Judgment 4, 1957

PC ...

No. 27 of 1956.

# In the Privy Council.

## ON APPEAL
*FROM THE HIGH COURT OF AUSTRALIA.*

BETWEEN

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener) *Appellant*

and

HER MAJESTY THE QUEEN

and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE HONOURABLE RICHARD CLARENCE KIRBY
THE HONOURABLE EDWARD ARTHUR DUNPHY
and THE HONOURABLE RICHARD ASHBURNER,
Judges of the Commonwealth Court of Conciliation and Arbitration (Respondents)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent) *Respondents.*

AND BETWEEN

THE HONOURABLE RICHARD CLARENCE KIRBY
THE HONOURABLE EDWARD ARTHUR DUNPHY
and THE HONOURABLE RICHARD ASHBURNER,
Judges of the Commonwealth Court of Conciliation and Arbitration - - (Respondents) *Appellants*

and

HER MAJESTY THE QUEEN

and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent)

and

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA - (Intervener) *Respondents.*

**(CONSOLIDATED APPEALS)**

# RECORD OF PROCEEDINGS.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, E.C.4.,
*Solicitors for the Appellants in the Consolidated appeals.*

WATERHOUSE & CO.,
1 New Court,
Lincoln's Inn, W.C.2.,
*Solicitors for the Boilermakers' Society of Australia.*

GDI.G.6.

No. 27 of 1956.

# In the Privy Council.

## ON APPEAL

*FROM THE HIGH COURT OF AUSTRALIA.*

BETWEEN

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener) *Appellant*

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and

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, Judges of the Commonwealth Court of Conciliation and Arbitration (Respondents)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent) *Respondents.*

AND BETWEEN

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, Judges of the Commonwealth Court of Conciliation and Arbitration - (Respondents) *Appellants*

and

HER MAJESTY THE QUEEN

and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent)

and

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener) *Respondents.*

## (CONSOLIDATED APPEALS)

UNIVERSITY OF LONDON
25 FEB 19..
INSTITUTE OF ADVANCED
LEGAL STUDIES
49872

# RECORD OF PROCEEDINGS.

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No. 27 of 1956.

# In the Privy Council.

## ON APPEAL

*FROM THE HIGH COURT OF AUSTRALIA.*

BETWEEN

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA - (Intervener) *Appellant*

and

HER MAJESTY THE QUEEN

10 and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, Judges of the Commonwealth Court of Conciliation and Arbitration (Respondents)

and

20 THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent) *Respondents.*

AND BETWEEN

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, Judges of the Commonwealth Court of Conciliation and Arbitration - (Respondents) *Appellants*

and

HER MAJESTY THE QUEEN

30 and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent)

and

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener) *Respondents.*

**(CONSOLIDATED APPEALS)**

# RECORD OF PROCEEDINGS.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Affidavit of Alfred Tennyson Brodney Sworn 29th July 1955.

## No. 1.

## AFFIDAVIT OF ALFRED TENNYSON BRODNEY AND ANNEXURES THERETO.

I, ALFRED TENNYSON BRODNEY of 17 Lygon Street, Carlton, in the State of Victoria, Solicitor, make oath and say as follows:—

1. I am the Solicitor for the Boilermakers' Society of Australia and am authorised to make this application.

2. The Boilermakers' Society of Australia (hereinafter referred to as "the Union") is an organization of employees registered in accordance with the provisions of the Conciliation and Arbitration Act 1904-1952. 10

3. The said Union is a party to and bound by an Award made under the said Act by Mr. J. M. Galvin, Conciliation Commissioner on the 16th January 1952. Clause 19 (ba) (i) of the said Award is as follows:—

> "No organization party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award."

Now produced and shown to me and marked with the letter "A" is a true copy of the said Award. 20

4. The Metal Trades Employers' Association (hereinafter referred to as the "Employers' Association") is an organization of employers registered under the above-named Act and is a party to and bound by the above-mentioned Award.

5. On the 16th day of May 1955 the Employers' Association applied to His Honour Mr. Justice Ashburner a Judge appointed under the said Act for a Rule to Show Cause why orders should not be made against the said Union under Sections 29 (1) (b) and 29 (1) (c) of the said Act upon the grounds set out in affidavits of Lancelot Ivor Sharp and Dudley George Fowler sworn the respective days of 13th and 16th May 1955. Produced and shown to me at 30 the time of my swearing this affidavit and marked "B" and "C" respectively are true copies of each of the said affidavits. On the same day the Judge granted a Rule to Show Cause to be heard before the Commonwealth Court of Conciliation and Arbitration at Sydney on 31st May 1955. Now produced and shown to me and marked "D" is a copy of the said Rule.

6. The said Rule came on for hearing before the Commonwealth Court of Conciliation and Arbitration constituted by Their Honours, Mr. Justice Kirby, Mr. Justice Dunphy and Mr. Justice Ashburner at Sydney on 31st May 1955. The Court granted leave to the Applicant to make certain amendments to the said Rule. Now produced and shown to me and marked "E" 40 is the transcript of the proceedings before the said Court. After hearing counsel for the Applicant, the Employers' Association, and Mr. A. R. Buckley, the Federal Secretary of the Union, the Court ordered that the said Rule

be made absolute and ordered that the Union should pay the taxed costs of the Employer's Association. Now produced and shown to me and marked "F" is a copy of the said order. Pursuant to the said order the Solicitors for the Employers' Association on 17th June 1955 filed with the Deputy Industrial Registrar at Sydney a Bill of Costs for taxation. The amount of such Bill was £200 . 4 . 0. The said Bill has been taxed and allowed at £182 . 4 . 0. Such costs have been paid.

7. On the 23rd day of June 1955 the Employers' Association issued a summons directed to the Union to answer a charge of having been guilty of 10 contempt of the Commonwealth Court of Conciliation and Arbitration upon the grounds set out in the affidavits of Lancelot Ivor Sharp and Dudley George Fowler both sworn on the 23rd day of June 1955 and filed in support of the said summons. Now produced and shown to me and respectively marked "G", "H" and "I" are copies of the said summons and affidavits.

8. On the 28th day of June 1955 the summons came on for hearing before the Commonwealth Court of Conciliation and Arbitration constituted by Their Honours Mr. Justice Kirby, Mr. Justice Dunphy and Mr. Justice Ashburner. After hearing the parties the Court made orders whereby the Union was fined the sum of Five hundred pounds and directed that the Union 20 pay the Employers' Association its taxed costs. Now produced and shown to me and respectively marked "J" and "K" are copies of the transcript of the said proceedings and of the said Order. The applicant has brought in a Bill of Costs amounting to £285 19 9. and the said Bill has been taxed and allowed at £250 . 13 . 9.

9. The Union contends that the purported orders which were made by the Court on the 31st day of May 1955 and the 28th day of June 1955 were an attempt to exercise the judicial power of the Commonwealth and that the Conciliation and Arbitration Act 1904-1952, in so far as it purports to vest in the Commonwealth Court of Conciliation and Arbitration any part of the 30 judicial power of the Commonwealth is *ultra vires* and invalid.

10. I am informed by A. R. Buckley, the Federal Secretary of the said Union and verily believe that the Union has not paid the said fine or the costs referred to in paragraph 8 hereof and fears that the Industrial Registrar or his Deputy at Sydney and the Employers' Association will take steps to enforce the said orders and recover from the Union the said fine and costs. The Union further fears that the Court may make further orders founded upon the order of the Court dated 31st day of May 1955. The Union respectfully requests that the Industrial Registrar, the Metal Trades Employers' Association and Their Honours the Judges of the Court and each of them be restrained from 40 acting further on or in respect of either of the said orders dated the 31st May 1955 or the 28th June 1955.

SWORN at Melbourne in the state of Victoria this 29th day of July 1955. } A. T. BRODNEY.

Before me :

W T. DIVERS, J.P.
A Justice of the Peace.

This affidavit is filed on behalf of the Boilermakers' Society of Australia.

*In the High Court of Australia.*

No. 1.
Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "A" being Metal Trades Award 1952.

# ANNEXURE " A " TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING METAL TRADES AWARD 1952.

**Lodged Separately.**

ANNEXURE " B " TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING AFFIDAVIT OF LANCELOT IVOR SHARP.



IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION No. of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29 of the said Act.

10 METAL TRADES EMPLOYERS' ASSOCIATION - Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA - - Respondent.

ON this 13th day of May 1955 LANCELOT IVOR SHARP of 241 Balmain Road, Leichhardt, in the State of New South Wales, Industrial Officer, being duly sworn makes oath and says as follows:—

1. I am employed by Morts Dock and Engineering Company Limited as an Industrial Officer and have been so employed over the last seven years. 20 The said Company carries on the business of ship builders ship repairers and engineers at its works at Morts Bay, Balmain.

2. At the said works the Company employs in its boiler shop approximately 192 members of the Federated Ironworkers' Association of Australia and approximately 130 members of the Boilermakers' Society of Australia.

3. In January 1955 a demand was made that all Ironworkers employed in rigging gangs should be paid riggers' rates of pay. This demand was refused by the Company.

4. On the 15th February 1955 eleven riggers' assistants members of the 30 Federated Ironworkers' Association of Australia went on strike and have been on strike up to the time of swearing this my affidavit.

5. On Friday, 25th February 1955, at 1.40 p.m. Mr. Harlor, an organizer of the Federated Ironworkers' Association of Australia at the Company's works, came and saw me at my office and informed me that a combined meeting of boiler shop employees had been held between 12.15 p.m. and 1.30 p.m. at which he had been present and informed me that at the meeting the decisions to finance the striking riggers' assistants had been reaffirmed. He also said that in addition it had been decided to increase the voluntary levy from 5/-d. to 8/-d. per week per man. I asked him whether 40 there was any possibility of the strikers deciding to return to work when next

they met on Tuesday, 1st March. He replied that he did not think so seeing that the boiler shop employees were still prepared to finance them, and they would receive almost the full amount of their usual wages from the increased levy and the Union's strike pay, and could remain out on strike almost indefinitely.

6. On the 23rd March 1955 Orders under Section 29 (1) (b) and Section 29 (1) (c) of the Commonwealth Conciliation and Arbitration Act 1904-1952 were obtained by the Metal Trades Employers' Association against the Federated Ironworkers' Association of Australia in respect of the above-mentioned strikes. 10

7. On Thursday, 31st March 1955, Mr. N. Origlass, the shop steward of the Federated Ironworkers' Association of Australia at the Company's works, at about 1.15 p.m. informed me that there had been a combined meeting of ironworkers and boilermakers employed in the boiler shop during the lunch hour and that it had been decided at the meeting that all boiler shop riggers cease work forthwith. The boiler shop riggers had not started work at the usual starting time at 12.45 p.m. The number of boiler shop riggers employed on 31st March 1955 was nine. The said nine boiler shop riggers are still on strike at the time of swearing this my affidavit.

8. I am informed by Mr. A. Finlay, Assistant Foreman boilermaker of 20 the Company, and verily believe, that at about 4 p.m. on Friday the 15th April 1955 Mr. L. Gilbert and Mr. A Graham, assistant co-delegates of the Boilermakers' Society of Australia, at the Company's works informed him that as it was a definite Union policy not to work overtime when men were stood off, no further overtime would be worked by boilermakers at Morts Dock until the men who were being stood down that night were reinstated. Prior to this intimation to Mr. Finlay seven boilermakers had been given notice they would be stood down as from that night.

9. I have been informed by various officers of the Company and verily believe that most of the aforesaid boilermakers had been instructed to carry 30 out overtime work during the weekend of the 16th and 17th April 1955 but that none of the aforesaid boilermakers attended for work during that weekend.

10. I have been informed by various officers of the Company and verily believe that during the week commencing the 18th April 1955 various boilermakers were requested to work overtime but they refused on the ground that they were prevented from so doing because of the overtime ban. Since the 15th day of April 1955 no overtime has been worked at the Company's works by boilermakers.

11. On Tuesday the 19th April 1955 I had a discussion with Mr. Origlass, 40 the delegate of the Federated Ironworkers' Association of Australia at the Company's works, with regard to a ban which had been placed on overtime by the ironworkers in the boiler shop and with regard to the aforesaid ban on overtime by the boilermakers. This discussion more particularly concerned an extra quarter of an hour each day for certain men to put away tools and check vessels for fire.

12. On Wednesday 20th April 1955 I held a meeting with Mr. Sponberg, the delegate of the Boilermakers' Society of Australia at the Company's works

and the aforesaid Mr. Origlass. Also present was Mr. C. Brown who is an organizer of the Boilermakers' Society of Australia. Mr. Origlass stated that a combined meeting of boilermakers and ironworkers in the shop had been held that day and that the meeting was not prepared to agree to the extra quarter of an hour being worked each day except for the purpose of fire watching and that no tools could be put away during this period. The Company declined to accept this proposition. Further discussion took place about the question of standing men off.

13. On Friday, 29th April 1955, the aforesaid Mr. Origlass reported to me that a combined meeting of ironworkers and boilermakers in the boiler shop had lifted the overtime ban so far as the ironworkers were concerned but that this did not apply to the boilermakers because only the ironworkers had voted on the question.

14. On Tuesday, 10th May 1955, I am informed by the aforesaid Mr. A. Finlay and verily believe that he requested the aforesaid Mr. Sponberg and the boilermaker, Mr. Davidson, to carry out certain work on a ship called the "Poul-Carl" on which work had been suspended since the commencement of the strike of riggers on the 31st March 1955. The aforesaid Mr. Sponberg and Mr. Davidson refused to perform this work and left the vessel where they had been asked to perform the work at about 9 a.m. Later in the morning the aforesaid Mr. Sponberg and certain other persons had a meeting with me at which Mr. Sponberg said that the policy of the boilermakers had always been and always would be not to infringe on the rights of the riggers or any other employees who may be on strike. Mr. Sponberg said that he had been dismissed but I stated that I regarded him as being on strike. At about 11.30 a.m. on the same day Mr. Sponberg and Mr. Davidson left the works and have not returned up to the time of swearing this my affidavit.

15. On Wednesday the 11th May 1955 I am informed by the aforesaid Mr. Finlay and verily believe that two other boilermakers and Mr. Moore and Mr. Williamson were asked to carry out the work which Mr. Sponberg and Mr. Davidson had refused to perform on the previous day. I am also informed by the aforesaid Mr. Finlay that thereafter at about 8.30 a.m. the two boilermakers and the then acting delegate of the Boilermakers' Society of Australia at the Company's works, Mr. Graham, who had been appointed to replace Mr. Sponberg, told Mr. Worland, Assistant Foreman of the Company, that they would not do the work asked of them and that while any job was in dispute no boilermaker would touch it. The aforesaid Mr. Moore and Mr. Williamson then left the works and have not returned up to the time of swearing this my affidavit.

16. I am also informed by the aforesaid Mr. Finlay that at about 9.20 a.m. on the said 11th day of May 1955 he instructed two other boilermakers, Mr. Graham and Mr. Stewart to do the work which the four other boilermakers had refused to do. Both these last-mentioned boilermakers declined to perform the work and left the works and have not returned at the time of swearing this affidavit.

17. At about 11.15 a.m. on the said 11th day of May 1955, I am informed by the aforesaid Mr. Finlay that he directed boilermakers, Mr. Doyle and Mr. Robertson, to carry out the aforesaid work but they both refused and left the works, and they have not returned up to the time of swearing this affidavit.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "B" being Affidavit of Lancelot Ivor Sharp Sworn 13th May 1955. *continued.*

18. On Wednesday the 11th day of May 1955 I had a conversation with Mr. R. Phillips, an organizer of the Boilermakers' Society of Australia, on the telephone and the question of the refusal of the boilermakers to work on the "Poul-Carl" and the overtime ban was discussed.

19. I am informed by the aforesaid Mr. Finlay and verily believe that on Thursday the 12th day of May 1955 he requested approximately thirteen of the remaining boilermakers, being those engaged in the fabrication of certain steel pipes, to perform overtime work in relation to the said fabrication. Nine of the aforesaid boilermakers refused so to work, eight of them giving as the reason that there was an overtime ban in existence. Four agreed to work but the Company could not properly conduct the work with four boilermakers and countermanded the said instructions to work overtime previously given to them. 10

20. The strikes of Ironworkers and Boilermakers and the aforesaid bans are having a very serious effect upon the Company's work and upon certain of the Company's clients. The Company has had to refuse certain repair work which would require boilermakers' work during overtime hours. The aforesaid "Poul-Carl" on which work has been held up since the 31st March 1955 requires less than two days work to complete the work being done on it. This ship carries cargo on the Australian coast and I am informed and verily believe that very heavy demurrage charges are payable on a daily basis. The fitting out of a new ship "Baralga" has been practically at a standstill since the 31st March 1955. Work on a new dredge being constructed for the Maritime Services Board has been very severely retarded since 31st March 1955. The boilermakers' overtime ban is having a particularly serious effect on the production of steel pipes for the Metropolitan Water Sewerage and Drainage Board because of the severe drop in production due to no overtime being worked by the boilermakers. 20

SWORN AND SIGNED by the above-named Deponent at Sydney in the State of New South Wales this 13th day of May 1955, } L. I. SHARP. 30

Before me:

A. G. KERN, J. P.

ANNEXURE "C" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING AFFIDAVIT OF DUDLEY GEORGE FOWLER.



IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION No. of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29 of the said Act.

10 METAL TRADES EMPLOYERS' ASSOCIATION - Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA - Respondent.

ON this 16th day of May 1955 DUDLEY GEORGE FOWLER of 7 Wynyard Street, Sydney, in the State of New South Wales, Secretary, being duly sworn makes oath and says as follows :—

1. I am the Secretary of the Metal Trades Employers' Association (hereinafter called the Association), Industrial Organisation of employers 20 registered under the Conciliation and Arbitration Act 1904-1952 and am authorised to make the application herein.

2. Morts Dock & Engineering Company Limited is and at all relevant times has been a member of the Association and is a cited respondent to the said Metal Trades Award.

3. The Boilermakers' Society of Australia (hereinafter referred to as the Union) is an organization of employees registered under the provisions of the above-mentioned Act and as such is an organization a party bound by the Metal Trades Award.

4. On the 12th day of May 1955 I caused to be handed personally to 30 Mr. Burge an official of the Boilermakers' Society of Australia and who I believe to be the President, at the Society's registered office at Daking House, Rawson Place, Sydney, a letter in the following terms :—

Mr. A. R. Buckley, 11th May, 1955.
Federal Secretary,
Boilermakers' Society of Australia,
Daking House,
Rawson Place,
SYDNEY.

Dear Sir,

40 MORTS DOCK AND ENGINEERING CO. LTD.

I draw your attention to the fact that there has been a strike since 15th February 1955 by a number of members of the Federated Ironworkers' Association of Australia employed by the above-mentioned Company at Balmain and this strike is still continuing.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "C" being Affidavit of Dudley George Fowler Sworn 16th May 1955. *continued.*

On the 18th April 1955 members of your Union employed by the above Company imposed a ban on all overtime work both maintenance and ship repair work. It would appear that a few boilermakers were of necessity stood down by reason of the strike by ironworkers. This ban by boilermakers still continues and I am further informed that certain boilermakers have refused to perform work on the grounds that the work is in dispute with the members of the Federated Ironworkers' Association.

I am also informed that members of your Society have been giving financial support to the members of the Federated Ironworkers' Association who are on strike. 10

I am bringing this matter to your notice as you are no doubt aware that there is an obligation on your Union to ensure that it is not concerned with any such ban, limitation or restriction on the performance of normal work by your members employed under the Metal Trades Award at the Company's establishment.

In the circumstances failing prompt action by your Union to bring these bans to an end it is intended to proceed early next week against your Union in the Arbitration Court for Orders under Section 29 (1) (b) and Section 29 (1) (c) of the Act.

Yours faithfully, 20

D. G. FOWLER,

Secretary.

5. The Association claims on the grounds set forth in this affidavit and the affidavit of Lancelot Ivor Sharp filed herein against the Boilermakers' Society of Australia :—

(A) That orders should be made under Section 29 (1) (b) of the Conciliation and Arbitration Act 1904-1952, ordering compliance by the said organization with Clause 19 (ba) (1) of the Award made on the 16th January, 1952, by Mr. Conciliation Commissioner Galvin and known as the Metal Trades Award. 30

(B) That orders should be made pursuant to Section 29 (1) (c) of the said Act enjoining the said organization from committing or continuing a breach or non-observance of the said Clause 19 (ba) (i) of the said Award.

SIGNED AND SWORN by the above-named Deponent at Sydney, in the State of New South Wales this 16th day of May 1955, } D. G. FOWLER.

Before me :

F. A. DOURY, J.P. 40

A Justice of the Peace.

## ANNEXURE "D" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING COPY OF RULE TO SHOW CAUSE.

IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION No. of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29 of the said Act.

10 METAL TRADES EMPLOYERS' ASSOCIATION Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA - - Respondent.

### RULE TO SHOW CAUSE.

IT IS HEREBY ORDERED that the BOILERMAKERS' SOCIETY OF AUSTRALIA APPEAR before the Commonwealth Court of Conciliation and Arbitration at Sydney in the State of New South Wales on Tuesday the 31st day of May 1955, at 10.30 o'clock in the forenoon TO
20 SHOW CAUSE why Orders should not be made under Section 29 (1) (b) of the above-named Act ordering compliance by the Boilermakers' Society of Australia with Clause 19 (ba) (i) of the Award made on the 16th day of January 1952 by Mr. Conciliation Commissioner Galvin and known as the Metal Trades Award AND ALSO TO SHOW CAUSE why the said Boilermakers' Society of Australia should not be enjoined pursuant to Section 29 (1) (c) of the said Act from committing or continuing a breach or non-observance of the said Clause 19 (ba) (i) of the Award UPON THE GROUNDS set forth in the Affidavits of Lancelot Ivor Sharp, and Dudley George Fowler sworn the 13th and 16th days of May 1955, respectively and
30 both filed herein.

The Orders which the claimant asks for herein are that it be ordered:—

1. That pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1952 the respondent, the Boilermakers' Society of Australia being a party to the Metal Trades Award made by Mr. J. Galvin, Conciliation Commissioner, on the 16th January 1952:—

(A) do comply with the provisions of paragraph (i) of sub-clause (ba) of clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban, limitation or restriction upon the performance of work in accordance with the
40 said Award, that is to say the ban limitation or restriction imposed on or about the 15th day of April 1955 by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "D" being copy of Rule to Show Cause. 16th May 1955. *continued.*

(B) be enjoined from continuing the above mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of clause 19 of the said Award namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction.

(C) be enjoined from committing a breach or non-observance of the said award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said award that is to say a ban limitation or restriction by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales. 10

(D) do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales. 20

(E) be enjoined from continuing the breach or non-observance set out in paragraph (D) hereof, of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction.

(F) be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales. 30

(G) do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales. 40

(H) be enjoined from continuing the breach or non-observance set out in paragraph (G) hereof, of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction.

(I) be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to

or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales.

(J) be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales.

2. Such other or further order as to the Court seems proper.

3. The Respondent to pay to the Applicant the taxed costs of this application.

DATED at Sydney the 16th day of May 1955.

By the Court,

(L.S.) RICHARD ASHBURNER,

Judge.

THIS RULE WAS OBTAINED by Messieurs Salwey & Primrose of 155 King Street, Sydney, Solicitors for the Claimant.

NOTE: On the hearing of this application, it is the intention of the Claimant to call oral evidence.

## ANNEXURE " E " TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING TRANSCRIPT OF PROCEEDINGS IN MATTER No. 395 OF 1955 IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

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Annexure " E " being Transcript of Proceedings in Matter No. 395 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 31st May 1955.

IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION — No. 395 of 1955. 10

IN THE MATTER of the

METAL TRADES EMPLOYERS' ASSOCIATION

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA

(Application for orders under Section 29 (1) (b) and 29 (1) (c) of the Act re The Metal Trades Award—at Morts Dock and Engineering Company Limited.)

*Coram:* KIRBY, J. 20
DUNPHY, J.
ASHBURNER, J.

TRANSCRIPT OF PROCEEDINGS
AT SYDNEY ON TUESDAY, 31st MAY 1955, AT 3.25 P.M.

MR. FRANKI appeared for the applicants.

MR. BUCKLEY appeared for the Boilermakers' Society of Australia.

MR. FRANKI: This is an application for an order under s.29 (1) (d) and 29 (1) (c) of the Act against the Boilermakers' Society of Australia and the application arises out of certain trouble at Morts Dock, Balmain, near Sydney. 30

Your Honours Mr. Justice Kirby and Mr. Justice Dunphy may remember some prior proceedings in relation to that matter, not against the boilermakers, but against the Ironworkers' Association and the position is that the first trouble there occurred with ironworkers assistant riggers, to give Your Honours the background, and on 15th February twelve assistant riggers went on strike and are still on strike. On 31st March some eleven riggers assistants went on strike and then on 15th April an overtime ban was placed on by the ironworkers and also by the boilermakers.

The Company employs some 139 boilermakers in the boiler shop 40 and the assistant delegate and delegate informed the Company's representative on 15th April 1955 that no further overtime would be worked until certain men who had been stood down as the result of this other strike of the ironworkers were put back in work. That overtime ban continues up to the present time, and on 10th and 11th May certain boilermakers were requested to do some work on a ship called the " Poul-Carl " and they declined to do that work and left the premises.

Those are the bare facts of the case. It is a tragic case, if I may put it that way. One ship particularly, the "Poul-Carl", has been held up for some considerable time. There is little work to be done on this ship which has been held up and there are some 27 members of the crew who are just waiting on board the ship. I put it to Your Honours that the whole circumstances are most tragic, not only in the interests of the Company and the employees, but also in the interests of the public as well.

Now, Your Honours, I think I might commence by formally tendering a certified copy of the Metal Trades Award.

EXHIBIT. **EXHIBIT "A"—Metal Trades Award (Annexure "A")**

MR. FRANKI: Then I next move to the rule to show cause in this case. The orders asked for are set out in the rule, I think if I just direct Yours Honours' attention to the framework of it. Orders are asked for under Clause 29 (1) (b) and 29 (1) (c) and if you look at the orders commencing at the top of the second page you will see an order is asked for that "The Union comply with the provisions of paragraph (1) of sub-clause (ba) of Clause 19 by ceasing in any way to be a party to the overtime ban of the 15th April."

Paragraph (b) is that "The Union be enjoined from continuing that overtime ban; (c) that the Union be enjoined from committing a breach . . of this award overtime ban"; then (d) it is the same in effect as (a) but it is directed to this ban, limitation or restriction imposed on or about 10th May by way of a stoppage of work; (e) is that the Union be enjoined from continuing that same breach; (f) that the Union be enjoined from committing a breach by way of stoppage of work; (g) that the Union comply with the award by ceasing to be a party to a ban by way of a black ban on this ship; (h) that the Union be enjoined from continuing that breach; (i) that the Union be enjoined from committing a breach by way of a black ban and (j) is the general order—"That the Union be enjoined from committing a breach . performance of work."

KIRBY, J.: At the particular establishment?

MR. FRANKI: At the establishment. Those are the orders for which I am asking.

I move first on the affidavit of Dudley George Fowler sworn on the 16th May 1951.

KIRBY, J.: Do the affidavits upon which you rely set out the facts which you have stated to the Court in greater amplification?

MR. FRANKI: They do.

KIRBY, J.: Mr. Buckley, have you read the affidavits?

MR. BUCKLEY: Yes Your Honour.

KIRBY, J.: Do you want them read in their entirety in Court?

MR. BUCKLEY: No, I do not think so.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "E" being Transcript of Proceedings in Matter No. 395 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 31st May 1955. *continued.*

MR. FRANKI: I should say that I wish to make a small correction to Paragraphs 19 and 20.

KIRBY, J.: You tender the affidavit of D. G. Fowler of the 16th May?

MR. FRANKI: I do.

EXHIBIT. **EXHIBIT "B"—Affidavit of D. G. Fowler sworn 16/5/55 (Annexure "C")**

KIRBY, J.: Mr Buckley, if you want all or any part of it read out it can be done.

MR. BUCKLEY: No, I do not want it.

KIRBY, J.: Then, Mr. Franki, you have the affidavit of L. I. Sharp of the 13th May? 10

MR. FRANKI: Yes, and I seek leave to correct one paragraph.

EXHIBIT. **EXHIBIT "C"—Affidavit of L. I. Sharp of 13/5/55 (Annexure "B")**

MR. FRANKI: Would you go into the box, Mr. Sharp.

LANCELOT IVOR SHARP, sworn:

MR. FRANKI: Your full name is Lancelot Ivor Sharp and you reside at 241 Balmain Road, Leichhardt?—That is correct.

And you are the industrial officer of Morts Dock and Engineering Co. Limited?—I am. 20

And you swore the affidavit which has just been tendered in this matter?—I did.

I think you wish to correct a matter in para. 19. It reads: "I am informed . . . and verily believe that on Thursday the 12th day of May 1955 he requested approximately 13 . . . boilermakers to perform overtime work . 9 of the aforesaid boilermakers refused so to work . . . countermanded the said instructions to work overtime previously given to them". I think the first correction you wish to make is that you were informed by some person other than Mr. Finlay?—That is correct, there is some confusion. 30

By whom where you informed?—By Mr. Yates.

What is his position with the Company?—Foreman boilermaker in the Church Street boiler shop.

Is the substance of what you say you were informed there correct?—It is exactly as I was informed except that the name "Finlay" should be "Yates".

Were you also informed that something was said to Mr. Yates after the Company decided to countermand these instructions as to overtime?—Since the making of the affidavit I was informed by Mr. Yates that on his return to the Church Street boiler shop those men who had previously said they would work the overtime on the Saturday, stated they could not now work on account of the overtime ban. 40

Passing to Para. 20—"The strike of ironworkers and boilermakers and the aforesaid bans are having a very serious defect upon the Company's work. . . . The Company has had to refuse certain repair work which would require boilermakers' work during overtime hours".

Has it also had to reduce certain dockings?—Some of the work we could not take was connected with the docking of a vessel, in addition to repair work which did not require docking.

Why could not the Company take dockings?—In the event of boilermakers' work being necessary after the vessel was surveyed, it could not have been performed in the absence of other employees who were still on strike.

Then it goes on—" The aforesaid 'Poul-Carl' on which work has been held up . . requires less than 2 days' work to complete the work being done on it. . I am informed and verily believe that very heavy demurrage charges are payable on a daily basis ". In addition to that, do you know how many members of the crew are on the "Poul-Carl" at the present time?—27 including the Captain.

And the vessel is about 2½ thousand tons?—Just 2,500.

And in effect this strike is causing that crew to simply remain on the vessel without any really useful work being performed?—That is correct. There is no useful work they can do, the ship is lying at the wharf.

Then it goes on—" The fitting out of a new ship 'Baralga' has been practically at a standstill since the 31st March 1955 ". Do you want to qualify that?—The superstructure and work on this new vessel cannot be proceeded with and carried out according to schedule because of the current disputes at the dockyard.

From the time you swore this affidavit on the 13th May 1955, is this overtime ban by boilermakers still in existence?—Yes, it is still in existence.

And these boilermakers who ceased work on the 10th and 11th May, have they returned to work?—The have not returned to work.

Were you informed by Mr. Finlay about a conversation which he had with Mr. Gilbert on Monday 23rd May and on Friday 25th May?—Yes, I was informed of that by Mr. Finlay.

What position does Mr. Finlay occupy with the Company?—At that time he was acting foreman boilermaker, normally he is assistant foreman boilermaker.

And Mr. Gilbert?—He is the delegate boilermaker.

What were you told of this conversation between Mr. Finlay and Mr. Gilbert?—On Monday of last week Mr. Finlay asked Mr. Gilbert what could be done about the overtime ban by the boilermakers as there were a couple of jobs he could not get on with. Mr. Gilbert replied he would see the Secretary of the Sydney branch, Mr. Grant and would see what the position was. On Friday last Mr. Gilbert reported to Mr. Finlay that he had seen Mr. Grant the previous night and that Mr. Grant had said that as there are still two of the boilermaker members unemployed they would have to get over that position before they could do anything about the overtime ban.

About 1 o'clock today Mr. Gilbert repeated those facts to me and informed me that was the position when he spoke to Mr. Grant on Friday night.

Did you have a conversation with Mr. Gilbert after some meeting was held at the works?—That conversation I have just referred to followed a meeting of boilermakers at Morts Dock during the lunch hour.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "E" being Transcript of Proceedings in Matter No. 395 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 31st May 1955. *continued.*

Did Mr. Gilbert report any resolution which the meeting had carried?—He gave me the text of it, it is quite lengthy.

Would you tell Their Honours what he told you?—Mr. Gilbert reported to me that a meeting of boilermakers had been held during lunchtime and that the following resolution had been framed and carried by the meeting:

> "This meeting of boilermakers at Morts Dock boilershop points out that we have refrained from working overtime because of a long-standing policy of not doing so in the event of our members being stood down or unemployed. We have no dispute with the Company apart from this. Our refusal to work springs directly from the policy of the Company of standing-down men who had adequate work to keep them employed at the time. This applies particularly in the case of several welders who were not directly affected by the dispute and could have been gainfully employed. Our attitude has been stiffened by the provocative attitude of the Company in suspending our delegate and several other men who considered that they were being asked to perform jobs which were directly in dispute. We declare that there is no barrier on our part to an immediate return to overtime if the Company is prepared to re-instate those of our members who are unemployed, recall all persons who are suspended or stood-down when the situation permits, and will give an assurance not to engage in any provocation of our members."

With regard to these members of the boilermakers who have been stood down, can you indicate approximately the number of men involved in that? I am not referring to any men who ceased work on the 10th or 11th May. I am referring to any stood down prior to that date?—To the best of my knowledge there were 12 boilermakers stood down. I cannot recall the dates exactly but it would be round about the early part of April. I was definitely assured that the first 7 were stood down on the evening of the 15th April.

