[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

Ex parte WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

[No. 2].

H. C. of A. 1958.

SYDNEY, *Mar.* 31; *Apr.* 1, 22.

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

Industrial Arbitration (Cth.)—Stevedoring industry—Commonwealth Industrial Court—Orders—Apprehended stoppage of work—Industrial organisation—Contravention of Act—Breach of award—Labour supply—Concerted obstruction—Implication — Prohibition — Grounds — Absence — Costs — Conciliation and Arbitration Act 1904-1955, *ss.* 40 (*b*), 48 (2)—*Conciliation and Arbitration Act* 1904-1956, *ss.* 4 (1), 58 (2), 109 (1) (*b*)—*Conciliation and Arbitration Act* 1956, *s.* 49 (3), (5)—*Stevedoring Industry Act* 1947, *ss.* 12 (1) (*b*), 16 (1) (*c*)—*Stevedoring Industry Act* 1949, *s.* 5 (3) (*g*)—*Stevedoring Industry Act* 1949-1954, *Pt. V, ss.* 49, 50—*Stevedoring Industry Act* 1956, *ss.* 6 (4) (*a*), (*b*), (*c*), (5), (6), (7), 7 (1), 18, 20.

The Commonwealth Industrial Court made an order pursuant to s. 109 (1) (*b*) of the *Conciliation and Arbitration Act* 1904-1956 that the Waterside Workers' Federation be enjoined for the next ensuing five days from committing a breach of a specified clause in the award by action by the federation to prevent men from offering their labour and continuing in employment on the conditions prescribed in the award. The clause provided that any action by the federation . . . by rule or fine or otherwise to prevent men from offering their labour and continuing in employment on the conditions prescribed in that award should be a breach of the award by the federation. By another order made also in pursuance of s. 109 (1) (*b*) the Commonwealth Industrial Court ordered that the federation be enjoined from committing a breach of a second clause by being implicated in any concerted failure of members to attend at the times and places prescribed for the engagement of labour at Port Melbourne. The latter clause provided that any failure of members of the federation . . . to attend at the times and places prescribed for the engagement of labour should be a breach of the award for which the federation might be held liable. On the construction of the clauses adopted by the Commonwealth Industrial Court that court found that upon the facts breaches of the clauses had been committed by the federation. The orders were made

in one proceeding the costs of which were awarded against the federation. After the five days had passed and the orders, except as to costs, were therefore exhausted, the federation sought a prerogative writ of prohibition from the High Court restraining further proceedings upon the order.

At the time when the clauses of the award were adopted the practice of the Port of Melbourne was for employers' representatives to pick up men for stevedoring labour at a bureau or pick-up place but as time went on the practice changed and at the time of the breaches found to have been committed waterside workers might be engaged for work by a system of press or radio announcements.

Held, that there was no longer anything in the Port of Melbourne which could answer the description in the second mentioned of the above clauses "the times and places prescribed for the engagement of labour", but that under the first-mentioned clause engagement was presupposed when the clause forbad action by the federation to prevent men from offering their labour and continuing in employment on the conditions prescribed in the award.

The order of the Commonwealth Industrial Court under this clause was within its jurisdiction conferred by s. 109 (1) (*b*), but having regard to the fact that the change of practice was effected by a public statutory order that court's order purporting to enforce the clause as to engagement must be treated as on its face made without jurisdiction and not simply as an erroneous exercise of jurisdiction.

Held, nevertheless, that because the order was exhausted by the expiration of the five days a writ of prohibition should not issue. The order for costs could not support such a writ because the costs were also covered by the good order, the difference being insubstantial.

Per curiam: In a general way it may be said that an order under s. 109 (1) (*b*) must answer the description expressed by the provision; it must "enjoin" and the thing from which it purports to enjoin must be of the character stated in the provision; unless the order is of that description it cannot be within the jurisdiction conferred by s. 109 (1) (*b*).

The status and enforceability of the Waterside Workers' Award and the various orders which were considered and traced in *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (1952) 85 C.L.R. 601, at pp. 605-608, 631-633, further traced and considered.

PROHIBITION.

Upon application made on behalf of the Waterside Workers' Federation of Australia *Williams* J. on 17th March 1958 granted an order nisi for a writ of prohibition directed to *Spicer* C.J., *Dunphy* and *Morgan* JJ., judges of the Commonwealth Industrial Court, calling upon the respondents and each of them to show cause why they and each of them should not be prohibited from proceeding further upon two several orders made by the Commonwealth Industrial Court on 27th February 1958 as matters numbered B 33 and B 34 of 1958 respectively on the ground that that court had no jurisdiction

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under s. 109 (1) (*b*) of the *Conciliation and Arbitration Act* 1904-1956 to make such orders—in the case of matter No. B 33 of 1958 upon the ground that there was no basis upon which the Commonwealth Industrial Court could find a breach of cl. 26 (m) of the Waterside Workers' Award 1936 committed by the Waterside Workers' Federation of Australia consisting of action by it to prevent men from offering their labour and continuing in employment on the conditions prescribed in that award, in that any action of the federation to prevent men from offering their labour and continuing in employment was not action to prevent them from offering or continuing on the conditions prescribed in the said award within the meaning of cl. 26 (m) of that award; and in the case of matter No. B 34 of 1958 upon the ground that there was no basis upon which the Commonwealth Industrial Court could find a concerted failure of members of the federation to attend at the times and places prescribed for the engagement of labour (within the meaning of cl. 26 (*g*) of the award) at the Port of Melbourne, having regard to the fact that the award no longer prescribed any times or places for the engagement of labour since its prescription in that regard had been superseded by the operation of Order No. 30 of 1948 of the Stevedoring Industry Commission and Order No. 14 of the Australian Stevedoring Industry Board.

