

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. notice on 21st February, and I doubt whether the defendant is in respect of this matter entitled to rely on other circumstances. Having, however, come to the conclusion on the other ground, relating to what may be called a general waiver, it is unnecessary for me to give any definite decision with respect to this second matter. I thought, however, that it would be desirable that I should set out the facts and my findings with relation to it.

I may add that there was a third ground on which plaintiff relied, depending upon the construction of the lease, and particularly on the construction to be given in the proviso for determination and re-entry to the general words "in respect of any breach or default by the lessee of or in respect of any covenant or condition of the lease." These general words followed an enumeration of particular matters, and Counsel's contention was that, by reason of such enumeration, taken in conjunction with the other provisions of the lease, they did not include a reference to the covenants and conditions which are here of importance. I need only say as to this contention that, having regard to the words themselves, their position in the clause, and the provisions of the lease as a whole, I do not think the contention can be supported.

I have next to deal with the amount of damages. I fix these at £600. I think I should take into account the fact that plaintiff's takings were largely made up from unauthorised trading, and this affects even the amount (£925) mentioned in the conditional contract with Mrs. Brewer, who said that the estimate of value in connection with her contract of purchase was based on the assumption that the trade was all legitimate.

As to the counterclaim, I think that probably no relief under it is necessary, but I will make a formal order, the plaintiff having taken the proceedings which he has taken and recovered damages, that the lease shall as between the plaintiff and the defendant be deemed to have been cancelled as on 23rd February, 1924.

As to costs, a good deal of time was taken up in connection with the question of unauthorised trading during the whole term of plaintiff's occupancy, and though much of this may in certain aspects of the case be considered immaterial by reason of super-added facts, yet it was a necessary part of defendant's case, and was raised by the pleadings. I make a reduction accordingly, and on the counterclaim there will be an order as set out above, without costs. Judgment for plaintiff for £600, with costs to be taxed, including costs of pleadings and discovery, less £40.

Judgment for plaintiff.

[Solicitors—For the plaintiff, McInerney, McInerney and Williams; for the defendant, Hall and Wilcox.]

W. P.

High Court of Australia.

FULL COURT — (Knox, C.J.,	April 28, 30;
Isaacs, Gavan Duffy, Rich	May 13, 14,
and Starke, JJ.)	15; Aug. 6.
(Sydney and Melbourne.)	

THE WATERSIDE WORKERS' FEDERATION v. GILCHRIST, WATT AND SANDERSON LTD. THE KING v. THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE WATERSIDE WORKERS' FEDERATION. Ex parte GILCHRIST, WATT AND SANDERSON LTD.

Constitutional law—Commonwealth Court of Conciliation and Arbitration—Prohibition—Amenability to—Award — Interpretation of — Arbitral function—Award conflicting with State law—"Commonwealth Conciliation and Arbitration Act 1904-1921," secs. 31 (1), 38 (o).

To the Commonwealth Court of Conciliation and Arbitration there was referred a dispute as to whether the members of an industrial organisation called the Waterside Workers' Federation should have preference of employment over non-members. The award of the Court upon that reference provided substantially that preference should be given to returned soldier and sailor members of the organisation as against all persons other than returned soldiers and sailors outside the organisation.

The validity of the award was challenged, *inter alia*, on the ground that the dispute was as to the refusal of preference to members of the organisation over non-members, and did not include the question of preference to returned soldiers over persons who were not returned soldiers, or the question of preference to some members of the organisation over other members. Upon a motion for an injunction restraining breaches of the award in respect of preference,—

Held, per Isaacs, Rich and Starke, JJ. (Knox, C.J., and Gavan Duffy, J., dissentientibus), that the preference granted by the award was within the ambit of the dispute, and that an injunction should be granted.

Per Isaacs, Rich and Starke, JJ.—The interpretation of a term of an existing award by the Court of Conciliation and Arbitration, under section 38 (o) of the "Conciliation and Arbitration Act 1904-1921," is an arbitral function and not a judicial one, and any interpretation proceeding upon a judicial basis is a void act.

Per Knox, C.J., Gavan Duffy and Starke, JJ. (Isaacs and Rich, JJ., dissentientibus).—The Commonwealth Court of Conciliation and Arbitration is amenable to prohibition in the High Court, with respect to an award, even after the award has been made.