Do you know why they were stood down, in broad terms?—On account of the dispute created by the boilermakers and the absence of the riggers and their assistants.

MR. BUCKLEY: It is stated here that there is a black ban in operation. Could you tell us who put that ban into operation?—It is not stated in my affidavit.

It is in the summons. Clause (g) in the summons states—" . . by ceasing in any way directly or indirectly to be a party to or concerned in a ban or limitation or restriction upon performance of work . . . by way of a black ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales". Will you tell us who imposed that black ban and what it was imposed on?

THE WITNESS: I have never claimed that there was any black ban on. I challenged the delegate at that time that the boilermakers refused to carry out certain work as directed. He gave as his reason that the

job was in dispute, and I asked him then did that mean in effect that there was a black ban on it and he denied there was, but they kept referring to the job as being in dispute.



MR. BUCKLEY: You are not inferring that there is a black ban on at your establishment?—I have never claimed that there is.

Taking your particular case in regard to the men who were laid off, the shop delegate in particular, can you tell me what work he was ordered to do?—He was ordered, with another boilermaker and two assistants, to erect some deck beams and side frames, and part of his work

10 would have been to cut away portion of a bulkhead, and he claimed that he could not do it because of the fact that rigging work was involved.

Isn't it a fact that the delegate Origlass was sent to do that job originally?—The delegate Origlass and two other ironworkers were formed into what was to work as a rigging squad to do certain work in connection with the same repair, but they declined to do any work connected with the rigging. The work Mr. Sponberg was asked to perform together with the other two boilermakers' assistants, had nothing to do with the rigging outside the ship.

20 Isn't it a fact that the boilermakers were told to do rigging work?—No, it is not a fact. There was no rigging work involved whatever.

You agree that Mr. Origlass was sent there with two other ironworkers. They did not do the rigging work?—They were to do certain rigging work outboard to enable the frames to be taken up when the plates were ready to go on.

Isn't it a fact that when they did not do it the boilermakers were expected to do this work?—No—an alternative method of getting the frames up before the plates went on. It is work, if it was refused by other boilermakers and similar work was refused by boilermakers, we

30 would not have a job done in the yard. It is a type of work done by boilermakers and their mates and on much bigger jobs.

You contend then that the Company was carrying out its normal work?—They were only asked to do the function of a boilermaker and his mate on this particular repair.

Can you give us any reason why the boilermakers would refuse to do this particular work which they have normally been accustomed to do?—Sponberg told me the reason was that the riggers had taken the job down originally and stacked the frames and deck beams and deck brackets on the deck, therefore it was a rigger's work to replace them.

40 How were these men laid of? I am speaking now of the shop delegate Sponberg?—Delegate Sponberg and a boilermaker named Davidson were the first two sent to the job and were directed by a foreman to erect the deck beams and the ship side frames. There was some argument as to the way in which the job was to be done. They wanted to know what would happen if they did not do the job, and the foreman told them that was the only job he had for them and unless they did it there was nothing else for them and they were told they would be considered as being on strike if they refused. They claimed that they were stood down.

MR. BUCKLEY: They were laid off?—They walked off the job. They elected to leave the job rather than do it.

Isn't it a fact that the foreman laid them off?—No. The foreman did not at any time tell them they were finished or laid off. They were told they would be considered to be on strike if they refused to do the work.

I have no further questions, Your Honours.

RE-EXAMINED BY MR. FRANKI:

After Mr. Sponberg and Mr. Davidson declined to do this particular job on the ship, did you have a conversation with them later in the morning?—Yes. 10

Do not go into too much detail but did you indicate to them that it was still open for them to return to the vessel and do the job?—I invited Mr. Sponberg and Mr. Davidson to go back to the ship, and the Works Manager and the Acting Foreman were prepared to go and show them how the job was to be done and could be done as a normal function of a boilermaker and his mate, and they declined even to go back to the ship. Mr. Sponberg said they could not go back to the ship as it was in dispute and they then went out of the gate.

(*The witness withdrew*).

MR. FRANKI: That is my case, Your Honours. 20

KIRBY, J.: Yes, Mr. Buckley.

MR. BUCKLEY:

Your Honours, I believe the resolution as read out by the witness, Mr. Sharp, expresses the views and the reasons why there is any dispute at all at Morts Dock. The men themselves down there carried this dispute forward and it is only of recent date that the Union has had any say in this matter at all. The result is that there has been some move towards a settlement of this dispute. I think Your Honours will appreciate this very fact to know that where a dispute of this character with another Union is involved and where a Union whose members 30 work in very close contact with the boilermakers is involved, we would be in a very difficult position to instruct our members to do any work which normally belongs to that of another organization.

We have been pulled into this dispute by the men down there by very reason of the fact, as we view it, of provocation on the part of the Company; that is, that members of our organization were sent to do work which would normally involve a rigger being employed on the work, probably in conjunction with a boilermaker.

It is also asserted by our members that the shop delegate was dismissed because he refused to do the work. Consequently the 40 question of a strike, as far as he is concerned, does not come into it.

I do not think there is anybody else that the Company refers to so specifically as the shop delegate Sponberg as being on strike—that is according to the evidence anyhow.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "E" being Transcript of Proceedings in Matter No. 395 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 31st May 1955. *continued.*

However, I feel the position at the moment is that our members are prepared to enter into discussion with the Company in order to overcome this position, and that is embodied in the resolution which was passed to-day.

I want to emphasize the fact that the Union officers could not possibly instruct their members to carry out the work of a rigger who is on strike. That stands as a matter of commonsense. So there is not much more I can say on the question at all. In actual fact the moves that have been taken to-day I think were taken by the Union officials, and for that reason I submit there should be no action against the Union, but that these negotiations should be allowed to take place.

MR. FRANKI: If Your Honours please, I submit this is a clear case where an order should be made. The Union in this case has not seen fit to call any evidence at all to put before Your Honours. There is no evidence, I submit, that the Union has taken any steps to direct these men to return to work or has taken any steps at all in relation to this trouble.

Now Mr. Buckley has suggested that the men who ceased work on the 10th and 11th were not on strike. It was open to him to call any evidence to rebut, if he thought be could, any evidence given by Mr. Sharp. Mr. Sharp's evidence is capable of only one possible interpretation, and that is that Sponberg, the delegate, and Davidson, were instructed to do work which Mr. Sharp says was purely and simply boilermakers' work. They were instructed to do this work but they declined to do it. Later on in the morning he said, "The opportunity is still open to you; you can still do it now," and they walked off the job.

That, Your Honours, I submit, is clearly a strike and clearly an illegal strike. Now the same position exists, of course, with the same general refusal to work existing as set out in paragraphs 16 and 17 of the affidavit—with four more boilermakers—or 15, 16 and 17,

6 more boilermakers on the 11th May They all declined to do this work, saying that while any job was in dispute—taking paragraph 15—the two boilermakers Moore and Williamson and the then acting delegate of the Boilermakers' Society at the Company's works, Mr. Graham, who had been appointed to replace Mr. Sponberg, told Mr. Wall, the officer of the Company, they would not do work of that nature, that while any dispute existed they would not touch it, and a refusal to carry out the same work was received from Graham and Stewart and from Doyle and Robinson. There is a concerted refusal by eight members of the Union to do work which is said to be boilermakers' work—work which the Company was entitled to ask these men to do and which they refused to do and left the works.

DUNPHY, J.: There is a demarcation provision in the award, is there not—provision for appointment of a Demarcation Board?

MR. FRANKI: There is a Board of Reference which has power to deal with any matters of that sort.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "E" being Transcript of Proceedings in Matter No. 395 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 31st May 1955. *continued.*

MR. FRANKI: They have the power under 23 (g) (read). I mean, that would clearly cover it and the machinery of conciliation and arbitration could have been set in motion by the employees if they had thought fit to do so, but there has been no attempt to do it and I submit that as far as that aspect is concerned and what happened on 10th and 11th May that on the evidence there is a clear strike, and I also ask Your Honours to draw the inference—notwithstanding Mr. Sharp's statement—he did not allege there was any black ban on the works—I would also ask Your Honours to draw the inference that there is a black ban on this particular job. Mr. Sharp said it was the job that was in dispute and they keep referring to it as such. But the fact is that they were not prepared to work on it. 10

KIRBY, J.: Is there any difference between a ban and a black ban? Is "black ban" a term of art?

MR. FRANKI: It is not used in that sense. I thought it was a ban on doing certain work and that is the way I put it to Your Honours. The order asked for is in relation to the ban, limitation or restriction imposed on or about the 10th day of May by way of a black ban at the establishment of the Morts Dock Engineering Company, Balmain. I think it is difficult to find the word or words to accurately describe it. 20

KIRBY, J.: Unfortunately the position is that your witness, Mr. Sharp, said he did not regard it as such. I take it from that he meant he did not mean to convey by his description of the events of about 10th May this year that they constituted a black ban. They clearly seemed to constitute a ban of some sort.

MR. FRANKI: Perhaps I might seek leave to amend the orders (g) (h) and (i) by deleting the word "black"

MR. BUCKLEY: There is no ban on the establishment at all, black or white.

KIRBY, J.: Take (g) first. 30

MR. FRANKI: I would ask leave to delete the word "black" and to insert after the word "black", "ban on work on the Poul-Carl", so it would then read—without reading the first few lines: "that is to say, a ban, limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on the Poul-Carl at the Morts Dock and Engineering Company Limited.

KIRBY, J.: Very well, the rule is amended and enlarged.

MR. FRANKI: I would ask for the same amendment in (i). (h) refers to the said ban and will not require any amendment. I would ask leave to amend (i) in the same way for work on the Poul-Carl. 40

KIRBY, J.: "Black" will be deleted, and "on work on the Poul-Carl" will be inserted immediately after "ban".

MR. FRANKI: I would ask for that leave to be granted.

KIRBY, J.: Very well. Those are the only amendments required and leave is granted to make them.

MR. FRANKI: I do not need I should elaborate on what I have put to Your Honours on that aspect. I think the ban has been shown and the strike has been shown, and my friend has not seen fit to call any evidence himself. So far as the overtime ban is concerned, that of its very nature is self-evident. Nobody disputes there is an overtime ban. There was some resolution passed to-day apparently which referred to the overtime ban being put on because of some long-standing policy of the Union that you cannot work overtime when members are stood down.

10 Your Honours see that the evidence is that these boilermakers were stood down because of the ironworkers strike. They were stood down because that had affected the work. That is not contradicted by my friend and it seems to me that that it is the only evidence and must be accepted. Then the boilermakers say " So long as you are going to stand any men down, we will not work any overtime ". Of course that cannot be the proper approach to the problem.

KIRBY, J.: In paragraphs 14 and 15, dealing with the same matter and that particularly in para. 14, the affidavit evidence is that Mr. Finlay requested Mr. Sponberg and Mr. Davis to carry out certain work on the " Poul-Carl " I am not clear in my recollection of the evidence
20 whether Mr. Sharp amplified that to say that that was a correction to perform work normally performed by boilermakers and to perform work within the award.

MR. FRANKI: I think is is fair to say he did.

KIRBY, J.: There is no evidence to the contrary but Mr. Buckley made the statement that they were called on to do work normally done by ironworkers.

MR. FRANKI: What Mr. Sharp said was that the work Sponberg and Davis were called upon to do was to erect deck beams and side frames He said it was work done by boilermakers and was the
30 normal function of a boilermaker and I think he was cross-examined on it. Anyhow, that is the note I have got. He also said that in the work Sponberg and Davis were asked to do, there was no rigging work involved at all, so that I think it can be accepted that the work was fairly stated by Sharp to be work that properly fell within the scope of boilermakers' work and he indicated that the work was, erecting deck beams and side frames.

There is one other aspect of the matter which has been left unexplained by my friend and nothing has been done about it. Your Honours see in para. 5 of Mr. Sharp's affidavit that in February 1955
40 there was a meeting of boiler shop employees held in the lunch hour between 12.15 and 1.30 at which the decision to finance striking riggers assistants had been re-affirmed. The boiler shop employees, of course, included 192 members of the Ironworkers' Association and 130 members of the Boilermakers' Society, so that the allegation is that at this stage there were contributions made to support this strike by the boilermakers. That has been left entirely uncovered by

In the High Court of Australia.

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

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my friend and no witness has been called on that aspect. There is no information before Your Honours as to whether or not that levy is continuing or not.

I submit that my clients are clearly entitled to these orders and I ask that Your Honours make the orders as asked.

KIRBY, J.: We have no alternative but to make the orders in the form in which they were sought, subject to the two amendments which were allowed. The Respondent organization must pay the costs of the proceedings and we express the hope that further proceedings will be rendered entirely unnecessary by the organization complying with the Order the Court now makes. 10

*At 4.15 p.m. the Hearing was concluded and the Court adjourned until 10.30 a.m. the following day, Wednesday, 1st June, 1955.*

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**ANNEXURE " F " TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING ORDER MADE IN MATTER NO. 395 OF 1955 BY THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.**

Annexure "F" being Order made in Matter No. 395 of 1955 by the Commonwealth Court of Conciliation and Arbitration, 31st May 1955.

IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION — No. 395 of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952. 20

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29 of the said Act.

METAL TRADES EMPLOYERS' ASSOCIATION - - Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA Respondent.

**Before Their Honours Mr. Justice Kirby, Mr. Justice Dunphy and Mr. Justice Ashburner.** 30

Tuesday the 31st day of May 1955.

WHEREAS upon application made on behalf of the above-named Metal Trades Employers' Association on Monday the 16th day of May instant a Rule to Show Cause was made by his Honour Mr. Justice Ashburner in Chambers herein that the Boilermakers' Society of Australia (hereinafter called the Respondent) Show Cause before this Court in Sydney on Tuesday the 31st day of May instant at the hour of 10.30 o'clock in the forenoon why Orders should

not be made by this Court under Section 29 (1) (b) of the Conciliation and Arbitration Act 1904-1952 that the above-named Respondent should comply with Clause 19 (ba) (i) of the Award made on the 16th day of January 1952 by Mr. Conciliation Commissioner Galvin and known as the Metal Trades Award and also to Show Cause why the said Respondent should not be enjoined pursuant to Section 29 (i) (c) of the said Act from committing or continuing a breach or non-observance of the said Clause 19 (ba) (i) of the said Award and the said Rule to Show Cause coming on for hearing this day AND UPON READING the affidavits of Dudley George Fowler and Lancelot Ivor Sharp sworn on the 16th and 13th days of May instant respectively and both filed herein AND UPON HEARING oral evidence called by the Metal Trades Employers' Association in support of the application no oral evidence being called on behalf of the Respondent AND UPON HEARING Mr. R. J. A. Franki of Counsel for the Metal Trades Employers' Association AND UPON HEARING Mr. A. R. Buckley of Counsel for the Respondent THIS COURT DOTH ORDER that the said Rule to Show Cause, as amended, be and the same is hereby made absolute AND THIS COURT DOTH FURTHER ORDER that pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1952 the Respondent, the Boilermakers' Society of Australia, being a party to the Metal Trades Award made by Mr. J. Galvin, Conciliation Commissioner, on the 16th day of January 1952 do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban, limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban, limitation or restriction imposed on or about the 15th day of April 1955 by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the above-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a stoppage of work at the establishment

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "F" being Order made in Matter No. 395 of 1955 by the Commonwealth Court of Conciliation and Arbitration, 31st May 1955. *continued.*

of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of this said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND THIS COURT DOTH FURTHER ORDER that the Respondent shall pay the costs of the Metal Trades Employers' Association as taxed by the proper officer of this Court.

By the Court,

(L.S.) R. C. KIRBY,

Judge.

ANNEXURE " G " TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING SUMMONS ISSUED ON BEHALF OF METAL TRADES EMLOYERS' ASSOCIATION.



IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION No. of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29A of the said Act.

METAL TRADES EMPLOYERS' ASSOCIATION Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA - Respondent.

TO: The Boilermakers' Society of Australia.

You are hereby summoned to appear before the Commonwealth Court of Conciliation and Arbitration at 119 Phillip Street Sydney in the State of New South Wales at 10.30 o'clock in the forenoon on Tuesday the 28th day of June 1955 to answer a charge that you have been guilty of contempt of the Commonwealth Court of Conciliation and Arbitration and to show cause why you should not be punished by the imposition of a fine for that you did commit contempt of the said Court between the 1st day of June 1955 and the 20th day of June 1955 both days inclusive by wilfully disobeying an order of the said Court, to wit an order made in this matter by the said Court on Tuesday the 31st day of May 1955 by which said order it was ordered that pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1952 the Respondent, the Boilermakers' Society of Australia, being a party to the Metal Trades Award made by Mr. J. Galvin, Conciliation Commissioner, on the 16th day of January 1952 do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 15th day of April 1955 by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the above-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "G" being Summons issued on behalf of Metal Trades Employers' Association, 23rd June 1955. *continued.*

being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales IN THAT CONTRARY TO THE SAID ORDER you were in any way directly or indirectly a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales namely a ban limitation or restriction by way of a strike of twelve riggers' assistants members of the Federated Ironworkers' Association of Australia which commenced on the 15th day of February 1955 and of eleven riggers members of the Federated Ironworkers' Association of Australia which commenced on the 31st day of March 1955 AND FURTHER you were in any way directly or indirectly a party to or concerned in a ban limitation or

restriction upon the performance of work in accordance with the said Award at the said establishment namely the aforesaid strikes of the aforesaid ironworkers.

DATED at Sydney this 23rd day of June 1955.

(L.S.) J. C. WELBOURN, Deputy Industrial Registrar.

This Summons is issued on behalf of Metal Trades Employers' Association Industrial Organisation of Employers, by Messieurs Salwey & Primrose, Solicitors of 155 King Street, Sydney.

10 NOTE: The applicant intends to call oral evidence at the hearing of this Summons.

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Annexure "H" being Affidavit of Lancelot Ivor Sharp Sworn 23rd June 1955.

**ANNEXURE "H" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING AFFIDAVIT OF LANCELOT IVOR SHARP.**

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IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION No. of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29A of
20 the said Act.

METAL TRADES EMPLOYERS' ASSOCIATION Claimant

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA Respondent.

ON this 23rd day of June 1955 LANCELOT IVOR SHARP of 241 Balmain Road, Leichhardt, in the State of New South Wales, Industrial Officer, being duly sworn makes oath and says as follows:—

1. I am employed by Morts Dock and Engineering Company Limited
30 as an Industrial Officer and have been so employed over the last seven years. The said Company carries on the business of ship builders ship repairers and engineers at its works at Morts Bay, Balmain.

2. At the said works the Company employs in its boiler shop approximately 192 members of the Federated Ironworkers' Association of Australia and approximately 130 members of the Boilermakers' Society of Australia.

*In the High Court of Australia.*

No. 1.
Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "H" being Affidavit of Lancelot Ivor Sharp Sworn 23rd June 1955. *continued.*

3. In January 1955 a demand was made that all Ironworkers employed in rigging gangs should be paid riggers' rates of pay. This demand was refused by the Company.

4. On the 15th February 1955 eleven riggers' assistants members of the Federated Ironworkers' Association of Australia performing work under the provisions of the Metal Trades Award at the Company's works went on strike and have been on strike up to the time of swearing this my affidavit.

5. On Friday, 25th February 1955, at 1.40 p.m. Mr. Harlor, an organizer of the Federated Ironworkers' Association of Australia at the Company's works, came and saw me at my office and informed me that a combined meeting, of boiler shop employees had been held between 12.15 p.m. and 1.30 p.m. at which he had been present and informed me that at the meeting the decisions to finance the striking riggers' assistants had been re-affirmed. He also said that in addition it had been decided to increase the voluntary levy from 5/-d. to 8/-d. per week per man. I asked him whether there was any possibility of the strikers deciding to return to work when next they met on Tuesday, 1st March. He replied that he did not think so seeing that the boiler shop employees were still prepared to finance them, and they would receive almost the full amount of their usual wages from the increased levy and the Union's strike pay, and could remain out on strike almost indefinitely.

6. On the 23rd March 1955 orders under Section 29 (1) (b) and Section 29 (1) (c) of the Commonwealth Conciliation and Arbitration Act 1904-1952 were obtained by the Metal Trades Employers' Association against the Federated Ironworkers' Association of Australia in respect of the above-mentioned strikes. On the 20th day of May 1955 this Honourable Court found the Federated Ironworkers' Association of Australia guilty of contempt of Court for failing to obey the aforesaid orders and imposed no fine and ordered the Federated Ironworkers' Association of Australia to pay the Applicant's costs assessed at one hundred and fifty guineas. On the 14th day of June 1955 this Honourable Court again found the Federated Ironworkers' Association of Australia guilty of contempt of Court for breach of the aforesaid orders and on this occasion fined the said Union the sum of Five hundred pounds (£500) and also ordered it to pay the taxed costs of the Applicant.

7. On Thursday, 31st March 1955, Mr. N. Origlass, the shop steward of the Federated Ironworkers' Association of Australia at the Company's works, at about 1.15 p.m. informed me that there had been a combined meeting of ironworkers and boilermakers employed in the boiler shop during the lunch hour and that it had been decided at the meeting that all boiler shop riggers cease work forthwith. The boiler shop riggers had not started work at the usual starting time at 12.45 p.m. The number of boiler shop riggers employed on 31st March 1955 was nine. The said nine boiler shop riggers who were performing work under the provisions of the Metal Trades Award at the Company's works are still on strike at the time of swearing this my affidavit.

8. I am informed by Mr. A. Finlay, Assistant Foreman Boilermaker of the Company, and verily believe, that at about 4 p.m. on Friday the 15th April 1955 Mr. L. Gilbert and Mr. A. Graham, assistant co-delegates of the Boilermakers' Society of Australia, at the Company's works informed him that as it was a definite Union policy not to work overtime when men were stood off,

no further overtime would be worked by boilermakers at Morts Dock until the men who were being stood down that night were reinstated. Prior to this intimation to Mr. Finlay seven boilermakers had been given notice that they would be stood down as from that night. The aforesaid overtime ban by the boilermakers continued until the 1st day of June 1955.

9. On Tuesday, 10th May 1955, I am informed by the aforesaid Mr. A. Finlay and verily believe that he requested the aforesaid Mr. Sponberg and a boilermaker, Mr. Davidson, to carry out certain work on a ship called the "Poul-Carl" on which work had been suspended since the commencement of the strike of riggers on the 31st March 1955. The aforesaid Mr. Sponberg and Mr. Davidson refused to perform this work and left the vessel where they had been asked to perform the work at about 9 a.m. Later in the morning the aforesaid Mr. Sponberg and certain other persons had a meeting with me at which Mr. Sponberg said that the policy of the boilermakers had always been and always would be not to infringe on the rights of the riggers or any other employees who may be on strike. Mr. Sponberg said that he had been dismissed but I stated that I regarded him as being on strike. At about 11.30 a.m. on the same day Mr. Sponberg and Mr. Davidson left the works and have not, apart from the circumstances set out in paragraph 17 hereof, returned up to the time of swearing this my affidavit.

10. On Wednesday the 11th May 1955 I am informed by the aforesaid Mr. Finlay and verily believe that two other boilermakers, Mr. Moore and Mr. Williamson, were asked to carry out the work which Mr. Sponberg and Mr. Davidson had refused to perform on the previous day. I am also informed by the aforesaid Mr. Finlay that thereafter at about 8.30 a.m. the two boilermakers and the then acting delegate of the Boilermakers' Society of Australia at the Company's works, Mr. Graham, who had been appointed to replace Mr. Sponberg, told Mr. Worland, Assistant Foreman of the Company, that they would not do the work asked of them and that while any job was in dispute no boilermaker would touch it. The aforesaid Mr. Moore and Mr. Williamson then left the works and have not returned up to the time of swearing this my affidavit.

11. I am also informed by the aforesaid Mr. Finlay that at about 9.20 a.m. on the said 11th day of May 1955 he instructed two other boilermakers, the said Mr. Graham and Mr. Stewart, to do the work which the four other boilermakers had refused to do. Both these last-mentioned boilermakers declined to perform the work and left the works and apart from the circumstances set out in paragraph 17 hereof have not returned at the time of swearing this affidavit.

12. At about 11.15 a.m. on the said 11th day of May 1955, I am informed by the aforesaid Mr. Finlay that he directed boilermakers, Mr. Doyle and Mr. Robertson, to carry out the aforesaid work but that they both refused and left the works, and they have not returned up to the time of swearing this affidavit.

13. On Wednesday the 11th day of May 1955 I had a conversation with Mr. R. Phillips, an organizer of the Boilermakers' Society of Australia, on the telephone and the question of the refusal of the boilermakers to work on the "Poul-Carl" and the overtime ban was discussed.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "H" being Affidavit of Lancelot Ivor Sharp Sworn 23rd June 1955. *continued.*

14. I have been informed by Mr. Parkin, the Works Manager of the Company that he attended a meeting on the 12th day of May 1955 at which were present inter alia the aforesaid Mr. Phillips, organizer of the Boilermakers' Society of Australia and the aforesaid Mr. Sponberg and the aforesaid Mr. Doyle. At the aforesaid meeting I am informed by the aforesaid Mr. Parkin and verily believe that he handed to the aforesaid Mr. Phillips a typewritten statement in the following terms, "While the boilermakers employed by this Company continue to take part in an illegal strike by their combined meetings with the assistants and by financially supporting the strikers, they are obstructing a settlement of the dispute, and are also inciting 10 the assistants to ignore the Arbitration Court's order and their Union officials instructions to return to work, and work in accordance with their Award. The management will not interview any boilermakers' Union official as long as the above position exists." I am also informed by the aforesaid Mr. Parkin and verily believe that on the same day, the 12th May 1955, at about 1 p.m. the aforesaid Mr. Phillips made the following request to him, "That the management do not irritate the position at present by directing employees to do the work on s.s. "Poul-Carl" until the executive of the Boilermakers' Society has dealt with the matter".

15. On Tuesday the 31st May 1955 this Honourable Court made orders 20 against the Boilermakers' Society of Australia under Section 29 (1) (b) and Section 29 (1) (c) of the above Act.

16. On the 1st day of June 1955 I was informed by the aforesaid Mr. Phillips that all bans had now been lifted. At the same time Mr. Parkin said to Mr. Phillips that if any two of the boilermakers who were considered as being on strike over the "Poul-Carl" trouble were prepared to return to work and carry on as instructed on the vessel the Company would not ask any boilermaker to do any work that was normally done by ironworkers. Mr. Phillips replied that he would endeavour to call a meeting of the eight boilermakers involved. 30

17. I am informed by Mr. A. Laughlin, foreman boilermaker at the Company's works, and verily believe that on the 6th day of June 1955 boilermakers Mr. Sponberg and Mr. Graham presented themselves for work at the usual starting time. They were instructed to report on the "Poul-Carl" together with ironworker Mr. Moore. Ironworker Mr. Moore refused to carry out the duties required of him, saying the work was still in dispute. The then delegate for the Federated Ironworkers' Association, Mr. Sommerville, then discussed the matter with Mr. Moore and Mr. Moore still refused to do the work as directed whereupon he was told by the aforesaid Mr. Laughlin that he was considered as being on strike. Later in the 40 same day a further attempt was made to get the work done on the "Poul-Carl" with the aforesaid Mr. Sponberg and Mr. Graham and Mr. Moore and another ironworker Mr. Gallagher. However, both ironworkers refused to perform the duties asked of them and they were both told they were considered as being on strike and both left the Company's works at about 2 p.m. that day and have not returned since. In view of the fact that the ironworkers had refused to perform their duties the aforesaid Mr. Graham and Mr. Sponberg were then stood down and have remained stood down ever since.

18. From time to time on Friday evenings during the continuance of the said strikes and particularly on Friday the 3rd, 10th and 17th days of June 50

1955 I have observed collections of money being made on the footpath outside the Company's works. On the three last-mentioned dates Mr. Sponberg had a list upon which he was writing the names and the amount collected and Mr. Graham was receiving money and had in his hands at the time a bundle of notes together with a money bag containing silver. On the said 10th day of June 1955 at the time of the aforesaid collection I heard the aforesaid Mr. Graham call out, " Here you are sick fund and strike ".

19. I was present throughout the hearing of the second contempt proceedings against the Federated Ironworkers' Association of Australia heard by this Honourable Court on the 14th day of June 1955 and in those proceedings certain striking ironworkers were called to give evidence. Their evidence covered the collection of funds to support the strikers referred to in paragraph 18 hereof. During this evidence and during the whole of the case I observed in Court Mr. H. Grant the secretary of the Sydney No. 1 Branch of the Boilermakers' Society of Australia and also the aforesaid Mr. R. Phillips.

20. The aforesaid strikes of the aforesaid ironworkers are causing great loss to certain of the Company's clients and to the Company. The said "Poul-Carl" on which work has been held up since the 31st March 1955 requires only about two days' work to complete the work to be done on it. This ship carries cargo on the Australian coast and I am informed and verily believe that very heavy charges amounting to about £9,000 per month are payable on a daily basis and that the full crew of twenty-seven persons is still aboard the ship performing no effective work. In addition work in connection with the super-structure and crew accommodation on a new ship " Baralga " which has cost to date about £725,000 exclusive of engines has been practically at a standstill since the 31st March 1955. Work on a new dredge being constructed for the Maritime Service Board has been severely retarded since the 31st March 1955 and is now almost completely held up. A ship "Tambua" belonging to the Colonial Sugar Refining Company Limited and fitted for the purpose of bulk carrying of sugar and molasses arrived at the Company's works on 20th January 1955 for a periodical survey and for certain alterations and additions to be made to crew accommodation. The total cost of the work was to have been about £200,000. The ship trades to Fiji and surrounding islands and the sugar season commences in July. This ship is the only Australian ship at present fitted for the purpose of carrying molasses in bulk. Due to the aforesaid strikes practically no work is progressing on the said ship at present and it is anticipated that the work to be completed will take a further five months after the termination of the said strikes. The Company in addition to the general disruption of its work has had to stand down approximately forty-one boilermakers and approximately thirty-three ironworkers due to the strike and about ten boilermakers have also resigned during the period of the strike. In view of the serious position it is respectfully requested that this Honourable Court hear this matter as a matter of extreme urgency.

SWORN by the Deponent on the 23rd day of June One thousand nine hundred and fifty-five at Sydney, } L. I. SHARP.

Before me :

D. SULLIVAN, J.P.

A Justice of the Peace.

**ANNEXURE "I" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING AFFIDAVIT OF RONALD GORDON FRY.**

IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION    No.    of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29A of the said Act.

METAL TRADES EMPLOYERS' ASSOCIATION    Claimant

10

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA    -    Respondent.

ON this 23rd day of June 1955 RONALD GORDON FRY of 7 Wynyard Street, Sydney, in the State of New South Wales, Assistant Secretary, being duly sworn makes oath and says as follows:—

1. I am the Assistant Secretary of the Metal Trades Employers' Association (hereinafter called the Association), Industrial Organization of employers registered under the Conciliation and Arbitration Act 1904-1952 and am authorised to make the application herein.

20

2. Morts Dock and Engineering Company Limited is and at all relevant times has been a member of the Association and is a cited respondent to the said Metal Trades Award.

3. The Boilermakers' Society of Australia (hereinafter referred to as the Union) and the Federated Ironworkers' Association of Australia each is an organization of employees registered under the provisions of the above-mentioned Act and as such each is an organization a party bound by the Metal Trades Award.

4. On the 12th day of May 1955 I am informed and verily believe a letter from the Claimant was handed personally to Mr. Burge an official of the Boilermakers' Society of Australia and who I believe to be the president, at the Society's registered office at Daking House, Rawson Place, Sydney, in the following terms:—

30

"

Mr. A. R. Buckley,    11th May, 1955.
Federal Secretary,
Boilermakers' Society of Australia,
Daking House,
Rawson Place,
SYDNEY.

40

Dear Sir,

MORTS DOCK AND ENGINEERING CO. LTD.

I draw your attention to the fact that there has been a strike since 15th February 1955 by a number of members of the Federated Ironworkers'

Association of Australia employed by the above-mentioned Company at Balmain and this strike is still continuing.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "I" being Affidavit of Ronald Gordon Fry Sworn 23rd June 1955. *continued.*

On the 18th April 1955 members of your Union employed by the above Company imposed a ban on all overtime work both maintenance and ship repair work. It would appear that a few boilermakers were of necessity stood down by reason of the strike by ironworkers. This ban by boilermakers still continues and I am further informed that certain boilermakers have refused to perform work on the grounds that the work is in dispute with the members of the Federated Ironworkers' Association.

10 I am also informed that members of your Society have been giving financial support to the members of the Federated Ironworkers' Association who are on strike.

I am bringing this matter to your notice as you are no doubt aware that there is an obligation on your Union to ensure that it is not concerned with any such ban, limitation or restriction on the performance of normal work by your members employed under the Metal Trades Award at the Company's establishment.

In the circumstances failing prompt action by your Union to bring these bans to an end it is intended to proceed early next week against your Union 20 in the Arbitration Court for Orders under Section 29 (1) (b) and Section 29 (1) (c) of the Act.

Yours faithfully,

D. G. FOWLER,

(D. G. FOWLER).

Secretary.

"

5. I charge the Respondent the Boilermakers' Society of Australia with being guilty of contempt of the Commonwealth Court of Conciliation and Arbitration for that the Respondent did commit contempt of the said Court 30 between the 1st day of June 1955 and the 20th day of June 1955 both days inclusive by wilfully disobeying an order of the said Court to wit an order made in this matter by the said Court on Tuesday the 31st day of May 1955 by which order it was ordered that pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1952 the Respondent, the Boilermakers' Society of Australia, being a party to the Metal Trades Award made by Mr. J. Galvin, Conciliation Commissioner, on the 16th day of January 1952 do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance 40 with the said Award, that is to say the ban limitation or restriction imposed on or about the 15th day of April 1955 by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the above-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or

concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales IN THAT CONTRARY TO THE SAID ORDER the Respondent was in any way directly or indirectly a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales namely a ban limitation or restriction by way of a strike of twelve riggers' assistants members of the Federated Ironworkers' Association of Australia which commenced on the 15th day of February 1955 and of eleven riggers members of the Federated Ironworkers' Association of Australia which commenced on the 31st day of March 1955 AND FURTHER the Respondent was in any

way directly or indirectly a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award at the said establishment namely the aforesaid strikes of the aforesaid ironworkers.

