resulted from the attempt of the respondent employer to apply to his employees the terms of a New South Wales statute, and that such one-State dispute is quite unrelated to the original inter-State dispute of 1927. But it has to be observed that every application for the variation of a subsisting Federal award, if made by an employer in one State, presents the appearance of a new one-State dispute. Prior decisions of this Court, and the long accepted practice of the Arbitration Court make it clear that, so long as the variation order is made within the ambit of the dispute, and is not open to challenge upon other grounds, it cannot be successfully challenged because it is made by, and its operation is confined to, a particular employer in one State (*Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (3), per *O'Connor* J.; and cf. *Victorian Railways Commissioners* v. *Australian Railways Union* (4)).

(III.) Next it was said that, by the order now challenged, two grounds of discrimination between employees have been introduced. The first ground is the lowering of wage rates in one State merely

(1) (1935) 53 C.L.R., at pp. 123, 124.
(2) (1920) 29 C.L.R. 106.
(3) (1909) 8 C.L.R. 465, at p. 513.
(4) (1935) 53 C.L.R. 113.

because of the existence of a special statute affecting public servants in that State. But such circumstances are not placed outside the consideration of the arbitrators, however unfairly and unreasonably the particular wage reduction may operate in practice. The second ground is that the present order sets up a discrimination between employees (members of the applicant organization) employed by a State instrumentality and those who are not. But the Arbitration Court is entitled to pay due regard to the differing situations of different employers. Such a discrimination is quite different in character from that made under the old clause 35 for that, by authorizing discrimination in wage rates between men employed by the same employer and performing similar work, *solely on the ground of marriage status*, introduced a matter quite foreign to the original dispute between the organization and the employees.

(IV.) It was also said that, apart altogether from the contention based on sec. 28 (3) dealt with above, the respective logs delivered to each other in 1927 by the disputing parties, evidenced no disagreement or dispute as to the final closing of accounts between employer and employee on each weekly or fortnightly pay day, so that any deprivation of pay by a retroactive order could never have been contemplated by any disputant. The answer to the argument is that the logs prove no agreement that the weekly or fortnightly receipt of pay shall forever close the wage account in respect of such period.

(V.) The last ground of challenge was that the Arbitration Court did not address its mind to a consideration of the question of industrial justice as between the parties, but merely engaged itself in seeking a way to evade or circumvent the previous declaration made by this Court. The facts, however, do not support such an inference. The reasons for judgment of the Arbitration Court show upon their face that all the Judges adverted to the question of what was a reasonable order to make, having regard to the circumstances of the parties and the new situation created by the prior decision of this Court. This Court accepts no responsibility for the reasonableness or justice of orders made by the Arbitration Court, from the orders and awards of which there is no appeal.

There should be a declaration that the order of July 12, 1935, was validly made.

H. C. OF A. 1935.

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

STARKE J. Summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 for a decision upon the question whether the variation of an award dated 12th July 1935 was not invalidly made. The variation was made in consequence of the decision of this Court in *Australian Tramways Employees Association* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1), which, as the learned Judges of the Commonwealth Court of Conciliation and Arbitration said, "clearly defeated the intention" of an order or award of that Court dated 17th April 1934. The employers in that case had served upon the employees' organization a log of wages based upon the equivalent of the Harvester standard, to be adjusted quarterly according to the increase or decrease in the purchasing power of money. The history of this so-called standard, and the method of its application, may be found in the *Commonwealth Year Book* for 1934, at pp. 718-724. The employees' organization did not "accept the terms contained in the log," and suggested a conference, which was refused. The employees' organization next served upon the employers a log of wages claiming minimum rates of weekly wages for various classes of employees. It made no reference to the employers' log, or the Harvester standard, or any method of calculating a rate, and the claim far exceeded any wage based upon the Harvester standard. But the Court held that the two demands or logs constituted a single industrial dispute, despite the fact that they were entirely disconnected, and had been treated in the curial records of the Arbitration Court and in the Court itself as separate disputes. This view narrowed the area of the dispute, and led to the conclusion that it was "a dispute about the manner of calculating a rate." The Arbitration Court had inserted a clause in its award which did not itself discriminate between the wages of married and those of unmarried men, but enabled the Commissioner for Transport to make reductions or deductions in the wage fixed by the award, not greater than the law of New South Wales allowed in substantially similar rates of pay of employees of the State. "Unfortunately for the validity of the provision" said this Court, "this involves a discrimination between married and unmarried men that is outside