Per Knox, C.J., and Gavan Duffy, J.—Section 31 (1) of the "Conciliation and Arbitration Act," in declaring that no award shall be challenged or be subject to prohibition, *mandamus* or injunction, in any other Court on any account whatever, does not prevent the granting of a writ of prohibition in the case of an award dealing with matters which were not in dispute.

Per Starke, J.—That section cannot give any validity to an award which transcends the constitutional power of the Commonwealth.

Per Isaacs and Rich, JJ.—A tribunal is not subject to prohibition or *certiorari* whose functions are not judicial in the same sense that the function of a Court is judicial, whatever the constitution or procedure of the tribunal may be. That sense is that the determination of the tribunal must itself, and of its own direct force, instantly impose an obligation upon, or affect the rights of, the parties concerned. A function that is substantially executive or legislative in its nature is not judicial in the necessary sense. Arbitration under the "Commonwealth Conciliation and Arbitration Act 1904-1921" is in its nature legislative and not judicial in the above sense, and the arbitral functions exercised by Courts under that Act are not amenable to prohibition or *certiorari*. In any event, those remedies would be inappropriate after an award, inasmuch as the tribunal would then be *functus officio*. Section 31 (1) of the Act is an express bar to the granting of any writ of prohibition or *certiorari* when once the award has been duly made and perfected.

Per Starke, J.—The form of preference awarded was in conflict with the provisions of the law of New South Wales contained in the "Returned Soldiers' and Sailors' Employment Act 1919;" but the award made under the authority of Commonwealth legislation prevailed over the State law.

MOTION for injunction and order *nisi* for prohibition and *certiorari*.

The Commonwealth Court of Conciliation and Arbitration made an award relating to wages and conditions of work for members of an organisation called the Waterside Workers' Federation of Australia, the term of operation of the award being from 23rd October, 1922, to 30th September, 1923. The first clause of that award was as follows:—

The minimum rate of wages to be paid to waterside workers if employed by any of the respondents shall be (with the exception hereinafter mentioned) 2s. 9d. per hour. The exception is in the case of men sorting timber, 3s. per hour.

On 21st December, 1922, the Federation delivered to a number of shipping companies and stevedoring companies, which had been respondents to the claim, a notice of demand asking for the adoption of the following condition of employment, namely:—

That members of the Federation shall have preference of employment over non-members. If at any time the said Federation fails to supply a sufficient number of competent men approved of by the employer for his requirements, such employer may engage non-union labour to make up the deficiency, at the rates and conditions set out in the last award of the Court. A failure to supply a sufficient number of competent men approved of by the employer shall mean a failure to do so within one hour, meal hours excluded, after a request in writing (by any employer directed to the secretary of the local branch) shall have been lodged at the registered office of the local branch, marked "Labour," with the secretary, clerk, or caretaker thereof during office hours. The application of the said condition is to apply to Sydney, Melbourne, Tasmania, and the coal work at Port Pirie, South Australia, also Albany, Western Australia.

The demand was followed by conferences, and the dispute was referred into Court by order of the

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. President (Powers, J.), and an award was made on 24th December, 1923, containing the following clauses:—

1 (a). The respondents whose names are set out in Schedule A to this award shall, subject to the provisions of sec. 81 (A) (1) of the "Commonwealth Conciliation and Arbitration Act," which prevents this Court from making any award or order which shall operate to prevent the employment of returned soldiers or sailors, give preference of employment over all persons but returned soldiers and sailors, other things being equal, to returned soldiers and sailors who are members of the Waterside Workers' Federation of Australia when requiring wharf labourers' work to be done in Sydney, subject to the following conditions:—

(b) The preference of employment referred to shall be over all other employees except returned soldiers and/or sailors, as no order can legally be made by this Court authorising discrimination by the respondents against any returned soldier or sailor, whether a member of the Waterside Workers' Federation or not.

(c) The employment of men at weekly rates of wages who are not returned soldiers or sailors shall not be deemed a breach of this award as to preference if the respondents first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates instead of at casual rates.