SWORN by the Deponent on the day and year first hereinbefore written, 23rd June 1955,

R. G. FRY

Before me:

F. A. DRURY, J.P.
A Justice of the Peace.

10

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "I" being Affidavit of Ronald Gordon Fry Sworn 23rd June 1955. *continued.*

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955.

**ANNEXURE "J" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING TRANSCRIPT OF PROCEEDINGS IN MATTER No. 503 OF 1955 IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.**

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IN THE COMMONWEALTH COURT OF
20 CONCILIATION AND ARBITRATION — No. 503 of 1955.

IN THE MATTER of the

METAL TRADES EMPLOYERS' ASSOCIATION — Applicants

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA — Respondents.

(Application by way of summons to answer charges of contempt of Court and to show cause why penalty should not be imposed for contempt in connection with an Order made by the Court on 31st
30 May 1955 pursuant to Sections 29 (1) (b) and 29 (1) (c) of the Act re bans, limitations etc. at Morts Dock and Engineering Co. Limited, Balmain.

*Coram:* KIRBY, J.
DUNPHY, J.
ASHBURNER, J.

**TRANSCRIPT OF PROCEEDINGS**

**AT SYDNEY ON TUESDAY, 28th JUNE 1955, AT 10.37 A.M.**

MR. J. O'BRIEN of Counsel (instructed by Salwey and Primrose) appeared for the Applicant Association.

40 MR. A. R. BUCKLEY appeared for the Respondent Society.

*In the High Court of Australia.*

No. I. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

KIRBY, J.: Mr. Buckley, this is the return of a summons which is addressed to the Boilermakers' Society of Australia as the Defendant and in which certain charges are made against it. The usual procedure is for the summons now to be read and to take a plea of either guilty or not guilty from you on behalf of the Society.

Have you read the summons?

MR. BUCKLEY: Yes, I have.

KIRBY, J.: Do you wish it to be read in open Court, or are you sufficiently aware of its contents to plead to it?

MR. BUCKLEY: I can plead to it now. 10

KIRBY, J.: What is the plea? Is it guilty or not guilty?

MR. BUCKLEY: We are guilty, that is, of one particular aspect of it. That is all.

KIRBY, J.: The plea must be either one of guilty or not guilty. If you wish to raise any issues . . .

MR. BUCKLEY: I speak only in regard to the question of collections of money as far as the members are concerned.

KIRBY, J.: I see.

MR. BUCKLEY: If it is taken as far as the Union is concerned, no, we are not. 20

KIRBY, J.: I think, Mr. Buckley, it would be safer to enter a plea of not guilty, if that is the circumstance, on behalf of the Society.

Yes, Mr. O'Brien.

MR. O'BRIEN: Just to open the matter, Your Honours are familiar with the history of this matter but there are certain aspects of which I would remind Your Honours so far as they relate to the Boilermakers' Society.

Your Honours recall that on the 15th February 1955 a problem arose at the works of Morts Dock Company at Balmain when after refusal by the Company to pay certain additional wage claims to 30 riggers' assistants, some 11 of them refused to perform work and went on strike and have since been on strike at the works.

On 25th February there was a meeting of both the boilermakers and the ironworkers at which there was a decision to finance the striking riggers with a levy of 8/- per week per man and it is alleged that ever since then both the ironworkers and the boilermakers at the plant have made those contributions weekly and the money has gone to assist the riggers of the Ironworkers' Association, who have remained on strike.

On 23rd March an Order was made under Section 29 against the 40 ironworkers and following that, on 31st March there was a combined meeting of the boilermakers and ironworkers, following which all the riggers at the boiler shop of the Company at Morts Dock went on strike, and they have since remained on strike—that is, 9 riggers.

On 15th April some boilermakers were stood down because of the strike of the riggers and the difficulty of providing work for them, and a ban was then imposed by the boilermakers on overtime at the works.

On 10th May and thereabouts certain boilermakers refused to do certain work on the ship " Poul-Carl ", on the basis that it was the policy of the boilermakers not to infringe on the rights of the riggers.

On 12th May a meeting was held between the Works Manager and the organizer of the boilermakers, Mr. Phillips, and certain other members of the Boilermakers' Society, when it was explained to the organizer and others that apart from these combined meetings, the financing by boilermakers of the striking ironworkers was holding up any possible settlement of the strike.

On 31st May an Order of this Court was made against the boilermakers, which is the Order now in question and I turn to that for the moment.

That Order dealt with various problems at the works, the first being the overtime ban. Your Honours ordered that the boilermakers should comply with the Award by ceasing to carry on the ban and Your Honours enjoined them from continuing that breach.

At the same time Your Honours made similar orders in relation to the refusal to work on the " Poul-Carl " insofar as the financing of the ironworkers was concerned. Two orders were made: one enjoining the boilermakers from committing a breach for non-observance of the Award by in any way, directly or indirectly, being a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with the Award: and the ban was, any ban by way of stoppage of work at the works.

The last order enjoins in similar terms except for the ommision of the words " stoppage of work ". It prohibited the members being a party to or concerned in any ban at all on work or the performance of work at the Morts Dock Company.

On 1st June the organizer, Mr. Phillips, informed the management of the Company that all the bans had been lifted, that is, the ban on overtime and the ban on work on the " Poul-Carl ".

On 6th June the Company instructed certain boilermakers to do work on the " Poul-Carl " and instructions were also given to an ironworker to work with those boilermakers. The boilermakers claimed that they were prepared to do the work but the ironworker refused, and that prevented work on the " Poul-Carl ".

Notwithstanding the order of 31st May, to which I have just referred, certain collections have taken place on each Friday evening at the works, both of the ironworkers and the boilermakers, and they continue to be made; and in particular, on the evenings of Friday, the 3rd, 10th, 17th and 24th June collections were made at the Company's works both by the ironworkers and boilermakers.

Your Honours will recall that on 14th June contempt proceedings for the second time were taken by the Applicant Organization here against the ironworkers, and Your Honours fined the ironworkers for contempt. Present at those proceedings were the

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

Secretary of the Sydney No. 1 Branch of the Boilermakers, Mr. Grant, and the Organizer, Mr. Phillips; and Your Honours will recall that at the hearing on 14th June of the ironworkers' contempt, evidence was given of the collection of funds by boilermakers to support the ironworkers' strike.

Now, apart from the fact that the original order was made against the boilermakers, part of the material before the Court was collections by boilermakers to finance the striking ironworkers. The matter has since then on occasions been brought to the notice of the boilermakers, that their members are continuing this financing of the strike, and in particular there were letters in May and a letter as late as 21st June this year, in which it was pointed out to the Federal Secretary of the boilermakers that their members were continuing to meet the levy in favour of the strikers and that that was considered to be a breach of the order Your Honours made on 31st May and that it was seriously prejudicing the endeavours being made by the Association and the Company to bring about a resumption of work by ironworkers at the works of the Morts Dock and Engineering Company at Balmain.

That is, very briefly, the history of the troubles now before the Court in relation to the boilermakers. The Association primarily charges an offence by contempt of the order Your Honours made, in respect of the period 1st June to 20th June this year. The order was made by the Court under Section 29 on 31st May.

I should say that the Union did lift the ban on overtime and, on the face of it, lifted the ban on work on the "Poul-Carl". but work has not proceeded on the "Poul-Carl" because of the fact that ironworkers refused to work with boilermakers.

The Association and the Company have the primary object of securing a resumption of work by ironworkers at the works and, as previously stated, the position has become active at the Company's works, though I need not give details of the problem.

It has already been mentioned that the ship "Poul-Carl" has been there two months; two days' work remains to be done and the crew is still on the ship and an expense of £9,000 per month is being incurred because of that.

In addition to that there is a ship of the Colonial Sugar Refining Company, the "Tambua", which is there for some refitting work that will take several months. Nothing has been done on that ship, although she has been lying there now for some months.

There is a dredger in the same position and a ship, practically constructed, which cost a very substantial sum of money, and work there has ceased.

And apart from this interference with the movements of the ships, the operations of the Company itself, Morts Dock, are gradually ceasing and the community is being held in the position where the losses are shared by all. So the Association brings this matter here in an endeavour to prevent the boilermakers from carrying on with

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

assisting the ironworker strikers so that at least in that regard the Court's jurisdiction may be invoked in an endeavour to get the ironworkers back to work.

That is, briefly, the history of the case.

EXHIBIT. **EXHIBIT " A "—Certified copy of the Metal Trades Award. (Annexure " A ")**

**EXHIBIT " B "—The original order of the Court of 31st May, 1955, No. 395 of 1955, against the Boilermakers' Society of Australia. (Annexure "F ")**

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KIRBY, J.: You understand, Mr. Buckley, that on the tender of any documents you are entitled to see them and, if you wish to, to object to them.

I also tender an affidavit of Blanch Davis sworn 24th June testifying as to service upon the Boilermakers' Society.

EXHIBIT. **EXHIBIT " C "—Affidavit of B. Davis sworn 24/6/1955.**

20 KIRBY, J.: Mr. Buckley, the same applies to these documents which are in the form of affidavits. If you wish them to be read you will just have to indicate that you do and it will be done, otherwise we will take it that you do not desire them to be read.

Mr. O'BRIEN: Next comes the affidavit of Lancelot Ivor Sharp sworn 23rd June 1955. That substantially sets out in somewhat greater detail the substance of the material already related to the Court. I will read that if the Court desires.

KIRBY, J.: The members of the Bench have read the affidavit Mr. O'Brien. Mr. Buckley, do you wish this affidavit to be read out?

30 Mr. BUCKLEY: No, I do not think it is necessary.

KIRBY, J.: You have had a copy served on you?

Mr. BUCKLEY: Yes.

KIRBY, J.: And you know its contents and its importance. You know it is the important affidavit in the case.

Mr. O'Brien, in paragraph 9, as my brother Ashburner points out to me, there is a reference to a Mr. Sponberg described as " the aforesaid Mr. Sponberg " We have been unable to find any prior reference to Mr. Sponberg in that affidavit. I don't know whether we have missed such a reference.

40 Mr. O'BRIEN: No. This is occasioned by the fact that certain paragraphs were extracted from the affidavit supporting the application and there is no earlier reference to Mr. Sponberg. I should state that at the time he was the delegate of the Boilermakers' Society.

KIRBY, J.: Mr. O'Brien, we think it is advisable that you should read those portions of the affidavit relating to the collections of money.

Although Mr. Buckley has indicated what he has, it is very important, I think, that we should know the full position and have the benefit of any argument on it.

MR. O'BRIEN: I propose to call Mr. Sharp.

Paragraph 18 is the first paragraph relating to the matter in which the Deponent says:

"From time to time on Friday evenings during the continuance of the said strike . . . strike".

The next paragraph refers to a different matter. I tender that affidavit at this stage. 10

EXHIBIT. **EXHIBIT "D"—Affidavit of L. I. Sharp 23/6/1955. (Annexure "H")**

MR. O'BRIEN: Before calling Mr. Sharp I would also like to refer to the affidavit of Ronald Gordon Fry sworn 23rd June 1955 which is substantially to found this application, if Your Honours please, in which he swears as to the Association of Employers and that the Boilermakers' Society is a registered union and he charges the Society with the matters to which I refer.

In addition, he testifies to a letter of the 11th May 1955 written by the Secretary of the Applicant Association to the Boilermakers' 20 Society and which is referred to in paragraph 4 on page 2. I draw attention to the third and fourth paragraphs of the affidavit.

(*Paragraphs read*).

I tender that affidavit.

EXHIBIT. **EXHIBIT "E"—Affidavit of R. G. Fry sworn 23/6/55. (Annexure "I")**

MR. BUCKLEY: There should be a correction in that affidavit. Mr. Burgess is not the President of our organization, he is the Assistant-General Secretary. It is on page 2 Mr. Fry's affidavit.

KIRBY, J.: Mr. Fry in the affidavit says "Who I believe to be the 30 President". You say?

MR. BUCKLEY: He is not the President but the Assistant-General Secretary.

MR. O'BRIEN: I now call Mr. Sharp.

LANCELOT IVOR SHARP, sworn:

MR. O'BRIEN: Your full name is Lancelot Ivor Sharp?—That is correct.

You reside at 241 Balmain Road, Leichhardt?—That is correct.

And you are the industrial officer of Morts Dock and Engineering Co., Balmain?—I am.

On last Friday afternoon, being 24th June 1955, about 4.30 in the afternoon 40 did you go to the Company's time office?—I did.

And did you observe there certain boiler shop ironworkers paying their levies to Mr. Origlass?—That is correct.

What did you see him do?—On Friday evening Mr. Origlass at that stage was on his own. He was holding a list of names clipped to a piece of plywood and he was collecting the money from the various ironworkers, who paid their subscriptions, and crossing off their names.

Was he holding money in his hands?—He was holding money and the plywood in one hand while he wrote with his right hand.

Mr. Origlass was previously a delegate at the works for the ironworkers?—Formerly Mr. Origlass was the ironworkers' delegate in the boiler shop.

10 At about 25 to 5 did you see certain boilermakers, Mr. Gilbert and Mr. Reed?—I saw the two boilermakers named walk from the vicinity of the boilermakers' pay door and they appeared to be assisting him in handling the money, in collecting and writing down.

Mr. O'Brien: Did you also observe the boilermakers on the pavement outside the No. 2 pay door of the works?—Yes.

That is the pay door from which the boilermakers are paid?—That is correct.

KIRBY, J.: Are these the same two delegates or different men?—On Friday night there were two boilermakers collecting at 4.30, usually they are paid at 4.35; Mr. Sponberg and Mr. Graham arrived and
20 took over the collecting of the money.

They are two officials of the Boilermakers' Society?—They were formerly delegates but at the present time Mr. Sponberg is stood down and I consider Mr. Graham as being on strike.

Mr. O'Brien: What did you observe them doing?—They immediately took charge of the list, Mr. Sponberg took over from boilermaker Faulkner and Mr. Graham took over the money from boilermaker Lintott; they took over the collections until the men had received their pay and dispersed.

And were collecting from all boilermakers?—As they passed out of the boiler
30 shop after receiving their pay.

Did Sponberg and Origlass remain outside the boiler shop for some time talking?—After the pay was collected and the men had dispersed the collectors stood around in a group talking and finally went away themselves.

On the 21st June was this letter sent from the Metal Trades Employers' Association to the Federal Secretary of the Boilermakers' Society (handing copy letter to witness)?—Yes that letter was forwarded by the Metal Trades Employers' Association.

I ask Mr. Buckley for the original of the letter dated 21st June. Will I read
40 the letter, Your Honour.

KIRBY, J.: Yes.

Mr. O'Brien: It is from the Secretary of the Metal Trades Employers' Association to the Federal Secretary of the Boilermakers' Society and is dated 21st June and states:

> "I refer to the orders made . . . by the Commonwealth Court of Conciliation and Arbitration . . against your Union in respect of the strike at Morts Dock at Balmain, . .

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

since that date certain bans and limitations have been lifted . . . contributions are still being made by members of your Union . . . for breach thereof".

EXHIBIT. **EXHIBIT "F"—Letter dated 21/6/55 from Metal Trades Employers' Association to Boilermakers' Society.**

Mr. O'BRIEN: Up to the present date the work on the "Poul-Carl" still remains static?—It is in the same state now as it was on 31st March.

And work on the "Tambua"—that is the sugar ship?—That is in the same state as when the matters were previously before the Court. 10

And also on the dredge?—Yes.

KIRBY, J.: Mr. O'Brien, the Court is not constituted in the same way as it was in previous proceedings, quite apart from the question whether we should use any knowledge we have gained in other cases in this matter, so if you want to prove any actual facts you should do so. I think Mr. Sharp has testified to the position of the "Poul-Carl" at earlier dates.

Mr. O'BRIEN: I think it is sufficient if the position as testified in the affidavit is the same to-day as it was at the date of the affidavit. 20

THE WITNESS: Exactly the same.

KIRBY, J.: In paragraph 9 of your affidavit you refer to Mr. Sponberg as "the aforesaid Mr. Sponberg": Mr. Sponberg is what in relation to the Boilermakers' Society?—He was formerly the delegate. I think that comes about as explained by Mr. O'Brien, that in certain previous affidavits it was deleted, and apparently this is the first reference to Mr. Sponberg. He should be referred to as "boilermaker Sponberg" at that stage.

Mr. O' BRIEN: He is the Mr. Sponberg you have already mentioned as collecting the levies at the Company's works from other boilermakers?—The same Mr. Sponberg. 30

Mr. BUCKLEY: Do you say that Mr. Sponberg is still the shop delegate? —No, I said the former delegate.

The bans were all removed following the order given by the Court on 31st May: is that correct?—The overtime ban and the ban on the work on the "Poul-Carl" were lifted.

Was there a ban on the work on the "Poul-Carl" previously?—At that stage there was.

By boilermakers?—Yes, imposed on about 10th or 11th May.

Work was resumed by some of the boilermakers?—That is correct. 40

(*The witness withdrew*).

ALAN CAMERON CAMPBELL GRAHAM, sworn:

Mr. O'BRIEN: What is your full name?—Alan Cameron Campbell Graham.

Where do you live?—2 River Street, Birchgrove.

Do you attend this Court in answer to a subpœna?—Yes.

Issued by the Metal Trades Employers' Association?—Yes.

And not otherwise?—Yes.

Have you worked at the works of Morts Dock and Engineering Company, Balmain?—Yes.

Are you working there now?—No.

What is the present position?—I am working at Cockatoo Island.

When did you commence work at Cockatoo Island?—Some time early this month.

10 When did you cease work at Morts Dock and Engineering Company?—Early this month—I forget the date.

Are you a member of the Boilermakers' Society of Australia?—Yes.

How long have you been a member?—Since about . . .

Some years, I take it?—Some number of years.

Have you attended at the works of Morts Dock and Engineering Company on the Friday afternoon?—On which particular Friday afternoon?

On any Friday afternoon?—Yes.

Which Friday afternoons were they?—I have been there practically every Friday afternoon now for a long while.

20 MR. O'BRIEN: Up till last Friday?—Last Friday.

Do you attend there with a Mr. Sponberg?—He is usually there when I get there.

Whereabouts at the works do you go?—On the footpath outside the boilermakers' race.

That is the boilermakers' pay race?—Yes.

Do either you or Mr. Sponberg have a list?—Yes, Mr. Sponberg has a list.

Of what?—He writes names down.

He writes names down of boilermakers?—Yes.

Who have come from the Company's works?—Yes.

30 Apart from writing names down what else does he write down?—Whatever they contribute.

Contribute to what?—A levy.

A levy for what?—A levy for the assistance of the dependents who are involved in this strike.

That is, the dependents of the ironworkers involved in the strike? Is that what you say?—Yes.

What is the amount of the levy?—8/-.

Do you collect the money . . .

KIRBY, J.: Mr. O'Brien, there is a possibility—I won't say how remote it is

40 —that this witness might be incriminating himself by answers he gives to questions. I have in mind only the provisions of Section 78 which are directed to an officer, servant or agent of an organization or a member of a committee or of a branch of an organization. I do not know whether you are going to ask him anything about the capacity

of agent. There has been nothing proved about officer or servant yet, at any rate, but if your examination in chief is likely to go on to that . . .

MR. O'BRIEN: I will bear that in mind, Your Honour.
(To the witness) I take it you hold no official position with the Boilermakers' Society, do you?—No.

On the collection of this money, what do you do?—Do with the money?

Yes?—I hand the money to Mr. Sponberg after the collection.

Do you know what he does with it?—I don't know actually. He hands it over actually, I think, to someone else. 10

Do you know who that is?—I am not too sure of that.

Have you any idea who that is?—Possibly one of the other men involved to pay the money out.

MR. O'BRIEN: Have you spoken to any members of your Union—any officials of your Union—concerning these collections?—No.

Have they spoken to you about them?—No.

Have you heard anything at all from Union officers concerning these collections?—No.

Are you aware of a body called the Strike Committee?—I am aware of it, yes.

Are you a member of it?—No. 20

Do you know who are members?—I don't know. I could not tell you. I don't know the names. I do know of the body, but I don't know who is actually who, or who are members.

MR. BUCKLEY: I have no questions.

*(The witness withdrew).*

JOHN STANISLAUS SPONBERG, sworn and examined:

MR. O'BRIEN: What is your full name, Mr. Sponberg?—John Stanislaus Sponberg.

Where do you live?—50 Hercules Street, Dulwich Hill.

Your occupation?—Boilermaker. 30

Where?—I was last employed at Morts Dock and Engineering Co. Limited.

At the moment what is it? Are you stood down?—Yes, stood down.

You know Mr. Graham, of course?—Yes.

He is a boilermaker at Morts Dock also, or he was?—Yes.

Have you been attending the works of the Company on recent Fridays?—Yes.

KIRBY, J.: Would you ask Mr. Sponberg if he is a member of any trade union.

MR. O'BRIEN: First of all are you a member of the Boilermakers' Society of Australia?—Yes.

Are you an official of that Society?—No. 40

You were going to tell us you attended the works of the Company on Friday afternoons did you say?—Do I attend at the Company's gate on a Friday afternoon? Yes.

Which gate is that?—Outside the boilermakers' pay race.

What do you do there?—I take the names of boilermakers who contribute to the dependents of the men who are not working in this dispute.

That is, the ironworkers who are not working, is it?—Well, there are in addition, I think, to ironworkers who are not working small numbers of men who have been stood down due to the dispute and I believe that they also receive some remuneration from the amounts collected.

MR. O'BRIEN: Do you take a note of the boilermakers who pay to you?—Yes.

10 How much do they they pay?—8/-

Each Friday each week?—Yes.

Have you got a list of the names of the men who pay?—Yes, I have a list here.

Could I see this? To what Fridays does this relate?—It has been collected every Friday night up till last Friday.

Is this list prepared by yourself?—Yes.

That is, the typed names—are they your own typing?—Yes.

You typed the names yourself on the sheet?—Yes, I typed the names myself and prepared the list myself.

Where did you do that?—At home.

20 The list represents the names of the men who have contributed?—Yes.

That being the column on the left-hand side?—That is correct.

And across the top are the dates of the contributions?—That is correct.

That is, the Fridays are shown?—Yes.

Being every Friday apparently from the 18th February last until the 24th June last?—Yes.

And then it shows throughout the amounts under those dates and opposite the names of the men who have paid?—That is correct.

Can you give me an approximation of the number of men concerned there?—Yes, the men all concerned there would be . .

30 All boilermakers at the Company's works, is that it?—Well, actually there are numbers of boilermakers who have been stood down and others who do not donate. Those, of course, may donate one week and may miss the next and things like that, and the amount of donation is shown under the particular heading and the date on which it was donated.

The names on the list you have just produced are the names of all boilermakers at the Company's works?—Yes, they are all boilermakers.

And includes not only those working each Friday at the works but includes some who have been stood down?—Well, you must understand that the names of those boilermakers are the names taken at the outset
40 and since then members have been stood down and that is a complete record of all amounts that have been collected from the outset. Possibly some members who have been stood down have not contributed in the later stages.

MR. O'BRIEN: On the last sheet on the foot of it there are totals shown?—That is correct.

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

In the last column that total represents what?—The last column, that total represents the final amount that was received for that particular Friday night.

In respect of this levy?—Yes.

EXHIBIT. **EXHIBIT "G"—List of names above-mentioned.**

Have you had any conversations about these levies in the last month with officials of your Union?—Yes, I have in passing, I think. On one occasion an organizer of the Union attended Morts Dock in relation to men who were stood down and I think he was requested, or rather, he was informed at that stage by the Company that boilermakers in 10 this particular boiler shop were contributing and the answer was, I think, to the Manager that the boilermakers could not do anything about particular individual contributions if boilermakers wanted to contribute their money then they could contribute it if they wanted to. No pressure would be used on them to force them to contribute or to force them not to contribute. That was in answer to the Manager.

When was that?—I could not recall the exact date, but it was when the "Poul-Carl"—there were a number of men who were stood down on the "Poul-Carl" and negotiations were started by an official of our Union 20 with the management, and as I mentioned the management brought that matter up.

Before you go any further, would that be in May or June, do you think?—I am not quite sure of the date. It would be either late May or early June.

Other than that have you had any other conversations with officials of the Union concerning the collection of the levy each Friday?—Oh no, none other than that.

Have you received any communication from them in regard to it?—In regard to levies no—no communication. 30

When you collect the moneys each Friday what do you do with them?—I total the amount, enter it on the sheet you have there and I pay the money over to the ironworker delegate or the previous delegate, Mr. Origlass.

MR. O'BRIEN: Do you go elsewhere besides Morts Dock in relation to the collection of a levy?—No.

Your attentions are confined exclusively to the boilermakers at Morts Dock?—That is correct.

Do you know whether collections are made from boilermakers elsewhere?—I do not doubt that boilermakers elsewhere do contribute to the list. 40

Have you seen any such list of contributions of boilermakers from elsewhere?—No.

Do you recall the combined meeting of boilermakers and ironworkers at the works of Morts Dock on 24th March last year, when a resolution was passed concerning this levy?—I recall that at a meeting—I am not sure of the date—a resolution was passed in something like these terms "That, without dealing with the merits of this dispute . .

I am talking about a resolution regarding a levy?—This is it, "That, without dealing with the merits of this dispute, this combined meeting of boilermakers and ironworkers agrees to donate"—I think that was the word—"the sum of 8/- per week for the dependents of the men who are not working."

That was confirmed subsequently at another combined meeting?—It has, I think, been confirmed from time to time—not necessarily at combined meetings. After a time objection was taken by the management to the boilermakers' meeting with the ironworkers and 10 subsequently the ironworkers met alone and the boilermakers met alone.

And the boilermakers met alone and confirmed this levy?—I am not sure of the meetings that have been held within the last two months or so, but I think they are still adhering to the original resolution.

Did you not yourself preside at the original meeting?—Yes, I was the Chairman of the meeting.

And in those days you were the delegate, as well, of the Society at the works? —Yes, I was the delegate.

Do you remain the delegate?—No, I can no longer be a delegate when I am 20 stood down.

Who is the delegate there now?—I am not sure whether it be one or the other of two co-delegates, who were elected at the last meeting.

Who were they?—Mr. Faulkner and Mr. Gilbert.

MR. BUCKLEY: I have no questions.

DUNPHY, J.: When you say the money is paid to the dependants of the people concerned, who are the dependants?—I take it that it would be the wives and children of the people.

Are all these people married?—I do not know, but I imagine that if they were not married they would have parents to take care of, perhaps; it is 30 often the case.

DUNPHY, J.: Is the money paid to the wives and children?—I am not competent to answer that; I pass the money over and I take it that that is done.

*(The witness withdrew).*

GEORGE HENRY LEGUIER, sworn.

MR. O'BRIEN: What is your name?—George Henry Leguier.

You live at 41 Collingwood Street, Drummoyne?—Yes.

You are a member of the Federated Ironworkers' Association of Australia?— I was until I was suspended.

40 You are at the moment suspended?—That is correct.

Have you been expelled?—Well . . .

The question is, have you been expelled?—Well, if you don't mind, I shall answer it in my own way.

Can you tell us whether or not you are expelled?—I am supposed to attend a meeting this evening of the National Council and probably will be expelled then.

You previously worked at Morts Dock as an ironworker, until the 15th February?—Yes.

Have you been working since the 15th February?—No.

So you are one of the riggers' assistants who are on strike from that date?—That is so.

Have you been working anywhere at all since the 15th February?—I have not.

Have you been receiving any contributions since then for your sustenance?—Yes I have, from the Strike Committee.

Who are they?—There are several members, the exact number I do not know; I have been receiving my money from Mr. McGee, the Treasurer of the Committee. 10

Do you receive it weekly?—Yes.

Whereabouts?—Sometimes in a hall at Balmain, at other times in the park there, and at other times in the street.

On what day of the week?—Tuesday, mostly.

Apart from yourself, who else attends on those days?—All the strikers.

Is money given to them?—Yes.

They are each paid money by Mr. McGee—how much do they get each week?—£12 recently.

Mr. O'BRIEN: And last Tuesday would you have got £12?—Last Tuesday, yes. 20

Do you know Mr. Origlass?—I do.

He is a member of the Federated Ironworkers' too?—That is correct.

Does he attend these Tuesday gatherings?—Yes, he is there mostly.

Mr. BUCKLEY: No questions, Your Honour.

(*The witness withdrew*).

Mr. O'BRIEN: That is all the evidence I desire to call.

KIRBY, J.: Mr. Buckley, that is the case against the Defendant Society.

Mr. BUCKLEY: Yes. Your Honour.

I must inform the Court that following the order made against the Union on 31st May we made an endeavour to settle the dispute so far as we were concerned, that is to say all bans and limitations were removed and that is as far as we went. 30

The Union has not paid any strike pay because of this dispute and my executive takes no responsibility for any collections that have been made. The collection of finance of course, in support of unionists on strike has operated ever since there have been trade unions and my executive considers that we have no right to interfere with the long established practice.

The executive also considers that these are voluntary levies that are being collected and we would be interfering with the individual rights of the members if we took the stand that they must contribute to such a fund or if we told them that they must not contribute to such a fund. 40

I am expressing the sentiments of my Federal Executive whom I contacted on this particular question and we consider we have carried out what is required of us as a union under the order made on the 31st May. I could not add any more to that.

The first day we received the notification from the Metal Trades Employers' Association was on Thursday morning by post and a few hours later, by hand, we received the summons and contact has been made with the Federal Executive by phone since then; those are the views expressed by the members of the Federal Executive with the exception of one, who is in Western Australia.

MR. O'BRIEN: It has transpired from the evidence that on the 12th May last the Boilermakers' Society was specifically advised in writing that while the boilermakers employed by Morts Dock and Engineering Co. continued to take part in an illegal strike by financially supporting the strikers, they were obstructing settlement of the dispute and also inciting the participants to ignore the Arbitration Court's order.

It also appears from the evidence that senior officials of the Society were in accord with such conduct, when evidence was given on the 14th June last that members of the Boilermakers' Society were actively engaged in collecting and giving contributions to a fund to support the strike and on that occasion the Court took certain firm action with the ironworkers on the basis that their strike was improper, that they were in contempt of an order of the Court and that they should cease the strike and it became abundantly evident to the Boilermakers' Society then that the Court was taking a strict view of the conduct of both Unions at Morts Dock.

In addition, on the 31st May this Union itself was told specifically by this Court that it was to cease to engage in any activity by means of which any stoppage of work at Morts Dock would be encouraged; in the summons to show cause that was specifically pointed out to the Union, that they being fully aware—as they now admit—of what was going on and being fully aware that that was in breach of an order which the Court made against them, they now tell the Court that they take a different view from the view held by the Court and they will have no part in carrying out the order made on the 31st May.

So, far from saying the Union is anxious to see the strike at Morts Dock brought to a conclusion so that work may be resumed, the Boilermakers' Society now says it is the custom of the Union to do these things and the Union will not interfere in what they know is going on and what has been brought home to them as an encouragement of an illegal strike.

So I submit the Boilermakers' Society now state they do not intend to observe the order of the Court of the 31st May. In those circumstances, I submit the evidence establishes a contempt by the failure to observe the order made on that date and the Federal Secretary of the Union comes before the Court and says they propose to continue in it.

In the circumstances, I ask the Court to regard the matter seriously. The Association and the Company have one object in

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "J" being Transcript of Proceedings in Matter No. 503 of 1955 in the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

these proceedings and that is to endeavour by all legal means to get the ironworkers back to work at Morts Dock and one of the matters standing in the way is the fact that a large number of boilermakers, with the knowledge of their Union, are contributing to finance men on strike. Therefore, efforts to obtain a cessation of the strike can only be rendered negative.

So I submit the matter assumes a very serious aspect, on the statements made by the Union. The Company has been trying to have work proceeding on matters which have now become tragic, not only to the Company but to the community by the holding up of work indefinitely, and work in which substantial money is involved. 10

I ask the Court to deal with the matter against the Boilermakers' Society firmly so that it can be brought home to them that when the Court made its order on the 31st May that the Boilermakers' Society should refrain from encouraging the strike, the Court meant what it said. When the Union says, in effect, " we do not intend to carry it out ", the Court will show that when it made the order it intended it to be observed.

I cannot add anything further because it has now assumed a significance which is somewhat intensified by the Union saying they do not intend to observe the Court's order. 20

KIRBY, J.: Before you conclude, Mr. O'Brien, would you indicate with particularity which particular clauses of the order of the 31st May the Society has committed breaches of since that date? If you take the order through from page 2.

MR. O'BRIEN: On page 2 the Court has ordered that " pursuant to the Act . . . be complied with ". The first order deals only with the overtime ban and that is not in point.

The second order begins with the Award and it enjoins the Union from continuing the previous ban on overtime. That is not in point. 30

Then the order goes further and says—" and do comply with the provisions in relation to a restriction imposed on or about the 10th May by way of stoppage of work at the establishment " That is not in point.

The second on page 3 is not in point and then it says—and this is where is becomes important—" thereafter be enjoined from committing a breach . . . being in any way directly . . . a party to . . . at the establishment of Morts Dock ". That is the first order which I suggest has been breached. There follows another order concerning the " Poul-Carl ". 40

KIRBY, J.: The ban, limitation or restriction by way of stoppage of work at Morts Dock at Balmain is by ironworkers?

MR. O'BRIEN: Yes. The next paragraph deals with the " Poul-Carl ".

KIRBY, J.: That is not material.