(1) (1935) 53 C.L.R. 90.

the scope of the original industrial dispute." The Harvester wage, or its equivalent, however, is a family wage "based on the normal needs of the average employee regarded as a human being living in a civilized community." "Treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home would not be treated as a living wage." So said *Higgins* J., who declared the Harvester wage. (See the articles "A New Province for Law and Order," contributed by *Higgins* J. to the *Harvard Law Review*, vol. 29, p. 13; vol. 32, p. 189; vol. 34, p. 105.) But if the family condition is involved in the Harvester wage, why is it beyond the ambit of a dispute, even as to the manner of calculating the rate, to consider the family condition—the condition of the employee with no family, and that of an employee with a large family? Are questions of sex, locality, and so forth, all beyond the ambit of a dispute unless specifically mentioned? The *Commonwealth Conciliation and Arbitration Act* provides in sec. 38B that in making an award or order the Arbitration Court shall not be restricted to the specific relief claimed by the parties to the industrial dispute or to the demands made by the parties in the course of the dispute, but may include in the award any matter or thing which the Court thinks necessary or expedient for the purpose of preventing or settling the dispute. Finally, the Court held that the clause which authorized a discrimination between married and unmarried men was severable from the rest of the award; the employees of the Commissioner of Road Transport thus became entitled to higher wages under the award of the Arbitration Court than it would have given them. The decision surprises me, as it must have surprised the learned Judges of the Arbitration Court. But there it is—to be followed, distinguished, or, perhaps, departed from, in future cases.

After this decision, the Arbitration Court reconsidered the matter, and resolved that it was just and fair that an order should be made carrying out its original intention in respect of a period of eleven months that ensued upon the award the subject of the decision in this Court. In substance, the order reduced the wages of the employees of the Railway Commissioners under awards of the

H. C. OF A. 1935.

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

Starke J.

Arbitration Court by ten per centum, and that reduction operated as from a past date. It excluded the Commissioner from any refund of moneys paid in excess of the amounts that would have been payable had the ten per centum reduction not been made, but it gave a right of set-off in respect of moneys that had not been paid. Encouraged by, and relying upon, the decision already given, the employees' organization attacks in these proceedings this order or award. Several grounds were urged, but I shall touch only upon the more important. (1) That the award is beyond the ambit of the dispute between the parties: (*a*) Because the award perpetuates the distinction between married and unmarried men in respect of refunds of moneys paid or payable in excess of the amounts that would have been payable had the ten per centum reduction not been made. The former decision, however, does not cover the case, though the argument is plausible. The award, as already mentioned, prevents the Commissioner from recovering moneys treated as overpaid, or gives him a right of set-off if moneys were not actually paid. But it does not prescribe or regulate the wages of employees according to their condition, though married and unmarried men benefit unequally by reason of the fact that the amounts paid or payable to them under the former award were not the same. (*b*) Because the award differentiates between the wages payable to the employees of the Commissioner for Road Transport and those payable to other employees. But there is nothing in the Act requiring the Arbitration Court to prescribe a uniform wage to disputants or any class of disputants. So long as it keeps within the bounds of the dispute, the Arbitration Court is not restricted to the specific claim, but may do what is just and right. (*c*) Because the award is retroactive. Nothing can be found in the Arbitration Act which prevents the Arbitration Court making such an award. (2) That the only jurisdiction possessed by the Arbitration Court to vary its award as it did arose under sec. 28 (3) of the Act, which, it was contended, does not authorize any variation operating retrospectively. It should be stated that the award or order which was varied had exceeded the period specified therein, and was operating by force of the provisions contained in sec. 28 (2) of the Act. The