(d) The respondents whose names are set out in Schedule B to this award shall, subject to the provisions of sec. 81 (A) (1) of the "Commonwealth Conciliation and Arbitration Act," which prevents this Court from making any award or order which shall operate to prevent the employment of returned soldiers or sailors, give preference of employment over all persons but returned soldiers and sailors, other things being equal, to returned soldiers and sailors who are members of the Waterside Workers' Federation when requiring wharf labourers' work to be done in Victoria and Tasmania, subject to the conditions set out in sub-clauses (b) and (c) and the other conditions of this clause applicable to preference.

2 (a). The respondents whose names are set out in Schedule A shall not when requiring wharf labourers' work to be done in Sydney, discriminate—other things being equal—against members of the Waterside Workers' Federation not returned soldiers or sailors except in favour of returned soldiers and sailors.

(b) The employment of men at weekly rates of wages not members of the Waterside Workers' Federation shall not be deemed discrimination under this award against members of the Waterside Workers' Federation if they give members of the Federation the same opportunity to accept weekly rates at the same rates they offer to others not members of the Federation.

(c) The respondents whose names are set out in Schedule B shall not when requiring wharf labourers'

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.
work to be done in Victoria or Tasmania discriminate—other things being equal—against members of the Waterside Workers' Federation not returned soldiers or sailors, except in favour of returned soldiers and sailors.

(d) The employment of men at weekly rates of wages shall not be deemed discrimination under this award against members of the Waterside Workers' Federation if they give members of the Federation the same opportunity to accept weekly rates at the same rates they offer to others not members of the Federation.

3 (a). It will not be deemed a breach of the award as to preference or discrimination if a respondent engages labourers not members of the Federation after the claimant organisation fails, after notice, to supply a sufficient number of competent returned soldiers or sailors where preference is granted, or of ordinary members where discrimination is prohibited, suitable for the respondent's requirements.

(b) A failure to supply a sufficient number of competent men shall be deemed to have taken place if the claimant organisation fails within one hour (meal hours excluded) after a request in writing by any employer or his agent directed to the secretary of the local branch, stating the employer's requirements, shall have been lodged at the registered office of the local branch in Sydney, Melbourne, or Hobart respectively, marked "Labour," with the secretary, clerk, caretaker, or other officer of the Federation, during office hours.

On 28th February, 1924, upon an application for an interpretation of clauses in the last mentioned award, the President delivered an interpretation of clause 1 (a), (b) and (c); clause 2 (a), (b) and (c); and clause 3 (a), in the following terms:—

I interpret the clauses referred to to mean—

(1) That subject to the provisions of sec. 81 A of the "Commonwealth Conciliation and Arbitration Act 1904-1921," returned soldiers and sailors members of the Waterside Workers' Federation of Australia are entitled to preference of employment—other things being equal—over all persons not returned soldiers or sailors, as defined by the award. The respondents' representative, I understand, did not dispute that claim of the union, but contended that the members referred to were not entitled under the award to preference of all employment as wharf labourers, as contended for by the union. It was also contended that the only claim made in the dispute under which the award was made was for casual rates, not for permanent employment. As a matter of fact, the claim for preference was dismissed in the first case, and the award made was under an order of reference in which the only dispute was a claim for preference of employment over non-members. That, I think, included all employment as wharf labourers. I interpret the clause to mean that the preference granted was to returned soldiers and sailors generally so far as the Court could grant it, for all employment as

wharf labourers (if the members of the union would accept the terms offered by the respondents). This is borne out by the clauses providing that it could not be a breach if other persons were employed at weekly rates if the returned soldiers are first offered the work at weekly rates, and by the other provisions of the award which prohibit discrimination against other members of the union when requiring wharf labourers' work to be done in Sydney, and providing that it would not be discrimination under the award if work at weekly rates were given to others if the members of the union were given the same opportunities to accept weekly rates at the rates offered to others.

I therefore hold that the preference granted by 1 (a) was for all employment, other things being equal, if they would accept the terms on which other wharf labourers are engaged by the respondents. It was said—and it may be correct—that so far as the respondents are concerned against whom the award has been given, they never employ or pay any wharf labourers except as casual labourers and at casual rates.