The order to show cause came on for hearing before the Full Court of the High Court.

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

M. J. Ashkanasy Q.C. (with him *E. F. Hill*), for the prosecutor. This is a matter for prohibition both as a matter of jurisdiction and on the merits. The basis of sub-cl. (g) is the failure to attend at the times and places prescribed but no times and places were prescribed. The question is whether the times and places of employment are continued to be prescribed in this award. [He referred to *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners Association* (1).] Clause 26 in referring to prescribed provisions both in sub-cl. (g) and sub-cl. (m) is referring to things prescribed by the award as varied by the authority with power to vary the award under the conciliation and arbitration power. If the times and places prescribed for the engagement of labour cease to be prescribed by the award, then sub-cl. (g) can have no application, and similarly under sub-cl. (m). [He referred to *Reg.* v. *Spicer*; *Ex parte Seamen's Union of Australia* (2).] So far as sub-cl. (g)

(1) (1936) 36 C.A.R. 385.

(2) (1957) 96 C.L.R. 341.

is concerned the prosecutor adopts the whole of the reasoning of *Spicer* C.J. in the Commonwealth Arbitration Court, apart from the question of the implications of the word " may ". That sub-clause is directed to making provision for vicarious liability in respect of a breach which has otherwise occurred. It requires a concerted failure ; that concerted failure is a breach by those who in concert so act in breach, and it is one for which the federation or a branch thereof or individual employee respondents to this award may be held liable. If there be a dispute as to times and places of engagement it is not within the power of the court to say that times and places of engagement shall be such as may be fixed from time to time by any authority or organisation or body which may deem fit to lay them down, and that they must be obeyed. That would not be a prescription within the ambit of the court's powers. It must determine it itself. As to the word " may " see *Federated Agricultural Implement Machinery and Ironworkers' Association of Australia* v. *H. V. Mackay, Massey Harris Pty. Ltd.* (1). Clause 26 should be construed as a case in which the federation is an actual party to the breach. The word " may " means it is sufficient if the federation is implicated in some way. If, however, it is a matter of discretion to make it liable without it being a party in any way, then it is beyond power. The question of costs is outstanding. [He referred to *R.* v. *Hibble* : *Ex parte Broken Hill Proprietary Co. Ltd.* (2).]

[DIXON C.J. referred to *R.* v. *Connell* ; *Ex parte The Hetton Bellbird Collieries Ltd.* (3).]

So far as costs are concerned the order has not come to an end ; it is operative in two ways : (i) it leaves the federation open indefinitely to be cited for contempt if it be found that it was implicated in any breach, and (ii) the order is an operative order in conferring upon the court power to extend the time, at any rate it is left open to an application being made to extend it. The power to enjoin can only arise if there is a duty and a breach of that duty either existing or threatened. If it be shown that the injunction creates a duty which did not previously exist in respect of which the federation may have come under a liability it is " a live thing ", creating an obligation which did not previously exist. In regard to sub-cl. (m) the expression there " prescribed in this award " leaves no room for any argument such as existed in regard to sub-cl. (g), that cl. 18 (e) having ceased to operate and the orders of the Stevedoring Commission or Stevedoring Board not being

(1) (1936) 36 C.A.R. 268.
(2) (1920) 28 C.L.R. 456.
(3) (1944) 69 C.L.R. 407.

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in this award, the injunction which required the prosecutor to continue offering labour and to continue in employment on the conditions in this award, there being no longer any such conditions, could not possibly operate. " Prescribed " in the context in sub-cl. (g) must also mean " prescribed in this award ". If it be sought to impose criminal liability, clear words are required, and it does not say " if it is implicated ". It gives a discretionary power to punish vicariously, even though it is clearly accepted that one cannot have a general vicarious liability (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1)). As set out in the order nisi for prohibition, that to which attention has been drawn shows that the very foundation of these orders is by way of injunction under s. 109 (1) (*b*) and (*c*). These orders nisi for prohibition should be made absolute.

[DIXON C.J. referred to *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2).]