latter part of the contention is met by the decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (1). And the former part appears to me equally wrong for reasons which I stated in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Australian Railways Union*; *Ex parte Victorian Railways Commissioners* (2) and shall not repeat. It is unimportant in this case whether the powers contained in secs. 28 (3) and 38 (*o*) are or are not cumulative. But if sec. 38 (*o*) does not extend to an award that has been continued in force pursuant to sec. 28 (2), I should feel some difficulty in applying such provisions as sec. 38 (*c*), (*d*), (*da*), (*e*), (*q*), and (*r*), to such an award, and the powers of the Arbitration Court would be greatly impaired. (3) That the Arbitration Court did not satisfy itself that circumstances had arisen which affected the justice of the award (sec. 28 (3)); it limited itself, according to the argument, to the order of this Court in the former proceedings. The argument is untenable in fact, for the Court did not so limit itself; and if it had, I cannot follow why that would not have been a circumstance that affected the justice of the terms of the award which was varied.

The parties are therefore back in much the same position as they were under the order of the Arbitration Court of April 1934, which was as to one of its clauses declared invalid. The subtleties of the law, unfortunately, have involved much time and no little cost.

In my opinion, the variation order of 12th July 1935 is valid, and it should be so declared.

DIXON J. After this Court gave the judgment in the matter between the same parties previously before the Court (3) the Court of Conciliation and Arbitration heard an application by the Commissioner for Road Transport and Tramways for an order varying the award in a manner which would have the effect of relieving him from the liability for underpayments of wages which otherwise, would arise from the invalidity of clause 35 of the award. The order of this Court declared that the order of variation of 17th April 1934 inserting clause 35 in the award was to that extent invalid.

(1) (1920) 29 C.L.R. 106.
(2) (1935) 53 C.L.R., at p. 131.
(3) (1935) 53 C.L.R. 90.

H. C. OF A. 1935.

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

Dixon J.

In the reasons which I gave for concurring in that order I stated the facts affecting the matter and I do not now repeat them. The Court of Conciliation and Arbitration did not make the order which the Commissioner formulated in his application, but it made another order which produces a similar result. The order was made on 12th July 1935. It relieves him of the greater part of the amounts which he would be liable to pay upon the footing that the minimum wages payable were to be ascertained from the award as varied in respects other than by the insertion of the clause which has been declared void. The effect is brought about by a somewhat complicated order. The scheme of the order is to exclude the Commissioner from the order of variation of 17th April 1934 as from the commencement of its operation, to declare his liability for wages calculated according to the award unaffected by that variation during a period ending in April 1935, as from that time to prescribe a new method of wages adjustment, and to provide against the repayment by employees of wages which on this footing would be overpaid and against double payment by the Commissioner. By this means the liability of the Commissioner is limited to the amount by which wages calculated by applying retrospectively the provisions resulting from the last order of the Court of Conciliation and Arbitration exceeds the wages he actually paid. Beyond this amount the Commissioner is discharged from any unfulfilled liability which would arise from the award and variations as they were left by this Court's declaration of partial invalidity.

The employees' organization now applies under sec. 21AA of the Act for an order declaring invalid the order of the Court of Conciliation and Arbitration producing this effect.

In considering its invalidity it is necessary to begin by ascertaining the true nature and operation of the order. It deals with a liability incurred to pay wages for work done. The liability arose from the terms of a variation of an award the specified period of which had expired. The liability was not discharged owing to a mistaken supposition that a particular clause of the variation was valid which, during the currency of a State statute, authorized the employer to pay less than the minimum otherwise prescribed. It had fully

accrued but was unsatisfied. The source of the liability was the operation of the *Commonwealth Conciliation and Arbitration Act* upon the order of variation.