As to the second claim of the union. The award is interpreted to mean that the other members of the Federation not returned soldiers or sailors are not entitled to preference over all other persons except returned soldiers or sailors; for the award only prohibits discrimination against them, other things being equal, except in favour of returned soldiers and sailors. Generally speaking, an order for preference made to take effect on a date named is not retrospective, and only means that after that date preference must be given to the members of the union if any new engagement is entered into with men after that date. The award does not take effect as an order of dismissal of all persons then under engagement with the respondents affected by the award, not members of the union, or prevent their employment while the engagement continues. The engagement of men on casual rates is, of course, determined when the casual work is finished or the men dismissed.

I was further asked to decide whether, on the true interpretation of the award, it did more than require the respondents to give preference or refuse to discriminate when they required labour in future, and that it did not require respondents to dismiss men they had at the time in their permanent employment. The answer to that is that the awards and Acts of Parliament are never interpreted to be retrospective unless expressly declared to be retrospective. The award, therefore, only applies to what is or was done by the respondents after the award came into force. That, however, does not mean that because the respondents have employed men at wharf labourers' work before, which has ceased before the award was made or since, they can re-engage the same men at new work in preference to those who have been granted preference by the award. The condition would apply to a respondent who in future employed wharf labourers not permanent employees of his at

casual rates for hours or days, just when he wants wharf labour, from time to time, even if he has arranged with some association who guaranteed a weekly wage to men registered by them to employ men temporarily who are sent to him by that association. If a respondent had at the time of the award all the wharf labour he required permanently engaged, and did not after the award engage any new men or casual labour for work as it comes along from time to time, the award would not affect him, but it would apply to a respondent who had not personally engaged any permanent employee, and who after the award required wharf labour for a few hours on a day, even if he had been in the habit of temporarily employing only certain men previously sent to him by the association.

On the 28th April the Federation applied, upon notice of motion in Sydney, for an injunction against Gilchrist, Watt and Sanderson Limited, one of the respondents named in the award, to restrain it from committing breaches of the award. In the affidavits filed there appeared statements, *inter alia*:—

1. That the respondent Company was a Shipping Company using the port of Sydney and employing wharf labour for the discharge and loading of vessels.

2. On the 2nd January, 1924, a conference was held between the Federation and the other parties to the award, who act through associations known as the Overseas and the Coastal Shipping Representatives' Associations respectively.

3. On the 3rd January, 1924, a letter was sent to the Federation by W. A. McKell, manager of the "Shipping Labour Bureau," Sydney, stating that the bureau would receive applications on the morning of 4th January for the issue of a number of bureau "preference casual discs" to returned soldiers and sailors.

4. On the 19th March, 1924, the Federation informed the respondent Company and other parties to the award that the latter were committing a breach of the award in that the method adopted of employing labour through the Shipping Labour Bureau was not in accordance with the terms of the award. The letter asked on behalf of the Federation that such practice of employing labour should cease at once, otherwise legal proceedings would be taken for an injunction.

5. On the 21st March, 1924, the respondent Company informed the Federation that "we have been advised "by Counsel that we are not committing a breach of "the award."

6. A large majority of the members of the Federation were prejudicially affected by the action of the respondent Company.

7. The conditions under which wharf labour is employed by all the shipping Companies, including the respondent, is that they do not each retain or employ a sufficient number of permanent men for discharging or loading vessels, but as men are required by each Company application is made by it to the Shipping Labour Bureau, which was not a party to the

award, for the supply of the required number and classes of men wanted for the particular vessels.

8. The bureau is a body registered in 1918 as a firm under the New South Wales "Registration of Firms Act 1902." The partners so registered are the principal overseas and coastal shipping companies, carrying on business in Sydney, and include the respondent Company. All of the said partners were parties to the award.

9. The bureau has an office and keeps a register of men available for work as wharf labourers. A large number of these are registered as permanent men, and are guaranteed a regular weekly wage. Many of such permanent men are neither returned soldiers nor returned sailors. The bureau has also a register of casual wharf labourers who are supplied to the shipping companies when there are no permanent men available. Of these casual workers the greater part are returned soldiers or sailors.

10. When the bureau supplies wharf labour to the shipping companies the men registered as permanent men are given preference of employment over all other men, whether registered at the bureau or not, and whether returned soldiers or sailors or not, and whether members of the Federation or not. Although called permanent men, they are employed casually in the way indicated, the practice being for the shipping companies to apply to the bureau, stating the nature of the work and the number of men required for the particular vessel.