MR. O'BRIEN: No, and the last order on that page also deals with the " Poul-Carl ". The next order, going on to page 4, deals with the " Poul-Carl ".

The final order is in point. It says "Be enjoined from committing a breach by being . . . a party to . . . performance of work in accordance with the said Award". That is the same wording as the previous order which I suggested was in point, except stoppage of work.

Those are the two orders in respect of which a breach is charged.

KIRBY, J.: Having heard Mr. O'Brien, have you anything further to say, Mr. Buckley?

MR. BUCKLEY: No. I have nothing further to add.

10 KIRBY, J.: We will consider our decision in this matter and will retire for the consideration and should reassemble shortly.

*Upon resuming at* 12.22 *p.m.*

JUDGMENT.

KIRBY, J.: The Defendant Society on the evidence and, indeed, on the admissions of Mr. Buckley, its Federal Secretary, who appeared for it in these proceedings, is guilty of contempt of this Court in its wilful disobedience to the Court's order of 31st May last.

The contempt of which it is guilty is disobedience to those portions of the order which enjoined the Society from committing a 20 breach or non-observance of the Metal Trades Award, 1952, in being a party to or concerned in a ban, limitation or restriction upon the performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain.

The ban, limitation or restriction of work was imposed by members of the Federated Ironworkers' Association of Australia on or about the 15th February 1955 and still continues.

The Defendant Society has been a party to and concerned in this ban, limitation or restriction by permitting its members to subsidise 30 the strike by contributing periodically what is known as "strike pay" to the striking members of the Federated Ironworkers' Association. The Defendant Society has permitted such contributions by its members in such circumstances that it must be held to be actively—through its contributing members—subsidising the strike and leading to its prolongation.

We are not impressed by the description of the contributions as being to dependents of the strikers although, even if they were intended for dependents rather than the strikers themselves, they would still amount to a subsidy of the strike. Such support of the 40 strike by the Defendant Society must constitute a serious, if not the main reason, for the strike's continuance.

The evidence shows that the strike has caused serious losses to the establishment concerned, to the community and to the membership of both the Defendant Society and of the Ironworkers' Association. This does not appear to cause the Defendant Society any concern. It has deliberately refused to take any steps to prevent the subsidy of the

strike and its disobedience to the Court's order must be judged in the light of that deliberation and the huge losses the strike has caused and is causing.

The Defendant Society is fined £500 and ordered to pay the taxed costs of the Applicant.

The exhibits may be handed back to the parties who tendered them, except such exhibits as are documents of the Court.

*The Court then proceeded with other business.*

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Annexure "K" being Order made in Matter No. 503 of 1955 by the Commonwealth Court of Conciliation and Arbitration, 28th June 1955.

**ANNEXURE "K" TO AFFIDAVIT OF ALFRED TENNYSON BRODNEY BEING ORDER MADE IN MATTER No. 503 OF 1955 BY THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.** 10

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IN THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION — No. 503 of 1955.

IN THE MATTER of the Conciliation and Arbitration Act 1904-1952.

IN THE MATTER of the Metal Trades Award, 1952, as varied.

AND IN THE MATTER of an application under Section 29A of the said Act.

METAL TRADES EMPLOYERS' ASSOCIATION - - Claimant 20

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA Respondent.

**Before Their Honours Mr. Justice Kirby, Mr. Justice Dunphy and Mr. Justice Ashburner.**

Tuesday 28th day of June 1955.

WHEREAS upon application made on behalf of the above-named Metal Trades Employers' Association on Thursday the 23rd day of June 1955 a Summons was issued by this Honourable Court to the Boilermakers' Society of Australia that it should appear to answer a charge that it had been guilty of 30 contempt of this Court and to Show Cause why it should not be punished by the imposition of a fine AND WHEREAS the said Summons to Show Cause coming on for hearing this day AND UPON READING the affidavits of Lancelot Ivor Sharp and Ronald Gordon Fry both sworn on the 23rd day of June 1955 and both filed herein AND UPON HEARING oral evidence called by the Metal Trades Employers' Association in support of the application no evidence being called on behalf of the Respondent, the

Boilermakers' Society of Australia AND UPON HEARING Mr. R. J. A. Franki of Counsel for the Metal Trades Employers' Association of Australia AND UPON HEARING Mr. A. R. Buckley of Counsel for the the Boilermakers' Society of Australia THIS COURT DID FIND the Respondent, the Boilermakers' Society of Australia guilty of contempt of this Court by wilfully disobeying the Order made by this Court on Tuesday the 31st day of May 1955 that pursuant to the Commonwealth Conciliation and Arbitration Act 1904-1952 the Respondent, the Boilermakers' Society of Australia, being a party to the Metal Trades Award made 10 by Mr. J. Galvin, Conciliation Commissioner, on the 16th day of January 1952 do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 15th day of April 1955 by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the above-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award 20 namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of an overtime ban at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation 30 or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in 40 a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a stoppage of work at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND do comply with the provisions of paragraph (i) of sub-clause (ba) of Clause 19 of the said Award by ceasing in any way directly or indirectly to be a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award, that is to say the ban limitation or restriction imposed on or about the 10th day of May 1955 by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering 50 Company Limited at Balmain in the State of New South Wales AND be enjoined from continuing the last-mentioned breach or non-observance of the said paragraph (i) of sub-clause (ba) of Clause 19 of the said Award, namely by

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "K" being Order made in Matter No. 503 of 1955 by the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

*In the High Court of Australia.*

No. 1. Affidavit of Alfred Tennyson Brodney and Annexures thereto.

Annexure "K" being Order made in Matter No. 503 of 1955 by the Commonwealth Court of Conciliation and Arbitration, 28th June 1955. *continued.*

continuing to be in any way directly or indirectly a party to or concerned in the said ban limitation or restriction AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the performance of work in accordance with the said Award that is to say a ban limitation or restriction by way of a ban on work on the "Poul-Carl" at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND be enjoined from committing a breach or non-observance of the said Award by in any way directly or indirectly being a party to or concerned in a ban limitation or restriction upon the 10 performance of work in accordance with the said Award at the establishment of Morts Dock and Engineering Company Limited at Balmain in the State of New South Wales AND THIS COURT DOTH IMPOSE a fine of Five hundred pounds (£500) on the Respondent Organization, the Boilermakers' Society of Australia, AND THIS COURT DOTH ORDER that such fine be paid by the Respondent, the Boilermakers' Society of Australia, to the Registrar of this Court AND THIS COURT DOTH FURTHER ORDER that the costs of the Claimant, the Metal Trades Employers' Association, as taxed by the Registrar of this Court be paid by the Respondent, the Boilermakers' Society of Australia, to the Claimant or its Solicitors Messieurs 20 Salwey & Primrose.

By the Court,

(L.S.) R. C. KIRBY,

Judge.

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No. 2.

## ORDER NISI FOR WRIT OF PROHIBITION GRANTED BY HIS HONOUR Mr. JUSTICE McTIERNAN.

No. 2. Order *Nisi* for Writ of Prohibition granted by His Honour Mr. Justice McTiernan, 30th July 1955.

**Before His Honour Mr. Justice McTiernan in Chambers**

**Saturday the 30th day of July 1955.**

UPON APPLICATION made this day at Sydney on behalf of the 30 above-named Prosecutor the Boilermakers' Society of Australia AND UPON READING the affidavit of Alfred Tennyson Brodney sworn the 29th day of July 1955 and filed herein and the exhibits referred to in the said affidavit AND UPON HEARING Mr. Eggleston of Queen's Counsel and Mr. Corson of Counsel for the said Prosecutor IT IS ORDERED that the Honourable Richard Clarence Kirby, the Honourable Edward Arthur Dunphy and the Honourable Richard Ashburner, Judges of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association (hereinafter referred to as "the Respondents") DO SHOW CAUSE before the Full Court of the High Court of Australia at Sydney on Monday the 15th 40 day of August 1955 at 10.30 o'clock in the forenoon or so soon thereafter as

Counsel can be heard WHY a Writ of Prohibition should not issue directed to the Respondents prohibiting them from further proceeding with or upon the Orders made by the Commonwealth Court of Conciliation and Arbitration on the 31st day of May 1955 and the 28th day of June 1955 respectively upon the applications of the Respondent the Metal Trades Employers' Association in matters Nos. 395 and 503 whereby the Prosecutor was ordered to pay certain costs and a fine of £500 UPON THE GROUND THAT the provisions of Sections 29 (1) (b), 29 (1) (c) and 29A of the Conciliation and Arbitration Act 1904-1952 are *ultra vires* and invalid in that :—



10 (A) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions, and authorities of an administrative, arbitral, executive and legislative character, and

(B) the powers which Sections 29 (1) (b), 29 (1) (c) and 29A respectively of the Conciliation and Arbitration Act 1904-1952 purport to vest in the said Court and exercised by it in making the said orders are judicial, and

(C) the said Sections 29 (1) (b), 29 (1) (c) and 29A are accordingly contrary and repugnant to the provisions of the Constitution of
20 the Commonwealth and, in particular, Chapter III thereof

AND WHY such further or other order should not be made in the premises as to the Court should seem fit AND IT IS FURTHER ORDERED that service upon the said Judges of this Order *Nisi* and of the affidavit in support may be effected by leaving copies thereof with the Industrial Registrar of the said Court at his office at 372 Little Bourke Street Melbourne and upon the Respondent the Metal Trades Employers' Association by leaving a copy of the said Order *Nisi* and of the said affidavit at its registered office AND IT IS ORDERED that service of the Order *Nisi* and affidavit be made within three days of the settlement of this Order AND IT IS ALSO ORDERED
30 that service of the exhibits referred to in the said affidavit be dispensed with unless a request for the same is made by any Respondent AND IT IS ALSO ORDERED that the costs of this application be reserved for consideration by the Full Court AND IT IS CERTIFIED that this was an application proper for the attendance of Counsel at Chambers.

(L.S.) J. G. HARDMAN,
Principal Registrar.

*In the High Court of Australia.*

No. 3. Joint Reasons for Judgment of their Honours, the Chief Justice, Sir Owen Dixon, Mr. Justice McTiernan, Mr. Justice Fullagar and Mr. Justice Kitto, 2nd March 1956.

No. 3.

## JOINT REASONS FOR JUDGMENT OF THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, Mr. JUSTICE McTIERNAN, Mr. JUSTICE FULLAGAR AND Mr. JUSTICE KITTO.

This Order *Nisi* for a writ of prohibition calls in question certain orders of the Court of Conciliation and Arbitration. First there is an order of 31st May 1955 falling into a number of parts. It consists in fact of a series of orders. The purpose in making them was to require obedience on the part of the Boilermakers' Society to a provision in an Award of the Arbitration Court prohibiting bans, limitations or restrictions on the performance of work in accordance with the Award. To effect the purpose the Arbitration Court relied upon the power which paragraph (b) of Section 29 (1) of the Conciliation and Arbitration Act 1904-1952 purports to confer of ordering compliance with an order or Award proved to the satisfaction of the Court to have been broken or not observed and upon the power which paragraph (c) of the same sub-section purports to confer of enjoining by order an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or Award. The first order in respect of which a writ of prohibition is sought takes various forms of disobedience of the provision of the Award and deals with them in turn, first, in each case, making an order for compliance and, next, two orders enjoining different aspects of breach or non-observance of the provision. Finally there is a more general order enjoining breach or non-observance. The second order which it is sought to restrain by a writ of prohibition is dated 28th June 1955 and is expressed as finding the Boilermakers' Society guilty of contempt of the Arbitration Court by wilfully disobeying the order of 31st May 1955. The order goes on to impose a fine of £500 upon the Society, which is a registered organization of employees, and to order it to pay the costs of the proceedings. This order was made in reliance upon Section 29A of the Act, the first sub-section of which provides that the Arbitration Court has the same power to punish contempt of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempt of the High Court. Sub-section 4 limits the penalty to £500 in the case of contempt committed by an organization which consists in failure to comply with an order made under para. (b) or para. (c) of Section 29 (1).

The attack upon the jurisdiction to make these orders is based upon the ground that they could be made only in the exercise of the judicial power of the Commonwealth and that the Constitution does not authorize the legislature to establish a tribunal which at once performs the function of industrial arbitration and exercises part of the judicial power of the Commonwealth. There may be a question whether powers such as those which Section 29 (1) (b) and (c) purport to give are necessarily part of the judicial power of the Commonwealth and cannot be referred simply to the power to legislate with respect to industrial conciliation and arbitration. But there can be no such question with reference to Section 29A which plainly could not be enacted except in conformity with Chapter III of the Constitution. Indeed it must rest on Section 76 (ii) and Sections 71 and 77. It is possible to state the

form of the argument very briefly. The primary function for which the Court of Conciliation and Arbitration is established is the prevention and settlement of industrial disputes by conciliation and arbitration. It involves the discharge for that purpose of the responsibility of determining directly the fundamental questions enumerated in Section 25 of maintaining a supervisory and appellate control over other matters of exercising certain powers to secure the due and orderly conduct of the affairs of registered industrial organizations which may be or commonly are disputants. So much, it is said, appears not only from the history of the Court and from the character of the powers from time to 10 time entrusted to it, but from a mere perusal of the Act as it now stands. From that can be seen clearly enough that the reason for seeking to attach to the Arbitration Court powers or jurisdictions forming part of the judicial power of the Commonwealth was because they were regarded as accessory to its principal function. Desirable or important as it may have been considered in point of policy to place such powers in the hands of the Arbitration Court, they nevertheless were in truth but incidental to or consequential upon the primary or chief functions of that Court. These propositions formed the basis of the argument against the validity of the orders. For it is denied that Chapter III of the Constitution authorizes or permits the legislature to confer 20 any part of the judicial power of the Commonwealth upon a body fulfilling such purposes and it is asserted that Chapter III does not authorize or permit a combination or confusion of strictly judicial power with entirely different functions.

In a federal form of government a part is necessarily assigned to the Judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A federal constitution must be rigid. The government it establishes must be one of defined powers, within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the 30 one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the Governments were placed in the federal Judicature. The demarcation of the powers of the Judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the Judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary 40 power of the States. The powers of the federal Judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Chapter III of the Constitution which is entitled "The Judicature" and consists of ten sections. It begins with Section 71 which says that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other courts as the Parliament creates or it invests with federal jurisdiction. There is not in 50 Section 51, as there is in the enumeration of legislative powers in Article I, Section 8, of the American Constitution, an express power to

constitute tribunals inferior to the Federal Supreme Court. No doubt it was thought unnecessary by the framers of the Australian Constitution who adopted so definitely the general pattern of Article III but in their variations and departures from its detailed provisions evidenced a discriminating appreciation of American experience. On the other hand, the autochthonous expedient of conferring federal jurisdiction on State Courts required a specific legislative power and that is conferred by Section 77 (iii). What constitutes judicial power is not stated. But the subject matter of its exercise is defined with some particularity. Judicial power is divided between appellate and original jurisdiction. Section 73 delimits the appellate power by reference to the tribunals from whose judgments decrees orders and sentences an appeal is to lie. Sections 75 and 76 confine the original jurisdiction which may be exercised in virtue of the judicial power to certain matters chosen in virtue of their relation to the Constitution or to federal law or to some supposed advantage in submitting them to the national judicial power. Section 77 (i) gives a legislative power of defining with respect to the subjects of original jurisdiction the jurisdiction of the Courts which Parliament creates. Section 77 (ii) authorizes the legislature to say with respect to those matters how much of the jurisdiction of a federal court shall be exclusive of that exercisable by the courts of the States. Section 79 gives to the Parliament a power to prescribe the number of Judges by whom the federal jurisdiction of a court may be exercised. Section 78 has reference to matters in which the Commonwealth is a party and matters between States or between a State and a resident of another State. They are of course matters which fall within the original jurisdiction that is conferred upon the High Court and may be conferred on other Courts. Section 74 concerns appeals to the Privy Council. Section 80 is an attempt, very unsuccessful it has proved, to adopt or adapt portion of the American provision in Article III, Sections 2 and 3. Section 72 secures the tenure and remuneration of the Judges and prescribes the mode of appointment.

Among the legislative powers enumerated in Section 51, para. (xxxix) alone mentions the Judicature. It takes the powers vested by the Constitution respectively in the three branches of government, that is to say by Section 1, by Section 61 and by Section 71, and gives a power to make laws with respect to matters incidental to the execution of these various powers, and adds, apparently for the purposes of such provisions as Sections 64 and 69, a reference to the powers vested in any department or officer of the Commonwealth.

Had there been no Chapter III in the Constitution it may be supposed that some at least of the legislative powers would have been construed as extending to the creation of courts with jurisdiction appropriate to the subject matter of the power. This could hardly have been otherwise with the powers in respect of bankruptcy and insolvency (Section 51 (xvii)) and with respect to divorce and matrimonial causes (Section 51 (xxii)). The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial officers by whom they might be constituted. But the existence in the Constitution of Chapter III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with Sections 71-80. An exercise of a legislative power may be such that "matters" fit for the judicial process may arise under the law that is made. In virtue of that character, that is to say because they are

matters arising under a law of the Commonwealth, they belong to federal judicial power. But they can be dealt with in federal jurisdiction only as the result of a law made in the exercise of the power conferred on the Parliament by Section 76 (ii) or that provision considered with Section 71 and Section 77. Section 51 (xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chapter III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal Judicature. But, except for this, when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chapter III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a Court created pursuant to Section 71 and constituted in accordance with Section 72 or a Court brought into existence by a State. It is a proposition which has been repeatedly affirmed and acted upon by this Court. See New South Wales v Commonwealth, 1915 20 C.L.R. 54, 62 : 89-90 : 108-9 : Waterside Workers Federation v Alexander, 1918 25 C.L.R. 434 : British Imperial Oil Co. v Commissioner of Taxation, 1925 35 C.L.R. 422 : Silk Bros. Pty. Ltd. v State Electricity Commission, 1943 67 C.L.R. 1 : Reg. v Davison, 1954 90 C.L.R. 353. Indeed to study Chapter III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chapter III to any other source of power when it makes a law giving judicial power exercisable within the federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chapter III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation : Plowden 113. In Chapter III we have a notable but very evident example.

The first contention made in support of the writ of prohibition is that Chapter III contemplates the creation of Courts which will exist for the exercise of some part of the judicial power and it does not authorize the bestowal of judicial power upon some body the purpose of whose being is not the exercise of federal jurisdiction in the sense of the Constitution notwithstanding that the body is given the character of a Court and that the persons who compose it are appointed and secured in their offices in the manner prescribed by Section 72. It would not, for example, be within the legislative power of the Commonwealth to constitute the Comptroller or a Collector of Customs a Court, providing him with the security of tenure and remuneration prescribed by Section 72, and to confer upon him judicial power to determine matters arising under the Act he administers. Nor could the like be done with the Commissioner of Taxation or the Director of Navigation. Had it been allowable under the Constitution to give the members of the Interstate Commission a life appointment, nevertheless the Commission could not on this view have been constituted a Court and armed with judicial power : for its dominant functions would still have been those described by Section 101, viz. the execution and maintenance of the provisions of the Constitution relating to trade and commerce and laws made thereunder. What Isaacs J. said in the N.S.W v Commonwealth 1915 20 C.L.R. 54, at p. 93, with

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reference to this description of its functions would have remained true: "Those words denote the purpose and nature of the power to be conferred, and mark their limit. Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: Its essential feature as an impartial tribunal would be gone and the manifest aim and object of the constitutional separation of powers would be frustrated. A result so violently opposed to the fundamental structure and scheme of the Constitution requires, as I have before observed, extremely plain and 10 unequivocal language." Therefore, if the argument be right, the decision in that case must have been the same, even without the fatal deficiency of tenure found in Section 103 (ii).

There is, of course, a wide difference—and probably it is more than one of degree—between a denial on the one hand of the possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose and, on the other hand, a denial of the possibility of adding to the judicial powers of a Court set up as part of the national Judicature some non-judicial powers that are not ancillary but are 20 directed to a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question.

A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of Courts established by or under Chapter III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto. First among them stands the very text of the Constitution. If attention is confined to Chapter III it would be difficult to believe that the careful provisions for the creation of a federal Judicature as the institution of government to exercise judicial power and the precise specification of the content 30 or subject matter of that power were compatible with the exercise by that institution of other powers. The absurdity is manifest of supposing that the legislative powers conferred by Section 51 or elsewhere enabled the Parliament to confer original jurisdiction not covered by Sections 75 and 76. It is even less possible to believe that for the federal Commonwealth of Australia an appellate power could be created or conferred that fell outside Section 73 aided possibly by Section 77 (ii) and (iii). As to the appellate power over State Courts it has recently been said in this Court: "On the face of the provisions they amount to an express statement of the federal legislative and judicial powers affecting State Courts which, with the addition of the ancillary 40 power contained in Section 51 (xxxix), one would take to be exhaustive.": Collins v Charles Marshall Pty. Ltd., 1955 A.L.R. 715, at pp. 720-1. To one instructed only by a reading of Chapter III and an understanding of the reasons inspiring the careful limitations which exist upon the judicial authority exercisable in the federal Commonwealth of Australia by the federal Juricature brought into existence for the purpose, it must seem entirely incongruous if nevertheless there may be conferred or imposed upon the same Judicature authorities or responsibilities of a description wholly unconnected with judicial power. It would seem a matter of course to treat the affirmative provisions stating the character and judicial powers of the federal Judicature as 50 exhaustive. What reason could there be in treating it as an exhaustive

statement, not of the powers, but only of the judicial power that may be exercised by the Judicature? It hardly seems a reasonable hypothesis that in respect of the very kind of power that the Judicature was designed to exercise its functions were carefully limited but as to the exercise of functions foreign to the character and purpose of the Judicature it was meant to leave the matter at large. Unfortunately, as perhaps it has turned out to be, the joint judgment delivered in *In re* the Judiciary & Navigation Acts, 1921 29 C.L.R. 257, by the majority of the Court, distinguished between the two conclusions. The joint judgment which took this course was that of Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. The legislation the validity of which was in question, viz. Part XII of the Judiciary Act, purported to give this Court jurisdiction to hear and determine any question of law as to the validity of a federal law which the Governor-General might refer for hearing and determination and to make the determination final and conclusive and subject to no appeal. The learned judges treated it as an attempt to confer judicial power but judicial power which fell outside Chapter III of the Constitution. Their Honours appear in effect to have regarded it as a provision seeking to impose upon this Court a duty to pronounce a judgment *in rem* on the abstract question of the constitutional validity of federal legislation. Their Honours do not use the expression "*in rem*" but "authoritative declaration" It is possible that no more is meant than authoritative precedent, which seems to have been the understanding of Higgins J. However that may be, if it was anything it was original jurisdiction and, as there was no "matter" within Section 76 made the subject of jurisdiction, it was outside the power to confer original jurisdiction. On the view that it was a kind of judicial power, it was enough to decide that the provision was an invalid attempt to enlarge the judicial power of the Commonwealth. The joint judgment contains these passages which sufficiently explains the position adopted in the joint judgment: "After carefully considering the provisions of Part XII, we have come to the conclusion that Parliament desired to obtain from this Court, not merely an opinion, but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court, or on its members, any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (New South Wales v The Commonwealth, 20 C.L.R. 54, at p. 88). In each case the Constitution first grants the power and then delimits the scope of its operation (Alexander's Case, 25 C.L.R. 434, at p. 441)."—29 C.L.R. 257 at p. 264. "This express statement (*scil.* in Sections 75 and 76) of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimination of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under Section 76 of the Constitution for the enactment of Part XII of the Judiciary Act?"—29 C.L.R. 257, at p. 265.

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The question thus propounded was answered by the learned judges in the negative.

Given a Court which satisfies Section 71 and Section 72, the line is by no means broad or easily discerned between judicial power, not being of an appellate nature, which under Section 76 and Section 77 the Parliament may confer upon it and the judicial power which, had there been no implication from Chapter III restricting the meaning or operation of Section 51, a legislative power contained in that section might have enabled the Parliament to confer. Inasmuch as Section 76 (ii) extends to all matters arising under any laws made by the Parliament, there could hardly be much difference so long as it is all within the conception of judicial power. So far as a difference exists it would seem to depend upon the word "matter" and upon some failure on the part of the Parliament to confine the jurisdiction it attempts to confer to some "matter" or "matters". But such a failure will usually mean either that the power it is sought to confer is not judicial or that it is so wide that it goes outside the subjects of federal power. Perhaps it will be enough by way of illustration to mention the unsuccessful argument in R. v Commonwealth Court of Conciliation and Arbitration *Ex parte* Barrett: Barrett v Opitz, 1945 70 C.L.R. 141, at p. 145, and the grounds for rejecting it (at pp. 154 and 165-9 and 172-3). There is in truth much to be said for the view that the function which the legislation, held invalid in *In re* the Judiciary and Navigation Acts, 1920 29 C.L.R. 257, attempted to confer was either not judicial or not only outside Chapter III but outside all affirmative legislation powers. If the legislation meant no more than that the Court was to give an opinion which would be treated as an authoritative precedent, that does not seem to amount to judicial power. If it meant that the Court was to pronounce a judgment on a question of constitutional validity legally concluding everybody, so that no one thereafter might resort to the Constitution as the test of competence but must be governed by the determination of the Court exclusively, then it may well be doubted whether Section 51 (xxxix) or any other legislative power could support such a measure.

With reference to the federal Judicature, the true contrast in federal powers is not between judicial power lying within Chapter III and judicial power lying outside Chapter III. That is tenuous and unreal. It is between judicial power within Chapter III and other powers. To turn to the provisions of the Constitution dealing with those other powers surely must be to find confirmation for the view that no functions but judicial may be reposed in the Judicature. If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chapters I, II and III and the form and contents of Sections 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then Section 61, in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of Section 71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal Courts the Parliament may create and the State Courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.

Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of Parliamentary Government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations. The fact that responsible government 10 is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of the separation of powers. For the American theory involves the Presidential and Congressional system in which the executive is independent of Congress and office in the former is inconsistent with membership of the latter. But that is a matter of the relation between the two organs of government and the political operation of the institution. It does not affect legal powers. It was open no doubt to the framers of the Commonwealth Constitution to decide that a distribution of powers between the executive and legislature could safely be dispensed with, once they rejected the system of the independence of the 20 executive. But it is only too evident from the text of the Constitution that that was not their decision. In any case the separation of the judicial powers from other powers is affected by different considerations. The position and constitution of the Judicature could not be considered accidental to the institution of federalism: for upon the Judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed. This would be enough in itself, were there no other reasons, to account for the fact that the Australian Constitution was framed so as closely to correspond with its American model in the classical division of powers 30 between the three organs of government, the legislature, the executive and the Judicature. But, whether it was necessary or not, it could hardly be clearer on the face of the Constitution that it was done. The fundamental principle upon which federalism proceeds is the allocation of the powers of government. In the United States no doubts seem to have existed that the principle should be applied not only between the federal Govcrment and the States but also among the organs of the national Government itself.

It is not necessary to trace the course of constitutional development in the United States with respect to the separation of powers. It is enough to say that an unfortunate rigidity in the conception of the boundaries between the 40 three great functions of government led for a time to difficulties both of practice and of theory and that the practical expedients by which the difficulties have been met have left the constitutional theorists somewhat at a loss in reconciling them with a priori principle. It is, however, a broad division of power and the division, although it was taken immediately from an American original, is a division of powers whose character is determined according to traditional British conceptions: see Victorian Stevedoring etc. Co. v Dignan, 1931 46 C.L.R. 73, particularly at pp. 101-2. So understood difficulties as between executive and legislative power are not to be expected and none has arisen. It is in connexion with judicial power that questions are 50 apt to occur. But it is hardly consistent with the form and contents of Chapters I, II and III to assign no legal consequence to the division. That was the contemporary view of at least two writers entitled to speak with

authority. Mr. Justice Inglis Clark in his Studies in Australian Constitutional Law (1901) deals with the matter. His understanding appears from the following passages: "The Constitution of the Commonwealth expressly and distinctly distributes between the Parliament of the Commonwealth, the Crown, and the Federal Judiciary together with such Courts of the States as shall be invested with federal jurisdiction, the legislative, the executive and the judicial powers exercisable under its authority. A similar distribution of legislative, executive and judicial powers is made by the Constitution of the United States of America. But within the limits of the British Empire it is only in the Constitution of the Commonwealth of Australia that such a distribution of governmental function is made by a written organic law." (p. 28). Having dealt with the separation of functions secured in practice in Great Britain he wrote: "Therefore the distribution of governmental functions which is made by the Constitution of the Commonwealth of Australia is not an innovation upon British constitutional practice; but the provisions of the Constitution of the Commonwealth which distributively and categorically vest the legislative, the executive, and the judicial powers in three separate organs of government, impose upon the legislative authority of the Parliament of the Commonwealth a legal limitation which does not exist in regard to the Parliament of any other portion of the British Empire." (p. 31). Sir William Harrison Moore, in his Commonwealth of Australia, 2nd Ed., 1910, begins his discussion by observing: "The Constitution follows the plan of the United States Constitution in committing the functions of government—legislative, executive, and judicial—to three separate departments." (p. 93). Having stated the provisions of Sections 1, 51, 61 and 71, he writes (p. 94): "The allotment of functions by the Constitution is thus not merely an allotment between State and Commonwealth; it is also an allotment amongst the organs of the Commonwealth Government." He concludes (p. 96): "In the case of the Commonwealth Parliament it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to address themselves to the problem of defining the functions of those organs." Strong judicial confirmation for these views is to be found in New South Wales v Commonwealth, 1915 20 C.L.R. 54. The question was whether the Interstate Commission established under Section 101 of the Constitution and consisting of members holding office on the tenure prescribed by Section 103 might be created a Court and given judicial powers. Isaacs J. said (at p. 88): "When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity." His Honour then refers to it as "the dominant principle of demarcation"—20 C.L.R. at p. 90. When this dominant principle is applied to Chapter III it confirms the inference to which its terms, independently considered, give rise, namely that Courts established by or under its provisions have for their exclusive purpose the performance of judicial functions and that it is not within the legislative power to impose or confer upon them duties or authorities of another order.

The judicial power, like all other constitutional powers, extends to every authority or capacity which is necessary or proper to render it effective. The judicial power of which Section 71 speaks is not to be defined or limited in any narrow or pedantic manner. With respect to the matters comprised within Sections 76, 77, 78 and 79, it rests with the Parliament to make laws affecting its content or exercise. Legislative powers too are involved in some of the

provisions of Sections 71, 72, 73 and 74. And it must not be forgotten that Section 51 (xxxix) expressly empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the federal Judicature. What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the principal or judicial function or purpose to which it may be thought to be accessory. On more than one occasion of late attempts have been made in judgments in this Court to make it clear that a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connexion with the Judicature, falls within the judicial power or what is incidental to it. See Queen Victoria Memorial Hospital v Thornton, 1953 87 C.L.R. 144, at p. 151 : Reg. v Davison, 1954 90 C.L.R. 353, at pp. 366-370. There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chapter III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive. See Davison's Case, 1954 90 C.L.R. 353, at pp. 369-70 : 376-378 ; 382-4 : 388-9.

The point might be elaborated and many illustrations, particularly from the bankruptcy jurisdiction, might be given. But enough has been said to show how absurd it is to speak as if the division of powers meant that the three organs of government were invested with separate powers which in all respects were mutually exclusive. The true position has been well stated in a brief paragraph by Professor Willoughby in his Constitutional Law of the United States, 2nd Edn., p. 1619, 1062 : " Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its divisions of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested." This principle and the conceptions of English law and tradition and British constitutional practice may explain what to some has appeared a contradiction of the view that the distribution of powers possessed a legal significance. That is to say it may explain the fact that it is the settled constitutional doctrine of the Commonwealth that the legislature, by a law otherwise within its competence, may empower the Executive Government to make statutory rules and orders possessing the binding force of law. The war is too recent to make it necessary to refer to the immense use of the power conferred by the National Security Act 1939-1940.

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The foundation of the doctrine as well as the course of authority by which it was established were examined in Victorian Stevedoring etc. Co. v Dignan, 1931 46 C.L.R. 73, at pp. 84: 86-7: 89-102: 116-117. Gavan Duffy C. J. and Starke J. said (at p. 84): "It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no 10 resemblance to the judicial power." An explanation that was ventured in that case was found in the nature of the power which the division prevents the Legislature handing over. "It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usage of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate 20 legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature. Minor consequences of such a doctrine are found in the rule that offences against subordinate regulation are offences against the statute (Willingale v Norris, (1909) 1 K.B. 57, at p. 66) and the rule that upon the repeal of the statute, the regulation fails (Watson v Winch, (1916) 1 K.B. 688). Major consequences are suggested by the emphasis laid in Powell's Case, (1885) 10 A.C. 282 at p. 291, and in Hodge's Case, (1883) 9 A.C. 117 at p. 132, upon the retention by the Legislature of the whole of its power of control and 30 of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity". (pp. 101-2). Rich J. concurred in the judgment (pp. 86-7). Evatt, J., however, expressed a view that is opposed to the conclusion reached in this judgment and he specifically referred to the Arbitration Court (at pp. 116-7).

Perhaps the most serious difficulty in the case arises from dicta of a like 40 tendency which have fallen from other judges in the Court or on other occasions and from the great length of time which has elapsed since it first became possible for a litigant to raise the contention upon which the Boilermakers' Society now relies. But it is desirable to postpone that difficulty for separate consideration.