The order of variation had been made under sec. 28 (3) of the Act. In my opinion there is no other power to vary an award after the effluxion of the time specified by the award for its duration under sec. 28 (1). I have already expressed this opinion (1), following that of *Evatt* J. in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2), which, in turn, is based upon that of *Isaacs* and *Rich* JJ. in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (3). I do not think that the power given by sec. 38 (*o*) to vary awards and to reopen any question applies to the original terms of an award after its fixed period has expired. Such an award is kept in force by virtue of sec. 28 (2), that is, by the direct operation of the statute independently of and, indeed, in opposition to, the exercise of the Court's discretion as to the term or duration of the award. The statutory provision assumes that the Court has performed all its functions as an arbitrator, that it has appointed a time for the termination of the award, that all variations have been made which, during the currency of the award, it has considered necessary to effect or preserve the settlement of the dispute including variations of the period of the award and that, nevertheless, the appointed time has come. Then, for the purpose of keeping alive the existing industrial regulation embodied in the expired award until a new regulation is made, the statute takes up the old award and gives it a continuing force. The power given by sec. 38 (*o*) to the arbitrator to review and revise his original settlement of the dispute does not appear to me naturally appropriate to this subsequent period of statutory continuance of the expired award. When *Isaacs* and *Rich* JJ. construed the provision, sub-sec. 2 did not, and it does not now, contain the words which appear in sub-sec. 1, "subject . . . to any variation ordered by the Court." This striking difference between the two sub-sections showed that after the award had expired it did not remain subject to the arbitral power of variation given by sec. 38 (*o*). When, afterwards in 1920, what stands now as the first paragraph

(1) (1935) 53 C.L.R., at p. 140. (2) (1931) 45 C.L.R., at pp. 439-442.
(3) (1920) 28 C.L.R. 209.

H. C. OF A. 1935.

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

Dixon J.

of sub-sec. 3 was enacted by sec. 13 of Act No. 31 of that year, it appears to me that the interpretation adopted by *Isaacs* and *Rich* JJ. was thereby completely confirmed. When, eight years later, what stands as the second paragraph of sub-sec. 3 was enacted by sec. 24 of Act No. 18 of 1928, a consideration ceased to exist which between 1920 and 1928 would make it impossible to avoid that interpretation of the provisions read as they then stood, namely, the consideration that the limitations upon the particular power contained in sub-sec. 3 negatived resort to a general power not so limited. But the main purpose of the introduction of the second paragraph of the sub-section was to prevent the implication arising that, in making a new award, "in another proceeding" arising out of a new dispute, the Court was restricted to the exercise of the conditional power given by sub-sec. 3 of setting aside or varying the terms of the prior award. If it was intended to alter the state of the law, as declared by *Isaacs* and *Rich* JJ., the legislation might be expected to do so directly. In my opinion the introduction of the second paragraph had not the indirect effect of furnishing the Court of Conciliation and Arbitration with a new and unconditional power which would supersede the power given by sub-sec. 3. This conclusion might be of great importance in the decision of the case if it is also true that the power of reviewing and revising orders of variation made under sub-sec. 3 is to be found in that sub-section alone. For the language of sub-sec. 3 is not very apt to express a power to discharge or vary liabilities which have already accrued under an award. It is a power to set aside or vary *terms* affected in point of justice by circumstances which have arisen. This language may appear rather to point to the executory operation of the terms. But it is unnecessary to decide whether under the power accrued liabilities can be discharged or accrued rights varied, because, in my opinion, the authority of the Court to reconsider orders made under sub-sec. 3 of sec. 28 is sec. 38 (*o*). When sub-sec. 3 conferred the power to vary or set aside the original terms of an award it conferred it upon a tribunal possessing under sec. 38 (*o*) a general authority to vary its orders and to re-open any question. When a new power is given to an existing Court or other tribunal, prima facie, it is exercisable in the same way and subject to the same

conditions and incidents as the general powers and jurisdictions of the Court or tribunal (cp. *Powell* v. *Lenthall* (1)). Once the Legislature resolved to permit the alteration of the terms of an expired award, there is nothing in the subject matter to distinguish the power to make orders doing so from other powers. The same control of such orders, the same review and reconsideration exercisable over other orders, seems appropriate. Accordingly, I am of opinion that the efficacy of the order of 12th July 1935 depends upon sec. 38 (*o*).