11. In the case of men registered at the bureau as permanent men, their wages are paid by the shipping companies to the bureau at the rates provided for casual work. In the case of men registered as casuals, their wages are paid directly to them by the company using their services.

12. There are 3500 wharf labourers in the Sydney branch of the Federation, including a large number of returned soldiers and sailors. These men are sufficient in number and efficiency to do all the work for the discharge and loading of vessels, but no requisition has ever been made to the Federation by any of the companies, including the respondent Company, unless and until all the wharf labourers registered by the bureau have been employed.

13. The shipping companies, including the respondent, were approached to discontinue their method of obtaining labour, as being a breach of the award, but refused to alter such practice. The respondent Company's representative stated that the companies were going to work according to the practice in force before the award of 24th December, 1923.

14. It was pointed out to the respondent Company that men registered at the bureau as permanent men who were not returned soldiers or sailors were employed by such Company prior to and were getting preference over returned soldier and sailor members of the Federation who were ready and willing to do the work.

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.

15. On the 1st February, 1924, 500 members of the Federation presented themselves at the bureau and asked to be allowed to register and to be supplied with discs, that would give them opportunity for selection for employment through the bureau. This was refused.

The evidence put before the Court by the respondent Company was in substance as follows:—

1. That the registration of the "Shipping Bureau" under the New South Wales "Registration of Firms Act" was cancelled, and a further registration effected, in which the respondent Company still remained registered as a partner.

2. The bureau was formed in 1917, in circumstances of grave national necessity set out in the judgment of Mr. Justice Higgins delivered on 29th June, 1918, and reported in 12 C.A.R. 277.

3. The bureau has an office with a manager and staff of twenty-eight, and has since its inauguration carried on business for the employment of permanent wharf labourers paid upon a weekly basis, and for the registration and allocation of wharf labourers for casual employment. The bureau employs permanently 321 wharf labourers.

4. The permanent wharf labourers so registered have enjoyed permanent employment except for brief intervals caused by slackness of trade or other circumstances, and have been paid a weekly wage in accordance with industrial agreements made between the bureau and the permanent and Casual Wharf Labourers' Union of New South Wales, such agreement being duly registered under the New South Wales "Arbitration Act." With the exception of a few returned soldiers and sailors since taken on, the whole of the permanent wharf labourers were engaged prior to 1st January, 1924.

5. The permanent wharf labourers are employed indefinitely by the bureau, subject to one week's notice on either side, and the power of dismissal for misconduct.

6. None of the shipping companies pay the wages of the permanent wharf labourers, nor do they ever exercise the power of dismissal, but make all complaints to the bureau. The shipping companies, including the respondent, pay the bureau for the services of the permanent wharf labourers hired out by the bureau to them at an agreed sum. The shipping companies, however, have the right to refuse the services of any permanent wharf labourer, but such refusal does not necessarily involve the termination of employment by the bureau. Of the 321 permanent wharf labourers registered and employed by the bureau, 113 are returned soldiers and sailors, and 183 are "loyalists" within the meaning of the definition of Higgins, J., of 29th June, 1918.

7. The majority of the said wharf labourers who are not returned soldiers or sailors have been employed permanently by the bureau for about six and a half years, and are well known to the shipping companies, including the respondent, as highly effi-

cient, obedient, speedy, dependable and honest workmen, willing to undertake any class of cargo.

8. All wharf labourers employed or registered by the bureau apply in writing upon an application form which sets out, *inter alia*, the names of previous employers, references from wharves, and name of union, if any. They undertake to carry out their duties, and not by word or deed to do anything that will disturb the peaceful work of their fellow employees.

9. In the event of a shipping company's requiring labour at any time, the bureau supplies this labour first from the permanent wharf labourers, and in the event of any shortage thereof, from casual labourers registered at the bureau. Only permanent wharf labourers and soldier and sailor casual wharf labourers registered at the bureau are permitted to attend the bureau premises.

10. In consequence of the award of 24th December, 1923, about 200 "loyalist" casual wharf labourers were notified not to use the bureau premises.