One point, however, should be mentioned here which is the subject of decision. When in Alexander's Case, 1918 25 C.L.R. 434, it was decided by a majority of the Court that no part of the judicial power of the Commonwealth could be exercised by the Arbitration Court as then constituted, it was held that there was no objection to the exercise of the functions of industrial 50 conciliation. The President forming the Arbitration Court was a Judge

of this Court and it is said that it was therefore impliedly decided that it was competent for the Legislature to combine the duties of an industrial arbitrator with the duty of exercising the judicial power. The Act established a separate office of President of the Arbitration Court and to that office the judge had accepted an appointment. It is true that the qualification prescribed by the statute for the office of President was that he shoud be a judge of this Court. All that seems to have been involved is that the office of President was not incompatible with the exercise of his duties as a judge, which duties it may be observed in some respects at least arose under the Constitution. It was not 10 a matter that was investigated or considered. It was simply assumed. No doubt no actual inconsistency had been experienced. But whether the view impliedly adopted can or cannot be sustained, it is quite a different situation from that now presented. One thing that Alexander's Case did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. Upon that subject Isaacs and Rich JJ. said of it (25 C.L.R. at p. 463): "That is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial 20 power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other." After describing the nature of the powers and duty of the industrial arbitrator and of the source of the binding force his determination possesses, Isaacs and Rich JJ. proceeded: "The two functions therefore are quite distinct. The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates 30 to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law. Not only are they different powers, but they spring from different sources in the Constitution. The arbitral power arises under Section 51 (xxxv); the judicial power under Section 71. The latter section contains, in the words 'such other Federal Courts as the Parliament creates,' the implied grant of power to create Courts other than the High Court. There is no other grant of that power in the Constitution—except as to territories (Section 122). The two powers being distinct and separate in nature and origin, it follows that, when an 40 Award is once made, the dispute is settled and the arbitral function is at an end. Variation of the Award is, of course, an act of the same nature. And when the Award is made and the right established, the law presumes the parties will obey it. Enforcement by a Court is an entirely separate matter. It arises on breach or threatened breach. But that is the case with every right. A right of property or a contractual right may exist, and, if violated, the law provides for its enforcement. But breach is not presumed. It follows that enforcement is in its nature an entirely separate process from the creation of the right." (25 C.L.R. at pp. 464-5).

When the Court of Conciliation and Arbitration was first established by 50 Act No. 13 of 1904, which was described in its long title as an Act relating to conciliation and arbitration for the prevention and settlement of industrial

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disputes extending beyond the limits of any one State, few powers were given to the Court which necessarily formed part of the judicial power of the Commonwealth. The chief objects of the Act were expressly stated under seven headings in Section 2. They concerned the prevention of strikes and lockouts, the establishment of an Arbitration Court "having jurisdiction for the prevention and settlement of industrial disputes", the providing for conciliation and in default for settlement by Award, the organization of representative bodies of employers and employees and the making and enforcement of industrial agreements. The objects set out did not refer to the enforcement of Awards of any other judicial process. Section 11 enacted that there should be a Commonwealth Court of Conciliation and Arbitration which should be a Court of Record and should consist of a President. The President was to be appointed from among the Justices of the High Court and hold office for seven years: Section 12. The jurisdiction and powers with which the Court and the President were armed were, with the exceptions to be mentioned, altogether concerned with the functions of industrial arbitration and conciliation. With powers and authorities of this description the Court was very fully equipped. The Act included a number of provisions creating specific offences. Thus strikes and lockouts and certain analogous acts were penalized: Sections 6-10. Obstructing the Court (Section 42), insulting and disturbing the Court and like action (Section 82), wilfully making default in compliance with an Award (Section 49), refusal and failure to give evidence (Section 84), certain disclosures of evidence and evidentiary information (Sections 85 and 86), all these were made offences. But all offences were punishable in the ordinary way by summary proceedings before Courts exercising federal jurisdiction: see Acts Interpretation Act 1904, Sections 3, 5 and 6. The provisions which did assume to confer authority on the Arbitration Court which either must or might form part of the judicial power of the Commonwealth include a power to impose penalties for breach or non-observance of orders or Awards proved to the satisfaction of the Arbitration Court to have been committed: Section 38(d). The same jurisdiction exactly is conferred on Courts of summary jurisdiction (Section 44) and, of course, it is plainly judicial power.

As the Act was amended up to the time of Alexander's Case—in that condition it is reprinted in Commonwealth Acts, Vol. 13, App. A. p. 205—there were three other provisions which may be regarded as involving judicial power, viz. paras. (da) and (e) of Section 38 and Section 48. Para. (da) corresponds with the present Section 29 (b) and para. (e) with the present Section 29 (c). Section 48 provided that the Arbitration Court, might on the application of a party to an Award, make an order in the nature of a mandamus or injunction to compel compliance with an Award or restrain its breach under pain of fine or imprisonment. A contravention of the Award after written notice of such an order was then made an offence punishable by fine or imprisonment.

How far the policy or principle of these provisions can be carried into effect under Section 51 (xxxv) without invoking Chapter III may be worthy of consideration, but the provisions as they stood, so it was claimed in Alexander's Case, gave a judicial character to the power. One further power has apparently been assumed to be judicial. It is the power which the President derived from Section 17 to review, annul, rescind or vary any act or decision of the Industrial Registrar. In Jumbunna Coal Mine N.L. v Victoria

Coal Miners' Association, 1908 6 C.L.R. 309 at p. 324, this Court without giving reasons overruled an objection to the competence of an appeal from a decision given by the President under Section 17. If, as seems to be the case, this implies an assumption that Section 17 involved judicial power and that the President was a Court within Section 73 (ii) of the Constitution, these are propositions which would not now be likely to find any support. Alexander's Case was decided upon a case stated which asked categorical but rather general questions. The result of the answers was in effect that the seven years tenure of the President meant that the powers of his Court to enforce Awards were invalid but his powers to arbitrate and make Awards were valid. At that time Section 15A of the Acts Interpretation Act had not been enacted and there were no "severability clause". But Isaacs, Rich and Powers JJ. considered that the primary and dominating object in establishing the Court had been industrial conciliation and arbitration and that the main provisions of the Act were not dependent on the provisions giving powers of enforcement to the Court, and that the latter formed no condition of the operation of the other provisions and were not compensatory or otherwise essential to them. Barton J. went further than these Judges and held the Act totally invalid. These learned Judges appear to have regarded the Arbitration Court as a body whose creation, form, constitution and status were referable to Section 51 (xxxv). They did not ascribe to the legislature any purpose of exercising the legislative power contained in Section 71. The failure of the provisions for the President's tenure to comply with Section 72 on the footing that the tenure prescribed by that section was for life was used by their Honours as a ground for supposing that no intention to rely on Section 71 existed. It is to be noted, however, that Higgins and Gavan Duffy JJ. interpreted Section 72 as allowing an appointment for a period less than life but forbidding the termination of the appointment (except on the grounds the section mentions) before the period expires and Griffith C.J. considered that the fact that the President held his office as a Judge of this Court for life was sufficient compliance with Section 72. No reason therefore existed for imputing to the legislature an understanding that under Section 72 the President must be appointed for life, if the Court was to be established under Section 71, and without that the failure to provide such a tenure can throw no light on the actual intention of the draftsman to rely or not to rely on Section 71.

After Alexander's Case the Act was amended for the evident purpose of removing to Courts exercising the judicial power that jurisdiction to enforce the Act or Awards which the invalid provisions had sought to confer on the Arbitration Court. By Act No. 39 of 1918 amendments were made which had the effect of transferring from the Arbitration Court to a District, County or Local Court or Court of summary jurisdiction the power given by Section 44 to impose penalties for a breach or non-observance of an Award and from the Arbitration Court to a District, County or Local Court the power given by Section 48 to make an order in the nature of a mandamus or injunction to compel compliance with an Award or to restrain its breach under pain of fine or imprisonment. Act No. 31 of 1920 added the High Court or a Justice thereof to the Courts mentioned in Section 48 and extended the section to include contraventions of the Act as well as Awards. The High Court acted more than once on the provision so amended while it was in force, which no doubt implies that it involved judicial power. See Waddell v A.W.U. 1922 30 C.L.R. 570: Whittaker Bros. v Australian Timber

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Workers' Union, 1922 31 C.L.R. 564: Australian Commonwealth Shipping Board v Federated Seamen's Union, 1925 35 C.L.R. 462. Strange as it may seem, neither paras (d), (da) nor (e) of Section 38 were amended or repealed. Possibly it was thought that paras. (da) and (e) might stand and that the judgments made it clear enough that para. (d) was void.

After nearly eight years had elapsed, during which the Arbitration Court had exercised its industrial powers under the law resulting from Alexander's Case and the amendments that immediately followed that case, the legislature passed provisions for the reconstitution of the Court. By Act No. 22 of 1926 the office of President was abolished. Section 11 was amended so as to read that the Court it established should consist not of a President but of a Chief Judge and such other Judges as should be appointed. New provisions were substituted for Sections 12 and 14 giving the Judges a tenure which complied with Section 72 and fixed a remuneration. In Section 44 and Section 48 the Arbitration Court was added to the other Courts therein named. Throughout the Act where the President was mentioned "Chief Judge" or, as the case might be. "Judge" was substituted. It was the same Court; a new Court was not created but the composition of the old one was changed. To cure the invalidity of any provisions which, had the Act been in its amended form *ab ovo*, would have been valid, Section 3 of Act No. 22 of 1926 provided that the Act as amended should be construed as if from the commencement of No. 22 it were confirmed and re-enacted to the intent that any provision that would otherwise have been construed as in excess of legislative power should from the commencement of No. 22 be read with and deemed to be enacted in relation to that Act. This provision does not create a new and different Court, if that matters, and it is difficult to see in what respect the section can affect the question. Plainly the Arbitration Court remained a tribunal established and equipped primarily and predominantly for the work of industrial conciliation and arbitration. Thus the attempt to restore the Arbitration Court to a place in the enforcement provisions contained in Sections 44, 48 and no doubt Section 38 (d), (da) and (e), assumed that it was constitutionally possible to treat the possession of judicial power as something necessary or proper for the effectuation of functions of an altogether different order and on the footing of its being incidental to the main function to annex part of the judicial power to other powers. If this could not be validly done under the Constitution, either because of the dominant purpose and character of the tribunal or because a Court established under Chapter III cannot exercise dual functions, then the attempt must be held to fail. Its failure could result only in its being held for a second time that such provisions as seek to attach to the arbitral powers powers of judicial enforcement are invalid. It could not result in the invalidity of the entire Act or the arbitral provisions of the Act. That would run counter to the whole intention of the legislature. Whether in 1918 it was Barton J. who was right or it was Isaacs, Powers and Rich JJ., once Section 15A of the Acts Interpretation Act came into force there could be no doubt of the severance.

By Act No. 43 of 1930 the provisions penalizing strikes, lockouts and analogous acts were repealed and at the same time Section 48 was repealed. This Act provided for the appointment of three Conciliation Commissioners who were to have certain of the powers of the Court including that of making Awards, but subject to appeal to the Court. When in 1947, by Act No. 10 of that year, the system of Conciliation Commissioners was strengthened and

their jurisdiction enlarged, the provisions dealing with those officers and with the Court were repealed and re-enacted in a form giving effect to the changes. Those dealing with the constitution and composition of the Court were not altered except for some paragraphing and the alteration of " Court of Record " to " Superior Court of Record ". But because of the course taken it was thought necessary to include a provision, Section 4 of No. 10 of 1947, that notwithstanding the repeal of the Part containing those sections the Commonwealth Court of Conciliation and Arbitration existing immediately prior to the commencement of the Act should not cease to exist but should continue as 10 the Court referred to in the principal Act as amended. It is therefore the same Court from beginning to end, if that is a relevant consideration. Act No. 10 of 1947 directed that the sections of the principal Act as amended by that Act should be renumbered and it is convenient to refer to the provisions by the numbers by which they are now known and to deal with the Act as it is amended up to and including Act No. 54 of 1955. By Section 25 the Court is empowered for the purpose of settling industrial disputes to make Awards on the basal matters which the provision enumerates. The Conciliation Commissioners make Awards on all else : Sections 13, 14 and 38. But a Commissioner may refer an industrial dispute or a matter in dispute to the 20 Court with the concurrence of the Chief Judge or a Judge appointed by him to deal with the matter, and if the Commissioner refuses to do so the Chief Judge or the Judge so appointed may on appeal to him refer the dispute or matter to the Court if he thinks that it is of such importance that in the public interest it should be dealt with by the Arbitration Court : Sections 14A and 14B. These provisions are enough to show that while the powers and functions of the Conciliation Commissioners were increased the responsibility of the Arbitration Court was not lessened as the supreme authority in the settlement of industrial disputes. The arbitral and industrial functions of the Court have indeed been extended in not a few directions but it would be tedious to go 30 through the provisions of the Act of an arbitral or industrial character. It is better to mention the provisions which either are or may be thought to be capable of reference only to the judicial power of the Commonwealth. Conspicuous among these are Section 119, Section 29 (1) (a) and Section 29A. These plainly confer jurisdictions which belong to judicial power. Section 29A is not directed to what, in the language used in Barton v Taylor, 1886 11 A.C. at p. 203, may be called the protective and self-defensive powers of the Arbitration Court. It is punitive. Section 119 is an ill-framed attempt to vest summary jurisdiction over offences. Para. (a) of Section 29 (1) is but a version of Section 38 (d) of the Act of 1904-1946 empowering the Court to 40 impose penalties for breach or non-observance of an order or Award. Section 29A gives power to punish for contempts of all descriptions. These provisions plainly must rest upon Chapter III. Section 59, which was formerly Section 44, includes the Arbitration Court among other Courts which it mentions and gives them serverally jurisdiction to impose penalties for breach or non-observance of an order or Award. This provision is in the same category. It is to be noticed that the invalidity of such provisions affects the operation, according to its own terms, of Section 86. The provisions of Division 3 of Part VI relating to disputed elections in organizations seem for the most part to depend on Section 51 (xxxv), including what is incidental to 50 that paragraph and not to be touched by Chapter III. This may be true of much of Section 96G but sub-section (3) (a) and (b) of that section and Section 96H, with which Section 96J is linked, may be thought to be cast in

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the mould of judicial power even although the same purpose may be achieved by provisions differently conceived. But that is not a matter now before us. A question not without difficulty is raised by Section 16 (2) and (3) which provide for the determination, on a reference from a Commissioner, of any question of law. Possibly it may be treated as advisory and not judicial. See Knight v Tabernacle Permanent Building Society, 1892 2 Q.B. 613. Possibly some doubt may exist whether sub-section (6) of Section 16 is necessarily invalid as involving judicial power. Sections 13 and 25, considered independently, have been held to involve a mutually exclusive division of power between Commissioners and Court according to an objective standard 10 that is imperitive : see R. v Commonwealth Court of Conciliation and Arbitration, *Ex parte* Ozone Theatres (Aust.) Ltd., 1949 78 C.L.R. 389 at pp. 400-1 ; R. v Metal Trades Employers' Association, *Ex parte* Amalgamated Engineers' Union, 1951 82 C.L.R. 208, at p. 248. But it may be possible to base the division on the opinion of the controlling arbitral tribunal rather than upon an objective standard. Whether sub-section (6) could be construed as doing no more than this is another matter. See R. v Galvin, *Ex parte* Metal Trades Employers' Association, 1949 77 C.L.R. 432, at pp. 444-5. But again the validity of sub-section (6) is a question that is not before us. It is needless to say too that we cannot now pass upon the characterisation of sub-section (5) 20 of Section 83A relating to the determination of disputes as to a title to membership of an organization. But it would be unreal to treat all or any of these powers as anything more than consequential, accessory or incidental authorities annexed to the powers and functions in the performance of which the Arbitration Court finds the real or dominant purpose of its being.

The foregoing lengthy examination of the considerations governing the meaning and effect of Chapter III and of the history and nature of the legislation determining the nature, purpose and function of the Arbitration Court discloses no ground for regarding it, consistently with the provisions of the Constitution, as possible to combine in one body the arbitral powers 30 and functions which Section 51 (xxxv) empowers the Parliament to create and any part of the judicial power of the Commonwealth ; and it discloses no ground for treating the Arbitration Court as a Court the purpose of whose creation or existence is the exercise of judicial power of the Commonwealth. The Institution was created and exists as and for an authority entrusted with the full power and functions which Section 51 (xxxv) authorizes. It is beside the mark to ask whether the legislature would in the beginning have given it the character of the Court or persevered in maintaining that character, had it not desired to give the Institution some judicial power. We do not know and it does not matter; for it is a question of the power of the legislature to effect 40 the object. There is no reason why Section 51 (xxxv) should not suffice to enable the legislature to clothe the arbitral authority with the designation and character of a Court and provide a status and tenure for the arbitrators of the same description as that required by Section 72 for Judges. What it could not do if the Constitution is to be applied according to the meaning which its text conveys is to exercise the power conferred by Section 71 for the creation of a Court for the fulfilment of the functions and objects forming the subject of the legislative power conferred by Section 51 (xxxv). To create such a tribunal it must rely upon Section 51 (xxxv) because those functions are outside Chapter III. Nor would it matter if the intention of the legislature was 50 to rely upon Section 71 and Section 77. You do not determine questions of

*ultra vires* except by reference to the sufficiency of the powers that actually exist to support what has actually been done.



Independently, therefore, of certain considerations which it will be necessary to discuss, it is difficult to see what escape there can be from the conclusion that the Arbitration Court, though under Section 51 (xxxv) of the Constitution there is legislative power to give it the description and many of the characteristics of a Court, is established as an arbitral tribunal which cannot constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of 10 the Commonwealth. The basal reason why such a combination is constitutionally inadmissible is that Chapter III does not allow powers which are foreign to the judicial power to be attached to the Courts created by or under that chapter for the exercise of the judicial power of the Commonwealth. To this interpretation of Chapter III an objection is made which rests upon the decisions given under Section 122 with respect to the appeal to this Court that has been given from the Courts of Territories. It has been decided that the Courts of the Territories falling under Section 122 are not governed by the judicature provisions. A trial on indictment for an offence against a law of a Territory need not be by jury : for Section 80 has no 20 application. A law of the Territory is not a law of the Commonwealth within that section. It was so held in R. v Bernasconi, 1915 19 C.L.R. 629. Nevertheless by an exercise of legislative power derived from Section 122 an appeal may be given to this Court from a Court of a Territory. That was decided in Porter v R., *Ex parte* Yee 1926 37 C.L.R. 432, by Isaacs, Higgins, Rich and Starke JJ : Knox C.J. and Gavan Duffy J. dissenting. This seems at first sight to be inconsistent with the decision in *In re* the Judiciary and Navigation Acts, 1921 29 C.L.R. 257, which was that the jurisdiction of the High Court, as of other federal Courts when created, arises wholly under Chapter III of the Constitution. The reconciliation depends upon the view 30 which the majority adopted that the exclusive or exhaustive character of the provisions of that chapter describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part. Isaacs J. expressed this view as follows : " I accordingly accept the later case (*scil.* *In re* the Judiciary and Navigation Acts) as authoritatively determining that ' the judicial power of the Commonwealth ', within the meaning of Chapter III, and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by R. v Bernasconi, 1915 19 C.L.R. 629, that of the Commonwealth proper, which means the area included within States. Beyond that the decision in the later 40 case does not apply. It follows that, if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts."—37 C.L.R. at p. 441. It would have been simple enough to follow the words of Section 122 and of Sections 71, 73 and 76 (ii) and to hold that the Courts and laws of a territory were federal Courts and laws made by the Parliament. As Section 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply and otherwise it would only be necessary to confer upon Judges of Courts of Territories the tenure required by Section 72. But an entirely different interpretation has been adopted, one which brings its own difficulties : see, for example, Waters v Common-50 wealth, 1951 82 C.L.R. 188 : Federal Capital Commission v Laristan Building etc. 1929 42 C.L.R. 582, and the comment thereon by Mr. Ewens, 1951 25 A.L.J. 537-8. It is an interpretation, however, which finds support

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in the course adopted in the United States in relation to the analogous Article III and Article IV, Section 3, cl. 2. " The laws of Congress organizing the different Territories from time to time have always provided for the constitution of appropriate Courts in those Territories; but it is settled that these are not Courts of the United States under the Constitution of the United States. They are what are called ' Congressional Courts,' established by force of the authority conferred on Congress to make all needful rules and regulations concerning the territory and other property of the United States. The Judges of those courts do not hold during good behaviour; they hold for a term of years. And there are various other provisions in the Acts constituting the 10
Courts, which distinguish them from the Courts of the United States. Nevertheless, there is an appeal from the highest Courts of the Territories to the Supreme Court of the United States."—Curtis, Jurisdiction etc. of the Courts of the United States, 2nd Ed., p. 105. Such Courts, in common with the Court of Claims and other Courts possessing an analogous basis of authority, are now commonly called legislative Courts rather than Congressional Courts to distinguish them from the Constitutional Courts exercising the judicial power of the United States. In a sense it is all placed on the supreme and unrestricted power with reference to Territories, as appears from the following passage in a judgment of the Supreme Court delivered by Fuller C.J.: " And 20
as wherever the United States exercise the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories . . . that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior Courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government."—U.S. v Coe, 1894 155 U.S. 76: at p. 86: 39 L. Ed. 76: at p. 79. The situation is described in the Annotated Constitution of the United States, 1952 Edn. by Professor Corwin at p. 536, as a judicial paradox. Under that heading the Annotation says that in De Groot 30
v U.S. 1867 5 Wall. 419: 18 L. Ed. 700, the Court tacitly rejected an opinion of Taney C.J. prepared in the case of Gordon v U.S., 1865 2 Wall. 261: 17 L. Ed. 921, and posthumously printed twenty years later in 117 U.S. 697, in which the Chief Justice expressed the view that judgments of legislative Courts could never be reviewed in the Supreme Court. The text proceeds that since then " the authority of the Supreme Court to exercise appellate jurisdiction over legislative Courts has turned not upon the nature or status of such Courts, but rather upon the nature of the proceeding before the lower Court and the finality of its judgment. Consequently in proceedings before a legislative Court which are judicial in nature and admit of a final 40
judgment the Supreme Court may be vested with appellate jurisdiction. Thus there arises the workable anomaly that though the legislative Courts can exercise no part of the judicial power of the United States and the Supreme Court can exercise only that power, the latter nonetheless can review judgments of the former." But it must not be forgotten that, in the language of Story J., " The appellate power is not limited by the terms of the third article to any particular Courts. . . . It is the case, then, and not the Court that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends "—Martin v Hunter's Lessee, 1816 1 50
Wheat. 304 at p. 338: 4 L. Ed. 97 at p. 105. In this respect Section 73 of the Commonwealth Constitution differs entirely: it makes the appellate power

depend upon the Court or tribunal to be appealed from. What in truth has been done in Australia is to treat the negative implication arising from the enumeration by that section of such Courts as confined wholly to the Courts of the federal system consisting of States and Commonwealth. That is the decision in Porter v R., 1926 37 C.L.R. 432. Once this is perceived it becomes apparent that the qualification has no influence on the question in hand. For the question is concerned wholly with the federal system consisting of States of Commonwealth. Wherever else the jurisdiction of the Arbitration Court may extend it was for that field that it was established, as indeed the very words with which Section 51 (xxxv) concludes illustrate. In the United States, both in that field and in that of sovereign power over the Territories the exclusion concerns rather the judicial or non-judicial quality of the power; what is excluded from the Supreme Court is the performance of functions which are foreign to the judicial power. "The power conferred on this Court is exclusively judicial and it cannot be required or authorized to exercise any other"—Muskrat v U.S., 1911 219 U.S. 346 at p. 355: 55 L. Ed. 246, at p. 249. In respect of this singleness of function Chapter III must surely mean that the judicature of the Commonwealth should stand in the same position. But it is one thing to feel the great strength of the reasons for this conclusion which appear on the face of the Constitution and receive such confirmation from every admissible consideration of history of analogy and of principle. It is another thing to give effect to it by holding at this date that the enactment was invalid of Section 29A and by consequence of others too: certainly Section 29A, Section 59, so far as it includes the Arbitration Court, and Section 119. During a great length of time, indeed ever since the Act No. 22 of 1926 took effect, it has been open to any litigant affected by the exercise by the Arbitration Court of any powers of the description conferred by these provisions to attack their validity. No such attack has come before this Court. It is perhaps not hard to understand why. Section 29A was inserted only in 1951 after the decision of this Court in R. v Metal Trades Employers' Association, 1951 82 C.L.R. 208. It was not until that decision that provisions such as cl. 19 (ba) of the Award now before us were sustained in this Court. The provisions of the Act penalizing strikes had long been removed from the Act and the punishment of breaches of other provisions of the Act and of other provisions of Awards may have seemed less important. In any case they were punishable in other Courts even if an objection to the jurisdiction of the Arbitration Court were made successfully by a defendant. Doubtless constitutional lawyers were not unaware of the difficulty. But for whatever reason it may have been no party raised the question and it is not the practise for the Court to raise questions of constitutional validity. The validity of the provisions was assumed. Not only was the assumption made but the character of the provisions was referred to once or twice by way of illustration on the footing that they were valid. Observations were made particularly by Latham C.J. and Starke J., concerning the doctrine of the separation of powers tending against either its existence or its practicability or its possessing any practical significance. See per Starke J. in Rola Co. v Commonwealth, 1944 69 C.L.R. 185, at p. 210: Johnston Fear & Kingham and the Offset Printing Company Proprietary Limited v Commonwealth, 1943 67 C.L.R. 314, at p. 326: R. v Federal Court of Bankruptcy: *Ex parte* Lowenstein, 1938 59 C.L.R. 556, at p. 576. In the last-mentioned case Latham C.J., at pp. 564-6, in a passage too extensive to quote at length, expressed the view that there could not be said to be a strict doctrine of separa-

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tion of powers, saying that the executive government and the legislature are not in Australia, as they are in the United States, kept apart. His Honour ended his observations as follows:—" Thus, in my opinion, it is not possible to rely upon any doctrine of absolute separation of powers for the purpose of establishing a universal proposition that no Court or person who discharges federal judicial functions can lawfully discharge any other function which has been entrusted to him by statute. This proposition, however, does not involve the further proposition that any powers or duties, of any description whatsoever, may be conferred or imposed upon federal Courts or federal Judges. If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it." Reliance was placed during the present argument on the actual decision of the Court in Lowenstein's Case as amounting to an adoption of the proposition that non-judicial powers could be attached to a federal Court. But this is not so. On the view which the majority of the Court took as to the role of the Judge under Section 217 of the Bankruptcy Act and the manner in which the proceedings thereunder against the bankrupt for an offence were to be carried on, there was no repugnance to the exercise of the judicial power and as there could be no doubt of the matter being incidental to a proceeding arising in bankruptcy, the provision was sustained accordingly under the incidental power. If on a recent occasion the Court had not interpreted the decision as dependent on the view taken of the operation of Section 217 rather than of constitutional principle, one may be sure that the Court would not have declined to allow the decision to be re-opened: See Sachter v A.G. for the Commonwealth, 1954 28 A.L.J. 298. Of the cases cited to illustrate the fact that the Court has repeatedly proceeded on the tacit assumption that a strictly judicial power was well conferred on the Arbitration Court, perhaps the most striking is The King v Taylor, *Ex parte* Roach, 1951 82 C.L.R. 587. For there an Order *Nisi* for a writ of prohibition challenging the validity of two orders finding the prosecutor in prohibition guilty of contempts and fining him was refused. The grounds upon which it was claimed that there was an excess of jurisdiction were examined and rejected and, although the question of validity now before us was not raised, it is said correctly enough that the refusal of prohibition implies in point of logic the existence in the Arbitration Court of a judicial power. But still further to emphasise the undesirability of disturbing the assumption that the Arbitration Court might exercise a part of the judicial power of the Commonwealth a number of reported cases were cited where the Court without question had accepted the assumption and proceeded accordingly. No purpose would be served by discussing then in detail. It is enough to state their nature. Five of them are cases in which, during the period when for some reason the long standing prohibition of appeals from the Arbitration Court was not in operation, (see Jacka v Lewis, 1944 68 C.L.R. 455) this Court entertained appeals from orders of a judicial nature as orders made by a Court within Section 73. Some five others treat the Arbitration Court in one way or another as if it was the repository of judicial power, either by refusing to prohibit orders made under Section 29 (b) or (c) or failing in some other way to take occasion to treat the Court as possessing no such jurisdiction. These cases, and perhaps other examples exist, do no doubt add to the weight of the general considerations arising from lapse of time, the neglect or avoidance of the question in

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previous cases and the very evident desirability of leaving undisturbed assumptions that have been accepted as to the validity of the provisions in question. At the same time, the Court is not entitled to place very great reliance upon the fact that, in cases before it where occasion might have been made to raise the question for augument and decision, this was not done by any member of the Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly. Undesirable as it is that doubtful questions of validity should go by default, the fact is that the Court usually acts upon the presumption of validity until the law is specifically challenged. Once or twice of late, however, when questions of the vadidity of provisions of the Act have been before it in which the confusion or combination of arbitral with judicial power appeared to be actually or potentially involved, members of the Court have felt that some *caveat* was called for. See Reg. v Foster, *Ex parte* the Commonwealth Life (Amalgamated) Assurances Ltd., 1952 85 C.L.R. 138, at p. 155 : Reg. v Commonwealth S.S. Owners, *Ex parte* Waterside Workers' Union, 1955 A.L.R. 654, at p. 659. In Collins v Charles Marshall Pty. Ltd., 1955 A.L.R. 715, it was formally raised by the Solicitor-General for Victoria but it proved unecessary for him to argue it (see 1955 A.L.R. at p. 723).

The accumulated weight of the foregoing considerations is very great. But it is necessary to stop short of treating them as relieving this Court of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce. It proceeds according to law in this duty when it is governed by the authority of prior judicial decisions in ascertaining the meaning and operation of the Constitution and carrying it into effect. If, as is the case here, the principle or the particular application of principle that is in question has not been settled by the authority of a judicial decision in which it has been raised, considered and dealt with, the Judges must give effect to the Constitution according to the interpretation which on proper consideration they are satisfied that it bears. But in arriving at a conclusion they not only are entitled, but ought, to attach weight to such matters as are dealt with in the foregoing discussion, treating them as considerations which should influence their judgment upon the meaning and application of the Constitution. Such matters as judicial dicta, common assumptions tacitly made and acted upon, and the fact that legislation has passed unchallenged for a considerable period of time, may be regarded as raising a presumption which should prevail until the judicial mind reaches a clear conviction that consistenly with the Constitution the validity of the provisions impugned cannot be sustained. But they cannot be regarded as doing more.

Notwithstanding the presumptive force which has been given to these matters in the consideration of the present case, it has been found impossible to escape the conviction that Chapter III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organized as a Court and in a manner which might otherwise satisfy Sections 71 and 72, and that Chapter III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it.

One suggestion made in support of the validity of the provisions impugned in this case is that, conceding the conclusion just stated, it can be no more than

a principle the application of which must be subject to any special provision of the Constitution qualifying its operation by express words or necessary intendment, and that in Section 51 (xxxv) such a special provision is to be found.

In support of this contention reliance was placed upon industrial legislation existing in New Zealand and some of the Australian colonies before and shortly after the adoption of the Constitution. It was relied upon as evidence that the conception of industrial arbitration that was current involved an Arbitral Court possessing some judicial power of enforcement. The contention finds some analogy in the argument in support of the validity of the statutory provisions as to the Interstate Commission which was rejected in N.S.W. v Commonwealth, 1915 20 C.L.R. 54. Much less material can be found in Section 51 (xxxv) than in Sections 101 and 103 in support of the suggestion that an exception to the operation of Chapter III was intended. In truth there is nothing in the form, content or subject matter of Section 51 (xxxv) indicating any such necessary intendment. The uncertain inferences drawn from colonial legislation as to the conceptions afloat in the decade during which the Constitution was adopted form no foundation on which implications of grave significance can be read into the Constitution. The argument no doubt presents a simple solution of the embarrassments of the problem raised by this litigation but unfortunately it has no material basis.

In the foregoing reasoning no specific reliance has been placed upon the course of judicial history in the United States concerning the impossibility of mixing judicial and non-judicial functions. It is a long history stretching from end of the eighteenth century. The first enunciation of the principle may be seen in Hayburn's Case and the communications of the Judges subjoined to the report of that case (1792 2 Dallas 489: 1 L. Ed. 436) and in the note of Yale Todd's Case (1794 13 Howard 52: 14 L. Ed. 47). The judicial paradox concerning appeals from territorial and other legislative courts has already been referred to. In addition, some controversial opinions have been expressed judicially as to the use of the power over territories to enlarge the diversity of citizenship jurisdiction to cover residents of the District of Columbia. But unless these be exceptions, there has never been any departure from the principle that the Courts established by or under the Constitution for the exercise of judicial power cannot be authorized to go beyond the limits marked out by Article III, and that the substantive powers of Congress do not extend to vesting in such Courts powers or functions which are not judicial and are not auxiliary to the judicial power. In Collins v Charles Marshall Pty. Ltd., 1955 A.L.R. 715, at pp. 721-723, the judgment of six of the Judges of this Court contains a passage which discusses the differences, so far as material to the purpose then in hand, between Chapter III and Article III. It is unnecessary to repeat the passage. It is enough to say that to read it is to see that Chapter III reflects an attempt to meet many of the difficulties or deficiencies in Article III that, in the history of that provision in the United States, had been encountered. It is the evident result of an understanding of at least certain important matters on which the Supreme Court had pronounced. It woud be indeed difficult to believe that the framework of Chapter III was not adopted because the effect of the framework of Article III was known and it was intended that the same broad principles affecting the judicial power should govern the situation of the Judicature in the Commonwealth Constitution. One American case should perhaps be mentioned because it supplies an example of a similar application of principle. It concerned an attempt to

establish a Court to determine freights and charges in connexion with transportation and to regulate that activity in specified respects. Certain judicial powers were given to the Court. The case arose under a State Constitution based upon a separation of powers but it was decided by a United States District Court—Western Union Telegraph Co. v Myatt 1899 98 Fed. Rep. 335. The judgment contains a full discussion both of the constitutional principle and of its application to the legislation, the nature and effect of which is examined. The material points of the decision are these:—(a) that to regulate the conduct of a business and to fix for future observance the rates and charges for services rendered therein is wholly a legislative or administrative function and is entirely and vitally different from a judicial function; (b) that the Court of Visitation, as it was called, was, in the exercise of such powers, a legislative and administrative body, its character being unaffected by the fact that it was denominated a Court and provided with the machinery of one or that it was empowered to conduct investigations under the forms of legal procedure before taking action in such matters; and (c) that the Act creating the Court of Visitation was invalid, at least in so far as it attempted to confer upon that body judicial powers in respect of the same matters of which it was given legislative and administrative jurisdiction.