In regard to cl. 26 (m) the material conditions prescribed in this award relate exclusively to time and place of employment which are not in the award: see *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (3). The Industrial Court as was laid down in *R.* v. *Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (4), is still a statutory body of limited powers subject to prohibition. In regard to each of the orders in this case they are directed to enjoining or ordering the prosecutor to take action in respect of something that is not part of the award; therefore the basis for prohibition does exist: see *Lee* v. *The Showmen's Guild of Great Britain* (5). Upon the view of the facts that the court arrived at it imposed a new and different duty. The clear intention of the 1956 Act in saying that orders should operate as awards of the Industrial Commission, was not to alter anything other than the question of validity and operation and power to vary and amend. The Industrial Commission and board's orders and rules were supported by a sanction which was beyond control of that commission and board, they were fixed by the Act. The *Arbitration Act* fixed certain penalties but gave the Arbitration Court, as it was then, power to determine certain penalties, and it is that power that cl. 26 set out to exercise, a power which previously it did not have. That would give them a totally different operation and that was never intended by that provision. It does not just continue orders in operation as though they were

(1) (1925) 35 C.L.R. 462, at pp. 475, 476.
(2) (1936) 36 C.A.R. 99.
(3) (1954) 90 C.L.R. 24, at p. 37.
(4) (1951) 82 C.L.R. 208.
(5) (1952) 2 Q.B. 329.

determinations of the Industrial Commission; it would have the effect of incorporating in these provisions what the Industrial Commission could never have incorporated under its powers, and one cannot, therefore, invoke cl. 26 or any part of that clause which is a power which they did not possess. So that either one is back in the position of enforcing the award, in which case the conditions are not prescribed, or, one is outside that, in which case the conditions cannot apply at all. [He referred to *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (1) and the *Stevedoring Industry Act* 1956.]

G. Wallace Q.C. (with him *D. I. Menzies* Q.C. and *D. B. McKenzie*) for the Commonwealth Steamship Owners' Association. The prosecutor should be confined strictly, in his argument, to the two grounds embraced in the rule nisi. In this sort of case prohibition is not attracted at all. It is an order, or orders, made by a federal court under s. 109 and the matters heard by the federal court were matters clearly submitted to the court by the section. The court had jurisdiction to embark on the inquiries and all that took place thereafter was that matters which were an integral part of the inquiry, both as to facts and law, were decided by that court from which court an appeal does not lie, except in certain cases and then only by leave of this Court. We are not dealing with an administrative body, but with a federal court, and, in principle, it is almost an irresistible inference that it was the intention of Parliament that that court should have complete jurisdiction to decide matters set forth in s. 109. That section is not formulated in a way which would throw doubt on that submission: see *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (2); *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union, Australian Section* (3); *Ex parte Jackson*; *Re Fletcher* (4); *Ex parte Mullen*; *Re Hood* (5) and *Colonial Bank of Australasia* v. *Willan* (6). The fact that a federal court is being dealt with from which an appeal does not lie except in special circumstances, adds strong support to the view that Parliament intended the court to decide this sort of thing finally regardless of whether it decided rightly or wrongly, because it was indeed a matter to be determined as part of the general inquiry. By way of analogy s. 119 may be of some assistance in this matter. [He referred

(1) (1952) 85 C.L.R. 601.
(2) (1938) 59 C.L.R. 369, at pp. 389, 391.
(3) (1953) 89 C.L.R. 636, at pp. 646-648.
(4) (1947) 47 S.R. (N.S.W.) 447; 64 W.N. 130.
(5) (1935) 35 S.R. (N.S.W.) 289, at p. 300; 52 W.N. 84.
(6) (1874) L.R. 5 P.C. 417.

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to *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (1).] Section 119 is almost, if not quite, identical in terms with s. 109 (1) (*b*), all except the opening words of s. 109. Prohibition does not lie in the case of cl. 26 (m), it being only a question of fact. As a matter of discretion prohibition should not be granted here because the operation of the order was exhausted the day before the federation's officer swore his affidavit. As a matter of construction of that order, there is no real substance in the prosecutor's construction of it, particularly in regard to the extension. The proper time for applying was 4th March 1958. If that be so, then all that is left is an order for costs. It being a matter for the discretion of this Court, the Court would not grant a prohibition where the only matter involved or left under the order was a question of costs, unless there were special circumstances.

[DIXON C.J. referred to *Yates* v. *Palmer* (2); *Denton* v. *Marshall* (3); *Paxton* v. *Knight* (4) and *Halsbury's Laws of England*, 2nd ed. vol. 9, par. 1402, p. 826.]

Apart from the question of costs, if, as submitted, the orders were exhausted before the application was made for the prohibition, it would not be an appropriate case for prohibition at all. The slight amendment in consolidation in 1937 operates as a variation of the 1936 award. Since the decision in *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (5) there are the 1956 Act (No. 44) and the transitional provisions in s. 49 (3). So that by those transitional provisions the 1936 award is deemed to be an award or order of the present day commission and if that be so then the definition of award would mean that an "award made under this Act" would include an award referred to in s. 49 (3) of Act No. 44 of 1956; and that means that it is an award or deemed to be an award made under Div. 4, Pt. III of the Act. By that route the 1936 award is now deemed to be an award of the Industrial Commission set up in 1956. When the definition of "award" in s. 4 of the *Conciliation and Arbitration Act* refers to an award made under this Act it is to the Act of 1904-1952, as amended, and its predecessor. Under this process the 1936 award is deemed to be an award of the commission set up in 1956. [He referred to *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (6).] The word "prescribed" in cl. 26 (g), in that context, if given its natural meaning, means "prescribed by any lawful authority from time to time". There is no reason for departing from the