Does par. (*o*) of sec. 38 enable the Court to divest rights or to discharge liabilities which have accrued under an order ?

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co. Ltd.* (2) this Court decided in terms that under that provision " there is power to vary an award retrospectively—i.e., to alter its provisions as from a date antecedent to the making of the order." The order in that case upheld under sec. 38 (*o*) was for increased wages in respect of work done before the order of variation was made. It conferred a right and imposed a liability by reference to facts which had already occurred. This is not the same as the discharge or variation of a liability which has been incurred or a right which has accrued in the past. But the decision negatives a construction of the provision which limits it to altering the executory provisions of an order or award. Once this interpretation is negatived, it appears to me almost necessarily to follow that it extends to the discharge and variation of all rights and liabilities which have accrued from the past operation of an order or award, at any rate if they are not spent or satisfied. Such an interpretation does not give to the Commonwealth Court of Conciliation and Arbitration a power to make " retrospective " arbitral provisions in the same sense as the expression " retrospective " is used of legislative provisions. An award or order of the Court, other than an order in the exercise of the judicial power of the Commonwealth, is an instrument which the Act of Parliament takes up and makes obligatory so that the duties it prescribes

(1) (1930) 44 C.L.R. 470, at pp. 476, 477. (2) (1920) 29 C.L.R., at p. 110.

H. C. OF A. 1935.

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

Dixon J.

become statutory (cp. *Ex parte McLean* (1)). A Legislature in making a retrospective law may require that in ascertaining rights and duties the assumption shall be made in every respect that the state of the law was otherwise than it in fact was. But, although an order of the Court of Conciliation and Arbitration may adopt the course of making past acts a measure or criterion for the ascertainment of rights and liabilities, or of the extent to which accrued rights and liabilities are discharged, what it is doing is in fact no more than varying the liabilities which its own award or order has already brought into existence so that they cease to be obligatory according to their original tenor.

The views which I have expressed appear to me to remove the objections which have been advanced to the validity of the order of 12th July 1935. They are inconsistent with the contention that the order attempts a retroactive regulation of wages which the Court has no power to make.

The ground that the order seeks to effectuate by indirect means the discrimination which our previous decision held to be outside the ambit of the dispute, even if in other respects tenable, must fail because, properly understood, the order of variation is not regulating the terms and conditions of employment, but discharging *pro tanto* unfulfilled obligations which have already arisen out of an an order which miscarried.

The same reason disposes of the contention, in other respects hopeless, that an unwarranted discrimination is made by the order between State employees and other employees and between State employees in New South Wales and other States because of the differences in statute law.

The argument that the order goes outside the dispute because the dispute did not relate to retrospective payment of wages is equally unsustainable.

The power of the Court to rescind accrued rights arising under an order of variation is independent. Doubtless the power is limited. But, in the present case, nothing has occurred but the abrogation of an accrued right resting altogether on the Court's order and this is within the power.

(1) (1930) 43 C.L.R., at pp. 480, 483-485.

In no view could the attack upon the grounds upon which the Court of Conciliation and Arbitration proceeded in determining to make the order be considered tenable.

In my opinion a declaration should be made in answer to the summons to the effect that the order of 12th July 1935 is valid.

Declaration that the order of variation made by the Full Court of the Arbitration Court on 12th July 1935 was validly made. No order as to costs.

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

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

J. B.