11. The bureau was not a respondent to such award.

12. The statement made on behalf of the Federation that the wages in respect of permanent men supplied by the bureau to the shipping office are paid to the bureau by such companies at the rates for casual work is incorrect. No wages in respect of such men are paid by the companies, but an agreed amount of payment for the use of their services is given to the bureau once a week, assessed at the aggregate of all hours worked by the men calculated at casual rates, with overtime, if any, added. The only wages paid to such permanent wharf labourers by the companies are paid as agents for the bureau. In the latter case the payment is made on the job, for the convenience of the men, to avoid the necessity of their attending the bureau in order to be paid.

13. The respondent Company considered that it was acting in obedience to the award, and always stated this in reply to any representations made on behalf of the Federation.

14. It has been the invariable rule of members of the Federation not to offer themselves for permanent employment, and no rate of wage has ever been fixed by the Commonwealth Court of Conciliation and Arbitration for permanent wharf labourers employed by the companies, nor has the said Federation ever claimed that the Court should award rates for permanent wharf labourers. No evidence was given during the hearing of the reference of any dispute between the Federation and the respondents as to the engagement of permanent hands.

S. A. Thompson and Nicholas for the applicant Federation.

Bavin (Attorney-General for New South Wales) and Ferguson for the respondent.

The following cases were referred to during argument (in addition to many of those cited in Melbourne as hereunder):—*Whittaker Brothers v. Australian Timber Workers' Union*, 29 A.L.R. 14; *Jones v. Scullard*, (1898) 2 Q.B. 565 at 573; *Marrow v. Flimby and*

Broughton Moor Coal and Fire Brick Co., (1898) 2 Q.B. 588; *Fitzpatrick v. Evans*, (1901) 1 Q.B. 756; *R. v. Commonwealth Court of Conciliation and Arbitration, Ex parte Whybrow and Company*, 16 A.L.R. 373 at 383; *R. v. Commonwealth Court of Conciliation and Arbitration, Ex parte Broken Hill Proprietary Company (The Broken Hill Case)*, 15 A.L.R. 416; *Federated Engine-drivers' and Firemen's Association of Australasia v. Broken Hill Proprietary Company*, 7 C.A.R. 132 at page 147.

Cur. adv. vult.

On 2nd May, 1924, upon the motion of Gilchrist, Watt and Sanderson Limited, an order *nisi* was granted by Isaacs, J., calling upon the President of the Court and the Federation to show cause why a writ of prohibition should not issue prohibiting further proceedings in the plaint, and upon the award made on 24th December, 1923, and the interpretation thereof, upon the grounds—

1. That there was not at the time of the service of the claim, or at the time of the service of the summons, or at the time of the so-called reference of the so-called dispute by the said President into Court, or at any other material time, or at all, any industrial dispute between the Federation and the applicant extending beyond the limits of any one State or at all with reference to—

- (a) The terms or conditions of employment of permanent wharf labourers by the applicant.
- (b) The preferring of returned soldiers generally or returned soldiers members of the Federation over other persons or at all.
- (c) Discrimination as against members of the Federation or as against returned soldier members of the Federation or at all.
- (d) The doing of work upon wharves or ships by wharf labourers otherwise than in the legal relation of future employment.

2. That the said President had no power to make an award in respect of preference to returned soldiers and sailors or to returned soldiers and sailors members of the said Federation, or as to discrimination against members of the said Federation.

3. That at none of the times mentioned in Ground 1 was there ever a dispute or an interstate dispute between the said Federation and the applicant as to the matters dealt with in the said purported award.

4. That the said purported award is beyond the powers contained in the "Commonwealth Conciliation and Arbitration Act" and/or the "Commonwealth of Australia Constitution Act," and is a nullity, and of no effect and is not binding on the applicant.

5. And the said Court and President had no power under the "Commonwealth of Australia Constitution Act" or otherwise to make the said purported interpretation, and the said purported interpretation is a nullity and of no effect, and is not binding on the applicant.

The order *nisi* came on for hearing in Melbourne, when the order was amended, and the Federation

called upon to show cause alternatively why a writ of *certiorari* should not issue.