(1) (1953) 88 C.L.R. 100, at p. 121.
(2) (1849) 6 Dow. & L. 283.
(3) (1863) 1 H. & C. 654 [158 E.R. 1046].
(4) (1757) 1 Burr. 314, at p. 315 [97 E.R. 328, at pp. 328, 329.]
(5) (1952) 85 C.L.R. 601.
(6) (1952) 85 C.L.R., at pp. 606, 607.

natural meaning of the word. The continuation of the operation of cl. 26 (g) required that the times and places should be attended howsoever and wheresoever they might be lawfully prescribed. Alternatively to the preferred view, "prescribed" means "prescribed by this award as lawfully amended from time to time". All that has happened is that the old method of pick-up and the times of picking up set forth in the award have been modified—see orders 14 and 30, and cl. 18 (e). The three have to be read together. Order 14 directs that waterside workers shall go where they are directed from time to time. A press or radio announcement is a prescription within the meaning of cl. 26 (g). "Prescribed" means lawfully prescribed under statutory authority. Times and places are duly prescribed for engagement by order. If no time or place is prescribed then this order which was made does not accomplish anything at the moment, because it only enjoins the federation from being implicated in the concerted failure to attend at the times and places prescribed for the engagement of labour. The actual wording of cl. 26 (m) is to prevent men from offering their labour and continuing in employment on the conditions prescribed in the award. Even if everything submitted under cl. 26 (g) be wrong, and there is now nothing in the award fixing times and places, yet it was fully open to the court to say that the federation had prevented men from offering their labour and continuing in employment under award conditions—not necessarily time and place—but there are plenty of other award conditions which it could not be argued were not still current, relating to working conditions. All that cl. 26 (m) does is to assume that there will be some terms and conditions governed by the award, and if there is a prevention of men working at all, and some terms of working conditions, even though not time and place, then a breach of cl. 26 (m) appears. Clause 26 (m) does not say, nor does it envisage, that all the terms must be in the award: it only supposes that some are. The view put forward on behalf of the prosecutor is unsound. It is fully open to the Court to say that there had been made apparent either an actual or an apprehended breach by the federation. Alternatively, it is proper to say that the times and places are prescribed in this award. Whatever the award conditions were, the evidence clearly shows there was a definite refusal to work under any conditions, or at all. [He referred to the *Law Quarterly Review* (1957), vol. 73, p. 534.] In essence all that is involved here is: What is the true construction of a term of the award? The interpretation of an award is fully open to the Industrial Court on an application under

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s. 109. If, as is submitted, it be correct that all that has taken place is simply the construction of the terms of the award, then they have authority to do so and the Court would not review it on prohibition.

[TAYLOR J. referred to *In re O'Lachlan* (1).]

G. R. Stewart, for the Judges of the Commonwealth Arbitration Court, submitted to such order as the Court should see fit to make.

M. J. Ashkanasy Q.C., in reply.

Cur. adv. vult.

April 22.

THE COURT delivered the following written judgment:—

The question we are called upon to decide in this proceeding is whether we should award a writ of prohibition directed to the learned judges of the Commonwealth Industrial Court prohibiting further proceedings upon two orders made in the purported exercise of the jurisdiction conferred on that court by s. 109 (1) (*b*) of the *Conciliation and Arbitration Act* 1904-1956. By that provision the court is empowered to enjoin an organisation or person from committing or continuing a contravention of the *Conciliation and Arbitration Act* or a breach or non-observance of an award. The word "award" is defined by s. 4 (1) to mean an award "made under this Act" and to include an order.

The orders of the Commonwealth Industrial Court which it is sought to prohibit were made by that court on 27th February 1958. They both relate to the same conduct or apprehended conduct on the part of the Waterside Workers' Federation but one order is expressed to restrain the breach of one sub-clause and the other order the breach of another sub-clause in the same clause in an award. The instrument is described as the Waterside Workers Award as varied. The operative words of the first of the two orders of the Commonwealth Industrial Court are to the effect that it is thereby ordered pursuant to s. 109 (1) (*b*) of the Act that the federation be enjoined until 4th March 1958 (that is for the next five days) from committing a breach of sub-cl. (m) of cl. 26 of the award, as varied, by action by the federation to prevent men from offering their labour and continuing in employment on the conditions prescribed in the said award. The five days have long since passed without any breach of the order and it might be thought that the order was exhausted and nothing remained to prohibit. To this rather evident objection the federa-

(1) (1886) 3 W.N. (N.S.W.) 54.