It is necessary now to return to the orders which it is sought to prohibit and the provisions of the Conciliation and Arbitration Act, Section 29A and Section 29 (1) (b) and (c), in purported pursuance of which the orders were made. The foregoing reasons necessarily mean that Section 29A is invalid and the order of 28th June 1955 cannot be supported. Concerning Section 29 (1) (b) and (c) there may be more doubt. The legislative power contained in Section 51 (xxxv) carries with it all that is incidental to the subject matter. Since it enables the legislature to provide for an Award or order with respect to a two state industrial dispute, why, it may be asked, should it not support a provision authorizing the industrial tribunal to repeat or amplify its Award or order in respect of a particular matter for the purpose of exposing parties who thereafter contravene the directions of the tribunal in that matter to a greater penalty or to prosecution for a more specific offence? Nothing said in this judgment warrants a negative answer to the question. But is the power given by Section 29 (1) (b) and (c) simply of this description? It is to be noticed that under para. (b) a breach must be proved to the satisfaction of the Court. Para. (c) appears to provide for the well-known judicial remedy of an injunction against a wrongful act. There is no increased or other penalty specifically attached to breach of an order made under para. (b) or para. (c). It is left to the same sanctions which Section 29A, Section 59 and Section 62 contemplate or name. The powers which Section 29 (1) enumerates are no longer introduced by the words "as regards every industrial dispute of which (the Court) has cognizance". It is not easy to give to these provisions a purely arbitral character. They seem rather to be powers of enforcement for the protection of rights arising from the Award or order compliance with which is to be ordered or breach of which is to be enjoined. Though it perhaps might have dealt with the matter differently, the legislature has in truth provided for the exercise of judicial powers. From this it follows that Section 29 (1) (b) and (c) cannot be sustained. The order of 31st May 1955 is consequently bad.

The Order *Nisi* for a Writ of Prohibition should be made absolute in respect of both orders.

*In the High Court of Australia.*

No. 4. Reasons for Judgment of His Honour, Mr. Justice Williams, 2nd March 1956.

No. 4.

REASONS FOR JUDGMENT OF HIS HONOUR Mr. JUSTICE WILLIAMS

This is an application by the Boilermakers' Society of Australia, an organization of employees registered under the Commonwealth Conciliation and Arbitration Act, 1904-1952, to make absolute a rule *nisi* for the issue of a writ of prohibition prohibiting the three Respondents, who are Judges of the Commonwealth Court of Conciliation and Arbitration, from further proceeding with or upon orders made by that Court on 31st May 1955 and 28th June 1955 upon the application of the Respondent, the Metal Trades Employers' 10 Association, an organization of employers registered under that Act. The details of these orders are not important. It is sufficient to say that they were made by the Arbitration Court consisting of the above three Judges under the provisions of Section 29 (1) (b) of the Arbitration Act which provides that the Court shall have power to order compliance with an order or Award proved to the satisfaction of the Court to have been broken or not observed, Section 29 (1) (c) which provides that the Court shall have power by order to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or Award, and Section 29A which confers on the Court the same powers to punish for contempts of its power and 20 authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court. The ground on which the validity of the Orders is attacked is that these provisions of the Conciliation and Arbitration Act, 1904-1952, are *ultra vires* and invalid in that (a) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, (b) the powers which these provisions purport to vest in that Court and exercised by it in making the said orders are judicial, and (c) these provisions are accordingly contrary and repugnant to the provisions of the Constitution 30 of the Commonwealth and in particular Chapter III thereof.

It is common ground and quite clear that in exercising the powers conferred by these provisions the Court was purporting to act as a federal Court created under Chapter III of the Constitution and to exercise part of the judicial power of the Commonwealth. It is not contended that the Parliament may not validly vest in the High Court or in any other federal Court which it creates some functions of a legislative or executive character provided they are merely incidental and ancillary to its judicial functions. It is conceded, for instance, that such Courts may be empowered to make rules governing their procedure. But it is contended that it is not constitutionally 40 permissible for the Parliament to vest any part of the judicial power of the Commonwealth in a body having non-judicial functions. If the body is primarily established for non-judicial purposes or has independent non-judicial functions, it cannot also be invested with part of the judicial power of the Commonwealth. The combination of such powers in one body is not permitted under the Constitution. If one set of functions is found to be predominant (in this case the arbitral functions) and the other subsidiary (in this case the judicial functions), the judicial functions must be discarded and the arbitral

powers alone remain. Alternatively, if the combination is invalid and there is no means of ascertaining which functions are predominant, the whole of the provisions must fail.



These contentions raise constitutional issues of first-class importance and the argument has occupied a considerable time. The whole history of the Commonwealth Conciliation and Arbitration Act in its various forms has been investigated and every reference that has been made in this Court to the Act and the Arbitration Court has been cited. But I only find it necessary to refer to some of this material. The argument for the prosecutor is based on the 10 doctrine of the separation of powers and it is contended that the structure of our Constitution is such that the functions of the three organs of government, the Parliament, the Executive and the Judiciary must be kept as separate and distinct as they have been in the case of the Constitution of the United States of America. Accordingly, a body performing functions of a non-judicial character cannot be created a federal Court under Chapter III of the Constitution, and a Court so created cannot have conferred upon it any functions which are not part of the judicial power of the Commonwealth within the meaning of that Chapter. With that argument I cannot agree. The doctrine of the separation of powers has led to grave difficulties in the United 20 States and we should apply it with great circumspection to the Australian Constitution. The Commonwealth of Australia Constitution Act is an Act of the Imperial Parliament and should be interpreted as such. In English constitutional history the doctrine means little more than that effective government requires that there should be a Parliament elected by the people to make the laws, an executive responsible to Parliament to execute them, and an independent judiciary to interpret and enforce them. It requires that in a broad sense the legislative, executive and judicial functions of government should be kept separate and distinct. The position is succinctly stated by Isaacs J. in Le Mesurier v Connor, 42 C.L.R. 481 at p. 519: "It is altogether a mistaken 30 notion that because the Constitution distinguishes between the legislative and the executive and the judicial departments of the Commonwealth, there can ever in the practical working of any Constitution be a rigid demarcation placing each class of acts in an exclusive section" I agree with the statement of Kitto J. in The Queen v Davison, 90 C.L.R. 353 at p. 381, that at the time the Australian Constitution was being formed neither in England nor elsewhere had any precise tests by which the respective functions of the three organs of government might be distinguished ever come to be generally accepted. Chapter I of the Constitution headed "The Parliament" provides (Section 1) that the legislative power of the Commonwealth shall be vested in 40 a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth". Chapter II headed "The Executive Government" provides (Section 61) that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. Chapter III headed "The Judicature" provides (Section 71) that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal Courts as the 50 Parliament creates, and in such other Courts as it invests with federal jurisdiction. The three organs of government are therefore created by separate

chapters of the Constitution. But the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the Constitution of the United States as a guide, its authors were almost bound to frame it in this way. But the persons elected or appointed to exercise the legislative and executive powers are not kept separate and distinct. The position is exactly to the contrary. Section 62 of the Constitution provides that there shall be a Federal Executive Council to advise the Governor-General in the Government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure. It is true that under this power the Governor-General could theoretically appoint as members of the Federal Executive Council persons who are not in Parliament but in accordance with constitutional practice he appoints the members of the Government of the day and he must appoint some Members of Parliament because Section 64 provides that the Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish, that they shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth, and that after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a Member of the House of Representatives. Chapter III defines how the judicial power of the Commonwealth shall be exercised and the extent of that power. Section 71 has already been set out. The judicial power of the Commonwealth can only be exercised by the Courts to which it refers. It cannot be exercised by any federal Court the Judges of which are not appointed for life. That is because Section 72 provides that the Justices of the High Court and of the other Courts created by the Parliament (i) shall be appointed by the Governor-General in Council, and (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

The Arbitration Court, if it be a Court, is a federal Court and its Judges must therefore be appointed for life. Section 72 (iii) provides that the Justices of the High Court and other federal Courts shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. No Act creating a federal Court need say specifically that the Judges shall be appointed for life. It is sufficient if Parliament creates the Court and fixes the remuneration of the Judges. The Constitution itself provides for the appointment of the Judges and for their life tenure of office, subject only to removal as there prescribed. An Act providing for the creation of a federal Court the Judges of which were to be appointed for a period, whether it be for a term of years or until they attain a certain age, would be inconsistent with Section 72 and would be invalid. A Court consisting of Judges so appointed would not be a federal Court within the meaning of Chapter III and could not exercise any part of the judicial power of the Commonwealth. Section 11 of the Commonwealth Conciliation and Arbitration Act, 1904, provided that there should be a Commonwealth Court of Conciliation and Arbitration, which should be a Court of Record, and should consist of a President. Section 12 provided that the President should be appointed by the Governor-General from among the Justices of the

High Court. He should be entitled to hold office during good behaviour for seven years, and should be eligible for re-appointment, and should not be liable to removal except on addresses to the Governor-General from both Houses of the Parliament during one session thereof praying for his removal on the ground of proved misbehaviour or incapacity. The Act also provided for the appointment by the President of any Justice of the High Court or Judge of the Supreme Court of a State to be his deputy in any part of the Commonwealth. The Act was amended from time to time. By Act No. 31 of 1920 Section 11 of the principal Act was amended so that the Court should consist of the
10 President and such Deputy Presidents as were appointed in pursuance of the Act. The qualifications of a Deputy President continued to be that he should hold the office of a Justice of the High Court or a Judge of the Supreme Court of a State. By Act No. 29 of 1921 Section 14 of the principal Act was amended so as to provide for the appointment as Deputy Presidents of Barristers or Solicitors of the High Court or of the Supreme Court of a State of not less than five years standing. The duties of the Court under the Commonwealth Conciliation and Arbitration Act, 1904, as amended up to 1921, were predominantly of an arbitral character, but the Court was also invested with some powers that were strictly judicial, for instance the power under Section
20 38 (d) to impose penalties for any breach or non-observance of any term of an order or Award proved to the satisfaction of the Court to have been committed. In Alexander's case, 25 C.L.R. 434, it was held that the Arbitration Court was incompetent to exercise the judicial power of the Comonwealth because the Presidents and Deputy Presidents were not appointed for life but that the arbitral powers were severable and still exercise-able. For eight years after this decision the Court remained an arbitral body shorn of its judicial powers. The Commonwealth Conciliation and Arbitration Act, 1926, repealed Sections 12, 13 and 14 of the principal Act and inserted three new sections in their stead. The effect of the amendments
30 was to provide for the substitution of Judges for the President and Deputy Presidents. The Act provided that the Court should consist of one or more Judges one of whom should be the Chief Judge, that the Judges should be appointed by the Governor-General in Council, and that they should not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity. The Act provided that the qualifications of the Chief Judge and of each other Judge should be that he must be a Barrister or Solicitor of the High Court or of the Supreme Court of a State of not less than five years standing. The Act also provided for the
40 remuneration of the Judges.

Accordingly, this Act provided for the appointment of Judges for life and in that respect the appointment complied with Section 72 of the Constitution. The Act also attempted to breathe fresh life into the whole of the sections of the principal Act, supposing any of these sections needed it. Section 3 provided that:—

> "3. The Principal Act, as amended by this Act, and every provision of that Act as so amended shall be construed as if that Act were, as from the commencement of this Act, confirmed and re-enacted as so amended; to the intent that where any provision of the
50 Commonwealth Conciliation and Arbitration Act 1904, or of that

Act as amended by any Act or Acts, has before the commencement of this Act been, or would, but for this Act, have been, construed as being in excess of the legislative power of the Parliament, that provision shall, as from the commencement of this Act, be read with and deemed to have been enacted in relation to the amendments made by this Act."

By the same Act, Section 48 of the principal Act was amended by inserting before the words "The High Court" the words "The Court". That section provided that the High Court or a Justice thereof or a County, District or Local Court might, on the application of any party to an Award, make an order in the nature of a mandamus or injunction to compel compliance with the Award or to restrain its breach or to enjoin any organization or person from committing or continuing any contravention of this Act or of the Award under pain of fine or imprisonment, and no person to whom such order applied should, after written notice of the order, be guilty of any contravention of the Act or the Award by act or omission. Penalty: £100 or three months' imprisonment. Accordingly, the Act not only provided for the appointment of Judges of the Arbitration Court for life. It also conferred on the Court a new power which was plainly judicial. But the functions of the Court continued to be predominantly arbitral. The Commonwealth Conciliation and Arbitration Act, 1947, made important changes in the principal Act, particularly with respect to the appointment of conciliation commissioners and the division of the arbitral functions between the commissioners and the Court. The effect of these amendments was to diminish the arbitral functions of the Court and increase its judicial functions. Part III of the principal Act which provided for the creation of the Court was repealed. But Section 4 provided that notwithstanding the repeal of Part III of the principal Act the Commonwealth Court of Conciliation and Arbitation existing immediately prior to the commencement of this Act should not cease to exist but should continue as the Commonwealth Court of Conciliation and Arbitration referred to in the principal Act as amended by this Act. The Act then proceeded to re-enact Part III of the principal Act and in that part to re-enact similar provisions relating to the appointment of the Chief Judge and the other Judges and to their qualifications and remuneration to those inserted in the principal Act by the amending Act of 1926. Section 17 of the principal Act now provides that there shall be a Commonwealth Court of Conciliation and Arbitration, that the Court shall consist of a Chief Judge and such other Judges as are appointed in pursuance of this Act, and that the Court shall be a Superior Court of Record. Section 18 provides that the Chief Judge and each other Judge shall be appointed by the Governor-General; and shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for his removal on the ground of proved misbehaviour or incapacity. Since 1947 the Act has been amended in 1948, 1949, 1950, 1951 and 1952, the effect of the latest amendment being to increase the arbitral functions of the Court in comparison with those existing after the Act of 1947. It can fairly be said, as Mr. Eggleston contended, that the Court now stands as the ultimate arbiter in all industrial disputes.

But I am unable to see how these swings of the pendulum between the two sets of functions can affect the question whether the Court has been validly created a federal Court by the Parliament under Chapter III of the

Constitution. If the Constitution means that the High Court and other federal Courts created under that chapter cannot be invested with any powers other than judicial powers, then the arbitral functions of the Arbitration Court must be the functions that are invalidated. The intention of the Parliament in 1926 to create the Arbitration Court a federal Court under Chapter III of the Constitution is clear. It amended the Act so as to provide that the Judges should be appointed by the Governor-General for life for that very purpose. It was really unnecessary so to provide because the Constitution itself provides for the life tenure of office, so that this express provision must have been intended to make assurance doubly sure. It provided a qualification for appointment fit only for appointment to judicial office. By Section 3 it re-enacted, *inter alia*, the sections of the principal Act conferring judicial power on the Court so that it could not be claimed that those sections had died by misadventure in the meantime, and no Court could have been created because, although it was called a Court and its members were appointed for life, there was no judicial power of the Commonwealth vested in it. By the same Act, Section 48, it conferred on the Court a fresh judicial power. It has since conferred further judicial powers. The whole purpose of amending the Act of 1926 was to qualify the Court to exercise judicial power and presumably to exercise such judicial power, more or less, as the Parliament should think fit to invest it with from time to time pursuant to Section 77 (i) of the Constitution. The conclusion seems to me to be inevitable that since 1926 the Arbitration Court has been validly created as a federal Court.

*In the High Court of Australia.*

No. 4. Reasons for Judgment of His Honour, Mr. Justice Williams, 2nd March 1956. *continued.*

But does this mean that its arbitral powers must fail? It is clear that only Courts can exercise the judicial power of the Commonwealth. But there is no express provision in the Constitution that they can exercise no other powers. If there is a prohibition against their doing so it must rest on some implication in the Constitution arising from the vague concept of the separation of powers. It has been said that in making Awards the Arbitration Court is exercising legislative power. In reality it is simply exercising the particular form of power which the Parliament is authorised to confer on arbiters by Section 51 para. (xxxv) of the Constitution. If it be necessary to classify such proceedings as legislative, executive or judicial I would prefer to classify them as quasi-judicial administrative proceedings. But it is sufficient to refer to them as the exercise of arbitral power. If the Parliament cannot under the Constitution validly confer that power on a federal Court then the arbitral provisions of the Arbitration Act, so far as they relate to the Court, must be invalid. But the Constitution like any other written instrument must be construed as a whole and it appears to me that, far from any implication arising from its provisions as a whole that this Court and other federal Courts that the Parliament creates cannot be invested with other than judicial powers, the implication in the case of some of the powers conferred on the Parliament by Section 51 of the Constitution, arising from their character and language, if implication be needed, is to the contrary. There are at least four legislative powers contained in Section 51: para. (xvii)—Bankruptcy and Insolvency; para. (xviii)—Copyrights, Patents and Trade Marks; para. (xxii)—Divorce and Matrimonial Causes, and in relation thereto, parental rights, and the custody and guardianship of infants; and para. (xxxv)—Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, which would appear to require a mixture of administrative and judicial functions for their effective exercise. Such functions would be

complementary of one another. Unless there is something tacit in the Constitution which prevents the whole of these functions being performed by the one tribunal it would appear to be convenient that the one tribunal should perform them. But the tribunal would have to be created a Court before it could be made the receptacle of the judicial functions. The meaning of judicial power as used in Section 71 of the Constitution has been discussed in many cases in this Court. There is the classic definition by Griffith C. J. in Huddart, Parker & Co. Pty. Ltd. v Moorehead, 8 C.L.R. 330 at p. 357, which has received the approval of the Privy Council in Shell Co. of Australia Ltd. v Federal Commissioner of Taxation, (1931) A.C. 275 and in Labour Relations Board of Saskatchewan v East, (1949) A.C. 134. " The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action ". But this definition is not exhaustive. It defines what lies at the very centre of judicial power. There are many functions of a quasi-judicial administrative character which have achieved recognition as functions suitable for Courts to undertake and have become part of the ordinary business of Courts because they are proper to the functions of a Judge. Examples of these forms of judicial power, which must form part of the judicial power of the Commonwealth under Section 71 of the Constitution, where duties of this kind can be created by the exercise by the Parliament of its legislative powers under the Constitution, will be found in Peacock v Newtown Marrickville & General Co-operative Building Society No. 4 Ltd., 67 C.L.R. 25, and R. v Davison, 90 C.L.R. 353. They are exercisable by the Court because they are proper subjects for the exercise of the judicial process. Under the Federal Bankruptcy Act, 1924-50, many administrative functions are conferred on the Court of Bankruptcy examples of which will be found in Sections 15 (b) and (d), 68, 69, 71 and in many of the sections comprised in Parts V, VI, VII, VIII, XI and XII of the Act. Indeed it can be said that the greater part of the duties imposed upon the Bankruptcy Court after the making of the sequestration order or in connection with the administration of the estate of a bankrupt under Part XI or Part XII of the Bankruptcy Act are of an administrative character and that, taking the Bankruptcy Act as a whole, the administrative functions predominate over the strictly judicial functions of the Court. Under the Trade Marks Acts 1905-1948 and the Patents Act 1952, particularly the latter Act, many duties of an administrative nature are imposed on this Court. Apart from the Matrimonial Causes Act 1945 there is, of course, no legislation yet enacted under Section 51 para. (xxii) of the Constitution but it is clear that, if a uniform Divorce and Matrimonial Causes law was enacted for the Commonwealth, a great part of the functions which would have to be performed to make such legislation effective, such as the provision of alimony and maintenance, the variation of settlements and the custody of the children of the marriage, would be of an administrative character and the legislation might well include provisions for attempts to be made to effect a reconciliation between the spouses pending the curial proceedings for a divorce. Coming to Section 51 para. (xxxv) of the Constitution it is apparent that the complete arbitral process produces a similar duality of functions. The purpose of the power is to authorise Parliament to legislate to prevent disputes by conciliation and settle disputes by arbitration. An Award can only be made effective and the dispute settled

if there is some sanction to compel the parties to obey the Award made in settlement of the dispute. It is within the content of the power to provide not only for the making but also for the enforcement of Awards. The whole process of making the Awards and enforcing them is a continuous process just like the duties imposed upon the Bankruptcy Court to superintend the administration of the estate of the bankrupt and its distribution amongst his creditors after the sequestration order has been made. In settling an industrial dispute the part of the continuous process that calls for the greatest display of knowledge, common sense, fairness and impartiality is the making of the
10 Award. It is then simply a question of determining whether the Award has been broken and applying the appropriate sanction. There is no incompatibility in the one tribunal making the Award and afterwards seeing that it is obeyed. That is normal judicial procedure—to make an order and to see that it is obeyed. All these administrative and judicial functions, whether created under the Bankruptcy Act, the Trade Marks Act, the Patents Act, under legislation such as that already suggested if enacted under the divorce power, or under the Arbitration Act, are administrative and judicial functions that can conveniently be combined in the one tribunal. If the Parliament thinks fit to combine them, and if the combination requires that
20 the tribunal should be created a federal Court in order that it should have the complete capacity to perform them all, I can find nothing expressed or unexpressed in the Constitution to prevent Parliament resorting at the same time to its powers under Section 51 and under Chapter III of the Constitution for that purpose.

Is there any decision of the Court that militates against this conclusion? In my opinion there is none. On the contrary there are decisions that support it. It has been decided that the doctrine of the separation of powers does not mean that under the Australian Constitution the Parliament cannot delegate legislative powers to the Executive. The Treaty of Peace Act, 1919,
30 Section 2, provided that the Governor-General might make such regulations as appeared to him to be necessary for carrying out and giving effect to the provisions of Part X (Economic Clauses) of the Treaty of Peace. Regulations were made under this delegation by the Governor-General—S.R. 1920 No. 25. The validity of these regulations was impeached in Roche v Kronheimer, 29 C.L.R. 329. The argument that under the Constitution the Parliament could not delegate legislative power to the Executive was clearly raised by Mr. Owen Dixon (as the Chief Justice then was). At p. 331 he is reported to have said:

> "Just as the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High
40 Court and other Federal Courts, so the vesting of the legislative power in any other body than Parliament is prohibited."

At p. 334 Sir Robert Garran is reported to have said in reply that where Parliament has vested in it a power of legislation it may exercise that power by assigning portion of the power to a subordinate rule-making body. That is a recognised constitutional usage. At p. 337, Knox C. J., Gavan Duffy, Rich and Starke JJ. in a joint judgment said:

> "Next, it was said that, even if the Federal Parliament had authority to legislate for the purpose of carrying out and giving effect to the provisions of Part X of the Treaty, it had no power to confer that

authority on the Governor-General. . . . It is enough to say that the validity of legislation in this form has been upheld in Farey v Burvett, Pankhurst v Kiernan, Ferrando v Pearce and Sickerdick v Ashton, and we do not propose to enter into any inquiry as to the correctness of those decisions ."

The same question arose again in Dignan's case, 46 C.L.R. 73. There, Section 3 of the Transport Workers Act, 1928-1929, purported to confer a power upon the Governor-General of making regulations not inconsistent with that Act with respect to the employment of transport workers. Regulations so made were to have the force of law notwithstanding anything in any other Act except the Acts Interpretation Acts, 1901-1918 and 1904-1916. It was held that it is within the legislative power of the Commonwealth Parliament to confer upon the Governor-General the power to make such regulations. Roche v Kronheimer was followed. At pp. 83-84 Gavan Duffy C. J. and Starke J. said:

> " Assuming, however, that the Act does impinge upon the doctrine (that is, of the separation of powers), still such a restriction has never been implied in English law from the division of powers between the several departments of government. . It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power. Indeed, unless this view is correct, and if there has been a delegation of legislative power, the judgments in the Huddart Parker case and in Dignan's case overlooked an obvious point, and the cases were wrongly decided."

At p. 86 Rich J. said:

> " Roche v Kronheimer is an authority for the proposition that an authority of subordinate law-making may be invested in the Executive. Whatever may be said for or against that decision, I think we should not now depart from it."

Dixon J., as he then was, delivered a long and careful judgment one effect of which, to my mind, is to crystallise the difficulties that flow from the American doctrine. He was inclined to think that the question at issue had not perhaps been decided by Roche v Kronheimer because there the delegation to the Executive was a delegation to legislate under the defence power. At p. 99 he said:

> " But the strength in time of war of the defence power, the exceptional nature of which had been much enlarged upon in Farey v Burvett, might conceivably have enabled the Court to confess and avoid an argument based upon the general doctrine of the separation of powers. For it might be considered that the exigencies which must be dealt with under the defence power are so many, so great and so urgent and are so much the proper concern of the Executive, that

from its very nature the power appears by necessary intendment to authorise a delegation otherwise generally forbidden to the Legislature."



Nevertheless His Honour came to the conclusion that the delegation under the Transport Workers Act was valid. At pp. 101-102 he said:

"It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to
10 authorise subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and the usages of British legislation and the theories of English law. . . . But, whatever may be its rationale, we should now adhere to the interpretation which results from the decision of Roche v Kronheimer."

With all respect to His Honour I would not be inclined to distinguish Roche v Kronheimer on any ground specially appertaining to the defence power. The decision appears to me to be of general application. But the point need not be pursued because the delegation of legislative power conferred on the
20 Governor-General by Section 3 of the Transport Workers Act was made under the Trade and Commerce power and was clearly legislative. It even provided that such regulations should have the force of law notwithstanding anything in any other Act. And that delegation of power was upheld. Since Dignan's case it could not be questioned in this Court that the Parliament has power under the Constitution to delegate legislative power to the Executive and that the Executive has power to receive it. But it does not necessarily follow from Dignan's case that the Parliament in the exercise of its legislative powers can impose functions other than functions of a strictly judicial character on Courts. On the question whether Parliament can do this or not
30 the two most important decisions of this Court would appear to be *In re* Judiciary and Navigation Act, 29 C.L.R. 257, and *Ex parte* Lowenstein, 59 C.L.R. 556. In the former case it was held by Knox, C. J., Gavan Duffy, Powers, Rich and Starke JJ. (Higgins J. dissenting) that Part XII of the Judiciary Act, 1903-1920, which purported by Section 88 to give the High Court jurisdiction to "hear and determine" any question referred to it by the Governor-General as to the validity of any enactment of the Parliament of the Commonwealth and by Section 93 to make the determination "final and conclusive and not subject to any appeal", was not a valid exercise of the legislative power conferred on the Parliament by the Constitution. In the
40 joint judgment at p. 264 Knox C J., Gavan Duffy, Powers, Rich, and Starke JJ. said:

"After carefully considering the provisions of Part XII, we have come to the conclusion that Parliament desired to obtain from this Court not barely an opinion but an authorative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so

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what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes— legislative, executive and judicial (New South Wales v The Commonwealth). In each case the Constitution first grants the power and then delimits the scope of its operation (Alexander's case)."

Their Honours then referred to Sections 71 and 73-77 inclusive of Chapter III of the Constitution and proceeded at p. 265: 10

> "This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under Section 76 of the Constitution for the enactment of Part XII of the Judiciary Act? Section 51 (xxxix) does not extend the power to confer original jurisdiction on the High Court contained in Section 76. It enables Parliament to 20 provide for the effective exercise by the Legislature, the Executive and the Judiciary, of the powers conferred by the Constitution on those bodies respectively, but does not enable it to extend the ambit of any such power."

Their Honours then referred to the word "matter" in Section 76 of the Constitution and proceeded:

> "In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court."

It will be seen that the Court in that case decided that the only judicial power 30 that could be conferred on Courts by Chapter III of the Constitution was the power to exercise the judicial power contained in that Chapter but did not decide that the Parliament cannot impose on a Federal Court functions other than strictly judicial functions. That question was expressly reserved. But it arose for decision in Lowenstein's case. One of the questions at issue there was whether Sub-sections 1 (a), 2 and 3 of Section 217 of the Bankruptcy Act, 1924-1933, were *ultra vires* the Parliament of the Commonwealth. Two contentions were raised: (1) that these provisions were an attempt to invest a Federal Court with non-judicial functions and that such functions cannot be reposed in such a Court; and (2) that even if such non-judicial functions can 40 be reposed in a Federal Court they do not include non-judicial functions which are incompatible with the Court functioning as a Court and the effect of the legislation under challenge was to require the Bankruptcy Court to be a prosecutor and a judge at the same time. The first of these contentions was rejected. The contention that non-judicial functions cannot be imposed on a Court which are incompatible with its strict judicial functions was accepted. But it was held by a majority of the Court that the non-judicial functions in question were not at variance with its judicial functions, a conclusion which, if I had been a member of the Court, I might not have reached.

In Sachter v Attorney-General for the Commonwealth, 28, A.L.J. 298, this Court followed Lowenstein's case and declared that it would not reconsider its correctness. The power conferred on the Bankruptcy Court by Section 217 was a power which the Parliament could only confer, if at all, by legislation under the Bankruptcy power (Section 51 (xvii) of the Constitution) so that Lowenstein's case is an express decision that non-judicial functions can be conferred on a Federal Court. Dignan's case and Lowenstein's case are quite antipathic to the idea that the doctrine of the separation of powers, so far as it is implicit in the Australian Constitution, means that there is a rigid demarcation of powers between the legislative, executive and judicial organs of government. As Isaacs J. pointed out in Munro's case, 38 C.L.R. 153 (affirmed in the Privy Council 1931 A.C. 275) at pp. 178-179:

> "The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. . . I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no a priori exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances."

In relation to Chapter III the doctrine means that only Courts can exercise the judicial power of the Commonwealth, and that nothing must be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament cannot, therefore, by legislation impose on the Courts duties which would be at variance with the exercise of these functions or duties and which could not be undertaken without a departure from the normal manner in which Courts are accustomed to discharge those functions. (What Fry L. J. in Royal Aquarium and Summer and Winter Garden Society v Parkinson, (1892) 1 Q.B. 431 at p. 447 calls their "fixed and dignified course of procedure".)

There are also the decisions under Section 122 of the Constitution. That section provides that Parliament may make laws for the government of territories. In Porter v The King, 37 C.L.R. 432, it was held by Isaacs, Higgins, Rich and Starke JJ. (Knox C. J. and Gavan Duffy J. dissenting) that in exercise of this power the Parliament of the Commonwealth may confer upon the High Court jurisdiction to entertain an appeal from a Court established by the Parliament in a territory, notwithstanding that the Court so established is not a Federal Court within the meaning of Section 71 of the Constitution. It was held that this section was an independent grant of power outside and beyond Chapter III which related only to "the judicial power of the Commonwealth consisting of States", in other words the Commonwealth proper, and had no reference to the Commonwealth in relation to territories. Presumably, therefore, functions not of a strictly judicial character could be imposed

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on Federal Courts by legislation under Section 122 of the Constitution. This being so, it would be irrational to imply a prohibition against the Parliament imposing similar functions on Federal Courts by legislation under Section 51. In each case the implied limitation must be the same. The functions must not be functions which Courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them. Discretionary judgments are not beyond the pale but there must be some standards applicable to a set of facts not altogether undefined before a Court can hear and determine a matter. Steele v Defence Forces Retirement Benefits Board, (1955) A.L.R. 661. If Courts cannot be invested with any judicial power not forming part of the judicial power of the Commonwealth it may seem, at first sight, anomalous that non-judicial functions can be imposed upon them by legislation under some of the paragraphs of Section 51 of the Constitution. But it is not really anomalous. The reason why, apart from Section 122 of the Constitution, Courts cannot be invested with any form of judicial power outside that created or authorised by Chapter III of the Constitution is because there is no other source of authority in the Constitution. But when the problem whether non-judicial duties can be imposed on Federal Courts arises, the crucial question is not whether the Constitution authorises the Parliament to create such duties for some person or body to exercise. The Parliament can create any duties which are authorised by its legislative powers. The crucial question is whether such duties can be imposed on Federal Courts. The reason why, under Chapter III, Courts can only be invested with the judicial power of the Commonwealth may lie in the circumstance that under that Chapter State Courts as well as Federal Courts can be invested with judicial power and it is necessary strictly to limit the extent to which State Courts can have duties imposed on them by federal law. Non-judicial functions cannot be imposed on such Courts. The Queen Victoria Memorial Hospital v Thornton 87 C.L.R. 144. But it does not necessarily follow from this that such functions cannot be imposed on Federal Courts by legislation under Section 51 of the Constitution. Since 1926 until very recently, when doubts on the subject began to be expressed, the Arbitration Court has always been accepted as a body properly constituted to undertake its dual activities. It has been accepted as a Federal Court created under Chapter III of the Constitution. It is sufficient to refer to the following cases. Jacka v Lewis (1944) 68 C.L.R. 455 ; Harrison v Goodland (1944) 69 C.L.R. 509 esp. 515 and 521 ; Barrett v Opitz (1945) 70 C.L.R. 141 ; Australian Workers' Union v Bowen (1948) 77 C.L.R. 601 ; R. v Taylor ; *ex parte* Federated Ironworkers' Association (1949) 79 C.L.R. 333 ; R. v Commonwealth Court of Conciliation and Arbitration ; *ex parte* Federated Gas Employees' Industrial Union (1951) 82 C.L.R. 267 ; R. v Taylor ; *ex parte* Roach (1951) 82 C.L.R. 587 ; R. v Kelly ; *ex parte* Waterside Workers' Federation of Australia (1952) 85 C.L.R. 601 ; R. v Kelly ; *ex parte* Berman (1953) 89 C.L.R. 608 ; R. v Commonwealth Court of Conciliation and Arbitration ; *ex parte* Amalgamated Engineers' Union (1953) 89 C.L.R. 636. In one of these cases, R. v Taylor ; *ex parte* Roach, 82 C.L.R. 587, to take an example, it was held that the Arbitration Court, being constituted by Statute a Superior Court of Record, has, by the common law, power to punish summarily for contempt of its judicial authority. In the joint judgment of Dixon, Webb, Fullagar and Kitto JJ. at pp. 597-598 it is said : "Section 17 (3) of that Act (the Commonwealth Conciliation and Arbitration Act) provides that the Commonwealth Court of Conciliation and

Arbitration shall be a Superior Court of Record. It is in virtue of its status as a Superior Court of Record that the Arbitration Court has exercised a summary power to punish for contempt. . . . What the Legislature meant to do by Section 17 (3) was simply to establish the Court as a Superior Court of Record. In other words, it is not a question of legislative intention but of the legal consequences of giving a Court such a status. The common law gives to a Superior Court of Record power to punish summarily for contempts of its judicial authority."