Bavin (Attorney-General for New South Wales) and *Ferguson* for the applicants.—There is no evidence of any dispute as to the fourth matter in the order *nisi*, and the award is for that reason *ultra vires*. The award grants preference to returned soldiers and sailors and to members of the organisation, and it prohibits discrimination against members. There was no claim as to preference to soldiers, nor as to discrimination against members of the Federation. Therefore there was no jurisdiction to deal with those matters. It purports to determine the obligations of the respondents "when requiring wharf labourers' work to be done in "Sydney," thus binding everybody who employs labour. That was never in dispute—only the relationship of employer and employee. That part of the award is not severable. The claim was as to future employment only. So that the award in compelling employers to give preference as to existing contracts is *ultra vires*. The conditions in the industry were that some men were engaged by the hour and others had employment determinable on a week's notice. The claim only had reference to those engaged at hourly rates. The letter of demand refers to conditions of employment of members, and should be read as not applying to permanent employees but to casuals only. No claim beyond that was within the claimant's intention, as shown by the facts leading up to the demand. The Court will ascertain for itself what is the real dispute—*The King v. Hibble, Ex parte Broken Hill Proprietary Co. Limited (No. 2)*, 27 A.L.R. 199 at 202. The organisation had no members who could take permanent employment, because if they did their membership ceased. A rule in the union prevents the members from working except at casual rates, then they ask for preference, and that means preference for men working under casual conditions. The award must be taken as applying to the subject-matter of the dispute. The Court has always had casual wharf work in mind alone—*Waterside Workers' Federation*, 8 Com. Arb. Rep. at 65, 72, *per Higgins, J.* And even if union members had been allowed to take permanent employment, yet no dispute had arisen as to permanent employment. And in so far as the award purports to deal with that, it is bad. Permanent employment did not exist except in New South Wales, so that there could be no interstate dispute about the conditions of permanent employment. The claimant has deliberately divided the industry into these two areas.

Next, as to the preference to returned soldiers, the award is bad. Such a matter was outside the claim and was never in dispute. The preference given by the award could give no higher right than the New South Wales Statute gives—that is, to soldier members of the organisation. The State Statute prescribed preference to all soldiers—Act No. 38 of 1919, sec. 3—and if the award prescribes a higher pre-

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. ference it is inconsistent with State law by depriving non-member returned soldiers of a statutory right. The Court cannot settle a dispute so as to deprive any person of a right which the State law gives—*The Australian Boot Trade Employees' Federation v. Whybrow*, 16 A.L.R. 185. Parties could not in a private arbitration—*The King v. The Commonwealth Court of Conciliation and Arbitration, Ex parte The Brisbane Tramway Co.*, 20 A.L.R. 470 at 486; *The Federated Engine-drivers', &c., Association v. Adelaide Chemical and Fertiliser Co.*, 26 A.L.R. 169 at 173. So that the Court cannot make an award which could not be carried into effect without breach of a State law. The claimant's constitution, rule 20, prescribes the method of submitting the claim, and the claim could not be varied, and was not varied from preference for all members, and sec. 40 of the Act is adverse to the preference awarded. Next, as to prohibiting discrimination. The Court had no power to so order. The power as to preference is limited by sec. 40. This also was not the subject of claim. The interpretation is outside the jurisdiction of the Court. It purports to be an exercise of jurisdiction under sec. 38 (o). [KNOX, C.J.—This Court in the injunction case arising out of this award ruled that the interpretation was inadmissible.] The function of interpretation is judicial, and the Arbitration Court is not a Court exercising the judicial power of the Commonwealth—*Waterside Workers' Federation v. Alexander*, 24 A.L.R. 341 at 351. The power to enforce an award is part of the judicial power, and the interpretation is in the same position. And if the interpretation could be treated as equivalent to a variation, the Court would have been competent; but the Court has purported to interpret the award judicially as a binding exposition. Parliament had no power by sec. 31 to prevent the above constitutional point from being raised. If this is a proper case this Court has power to prohibit while the order is still in operation—*The King v. Hibble*, 27 A.L.R. 199. Though if a tribunal is *functus officio*, prohibition will not lie—*Clifford and O'Sullivan*, (1921) 2 A.C. 570. [STARKE, J., referred to *The King v. Electricity Commissioners*, (1924) 1 K.B. 171 at 206.]