tion answers that the order also orders that body to pay costs and further that it reserves liberty to the Commonwealth Steamship Owners' Association, the organisation of employers obtaining the order, to apply for an extension of the time of operation of the order. This reservation, however, would surely be construed as referring to an application made before the period expired. For otherwise an extension might involve an *ex post facto* contempt of a retrospective injunction. The second of the two orders in question was confined to the same five days. It includes too a like order as to costs and a like liberty to apply to extend the order. The substance of the order, which also was expressed to be pursuant to s. 109 (1) (*b*), was that the federation be enjoined from committing a breach of sub-cl. (g) of cl. 26 of the award, as varied, by being implicated in any concerted failure of members of the federation to attend at the times and places prescribed for the engagement of labour at the Port of Melbourne. The orders were made because of an apprehended stoppage of work in the Port of Melbourne within the five days over a question of the size of gangs. Omitting immaterial words, cl. 26 (g) of the award provided that any concerted failure of members of the federation . . . to attend at the times and places prescribed for the engagement of labour shall be a breach of the award for which the federation or a branch thereof . . . may be held liable. The majority of the Commonwealth Industrial Court (*Dunphy* and *Morgan* JJ.) construed this clause as meaning that whenever the organisation or branch thereof should be implicated in such a concerted failure of members the organisation committed a breach of the award and, on the facts, found that the clause so construed had been contravened by the federation. Clause 26 (m) provided that any action by the federation or a branch thereof . . . by rule, fine or otherwise to prevent men from offering their labour and continuing in employment on the conditions prescribed in that award should be a breach of the award by the federation or a branch. All the members of the Commonwealth Industrial Court (*Spicer* C.J., *Dunphy* and *Morgan* JJ.) were of opinion that a breach of this provision had been committed by the federation.

Upon this application for a writ of prohibition to restrain further proceedings upon these two orders this Court has no concern with the correctness or incorrectness of anything the Commonwealth Industrial Court decided within its jurisdiction. Before a writ of prohibition may be awarded it must clearly appear that in making one or both orders there has been an excess of the jurisdiction conferred upon the Commonwealth Industrial Court. The particular jurisdiction which that court has exercised in making the two

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orders is given by s. 109 (1) (*b*) and unfortunately that provision does not employ terms which distinguish between the power of the court and the matters which it is to decide. In a general way it may be said that the order made by the court must answer the description expressed by s. 109 (1) (*b*), that is to say it must " enjoin " and the thing from which it purports to enjoin must be of the character stated in the paragraph. Unless the order is of that description, it cannot be within the jurisdiction conferred on the court by the provision. But before going beyond this rather general statement it is necessary to turn to the precise difficulties which this case presents. The first is to ascertain what is now the legal status of the award in which sub-cll. (g) and (m) of cl. 26 are found and what is now the application or operation of those sub-clauses. Up to a point the status of the award was dealt with and decided in *Reg.* v. *Kelly; Ex parte Waterside Workers' Federation of Australia* (1). That decision established that after the *Stevedoring Industry Act* 1947 (No. 2 of 1947) the award retained its character as an award of the Court of Conciliation and Arbitration and remained in force even if it took on the additional character of an industrial regulation deriving its obligatory effect from s. 12 (1) (*b*) and s. 16 (1) (*c*) of the *Stevedoring Industry Act* 1947. The decision appears also to mean that the award carried over this double character after the repeal of that Act by the *Stevedoring Industry Act* 1949 (No. 39 of 1949) and the placing, by Pt. V. of the latter Act, of industrial matters in connection with stevedoring operations under the jurisdiction of the Court of Conciliation and Arbitration consisting of a single judge, followed, as it was immediately, by the promulgation by the judge of a general order that the award should continue in force and effect as amended or varied by the court and by orders of the Stevedoring Industry Commission under the *National Security Regulations* and by orders of the Stevedoring Industry Commission under the Act of 1947. It is unnecessary to go over this long and confused story again. It is set out in the report of the facts of the case in (2) and the conclusion stated above appears from the judgment (3). But that took the matter only up to 1952 and moreover it did not cover the particular subject with which sub-cl. (g) and, as it is said, sub-cl. (m) of cl. 26 are concerned, viz., attending at the times and places prescribed for the engagement of labour. In 1936, when the award was made, the practice at the Port of Melbourne was for the employers' representative to pick up men for stevedoring labour at a bureau or pick-up place. Accordingly,

(1) (1952) 85 C.L.R. 601.
(2) (1952) 85 C.L.R., at pp. 605-608.
(3) (1952) 85 C.L.R., at pp. 631-633.