The important question now at issue was not, of course, raised in any of 10 these cases and it is not the duty or practice of this Court, of its own volition, to raise constitutional issues unless the decision in any case before the Court requires it to do so. But in several of the cases the decision did involve an acceptance of the validity of the dual functions of the Court and it would be a very serious step at this late stage to jettison that acceptance. Naturally, in these circumstances, we were urged in the last resort to apply the principle of *stare decisis*, but I need not consider whether it would be proper to do so because I do not think that there is any constitutional impediment to the Arbitration Court exercising both sets of functions. It is only necessary to read the anaylsis of the process of obtaining an Award made by Barton J. in 20 Alexander's case at pp. 452-457 in order to realise the close analogy with ordinary curial proceedings. This analysis led His Honour to conclude that in making an Award the Arbitration Court was exercising part of the judicial power of the Commonwealth. This view has not prevailed. The truth is that when an Award is made the dispute is settled and the arbitral function is at an end and that the enforcement of the rights thereby created is a separate process from their creation. But the arbitral proceedings are proceedings which should be conducted with that fairness and impartiality which should characterise proceedings in Courts of Justice. They are proceedings proper to the functions of a Judge. In Frome United Breweries Co. Ltd. v Bath Justices, (1926) 30 A.C. 586 at p. 602, Lord Atkinson cited with approval the following definition of a judicial act by May, C. J. in the Irish case of R. v Dublin Corporation:

> "The term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

The making of an Award is at least a judicial act. It requires the same judicial approach as that required when an application is made to the Court to enforce it. There is nothing at variance between the arbitral duty to make the Award 40 and the curial duty to enforce it.

For these reasons I would discharge the Order *Nisi*.

*In the High Court of Australia.*

No. 5. Reasons for Judgment of His Honour Mr. Justice Webb, 2nd March 1956.

## No. 5.

## REASONS FOR JUDGMENT OF HIS HONOUR Mr. JUSTICE WEBB.

The Prosecutor, the Boilermakers' Society of Australia, and the Respondent, the Metal Trades Employers' Association, are parties to and are bound by the Metal Trades Award made on 16th January 1952 under the Conciliation and Arbitration Act 1904-1951 by Conciliation Commissioner Galvin. Clause 19 (ba) (i) of the Award provides, *inter alia*:—

"No organization party to this Award shall in any way, whether "directly or indirectly, be a party to or concerned in any ban, 10 "limitation or restriction upon the performance of work in "accordance with this Award".

On 16th May 1955, the Respondent Association applied to a Judge of the Commonwealth Court of Conciliation and Arbitration for a rule to show cause why orders should not be made against the Prosecutor Union under Section 29 (1) (b) and (c) of the Act. Section 29 (1) povides *inter alia* :—

"The Court shall have power—

" (b) to order compliance with an order or Award proved to the " satisfaction of the Court to have been broken or not observed;

" (c) by order, to enjoin an organization or person from committing 20 " or continuing a contravention of this Act, or a breach or non- " observance of an order or Award. . . ."

This rule was granted, and, on the 31st May 1955, was made absolute, by the three Judges of the Commonwealth Court of Conciliation and Arbitration who are Respondents in these proceedings, and the Prosecutor Union was ordered to comply with Clause 19 (ba) (i) "by ceasing in any way directly or indirectly to be a party to or concerned in a ban, limitation or restriction upon the performance of work in accordance with the Award", and were enjoined from continuing the breach or non-observance of Clause 19 (ba) (i), at the establishment of Morts Dock and Engineering Company Limited at Balmain. 30 This order was not obeyed, and on the application of the Respondent Association made under Section 29A of the Act, the Prosecutor Union was, on 28th June 1955, found by the three Respondent Judges to have been guilty of contempt of Court and was fined £500 and ordered to pay certain costs.

Section 29A provides *inter alia*:—

" (1) The Court has the same power to punish contempts of its " power and authority, whether in relation to its judicial powers " and functions or otherwise, as is possessed by the High Court " in respect of contempts of the High Court.

" (2) The jurisdiction of the Court to punish a contempt of the Court 40 " committed in the face or hearing of the Court, when constituted " by a single Judge, may be exercised by that Judge; in any " other case, the jurisdiction of the Court to punish a contempt

" of the Court shall (without prejudice to the operation of sub-
" section (7) of Section 24 of this Act) be exercised by not less
" than three Judges.

" (3) The Court has power to punish, as a contempt of the Court, an
" act or omission although a penalty is provided in respect of that
" act or omission under some other provision of this Act.

" (4) The maximum penalty which the Court is empowered to
" impose in respect of a contempt of the Court consisting of a
" failure to comply with an order of the Court made under para-
10 " graph (b) or (c) of the last preceding section is—

(a) where the offence was committed by—

(i) an organization (not consisting of a single employer) Five hundred pounds. . "

The Prosecutor Union obtained from the High Court, and now moves to make absolute, an Order *Nisi* for a Writ of Prohibition restraining the Respondents from further proceeding on the orders of 31st May and 28th June 1955, on the ground that Section 29 (1) (b) (c) and Section 29A are *ultra vires* and invalid, in that "the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and
20 authorities of an administrative, arbitral, executive and legislative character"; and that the powers which these two sections purport to vest in the Court are judicial, and so are conferred contrary and repugnant to Chapter III of the Commonwealth Constitution.

Section 51 of the Constitution provides that—

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any
30 one State;"

Prior to the enactment of the Australian Constitution by the Imperial Parliament in July 1900, the South Australian Parliament had in 1894, by Act No. 598, provided for the compulsory settlement of industrial disputes by award and for the enforcement of the awards by the same tribunal. In the same year the New Zealand Parliament, by Act No. 14, also legislated for the compulsory settlement of industrial disputes and for the making of industrial awards by special tribunal, but left the enforcement of the awards to the ordinary Courts of Law until 1898 when the legislation was amended to provide for the making and enforcement of the awards by the same tribunal.
40 Both statutes made strikes punishable. In Stemp v Australian Glass Manufacturers Co. Ltd. (1917) 23 C.L.R. 226 at 238, Isaacs J. (as he then was) relied on those two Acts as having attached to the notion of compulsory arbitration in the minds of the Australian people and of the framers of the Constitution the prevention of strikes. That might well have been the case. But it does not follow that the making and enforcing of awards by the same tribunal was also attached by those statutes to that notion in their minds as

Mr. Macfarlan for the Respondent Association submitted. That depends on the effect of Chapter III. And here it is noted that all legislation under Section 51 is expressly made "subject to this Constitution", that is to say, subject to Chapter III among other provisions of the Constitution; while, on the other hand, no Section in Chapter III has been expressly made "subject to this Constitution". Actually the only reference outside Chapter III to the Courts brought into existence by or under Chapter III is in Section 51 (xxxix) which provides that the Parliament may make laws, subject to the Constitution with respect to:—

> "Matters incidental to the execution of any power vested by this Constitution in the Parliament . . or in the Federal Judicature. . . ." 10

It is submitted by Mr. D. I. Menzies for the Respondent Judges and the intervenent Commonwealth that the arbitral powers and the judicial powers in the Commonwealth Conciliation and Arbitration Act 1904-1952 are complementary to each other, and that neither is incidental to the other: that the arbitral powers and the judicial powers are equally necessary for the purposes of compulsory arbitration. I agree, unless judicial power is always incidental when conferred by the Commonwealth Parliament, which no counsel contends. As to this see The King against the Federal Court of Bankruptcy; *ex parte* Lowenstein, 59 C.L.R. 556. 20

Just ten years after the enactment of the South Australian and New Zealand legislation referred to, the Commonwealth Parliament legislated for the first time in exercise of the power conferred by Section 51 (xxxv) of the Constitution, by enacting the Commonwealth Conciliation and Arbitration Act 1904 which by Section 11 provided that "There shall be a Commonwealth Court of Conciliation and Arbitration which shall be a Court of Record, and shall consist of a President"; by Section 12 (1) that "The President shall be appointed by the Governor-General from among the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years. . . ."; by Section 13 that "the President shall be paid no other salary in respect of his services under this Act than his salary as Justice of the High Court. . . ."; by Section 14 that "The President may, by instrument under his hand, appoint any Justice of the High Court or Judge of the Supreme Court of a State to be his deputy in any part of the Commonwealth . . ."; and by Section 15 that "The President or Deputy President shall before proceeding to discharge the duties of his office, take an oath or affirmation in the form in Schedule A" The Act then proceeded to confer, *inter alia*, power on the Court and the President to make awards and orders and to provide for the enforcement of awards and orders by pecuniary penalties imposed by the Court and by Courts of summary jurisdiction (Section 44), and by the Court alone by way of order in the nature of a mandamus or injunction to compel compliance with an award or to restrain its breach under pain of fine or imprisonment (Section 48). The Court was also empowered to punish contempt of Court in specified cases (Section 83). Chapter III, not Section 51 (xxxix) of the Constitution confers the power to enact such provisions. 30 40

It will be observed that this Act followed the South Australian and New Zealand legislation in providing for the making and enforcement of awards and orders by the same tribunal. Accordingly, awards and orders were made 50

and enforced by the President and Deputy President for fourteen years, until 1918 when in Alexander. (J. W.) Limited v Waterside Workers Federation of Australia (1918) 25 C.L.R. 454, it was held by a majority of the High Court that the enforcement provisions of the Act were invalid, as the President was appointed to this Federal Arbitration Court for seven years, and not for life as required by Section 72 in Chapter III of the Constitution in the case of Federal Courts. However, a majority of the High Court also held that these invalid enforcement provisions were severable and that the rest of the Act was valid. In none of the reasons for judgment was it suggested that arbitral functions could not validly be mixed with judicial functions: it was simply on the ground that the President was not appointed to the Federal Arbitration Court for life that the enforcement provisions were held by the majority to be invalid. No member of the Court suggested that Chapter III prevented the High Court or any Federal Court from doing anything more than exercising the judicial power of the Commonwealth.



As a result of the decision in Alexander's Case, the power of enforcing awards and orders was given to the High Court and other Courts of law until 1926 when the Commonwealth Conciliation and Arbitration Act 1926 was enacted and contained the following provision—

> "The principal act," (i.e. the 1904 Act and amendments thereof up to 1926), "as amended by this Act, and every provision of that Act as so amended shall be construed as if that Act were, as from the commencement of this Act, confirmed and and re-enacted as so amended: to the intent that where any provision of the Commonwealth Conciliation and Arbitration Act 1904, or of that Act as amended by any Act or Acts, has before the commencement of this Act been, or would, but for this Act, have been, construed as being in excess of the legislative power of the Parliaments, that provision shall, as from the commencement of this Act, be read with and deemed to have been enacted in relation to the amendments made by this Act."

I take this provision to mean that the 1904 Act was not repealed but only amended.

The 1926 Act then went on to provide by Section 11 that "There shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a Chief Judge and such other judges as are appointed in pursuance of this Act"; by Section 12 that "The Chief Judge and the other Judges—(a) shall be appointed by the Governor-General in Council; and (b) shall not be removed except . . . on the ground of proved misbehaviour or incapacity"; and by Section 14 that the Chief Judge and the other Judges should receive specified salaries. Section 11 of the 1926 Act really was Section 11 of the 1904 Act amended to provide for a Chief Judge and other Judges in the places of the President and Deputy President. So viewed, the 1904 Court continued to exist and a Court was not created by the 1926 Act; and so, if the 1904 Court was never a Federal Court within Chapter III, then no such Court was brought into existence by the 1926 Act. It is seriously arguable that a Federal Court within Chapter III was not created in 1904. To create such a Court, it would appear to be necessary not only to vest in it part of the

judicial power of the Commonwealth and to provide for the number of Judges, but also to fix the salary of its Judges. In fact, Parliament provided in the 1904 Act that there should be no salary. So it is arguable in any event that in the 1904 Act Parliament intended to create a Federal Court with unpaid Judges, and that it did not intend to bring the Court into existence otherwise. However, Starke J. in Consolidated Press v The Australian Journalists' Association, (1947) 73 C.L.R. 549 at 564 treated the 1926 Act as having *created* a Court, whilst Dixon J. (as he then was) thought it was *reconstituted*, that is to say, so I understand, that the 1904 Court continued but with a Chief Judge and other Judges instead of a President and Deputy President. See The King v The Court of Conciliation and Arbitration; *Ex parte* the Gas Employees Union, (1950-1) 82 C.L.R. 267 at 272. 10

At this stage it is unnecessary and undesirable to decide whether the Court was created before 1926, if it was ever validly created. None of the counsel for the parties submitted that the Court was never validly created, so we have not had the full argument which would be essential for the proper decision of a question of such great importance. In the absence of such argument, I assume that the Court was validly created not later than 1926, that is to say, if Chapter III permits of the creation of a Court with both arbitral and judicial powers, a question I shall deal with later. 20

Between 1926 and 1947 there were several amendments of this legislation with which I do not find it necessary to deal. In 1947 the arbitral functions were divided between the Conciliation Commissioners and the Court, the judicial functions being discharged by the Court alone. Again, between 1947 and 1952 there were further amendments with which also I do not find it necessary to deal. In 1952 provision was made for appeals from the Conciliation Commissioners to the Court, which retained all the arbitral and other powers it possessed under the 1947 Act. In the result, the Court was left with both arbitral powers and part of the judicial power of the Commonwealth. A question was raised as to the position of the Judges of the Court as a result of 30 the 1947-1952 Acts; but on this point we have heard little argument, and in any event we might well need more facts before coming to a conclusion in particular cases. Mr. Eggleston for the Prosector Union made no attack on the constitution of the Court, apart from challenging its right to exercise any judicial power of the Commonwealth. The Writ of Prohibition sought is merely to restrain proceedings on orders made under Section 29 (1) (b) and (c) and Section 29A. However, if the whole Act is invalid for any reason, then nothing remains for consideration by this Court. If the Act is invalid only in part, the question will arise as to whether that part can be severed so as to leave the rest of the Act operative. It is the submission of the Prosecutor 40 Union that only the parts of the Act purporting to confer judicial power on the Court are invalid, and that the arbitral powers are valid and may be exercised by the Court as at present constituted However, Mr. Eggleston also submits that if this Court cannot be satisfied that it was the intention of Parliament that the Court should continue to exist without the judicial power purported to be conferred on it, then the whole Act should be declared invalid, despite the drastic consequences attaching to such declaration.

For his submissions Mr. Eggleston relies wholly on Chapter III.

Since 1926 provisions of this legislation and awards and orders made under it have frequently come before this Court for consideration. In Victorian Stevedoring and General Contracting Company Proprietary Limited and Meakes v Dignan, (1931) 46 C.L.R. 73 at 98, Dixon J. (as he then was) observed, speaking of Chapter III, that it appeared from authorities referred to by His Honour that "because of the distribution of the functions of government and of the manner in which the Constitution describes the tribunals to be invested with judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals". Again in The Queen v Foster and others; *Ex parte* The Commonwealth Life (Amalgamated) Assurances Limited, (1951-1952) 85 C.L.R. 138 at 155, His Honour in a joint judgment with Fullagar J. and Kitto J. observed that "Whether and how far judicial and arbitral functions may be mixed up is another question, one which fortunately the Court has never been called upon to examine."

Apart from these two observations, in no judgment has it been suggested, so far as I am aware, that the enforcement provisions of this legislation are invalid because of the combination of arbitral and judicial powers in the Court. But, to say the least, it has been assumed in many cases that a mere combination of such powers did not give rise to any question of validity or jurisdiction. Among other such cases are R. v Taylor; *Ex parte* Federated Ironworkers' Association, (1949) 79 C.L.R. 333; R. v Commonwealth Court of Conciliation and Arbitration; *Ex parte* Federated Gas Employees Industrial Union, (1951) 82 C.L.R. 267; R. v Taylor; *Ex parte* Roach (1951) 82 C.L.R. 587; R. v Kelly; *Ex parte* Waterside Workers Federation of Australia (1952) 85 C.L.R. 601; and R. v Commonwealth Court of Conciliation and Arbitration; *Ex parte* Amalgamated Engineering Union (1953) 89 C.L.R. 636. Every member of this Court as at present constituted was a party to one or more of these decisions. Here it should be observed, however, that while this Court would, even in the absence of any submission by a party, consider itself bound to satisfy itself as to the existence of its own jurisdiction in any particular matter, as it did in Watson v The Federal Commissioner of Taxation (1952-1953) 87 C.L.R. 353, it would not be likely to question the jurisdiction of another Court unless its jurisdiction was challenged by a party on a specific ground. The ground of combination of judicial and arbitral powers is now raised for the first time.

In Federated Ironworkers' Association of Australia v the Commonwealth and others, (1951) 84 C.L.R. 265 at 277 all the members of this Court, as at present constituted, exept Taylor J., referred with approval to a passage in the judgment of O'Connor J. in Jumbunna Coal Mine v Victorian Coal Miners' Association, (1908) 6 C.L.R. 309 at 358-360 that included a suggestion that the making of industrial awards was an exercise of the judicial power of the Commonwealth. But that suggestion was in no way relied upon in the Federated Ironworkers' Case, although it was not expressly rejected. O'Connor J. may have had in mind the setting up of a "Court" in the New Zealand legislation already referred to and have taken the view adopted by this Court in The Queen v Davison, (1953) 90 C.L.R. 353 that what constitutes judicial power is to be determined in the light of history, even to the extent of

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including in the concept findings of constitutive or antecedent facts, to which awards amount, as well as findings of remedial facts, such as are involved in the enforcement of awards.

In the absence of these decisions and of decisions referred to later, I might have taken and acted on the view (1) that, although the Australian Constitution followed the English Constitution as regards the separation of powers, still the Australian Constitution, being written, necessarily substituted laws for conventions, e.g., it would be unconventional under the English unwritten Constitution for the Imperial Parliament to confer executive authority on the Judicature, but it would be lawful; whilst under our Constitution such action could be both unconventional and unlawful; and (2) that Chapter III is exhaustive both as to the Courts that can be vested with the judicial power of the Commonwealth and as to the powers that can be given to Federal Courts. 10

However, statements by the Privy Council in the following well-known passages contain, I think, the solution of the problem now being dealt with:—

(1) "The established Courts of Justice, when a question arises "whether the prescribed limits have been exceeded, must of "necessity determine that question; and the only way in which "they can properly do so, is by looking at the terms of the instru- "ment by which affirmatively, the legislative powers were 20 "created, and by which, negatively, they are restricted. If what "has been done is legislation, within the general scope of the "affirmative words which give the power, and if it violates no "express condition or restriction by which that power is limited "(in which category would of course be included any Act of the "Imperial Parliament at variance with it) it is not for any Court "of Justice to enquire further, or to enlarge constructively those "conditions or restrictions."

The Queen v Burah 3 A.C. 889 at 1904-5.

(2) "When the British North America Act enacted that there 30 "should be a legislature for Ontario, and that its legislative "assembly should have exclusive authority to make laws for the "Province and for provincial purposes in relation to matters "enumerated in Section 92 it conferred powers not in any sense "to be exercised by delegation from or as agents of the Imperial "Parliament, but authority as plenary and as ample within the "limits prescribed by Section 92 as the Imperial Parliament in "the plenitude of its power possessed and could bestow. Within "these limits of subject area the local legislature is supreme and "has the same authority as the Imperial Parliament would have 40 "had under like circumstances to confide to a municipal institu- "tion or body of its own creation authority to make by-laws or "resolutions as to subjects specified in the enactment and with "the object of carrying the enactment into operation and effect."

Hodge v The Queen, 9 A.C. 117 at 132.

(3) "The Indian legislature has powers expressly limited by the "Act of the Imperial Parliament. . . . When acting within

" those limits it is not in any sense an agent or delegate of the
" Imperial Parliament, but has, and was intended to have,
" plenary powers of legislation as large, and of the same nature,
" as those of Parliament itself."

Powell v Apollo Candle Co. Ltd. 10 A.C. 282 at 289.

(4) " In the interpretation of a completely self-governing Constitu-
" tion founded upon a written organic instrument . . . if the
" text is explicit the text is conclusive, alike in what it directs and
" what it forbids . if the text says nothing expressly, then
10 " it is not to be presumed that the Constitution withholds the
" power altogether. On the contrary it is to be taken for granted
" that the power is bestowed in some quarter unless it be
" extraneous to the Statute itself . . or otherwise is clearly
" repugnant to its sense."

A. G. for Ontario v A. G. for Canada, 1912, A.C. 571 at 583.

Neither Mr. Menzies nor Mr. Macfarlan referred to these authorities, and Mr. Eggleston submitted that they should not be taken too literally. But they should be taken literally, and moreover have frequently been relied upon by this Court for a liberal interpretation of the Commonwealth Constitution.

20 Giving full effect to these statements of the Privy Council, it still might seem that Chapter III, which is not expressed to be "subject to this Constitution", as are the legislative powers conferred by Sections 51 and 52, exhaustively deals with the jurisdiction of the High Court which it creates and of the other Courts which Parliament creates to exercise the judicial power of the Commonwealth. As already stated, only in one provision of the Constitution outside Chapter III is the "Federal Judicature" referred to, i.e. in Section 51 (xxxix). But this power to legislate with respect to matters incidental to vesting the judicial power of the Commonwealth in Federal Courts obviously does not authorize the addition of judicial power other than that of 30 the Commonwealth or of non-judicial power not incidental to the exercise of the judicial power of the Commonwealth.

This view of the exhaustive nature of Chapter III was taken not only by Dixon J. (as he then was) in the Victorian Stevedoring Case, *supra*, at 98, but also by Knox C. J. and Gavan Duffy J. in Porter v The King; *Ex parte* Yee, (1926) 37 C.L.R. 432 at 437 where Their Honours observed—

" In our opinion, the reasoning of the majority judgment in *In re* Judiciary and Navigation Acts establishes the proposition that the jurisdiction of this Court, whether original or appellate, is to be sought wholly within Chapter III of the Constitution, that the Court 40 exists wholly for the performance of the functions therein described and that the Parliament of the Commonwealth legislating for the peace, order and good government of the Commonweatlh, can no more add to or alter the jurisdiction of the Court than it can add to or alter its own legislative powers. . . The status and duties of this Court are explicitly defined in Chapter III of the Constitution; and an attempt to alter that status or add to those duties is not only

an attempt to do that which is not authorized by Section 122 but it is an attempt to do that which is implicitly forbidden by the Constitution."

I take this to be an acknowledgment that the decision of the point expressed to be reserved in the joint judgment to which Their Honours were parties in *In re* Judiciary and Navigation Acts (1921) 29 C.L.R. 257, was really implicit in the reasoning in that judgment. It was suggested from the Bench during argument that perhaps the point intended to be reserved in that case was whether non-judicial duties, as distinct from powers, could be imposed on the Court so as to overburden it. That would, however, have conceded the power of Parliament to add non-judicial duties so long as the Court was not called upon to do the extra work to the prejudice of its exercise of the judicial power of the Commonwealth.

It may seem remarkable that the view stated by Knox C. J. and Gavan Duffy J., and which was shared by Dixon J. (as he then was) in The Victorian Stevedoring Company's Case, *supra*, was not expressly dealt with in the majority judgments in Porter's Case. Those judgments rested wholly on Section 122 of the Constitution, which reads:—

> "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit."

In Porter's Case, as in R. v Bernasconi, (1914) 19 C.L.R. 629, this Court, relying on Section 122, entertained appeals from Territorial Courts of New Guinea.

In Bernasconi's Case, *supra*, at 635, Griffith C. J. said that Chapter III was limited to the exercise of the judicial power of the Commonwealth in respect of the functions of government as to which it stood in relation to the States; that it had no application to territories; and that Section 122 was not restricted by Chapter III. No doubt Section 122 is not so restricted, but the question is whether the power conferred by Section 122 is so complete that it extends as far as to require such a qualification of Chapter III itself as to permit this Court or any other Federal Court brought into existence for the purpose of exercising the judicial power of the Commonwealth to be used as a Court of Appeal for the Territories; in other words, whether Section 122 gives power to treat this Court and other Federal Courts created by or under Chapter III, as though they were individuals whose services could be availed of for general purposes and not legal entities created for the single purpose specified in Chapter III. In the absence of anything to the contrary in the judgments in Bernasconi's Case and Porter's Case, I conclude that Their Honours who took the broad view of Section 122 were really giving effect to what the Privy Council said in the passages cited above from the judgments in R. v Burah, Hodge v The Queen, Powell v Apollo Candle Company, and A. G. of Ontario v A. G. of Canada and more particularly in the passage

quoted from the case last-mentioned, that if the text of the Constitution is explicit in what it forbids then the text is conclusive; but that *if the text says nothing expressly then it is to be taken for granted that the power is bestowed, unless it is clearly repugnant to the sense of the text.* Taking this to be the explanation of the broad view in Bernasconi's Case and in Porter's Case, I do not venture to say that it is a wrong view, although I do not readily conclude that it is not repugnant to the sense of Chapter III to hold that powers other than the judicial power of the Commonwealth can be conferred on this Court or other Federal Courts. However, to combat the broad view
10 effectively it would, I think, be necessary to fall back on the strict doctrine of the separation of powers. But Mr. Eggleston for the Prosecutor Union does not press for the acceptance of this doctrine, which has never been accepted as applying to the Australian Constitution either by the Privy Council or by this Court. Whatever difference there is between the English and Australian Constitutions is due to the fact that the latter is a written Constitution, that is to say, that the rules of construction of statutes determine its meaning and effect and the theory of the strict doctrine of separation of powers as applied in the United States of America plays no part.

Mr. Menzies for the Respondent Judges and the intervenent Common-
20 wealth submitted that as Section 61 of the Constitution permitted non-executive power to be given to the Executive so Section 71 in Chapter III permitted non-judicial power to be given to Federal Courts. The non-executive power to which counsel referred was the power to legislate, which it was held in The Victorian Stevedoring Case, *supra*, was validly delegated to the Governor-General in Council, even when the delegated power authorised the repeal of a Federal Statute. However, it seems that any valid statute of the Commonwealth Parliament falls automatically within Section 61, without adding to the Section. It is not necessary to state what is the limit of this power of delegation; but I would find it difficult to supply reasons why any
30 delegation of power to legislate under Section 51 or Section 52 of the Constitution should be held invalid, provided the delegation left the Parliament at liberty to revoke the delegation at any time and to cancel what had been done under it. Such a delegation would seem to be a law with respect to the subject matter delegated and not an attempt to amend the Constitution.

I conclude then that Chapter III permits of the combination of arbitral and judicial powers as in the Commonwealth Conciliation and Arbitration Act 1904-1952. But if I had concluded otherwise, still I would have held that the many decisions of this Court based on the assumption that the combination was permissible should be allowed to stand. This would be because if they were
40 set aside it would still be possible to legislate validly, and indeed very briefly, to continue the present system with or without the co-operation of the Executive. Under such legislation, and with or without such co-operation, the same officers of the Commonwealth could continue to perform the same acts in the same way, except that the arbitral powers now exercised by the Judges would have to be exercised by them as *personæ designatæ*, but for all practical purposes with the same consequences. The Judges as individuals are subject to both State and Commonwealth laws and may be required to perform duties other than judicial duties; and may even be required to perform additional duties simply because, having become Judges, they are believed to have special
50 personal qualifications to discharge them. The Judges as individuals must be

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distinguished from the Courts which they constitute. If all the Judges of a Court resigned to-day their places on the Court could be filled to-morrow; the legal entity, the Court, would continue without further legislative enactment. Even if then additional powers might not validly be given to a Court under Chapter III, still extra duties involving the exercise of these same powers might validly be imposed on the Judges of the Court as *personæ designatæ*. In view of the long experience of the working of this industrial legislation it could not be established that this would place an undue burden on the Judges. However, it is not within my province to suggest what Parliament should do in view of any decision of this Court or of anything in any reasons for judgment; 10 that is to say, whether Parliament should leave things as they are, or separate the arbitral powers from the judicial and provide for their discharge by the same or by different officers of the Commonwealth. In saying this I am not making gratuitous observations because Mr. Menzies for the Respondent Judges naturally enough stressed as a matter calling for careful consideration in coming to our decision the situation of the Arbitration Court Judges if the legislation were declared invalid wholly or in part. But whatever happens, Parliament can adequately cope with any situation that arises. At all events nothing in the Constitution stands in the way, as far as I am aware.

It will be observed that in taking the view that, whatever the effect of 20 Chapter III, the principal of *stare decisis* should apply in any event, I am influenced by the limited consequences that would necessarily follow if it were not applied, namely, nothing more than the need for a short amendment of the legislation by a few more or less formal changes that would preserve the *status quo* for all practical purposes. The application of the principal would not be warranted if the necessary consequences were considerable, e.g. if the view that arbitral powers were judicial powers of the Commonwealth within Chapter III had prevailed so that industrial Awards could validly be made only by Judges appointed for life, and that view were now successfully challenged. Of course, Parliament might not care to resort to the *personæ* 30 *designatæ* method, although it has been resorted to frequently enough; as that might seem to circumvent the Constitution by observing its letter whilst violating its spirit. But it is sufficient for my purposes that Parliament could resort to it.

It might appear that the making and enforcing of Awards by the same persons involves the discharge of conflicting duties. However, that objection is not raised here. It is no answer to say that the making and enforcing of rules of Court by the same Judges is objectionable for the same reason; there is a difference in principle between Awards which are the subject matter of the jurisdiction and the rules of Court and contempt proceedings which are 40 essential to its exercise. I think that the only answer is that Awards were made and enforced by the same tribunals in New Zealand and South Australia before Federation and that several States as well as the Commonwealth have for many years followed this lead. This answer may not seem very persuasive, but it is supported by Stemp's Case, *supra*, and to some extent by Lowenstein's Case, *supra*, at p. 572.

Before concluding, I think I should refer to the decision of this Court in Mainka v The Custodian of Expropriated Property, (1924) 34 C.L.R. 297, in which it was held that the High Court was validly given jurisdiction to hear

an appeal from the Central Court of the Mandated Territory of New Guinea. The decision was based on the fact that the Mandate provided that the Mandatory should have full power of administration and legislation over the Territory "as an integral portion of the Commonwealth of Australia". The acceptance of the Mandate was authorised by The King by Imperial Act 9 & 10 Geo. V., C. 33 called "The Treaty of Peace Act 1919". It was held by a majority that the Central Court was a Federal Court within Section 73 in Chapter III of the Constitution. However, the Imperial legislation operating on the terms of the Mandate accounts for this decision which then is of no 10 assistance here.



I would discharge the Order *Nisi for* prohibition.

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*In the High Court of Australia.*

No. 6. Reasons for Judgment of His Honour Mr. Justice Taylor, 2nd March 1956.

No. 6.

## REASONS FOR JUDGMENT OF HIS HONOUR Mr. JUSTICE TAYLOR.

In this matter the prosecutor seeks an order making absolute an Order *Nisi* calling upon three members of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association to show cause why a writ of prohibition should not issue prohibiting any further proceedings upon two orders made by the Court, as constituted by those members, on 31st May 1955 and 28th June 1955 respectively. The orders were made pursuant to Sections 29 (1) (b), 29 (1) (c) and 29A of the Conciliation and Arbitration Act 1904-1952. These provisions are in the following terms :— 10

" 29.—(1) The Court shall have power—

(b) to order compliance with an order or Award proved to the satisfaction of the Court to have been broken or not observed ;

(c) by order, to enjoin an organization or person from committing or continuing a contravention of this Act or a breach or non-observance of an order or Award ;"

" 29A.—(1) The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court. 20

(2) The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court, when constituted by a single Judge, may be exercised by that Judge ; in any other case, the jurisdiction of the Court to punish a contempt of the Court shall (without prejudice to the operation of sub-section (7) of Section 24 of this Act) be exercised by not less than three Judges.

(3) The Court has power to punish, as a contempt of the Court, an act or omission although a penalty is provided in respect of that act or omission under some other provision of this Act. 30

(4) The maximum penalty which the Court is empowered to impose in respect of a contempt of the Court consisting of a failure to comply with an order of the Court made under paragraph (b) or (c) of the last preceding section is—

(a) where the contempt was committed by—

(i) an organization (not consisting of a single employer)—Five hundred pounds ; or

(ii) an employer, or the holder of an office in an organization, being an office specified in paragraph (a), (aa), or (b) of the definition of " Office " in Section 4 of this Act—Two hundred pounds or imprisonment for twelve months ; or 40

(b) in any other case—Fifty pounds."