cl. 18 (e) provided that subject to certain exceptions federation labour should be engaged at the bureau in Piggott Street between hours named in the sub-clause and that the selection should be by the employers' representative. Whatever may be the present scope and application of the language of cl. 26 (g) and (m), doubtless this practice was in mind when these sub-clauses were framed. But as time went on the practice was changed. As at 29th September 1948 the Stevedoring Industry Commission, acting under the *Stevedoring Industry Act* 1947, embodied the rules for the port in an order called the Rules of Engagement and Organization Order for the Port of Melbourne (Order No. 30 of 1948). It depended for its efficacy upon s. 12 (1) (*b*) and s. 16 (1) (*c*) of that Act, the combined effect of which was to give the force of law to orders made by the commission regulating industrial matters in connection with stevedoring operations in so far as the operations related to trade and commerce with other countries or among the States or were performed within a territory. We have before us a copy of this order as amended up to 30th June 1954 that is to say, under the *Stevedoring Industry Act* 1949. The order expressly referred to the award of 1936 and one of 1937 and declared that their provisions should continue to apply except in so far as the same were varied by the rules contained in the order and that, where that happened, the rules were to prevail. For the purposes in hand it is unnecessary to describe the system which this order prescribed. It is enough to say that the bureau in Piggott Street was named by the order as the only place of engagement, that a number of provisions was made with respect to requisitions for labour, engagement, re-engagement, shifts, the gang system and other matters, and that times of engagement were prescribed. Inasmuch as this order was "in force or purporting to be in force immediately before the commencement", on 18th July 1949 of the *Stevedoring Industry Act* 1949, it seems clear enough that by s. 5 (3) (*g*) of that Act it was continued in force as if made under the Act of 1949 and that the provisions of that Act relating to orders of the Australian Stevedoring Industry Board which it set up applied to the order. As the order had continued the award as varied thereby that involved a further continuance of the award, but that presumably must mean of the award so far as relevant to the engagement of labour and as varied. It must be noted that this continuance is first by administrative order and then by statute (Act No. 39 of 1949) by and under provisions based upon the commerce power and therefore restricted to the ambit of that power. Next comes an "interim award" about the making of which we have little or no information. A print

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of the instrument was put before us, and in an affidavit filed before the Commonwealth Industrial Court and put in evidence here it is stated that about July 1954 logs of claim were served by the federation on the employers and vice versa and that in 1956 an award was made by *Ashburner* J. with respect to the logs, which award is known as the Waterside Workers' Interim (General) Award. In making this interim award *Ashburner* J. must have exercised the jurisdiction dealt with in Pt. V. and ss. 49 and 50 of the *Stevedoring Industry Act* 1949-1954. Clause 10 of the instrument says: "This interim award shall operate on and from the 1st day of July 1956 and shall continue in force for one year." The text of the document shows in numerous places that it was framed, not to supersede the award of 1936, but on the footing that the award of 1936 should continue subject to the later document. At a late stage, however the objection was made before us that in consequence of what is now s. 58 (2) of the *Conciliation and Arbitration Act* 1904-1956 the making of the interim award must bring to an end the operation of the award of 1936. It will be necessary to return to this objection. Putting it aside for the time being, what is important to notice is that the interim award contained a provision (cl. 4) that in a port to which that award applied waterside workers might be engaged for work by a system of press or radio announcements or both in such manner as might be determined by the Stevedoring Industry Board or the appropriate statutory authority. That board proceeded on 17th July 1956 to make an order (Order No. 14 of 1956) "in relation to the engagement for employment in the Port of Melbourne of waterside workers for the performance of stevedoring operations in so far as these operations are performed in the course of trade and commerce with other countries and among the States." There is no reference in this document to the prior order (No. 30 of 1948) nor to the award of 1936 nor to the interim award of 1956 which had very recently come into operation. The general plan of Order No. 14 of 1956 is to provide for the lodging with the Bureau Superintendent of requisitions for labour in accordance with rules prescribing time and manner and for the bureau's notifying by press and radio announcement the details of the engagement of waterside workers allocated to work. The order speaks of the announcement as to the engagement and requires "waterside workers so engaged" to "report direct to the place and at the time indicated in the announcements". An announcement may be "a notification of details of waterside workers required to attend" at the bureau. "Waterside workers notified that they are required to attend at the Bureau on any day,

must so attend and accept any engagement to which they may be allocated." There are elaborate provisions for notifying for different shifts and for week-end work, and for re-engagement. Attendance money is not to be withheld on any day merely by reason that the waterside worker had not been required to attend at the bureau. Once this order came into operation it is not easy to see what, in the Port of Melbourne, could possibly answer the description " the times and places prescribed for the engagement of labour ". Those are the words of cl. 26 (g) of the award of 1936. The order came into operation on 23rd July 1956. On 14th August 1956 there came into operation the *Stevedoring Industry Act* 1956 (No. 53 of 1956) and the chief provisions of the *Conciliation and Arbitration Act* 1956 (No. 44 of 1956). These Acts had been assented to on 30th June 1956. If and in so far as the award of 1936 could still be considered an award of the Court of Conciliation and Arbitration not made under the *Stevedoring Industry Act* 1949-1954, it would be continued in force and receive effect as an award of the Commonwealth Conciliation and Arbitration Commission. That would seem to be the result of sub-ss. (3) and (5) of s. 49 of the *Conciliation and Arbitration Act* 1956 (No. 44 of 1956). On the other hand, the interim award of 1956 is excluded by sub-s. (5) of s. 49 from the operation of sub-s. (3). It is, however, an award or order by the Arbitration Court within sub-s. 4 (*c*) of s. 6 of the *Stevedoring Industry Act* 1956 (No. 53 of 1956). As a result of sub-s. (5) of s. 6 (read with the definition of " the Commission " in s. 7 (1)) it obtains, so far as it was in force on 14th August 1956, the effect of an award of the Commonwealth Conciliation and Arbitration Commission. Sub-section (5) of s. 6 gives this effect to all awards and orders falling within any of the categories of sub-s. (4) and provides that proceedings may be taken upon such an award and order and in relation thereto under the *Conciliation and Arbitration Act* 1904-1956 as though it were an award or order of the Commonwealth Conciliation and Arbitration Commission. The category set out in par. (*b*) of sub-s. (4) is " an order of the Australian Stevedoring Industry Board made under that Act " (see the *Stevedoring Industry Act* 1949), " or that Act as amended from time to time, which amended or varied an award or order referred to in the last preceding paragraph ", that is par. (*a*) of sub-s. (4). Paragraph (*a*) comprises, for the reason given, the interim award of 1956. It appears also to comprise the award of 1936 so far as in force, because that award was continued in force or purported to be continued in force, first, by the Order of 18th July 1949, set out (1), and perhaps,

(1) (1952) 85 C.L.R., at pp. 607, 608.

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second, by s. 5 (3) (*g*) of the *Stevedoring Industry Act* 1949 operating upon the clause already cited in Order 30 of 1948 which continued the award as varied. It seems to be clear enough that Order 30 of 1948 was continued in force by s. 5 (3) (*g*) of the *Stevedoring Industry Act* 1949 as an order of the Stevedoring Industry Board and then, subject to the effect of Order 14 of 1956, was picked up, so to speak, by sub-ss. (4) (*a*) and (5) of s. 6 of the *Stevedoring Industry Act* 1956 and thus became equivalent to an award or order of the Commonweatlh Conciliation and Arbitration Commission. But where stands Order 14 of 1956 ? If that can correctly be said to amend or vary the award of 1936 or the interim award of 1956 or Order 30 of 1948, then the order falls within par. (b) of sub-s. (4) of s. 6. Clearly it affects the operation of all three of those instruments. But it does not derogate from the operation of the interim award of 1956 and is rather epexegetical to cl. 4 thereof than an alteration. It would therefore go very far to treat it as " amending " or " varying " that award. But it derogates from the operation of Order 30 of 1948 and from the award of 1936 as varied by that order. The difficulty is that it does not purport to vary or amend either instrument. It disregards them and speaks as if they did not exist. It is in truth expressed as a subsequent ordinance operating quasi-legislatively and *pro tanto* rescinding instruments *in pari materia*. Sub-section (7) of s. 6 of the *Stevedoring Industry Act* 1956, applies to orders continued under par. (*b*) of sub-s. (4) and enables the new Australian Stevedoring Industry Authority to vary or revoke such orders if the Conciliation and Arbitration Commission does not do so in the exercise of its jurisdiction over industrial matters in connection with the stevedoring industry. If, however, an order of the old board does not fall under sub-s. (4) (*b*) of s. 6 as an order varying or amending an award or order continued in force by or under or by virtue of the *Stevedoring Industry Act* 1949, then sub-s. (6) of s. 6 gives it the full status of an order of the new authority made under s. 18 of the *Stevedoring Industry Act* 1956. It is not altogether easy to say on which side of this line Order 14 of 1956 falls. In the view which we take of this case it is not a question on which our conclusion depends. But as the order appears to have been framed by the board as an independent administrative order standing on its own ground and independently of prior industrial regulations on the matter, whether deriving from the power of the Arbitration Court or of a Stevedoring Commission preceding the board, it may be better to adopt the hypothesis that it is not a variation. This assumption means that Order 14 of 1956 does not become the equivalent of an award or order of the Commonwealth Conciliation and

Arbitration Commission but stands as if it were an order of the authority made under s. 18.

The result of the foregoing may be now stated, but it must be stated first without regard to the possible effect which, under s. 58 (2) of the *Conciliation and Arbitration Act* 1904-1957 (the section corresponding to what was formerly s. 48 (2)), the making of the interim award of 1956 might have upon the operation of the award of 1936.

The result, apart from that, would be that so far as the award of 1936 and the Order No. 30 of 1948 as varied to 1954 are consistent with Order 14 of 1956, they have the same force and effect as an award or order of the Commonwealth Conciliation and Arbitration Commission and may be enforced accordingly under s. 109 of the *Conciliation and Arbitration Act* 1904-1956 by the Commonwealth Industrial Court. There remains the point that the making of the interim award may have brought to an end the operation of the old award of 1936. The suggestion is that sub-s. (2) of s. 48 of the *Conciliation and Arbitration Act* 1904-1955 continued in force the old award only until a new award should be made and that the interim award is such a new award. This point is not covered by the order nisi; it was not raised until very late in the argument and it was not really argued. Whether the award of 1956 is an interim award within the meaning of s. 40 (*b*) of the Act of 1904-1955 was not discussed and what relation a provisional or interim award under s. 40 (*b*) has to s. 48 (2) of that Act was not considered. Further, once the award was taken over, as it seems to have been, by an order or orders made under the provisions of the *Stevedoring Industry Acts* 1947 and 1949, and once the award thus obtained the force of law in relation to stevedoring operations in connection with commerce with other countries and among the States, it may be that in relation to operations in inter-State and overseas shipping it ceased to be terminable under s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1955 by the making of a new award. It is to be noticed that s. 49 of the *Stevedoring Industry Act* 1949 does not make the Commonwealth *Conciliation and Arbitration Act* 1904-1949 applicable except to industrial disputes and other proceedings before the court. In the same way s. 50 (1) excludes orders made under s. 34 of that Act. None of these matters was discussed before this Court. In all these circumstances we ought not to entertain the point in considering whether a writ of prohibition should be awarded.