Both the prosecutor in this matter and the Metal Trades Employers' Association are organizations registered under the Act and the orders which

are called in question were made by the Court upon the application of the latter. The first of the orders directed the prosecutor to comply with specified provisions of the Metal Trades Award and enjoined it from continuing specified breaches thereof, whilst the second, after reciting a finding by the Court that the prosecutor had been guilty of contempt constituted by its wilful disobedience of the earlier order, imposed a fine upon it of £500. It is unnecessary to set out the precise terms of the orders, for their form is not in question, but it is of importance to observe that it was common ground between the parties that both orders were essentially judicial in character and 10 that they can have no legal foundation unless they were made in the exercise of the judicial power of the Commonwealth. It is this circumstance which has given rise to the constitutional arguments submitted to us in this matter, it being asserted by the prosecutor that it is not competent for the legislature to confer any part of the judicial power of the Commonwealth upon any federal body unless it is a Court constituted in accordance with Chapter III of the Constitution. This is, of course, beyond question and is not denied by the Respondents, who maintain that the Commonwealth Court of Conciliation and Arbitration is such a Court. But the prosecutor relies upon the circumstance that the Act purports to confer what have been described as mixed functions 20 upon that Court, some judicial in their nature and others described as "arbitral", and this, it is contended, is not permissible under the Constitution of the Commonwealth.

The arguments of the prosecutor are twofold. In the first place, it is said, the political theory of the separation of the three functions of government—legislative, executive and judicial—is to be found incorporated as a fundamental part of the structure of the Constitution and, accordingly, it is not permissible for any one organ of government to exercise any of the powers or functions which belong to or are appropriate to either of the other two. Strict adherence to this doctrine or theory must necessarily mean that legislation which purports 30 to authorise any one organ of government to exercise functions which appertain to either of the others is invalid.

The prosecutor's second submission asserts that Chapter III is the exclusive measure of Parliament's legislative authority to confer power upon Federal Courts and that, since the "arbitral" powers and functions with which the Conciliation and Arbitration Act purports to invest the Arbitration Court are not part of the judicial power of the Commonwealth, the Act is, or at least many of its provisions are, invalid. This result is said to flow from a consideration of the provisions of the Constitution itself, and in particular those of Chapter III, and quite independently of the political theory of the 40 separation of powers.

As a political theory the doctrine of the separation of powers has had a marked influence in the United States and to some extent, at least, Sections 1, 61 and 71 of the Commonwealth Constitution represent an attempt to commit to the three organs of government those powers and functions appropriate to their respective departments. But it is apparent that the extent to which the doctrine is capable of being employed as an independent practical constitutional principle will, of necessity, depend upon the extent to which legislative, executive and judicial functions are capable of precise definition and identification. (See per Isaacs J. in Le Mesurier v Connor, 42 C.L.R. 481

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at p. 519). Some of such matters, as the same learned justice said in Federal Commissioner of Taxation v Munro (38 C.L.R. 153 at pp. 178-9), " so clearly and distinctly appertain to one branch of government as to be incapable of exercise by another " and he gave as obvious examples the appropriation of public money, a trial for murder and the appointment of a Federal Judge. But he then went on to say that " other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trademarks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances." Examples of the latter kind are numerous and though His Honour mentioned some it is, perhaps, not out of place to supplement the list by some particular references. The Patents Act, 1952, Section 95, authorises a patentee, who has suffered loss or damage of the nature referred to in that section, to apply to the High Court *or* to the Commissioner of Patents for an extension of the term of his patent. In any application made to the Court it may, if it finds that the patentee " has suffered loss or damage by reason of hostilities between Her Majesty and the foreign state ", order the extension of the term of the patent for such further term as the Court thinks fit, whilst in any application made to the Commissioner he may, if he makes a similar finding, extend the term of the patent in the same way. Again by Part 17 of the Act the High Court is constituted the Appeal Tribunal for the purposes of the Act and a right of appeal from the Commissioner is given in many matters which, in the first instance, are dealt with by him pursuant to powers and authorities vested in him by the Act. The " appeal " is of course not a true appeal for it is not brought from a Court and it is disposed of by the Court as a matter within its original jurisdiction and in the exercise of powers and authorities of the same apparent character as those which are vested in the Commissioner. But in the former case the Court, in some cases at least, may be said to exercise judicial power whilst, in the latter, the Commissioner exercises administrative authority. Similar comments may be made with respect to the right of appeal from the decisions of the Commissioner under the earlier Patents Act and from decisions of the Law Officer pursuant to Section 34 of the Trade Marks Act 1905-1948. Again many of the powers exercisable under the Bankruptcy Act 1924-1950 may be thought to present this double aspect, but that it was the legislative intention that the Federal Court of Bankruptcy should be invested with powers, duties and functions of an administrative character, is apparent from the plain terms of Section 23. Striking examples are the powers given to the Court, by Section 68, to hold a sitting for the examination of any bankrupt as to his conduct and affairs and, by Section 80, to require the bankrupt or his wife or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt to attend before the Court and to give evidence relating to the bankrupt, his trade dealings, property, or affairs. The examination in either case may be conducted before the Court or, pursuant to Section 24 of the Act, before the registrar. Whichever course is adopted it is in aid of the official receiver's duty of investigation and administration. (See Section 15). No less striking are the powers conferred upon the Court by Part VIII with respect to trustees. The provisions in this Part authorize the Court to direct that any person may be registered as a trustee, to cancel any such registration, to confirm, reverse

or modify any action or decision of a committee upon the application of the bankrupt or any of his creditors, to enquire into the question whether a trustee is faithfully performing his duties and to take such action and make such order as may be deemed expedient. Many of these powers are by no means essentially judicial in their nature and might well be vested in an administrative officer. Indeed they are so exercisable either under Section 24 or pursuant to a direction of the Court (Section 23). The authority of a Court of Marine Inquiry to make enquiries concerning marine casualties or in any matter of the character specified in Section 354 of the Navigation Act is another instance of an authority which might be exercised administratively. Indeed, Section 377 which authorizes a Court of Marine Inquiry to hear and determine in open Court any appeal or reference in pursuance of the Act in respect of the detention of a ship alleged to be unseaworthy or any other prescribed matter, expressly empowers the Court "in relation to the hearing and determination of the appeal or reference" to exercise "all the powers of the Minister" The powers given to the High Court by the Life Insurance Act 1945-1950 are a further example of powers which might be exercised administratively. I refer particularly to Section 39 which requires the sanction of the Court to investments of a specified character, to Section 40 which authorizes appeals to the Court against directions given by the Commissioner with respect to the allocation of further assets to a company's statutory fund, to Section 47 which authorizes an appeal against the refusal of the Commissioner to approve of any person performing the functions of an auditor under Division 4 of Part III of the Act, to Section 52 which gives a right of appeal to the High Court against the rejection of any account or balance sheet of a company, to Section 58 which gives a right of appeal against the directions concerning the conduct of a company's business which may be given under that section, to Section 75 which authorizes the Court to confirm a scheme for transfer or amalgamation and Section 119 which authorizes the Court to direct the issue of special policies in lieu of policies which have been lost or destroyed. These powers are not dissimilar to the supervisory powers conferred upon the High Court by the Trading with the Enemy Act 1939-1952 and which have so often been exercised by this Court without question. Many other examples might be given but I conclude the list by referring to two of the many cases in which it became necessary to determine whether powers which had been conferred were not only judicial or quasi-judicial but were part of the judicial power of the Commonwealth. The first of these (Peacock v Newtown Marrickville and General Co-operative Building Society, 67 C.L.R. 25) was concerned with the National Security (Contracts Adjustment) Regulations, which purported to authorize, *inter alia*, a district Court of the State of New South Wales, upon the application of any party, to cancel or vary any agreement where it was satisfied that "by reason of circumstances attributable to the war or the operation of any regulation made under the National Security Act 1939 . . . the performance, or further performance" of the agreement had become or was likely to become impossible or, so far as the applicant was concerned, had become or was *likely* to become *inequitable* or unduly onerous. The power so conferred was held to constitute a part of the judicial power of the Commonwealth notwithstanding the fact that the power was not concerned with the declaration or enforcement of existing rights but extended to the variation or total destruction of the existing legal rights and obligations of the parties. On the other hand the powers conferred upon committees of reference by the Women's Employment Regulations were held not to

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constitute part of the judicial power of the Commonwealth (Rola Company (Australia) Pty. Ltd. v The Commonwealth, 69 C.L.R. 185). These regulations authorised such committees to decide authoritatively questions of fact upon which the rights and liabilities of particular employers with respect to their female employees depended. A majority of the Court held that this function was not essentially judicial though there can be little doubt that the power might validly have been conferred upon a Court. Considerations which become evident from illustrations such as have been given lead inevitably to the conclusion that, though the Constitution effects a broad and fundamental distribution of powers among the organs of government, it is not such a 10 distribution as precludes overlapping in the case of powers or functions the inherent features of which are not such as to enable them to be assigned, *a priori*, to one organ rather than to another. Moreover as the Judicial Committee of the Privy Council said in Labour Relations Board of Saskatchewan v John East Iron Works Ltd. (1949 A.C. 134 at p. 148) "The borderland in which judicial and administrative functions overlap is a wide one."

Chapter III of the Constitution deals specifically with the judicature. Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, 20 and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction. By Section 73 the High Court is given an extensive appellate jurisdiction and by Section 75 it is invested with original jurisdiction in matters of a specified character. In addition Parliament is authorised to make laws conferring original jurisdiction upon the High Court in a number of other matters. The legislative power to create other Federal Courts and to define their respective jurisdictions is to be found in Section 71 and 77 (i). There is no power to confer judicial power generally upon any new Federal Court, for jurisdiction may only be conferred with respect to any of the *matters* specified in Sections 75 and 76. These latter sections 30 mark the limits of judicial power which may be conferred upon any new Federal Court created by Parliament and also, it is said, the limits of legislative authority to confer powers of any kind upon a Court. It should, perhaps, be observed, in passing, that the legislative authority to confer judicial power upon Courts created by Parliament, though defined by reference to a number of so called subject matters, extends to *any matter arising under any laws made by Parliament* and *in addition* to a number of other matters. But on the assumption that the "arbitral" powers of the Arbitration Court are not judicial in their essential character the argument of the prosecutor means that legislation which purports to vest such powers in a Federal Court must 40 be invalid.

In argument however it was said by the prosecutor, on the authority of The King v The Federal Court of Bankruptcy *ex parte* Lowenstein (59 C.L.R. 556) that it is constitutionally permissible to invest a Court with limited legislative powers where the existence and exercise of such a power may be considered as reasonably incidental to the performance of its judicial functions. There is, of course, no express provision in Chapter III to justify legislation investing Courts with subordinate legislative authority and to suggest, as was done during the course of argument, that such legislation may be justified under Section 51 (xxxix) is immediately to depart, to this extent 50

at least, from the notion that the legislative authority to confer powers upon Courts is to be sought exclusively, in Chapter III. And if the prosecutor's main contention is correct there is nothing in Section 51 (xxxix) to authorize any exception from it. That paragraph, so far as is relevant to this enquiry, merely authorises legislation with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Federal judicature and effective laws may well be made under this head of power without investing the Courts with subordinate legislative authority. Indeed it was not thought necessary to invest the Federal Court of Bankruptcy with power to make rules for regulating its practice and procedure in the many types of matters which may come before it; it was sufficient to leave the making of such rules to the executive. Moreover, it should be observed, the express power given by *placitum* (xxxix) would seem to be quite inconsistent with the notion, suggested in argument at one stage, that Chapter III impliedly authorises legislation investing Courts with non-judicial powers, including *subordinate legislative power*, which are incidental to the exercise of the judicial powers with which they have been invested. These observations may, of course, be said to constitute but a minor criticism of the prosecutor's contentions, but if Section 51 (xxxix) may be relied upon to enable the legislature to confer upon Courts authorities incidental to the performance of their strictly judicial functions it constitutes a real and not merely an apparent exception to the proposition that Chapter III is the exclusive measure of legislative authority to invest Courts with powers and functions.

It cannot, of course, be doubted that no part of the judicial power of the Commonwealth can be vested in a body which is not a Court constituted in accordance with Chapter III. Nor, except to the extent indicated, is it permissible to vest in any such Court functions which " so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another ". But what is the position with respect to those other powers which are " subject to no *a priori* exclusive delimitation "? In relation to this problem the question also arises whether the " arbitral " powers of the Arbitration Court fall into this category of powers or whether they may, *a priori*, be assigned exclusively to one branch of government or another.

In his work on the Constitution of the United States Willoughby has sought to deduce some general principles from the cases decided in that country in relation to these matters. He points out (2nd Ed. pp. 1619-1620) that " it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather the correct statement is that a department may consitutionally exercise any power, whatever its essential nature, which has, by the Constitution been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions ". Thereupon he proceeds: " From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative, or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate

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functions of the department into whose hands its exercise has been given." But speaking of those powers the character of which does not admit of any *a priori* assignment he continues: "Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested". I should have thought that a particular application of the latter proposition is to be found in Waterside Workers' Federation of Australia v Alexander, (25 C.L.R. 434) for if it be not permissible to entrust to Courts functions which cannot be said to be judicial in character it mattered little whether the President of the Arbitration Court, as it was then constituted, had been appointed in accordance with constitutional requirements or not. It is true, of course, that the question whether such a course was permissible was not directly decided by the Court but the circumstance that the Act then under challenge purported to invest the Court with "mixed" powers and functions and the possible consequences of this were not overlooked. Counsel for the Respondent, upon the authority of United States v Ferreira (13 How. 40), stated in argument that "Under section 51 (xxxv) of the Constitution the power to settle disputes by means of arbitration might be conferred upon a Court exercising the judicial power of the Commonwealth. There is no reason why the Commonwealth Parliament should not have authority to impose upon a Court exercising judicial power the performance of other duties." Counsel for the Applicants asserted that "Under Section 51 (xxxv), which may be used in conjunction with Section 71 of the Constitution, it is perfectly proper to create a Court, and to arm that Court with the powers incidental to the performance of its purpose of settling disputes. It is clear that no argument to the contrary was addressed to the Court but the heresy involved in the propositions as stated—if there was one—was so fundamental, and I venture to add, must then have been so palpable, that it could not have escaped detection and exposure. There was however no such exposure. On the contrary three Justices of the Court (Griffiths C.J. and Higgins and Gavan Duffy JJ.) upheld the impugned provisions in their entirety whilst a fourth (Powers J. at p. 479) expressly stated that he did not think that "any member of the Court considers that the Constitution of a Commonwealth Court of Conciliation and Arbitration, to be presided over by a Judge or Justice duly appointed as Judge of that Court in accordance with Section 72 of the Constitution, to exercise all the powers given by the present Commonwealth Conciliation and Arbitration Act, is beyond the powers of the Parliament of the Commonwealth". Though it is not the practice of this Court to pronounce upon questions which are not directly raised in proceedings before it, it is clear that this matter was before the Court, that it was of transcendent constitutional importance, that the views of a number of the Justices were opposed to the argument now advanced in this case and that there is nothing in the reasons of the remaining Justices to support that argument. On the contrary it is perhaps reasonable to say that the only vice which their Honours saw in the legislation was the tenure of office provided by the Act for the appointment of the President. Moreover, this view of Alexander's Case was the one which was acted upon when the Court was reconstituted in 1926 and it is a view which has remained unchallenged until now. Lapse of time is of course no answer to a valid constitutional argument but before acting upon a submission which appears to me to be contrary to all the implications of Alexander's Case I should be required to be convinced of the validity of the submission.

The submission does not, however, carry conviction to my mind. On the contrary, whilst I see in Chapter III of the Constitution an exhaustive declaration of the judicial power with which Federal Courts may be invested, I see nothing to prohibit Parliament absolutely from conferring other powers or imposing other duties upon them under Section 51. But this does not mean that Parliament may confer upon Courts powers and functions which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. The investing of Courts with such powers would clearly be in conflict with constitutional principles and, in turn, judicial authority. But "arbitral" functions are not, in my opinion, essentially legislative or executive in character. Indeed, Barton J. in Alexander's Case (p. 456), considered that the "arbitral" functions of the Arbitration Court constituted part of the judicial power of the Commonwealth whilst Griffith C.J. (p. 449) found himself unable to make any intelligent distinction between the "arbitral" and "judicial" provisions of the Act and pointed out, in effect, that "arbitral" is not synonymous with "non-judicial". It is, of course, much too late in the day to contend that "arbitral" functions of the nature created by the Conciliation and Arbitration Act can ever constitute any part of the judicial power of the Commonwealth, but I mention in passing that the Court in Alexander's Case was not so much concerned with the question whether such functions could be classified as judicial if committed to a properly constituted Court; it was sufficient if they could be made exercisable by a tribunal which was not a Court. The notion that powers of an indeterminate character may "achieve ultimate recognition as aspects of the judicial power, not so much because of their inherent nature or characteristics, but because their performance has been committed to a Court in the strict sense" (The Queen v Davison, 90 C.L.R. 353 at p. 388) appears to be a subsequent development. It is, however, sufficient to say that "arbitral" functions of the kind in question do not bear the indelible imprint of legislative or executive character; on the contrary an examination of the provisions of Section 51 (xxxv) may lead to the conclusion that they are of a special character.

The authority conferred upon the Commonwealth Parliament by Section 51 (xxxv) of the Constitution is expressed as a power to make laws for the peace, order and good government of the Commonwealth with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". It is not, as has been frequently observed, a power to legislate with respect to industrial matters or, even, with respect to industrial disputes; the subject matter of the power is conciliation and arbitration for the declared purpose. Accordingly Parliament has no power to make laws directly regulating industrial conditions; its authority is limited to the establishment and maintenance of a system, in some form or other, of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

It has been argued, without success, that "arbitration", as used in Section 51 (xxxv) does not authorise legislation under which the parties to an industrial disputes are *required* to submit to the determination of a dispute by an arbitrator not appointed either directly or indirectly by the parties. (The King v The Commonwealth Court of Conciliation and Arbitration & anor.; *ex parte* Whybrow & Co. & others (11 C.L.R. 1)). The position is

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therefore that this head of power authorises legislation for the establishment of a system of arbitration which, at the option of the legislature, may be available to the parties if they wish to avail themselves of it or which, on the other hand, will begin to function upon the occurrence of an industrial dispute irrespective of the wishes of either party or, indeed, in spite of their desire to settle their differences otherwise. Likewise, the legislature may, at its option, provide for arbitrators who will represent the parties in dispute or provide an arbitrator who is an entire stranger to the dispute and to the parties. But whatever the composition of the body charged with the function of arbitrating between parties in dispute, "arbitration" requires that it must "act on the ordinary principles of justice involved in the necessity of allowing a hearing to all parties to the difference on which it must decide, and of abstaining from involving in its decision interests of others than the parties to the difference. It is not absolved from this duty by the fact that a Statute has imposed it on the parties as their tribunal, or has compelled them to submit their differences to it." (Per Barton J. in Whybrow's Case, *supra*, at pp. 36-37). Accordingly, arbitration presents some features which are characteristic of the exercise of judicial power. It is concerned with a dispute or disputes between parties and it involves a hearing and determination of the matters in dispute. Indeed, "A law which enables a body of persons to settle a dispute by issuing a decree arrived at by discussion amongst themselves without any hearing or determination between the disputants is . . . not a law with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes and is not authorised by Section 51 (xxxv) of the Constitution". (Australian Railways Union v Victorian Railways Commissioners and others (44 C.L.R. 319 at pp. 384-5)).

The Constitution therefore authorises Parliament to legislate for the establishment of a tribunal to which the parties to industrial disputes of the specified character are compelled to submit their differences and which, in the exercise of its arbitral functions, is bound to proceed, according to the ordinary principles of justice, to hear the parties and to determine the matters in dispute. But, it should be observed, the competence of Parliament does not extend beyond making such provision with respect to industrial disputes "*extending beyond the limits of any one State.*" The italicised words immediately suggest the reason for the vesting of this power in the Commonwealth Parliament. According to Griffith C.J. (The Federated Saw Mill, Timber Yard, and General Woodworkers Employés' Association of Australasia v James Moore & Son Pty. Ltd. & others (8 C.L.R. 465 at p. 487)):

> "Before the establishment of the Commonwealth 'industrial disputes' (as to the meaning of which term I shall have more to say) had occasionally arisen in the different Colonies, and in two of them (New South Wales and South Australia) tentative legislation had been passed for the purpose of dealing with them by conciliation and arbitration. A similar law had been passed in the neighbouring Colony of New Zealand. Tentative efforts had been also made in the United Kingdom to deal with the same subject. Each Colony had absolute power to deal with the matter within its own limits, but in the event of a single dispute covering an area not within the bounds of any one Colony, there was no legislative authority (except the Parliament of the United Kingdom) which could have dealt with it.

> This was the state of the law, and this was the defect. The remedy was to authorize the Commonwealth Parliament to make laws for dealing with such disputes, not in any way they might think desirable, but by conciliation and arbitration for their prevention and settlement."

Many other observations to the same effect may be quoted and they reveal the true character of the power. It is a power which is not concerned with and which cannot be exercised with respect to industrial disputes which are confined within the limits of any one State; it is a power which was designed 10 to deal with the situation which arises when, an industrial dispute having spread across State borders, the machinery of any one State is unable to deal effectively with the whole matter.

Nothing of what I have so far said on this point would, I think, be denied by the Prosecutor but from it emerges the notion that the legislative power was intended to authorise Parliament, at least, to employ, in its exercise, instruments of the same character as those then recognised as a usual or commonly accepted instrument of compulsory arbitration in such matters. Indeed to deny to the Commonwealth Parliament the authority to use instruments of the character or characters then in use in the various States would have been to 20 deprive the power of a great deal of its significance.

The history of arbitration as a means of regulating industrial relations has been the subject of considerable discussion. (See Federated Saw Mill, &c. Employés' Assn. of Australasia v James Moore & Son Pty. Ltd. (*supra*)—per O'Connor J. at pp. 502 *et seq.* and per Issacs J. at pp. 522 *et seq.*—and Australian Railways Union v Victorian Railways Commissioners (*supra*)—per Isaacs J. at pp. 354 *et seq.*) but for the purposes of the present case it is unnecessary to make any extended survey. Griffith C.J. in the former case (p. 487) referred to the fact that tentative legislation had been passed in New South Wales and South Australia—and also "in the neighbouring Colony of 30 New Zealand"—for the purpose of dealing with industrial disputes. In the last-mentioned Colony the Industrial Conciliation and Arbitration Act became law in 1894. This Statute made provision for the registration of societies lawfully associated for the purpose of protecting or furthering the interests of employers or workmen in or in connection with any industry in the Colony and set up Boards of Conciliation and a Court of Arbitration. The various Boards, within their respective districts, were charged with the settlement of industrial disputes and the Court, presided over by a Judge of the Supreme Court, was given jurisdiction to determine any dispute referred to it by a Board. The Court was not given power by this enactment to enforce its own Awards, provision 40 being made for their enforcement in the same manner as a judgment of the Supreme Court after the filing in that Court of a duplicate of any Award. But by the Industrial Conciliation and Arbitration Act Amendment Act 1898 the Court of Arbitration was given power to fix (Section 3) and impose (Section 83) penalties for the breach of any Award and it was further given full and exclusive jurisdiction to deal with all offences against the Act. The system erected by the New Zealand Statutes of 1894 and 1898 was adopted in Western Australia by the Industrial Conciliation and Arbitration Act of 1900. The provisions of the New Zealand legislation were adopted almost literally and, as in the latter Colony, a Court was created for the purpose of exercising arbitral

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and judicial functions side by side. In addition to having authority to fix and impose penalties for breaches of Awards and full and exclusive jurisdiction to deal with all offences against the Act it was invested with power to grant injunctions and prohibitions and to issue writs of mandamus and generally to exercise the powers of the Supreme Court in the administration of the Act. The "tentative" legislation in New South Wales (the Arbitration Act 1892 and the Conciliation and Arbitration Act 1899) were followed by the Industrial Arbitration Act 1901 which set up a Court of Arbitration, presided over by a Judge of the Supreme Court, for the hearing and determination of industrial disputes. In addition to its arbitral functions it was given power "to deal with all offences and enforce all orders under" the Act (Section 26 (n)), to grant injunctions restraining the breach or non-obervance of any Award (Section 37 (4)) and to impose fines for any such breach or non- observance (Section 37 (8)). The industrial legislation of the other States does not appear to have embodied those features. According to Isaacs J. (Federated Saw Mill &c. Employés' Assn. of Australasia v James Moore & Son Pty. Ltd. (*supra*) at p. 526: "Some States were without any legislation whatever on the subject; no two States were uniform; all of the Acts were inadequate to cope with admitted evils, even domestic; and with the advent of inter-colonial free trade and the enlargement of intercourse the mischief manifestly might be more extensive and more destructive in the Commonwealth about to be created". The New South Wales Act of 1901 became law after Federation but sufficient has been said to indicate that the concept of a Court having cognizance of industrial disputes and possessing full power to enforce its own Awards was by no means unknown before that time. On the contrary it was a well-recognized concept and, though differing views may have been entertained concerning the wisdom of creating tribunals possessing both arbitral and judicial powers, it was a concept which, if the matter fell to be determined by consideration of the language of *placitum* (xxxv) alone, was clearly embraced by the terms in which the power was defined. I find myself in agreement with Isaacs J. (Federated Saw Mill &c. Employés' Assn. of Australasia v James Moore & Son Pty. Ltd. (*supra*) at pp. 526-7) when, after discussing the meaning of "arbitration" and referring to pre-Federation legislation, he said: "When therefore there was entrusted to the Commonwealth Parliament the plenary power of legislating upon the familiar subjects of conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one State, It appears to me an irresistible inference that the grant with respect to such disputes was as full and unrestricted as a State already possessed over disputes confined to its own borders." Much the same thing was said by O'Connor J. in the same case (p. 504).

These observations, which are by no means conclusive of the question in this case, do however serve to indicate the special character of the arbitral functions of the Commonwealth Court of Conciliation and Arbitration. They bear little, if any, resemblance to executive or legislative functions as generally conceived; on the contrary, both in their nature and exercise they present a number of features which are characteristic of judicial functions. These considerations, coupled with the fact that the combination in one tribunal of both arbitral and limited judicial authority is and has been for over half a century a well-recognized concept, induce me to think that, unless there is to be found in the Constitution any clear provision or implication which denies to the legislature the right to combine these two functions in a Court

constituted under Sections 71 and 77 (1), the prosecutor's submissions must fail. While I am conscious of the weight of the arguments advanced by the prosecutor they have failed to convince me that there is to be found in the Constitution any implication which, in the face of the special character of the power conferred by *placitum* (xxxv), could so operate. Accordingly, I am of the opinion that the Order *Nisi* should be discharged.

*In the High Court of Australia.*

No. 7. Order Absolute for Writ of Prohibition, 2nd March 1956.

No. 7.

## ORDER ABSOLUTE FOR WRIT OF PROHIBITION.

**Before Their Honours the Chief Justice Sir Owen Dixon, Mr. Justice McTiernan, Mr. Justice Williams, Mr. Justice Webb, Mr. Justice Fullagar, Mr. Justice Kitto and Mr. Justice Taylor.**

**Friday the 2nd day of March 1956.**

THIS MATTER coming on for hearing before this Court at Sydney on the 15th, 16th, 17th, 18th, 19th, 22nd and 23rd days of August 1955 by way of Order *Nisi* granted by His Honour Mr. Justice McTiernan on the 30th day of July 1955 directed to the above-named Respondents to show cause why a Writ of Prohibition should not issue prohibiting them from further proceedings with or upon the Orders made by the Commonwealth Court of Conciliation and Arbitration on the 31st day of May 1955 and the 28th day of June 1955 respectively upon the applications of the Respondent the Metal Trades Employers' Association in Matters Nos. 395 and 503 of 1955 UPON READING the said Order *Nisi* and the affidavit of Alfred Tennyson Brodney sworn the 29th day of July 1955 and filed herein and the exhibits referred to in the said affidavit AND UPON HEARING Mr. Eggleston of Queen's Counsel and Mr. Corson of Counsel for the Prosecutor, Mr. D. I. Menzies of Queen's Counsel and Mr. Menhennitt of Counsel for the Respondents The Honourable Richard Clarence Kirby, The Honourable Edward Arthur Dunphy and The Honourable Richard Ashburner and for the Attorney-General of the Commonwealth intervening pursuant to the leave of this Court and Mr. Macfarlan of Queen's Counsel and Mr. Franki of Counsel for the Respondent the Metal Trades Employers' Association THIS COURT DID ORDER on the said 23rd day of August 1955 that this matter should stand for judgment and the same standing for judgment this day accordingly at Melbourne THIS COURT DOTH ORDER that the said Order *Nisi* for a Writ of Prohibition be and the same is hereby made absolute AND THIS COURT DOTH FURTHER ORDER that the costs of the Prosecutor of and incidental to this matter be taxed by the proper officer of this Court and that such costs when so taxed and allowed be paid by the Respondent the Metal Trades Employers' Association to the Prosecutor.

By the Court,

(L.S.) (Sgd.) M. DOHERTY,

District Registrar.

*In the Privy Council.*

No. 8. Order in Council granting leave to Appeal and directing that the two Appeals be consolidated, 1st June 1956.

No. 8.

ORDER IN COUNCIL GRANTING LEAVE TO APPEAL AND DIRECTING THAT THE TWO APPEALS BE CONSOLIDATED.

# At the Court at Buckingham Palace

The 1st day of June, 1956.

PRESENT

## THE QUEEN'S MOST EXCELLENT MAJESTY

| | |
|---|---|
| Lord President | Mr. Thorneycroft |
| Earl of Munster | Sir Michael Adeane |
| Mr. Secretary Lennox-Boyd | Mr. Molson |

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of May 1956 in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of the Commonwealth of Australia in the matter of an Appeal from the High Court of Australia between the Petitioner (Intervener) and Your Majesty and the Boilermakers' Society of Australia (Prosecutor) and The Honourable Richard Clarence Kirby The Honourable Edward Arthur Dunphy and The Honourable Richard Ashburner Judges of the Commonwealth Court of Conciliation and Arbitration (Respondents) and the Metal Trades Employers' Association (Respondent) Respondents setting forth that on the 31st May 1955 the Commonwealth Court of Conciliation and Arbitration (thereinafter called the Arbitration Court) made an Order requiring obedience on the part of the Prosecutor (a registered organization of employees) to a provision contained in the Metal Trades Award which prescribes terms and conditions of employment for specified types of work performed by members of various registered organizations of employees for various employers including members of the Metal Trades Employers' Association (a registered organization of employers): that the particular provision of the Award of which the said Order of the Arbitration Court required obedience as aforesaid was Clause 19 (*ba*) (i) which prohibited any organization a party to the Award (including the Prosecutor) from directly or indirectly being a party to or concerned in any ban limitation or restriction upon the performance of work in accordance with the Award: that on the 28th June 1955 the Arbitration Court made a further Order holding that the Prosecutor had been guilty of contempt of the Court by wilfully disobeying the aforesaid Order of the 31st May 1955 and imposed a fine of £500: that the aforesaid two Orders of the

*In the Privy Council.*

No. 8. Order in Council granting leave to Appeal and directing that the two Appeals be consolidated, 1st June 1956. *continued.*

Arbitration Court were made pursuant to the powers conferred upon it by Sections 29 (1) (*b*) and (*c*) and 29A of the Conciliation and Arbitration Act 1904-1952 (thereinafter called the Arbitration Act): that on the 30th July 1955 the High Court of Australia ordered the three Judges of the Arbitration Court to show cause why a Writ of Prohibition should not issue prohibiting them from further proceeding with or upon the Orders of the Court dated the 31st May 1955 and the 28th June 1955 respectively on the grounds that Sections 29 (1) (*b*) and (*c*) and 29A of the Arbitration Act were *ultra vires* the Parliament of the Commonwealth of Australia and invalid: that on the 2nd March 1956 the Full Court of the High Court of Australia made absolute an Order Nisi for a Writ of Prohibition directed against the three Judges and the Metal Trades Employers' Association holding that it is not permissible for the Commonwealth Parliament to enact that there shall be conferred on the one tribunal both judicial and arbitral powers and functions and accordingly Sections 29 (1) (*b*) and (*c*) and 29A of the Arbitration Act are invalid: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment and Order of the High Court of Australia dated the 2nd day of March 1956 and such further relief as to Your Majesty in Council may seem meet:

"AND WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of The Honourable Richard Clarence Kirby The Honourable Edward Arthur Dunphy and The Honourable Richard Ashburner Judges of the Commonwealth Court of Conciliation and Arbitration in the matter of an Appeal between the Petitioners (Respondents) and Your Majesty and the Boilermakers' Society of Australia (Prosecutor) and the Metal Trades Employers' Association (Respondent) and the Attorney-General of the Commonwealth of Australia (Intervener) Respondents setting forth the facts as adumbrated in the first Petition: And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment and Order of the High Court of Australia dated the 2nd day of March 1956 and such further relief as to Your Majesty in Council may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Councill have taken the humble Petitions into consideration and having heard Counsel in support thereof no one appearing at the Bar in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeals against the Judgment and Order of the High Court of Australia dated the 2nd day of March 1956 and that the two Appeals ought to be consolidated and heard together:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

No. 8.
Order in Council granting leave to Appeal and directing that the two Appeals be consolidated, 1st June 1956.
*continued.*

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW

No. 27 of 1956.

# In the Privy Council.

## ON APPEAL
*FROM THE HIGH COURT OF AUSTRALIA.*

BETWEEN

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA - (Intervener) *Appellant*

and

HER MAJESTY THE QUEEN

and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER Judges of the Commonwealth Court of Conciliation and Arbitration (Respondents)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent) *Respondents.*

AND BETWEEN

THE HONOURABLE RICHARD CLARENCE KIRBY THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER. Judges of the Commonwealth Court of Conciliation and Arbitration - (Respondents) *Appellants*

and

HER MAJESTY THE QUEEN

and

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

and

THE METAL TRADES EMPLOYERS' ASSOCIATION (Respondent)

and

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener) *Respondents.*

**(CONSOLIDATED APPEALS)**

# RECORD OF PROCEEDINGS.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, E.C.4.,
*Solicitors for the Appellants in the Consolidated appeals.*

WATERHOUSE & CO.,
1 New Court,
Lincoln's Inn, W.C.2.,
*Solicitors for the Boilermakers' Society of Australia.*