We come back therefore to the position that so much of the award of 1936 and of Order 30 of 1948 as varied to 1954 as can survive the inconsistent operation of Order 14 of 1956 may be enforced as

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though they were an award and an order of the Commonwealth Conciliation and Arbitration Commission. But on the assumption already stated Order 14 would not be enforceable on that footing but only under s. 20 of the *Stevedoring Industry Act* 1956, because it would not be a variation or amendment within s. 6 (4) (*b*) and because we see no way in which it could be brought within sub-s. (3) of s. 20 as "an order of the Authority which was made after hearing under sub-s. (3) of s. 18 of this Act". It is, however, beyond doubt that Order 14 of 1956 sweeps away so much of cl. 18 (e) of the award and of Order 30 of 1948-1954 as provided procedure for engaging labour in the Port of Melbourne at the times and places prescribed. Let the word "prescribed" in cl. 26 (g) of the award of 1936 be construed as flexibly as one may please. Let it be treated as applicable to times and places appointed by any lawful authority. Still Order 14 of 1956 leaves nothing which could answer the description "the times and places prescribed for the engagement of labour".

Turn, however, to the terms of cl. 26 (m) of the same award. If there has been action by the federation to prevent men offering their labour according to the procedure provided by Order 14 of 1956, why should it be any the less true that it is "labour on the conditions prescribed in this award" that they are prevented from offering? These words refer to the conditions of employment, that is to say engagement is pre-supposed. The "award" means the award as it may be amended or varied. There may have been a question whether the "prevention" alleged was directed to conditions of work which did not form part of the "conditions" of employment "prescribed by the award" as varied. If so, that was a matter of fact to be decided once for all by the Commonwealth Industrial Court. It is a matter which is not examinable in this Court on prohibition. For it does not go to the jurisdiction of the Commonwealth Industrial Court. It is a matter which it is within the jurisdiction of that court to decide. The fact is that no mistake was made by that court going to jurisdiction in making an order that the federation be enjoined during the five days from committing a breach of cl. 26 (m) by action by it to prevent men from offering their labour and continuing in employment on the conditions prescribed in the award. There is therefore no ground for a writ of prohibition in the case of that order. As to the order enjoining the federation from being implicated in a concerted failure in breach of cl. 26 (g), a more difficult question arises. It is whether what appears on the face of the order takes it out of the jurisdiction conferred on the Commonwealth Industrial Court to enjoin an organisation from committing a breach of the award. It may be conceded that s. 109 (1) (*b*) places it within the jurisdiction

of that court to find the facts, to interpret the award and to say whether the case is one for injunction. But we have a public statutory order having the force of law which is inconsistent with the postulate which the order makes by the words " to attend at the times and places prescribed for the engagement of labour" at the Port of Melbourne. That seems to take the order outside the description of s. 109 (1) (*b*) " enjoining . . . from committing . . . a breach . . . of an award ".

But it by no means follows that in the case of this order which leaves nothing outstanding but costs a writ of prohibition should be granted. The Commonwealth Industrial Court drew up two separate orders, but there was one hearing only and the costs of the two orders were distinguishable only in very unimportant respects. Apart from costs the orders are exhausted: they are not like the order which in *R.* v. *Hibble*; *Ex parte Broken Hill Proprietary Co. Ltd.* (1), *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Higgins* and *Rich* JJ. dissenting) thought was still subject to a writ of prohibition. It was an award or order purporting to operate as a regulation of industry. The principle was stated thus by *Knox* C.J. and *Gavan Duffy* J.: " In our opinion, so long, at any rate, as a judgment or order made without jurisdiction remains in force so as to impose liabilities upon an individual, prohibition will lie to correct the excess of jurisdiction." (2) Here except for costs no liabilities remain under the order in question and as to costs the other order imposes the same liabilities with only an insubstantial difference. With nothing left to prohibit in the substances of the order and with no appreciable relief from costs obtainable by a writ of prohibition the prosecutors are not entitled to the writ. Moreover the order based on cl. 26 (m) of the award of 1936 as amended would have been effective in the same extent as the order based on cl. 26 (g). For those reasons a writ of prohibition should not be awarded and the order nisi should be discharged.

Discharge the order nisi for writ of prohibition with costs.

Solicitor for the prosecutor, Miss *C. Jollie Smith*, agent for *Slater & Gordon*, Melbourne.

Solicitors for the respondent Commonwealth Steamship Owners' Association, *Malleson, Stewart & Co.*

Solicitor for the Judges of the Commonwealth Industrial Court, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1920) 28 C.L.R. 456.

(2) (1920) 28 C.L.R., at p. 463.