Certiorari will also lie as an exercise of original jurisdiction—*Short and Mellor's Crown Practice* (2nd ed.), p. 14. The matter arises under the Constitution, and original jurisdiction is given by the "Judiciary Act," sec. 30, by appropriate procedure as prescribed by the rules or otherwise. *Certiorari* is applicable to judicial tribunals as distinguished from bodies exercising ministerial functions, and has an advantage in that it may be argued that the Court's act had finished and the right to prohibition might be questioned on that ground—*Rea v. Woodhouse*, (1906) 2 K.B. 501 at 534. A strict construction is applied to any restriction upon powers of superior Courts in controlling other Courts—*Jacobs v. Brett*, 20 Eq. 6. Nor will words depriving parties of the right of *certiorari* be

operative in cases where statutory jurisdiction has been exceeded—*Short and Mellor* (2nd ed.), p. 42; *The Queen v. Bradlaugh*, 2 Q.B.D. 569; Halsbury's *Laws*, vol. X., p. 177. This principle was applied in *Clancy v. Butchers' Shop Employees' Union*, 1 C.L.R. 181. The Court has jurisdiction over any "matter"—*State of New South Wales v. The Commonwealth*, 29 A.L.R. 289; and there is a "matter" when a Court has exceeded jurisdiction and imposed obligations. This Court has assumed that *certiorari* is within its scope—*The King v. Arndel*, 12 A.L.R. 97 at 102. Though this Court's power to grant *certiorari* is to be gathered from Statute and not Common Law, this Court will apply to restrictions on itself as a superior Court the same principles as are applicable to similar restrictions on Common Law powers. The parties here are residents in different States, and this Court acquires jurisdiction from that fact.

Russell Martin for the President of the Court of Conciliation and Arbitration.—The President regards the Arbitration Court as *functus officio*. That Court acted under Statute, and as the parties concerned are now before the Court it is not desired to advance any argument.

Dixon, K.C., and *Menzies* for the Federation.—As to there being no interstate dispute, such a dispute was constituted by the demand and refusal. The circumstances surrounding the demand tend to show that the whole area of the award was intended to be covered. Prior to 1917 the employment of wharf labourers was merely casual, and then a new method was adopted, and a bureau was established and registered as a firm, and engaged workers by the week at a given wage—£5 per week. If such workers were not sufficiently numerous for the job in question, others registered as casuals were engaged to supplement them. The bureau paid the men and the ship-owner paid to the bureau the amount which would have been payable to the men if engaged direct at the ship's side, any difference being regarded as the property of the bureau. The basis of the dispute was the attainment of preference as against the bureau and everybody else, whatever the term of engagement. The demand was made in respect of those engaged in several States, and in that sense the dispute was an interstate one. The fact that the remedy did not precisely accord with the claim is immaterial. The preference given to soldiers over other members was not included in the demand, but was kindred relief close to that asked and designed to compose the very dispute, and the claim was made in a State where the law required that soldiers should have preference. The order as to preference is justified by sec. 38 (b) of the Act under which the Court is not restricted to the claim. The question always is—what shall be done on the subject of the dispute?—which in this case was as to preferential treatment in the selection of men for work. It is for the Court to say whether the matter awarded was reasonably incidental to the claim. [STARKE, J.—There was

nothing to prevent the union from accepting a preference amongst its members. That was immaterial to the other party to the dispute, when there was a general preference to members as against outsiders.] If the contention is not right, then as an alternative it is submitted that, properly construed, the preference is only to soldier members as against non-soldier outsiders. Section 40 permits preference to some members over everybody else. In the absence of sec. 40, preference might have been given if the question of preference was within the dispute. Under sec. 24 an award may be made as to preference to settle that as part of the dispute. That section, apart from sec. 40, does not imply any limitation on that power. The award is not inconsistent with the Act of New South Wales (No. 38 of 1919). The statutory right is conferred upon those soldiers who are registered and apply in writing. Thus the preference is limited by those conditions, and the award confers a preference whether the conditions are present or not. By obeying the Statute a person would not be disobeying the award. Section 31 of the Arbitration Act prevents interference with an award on the ground of non-compliance with the Act. The award could still be challenged if it violated the Constitution. Part of the section would be *ultra vires* unless the section were read down to that extent. *Certiorari* is not granted by Statute. The Court has not been invested with the jurisdiction of the King's Bench. The term "matter" does not include a claim against a Court that that Court has not jurisdiction. Such a claim is not incidental to the proceeding between parties. *Certiorari* is not within the "Judiciary Act," sec. 30, read with sec. 80. And sec. 31 of the "Conciliation and Arbitration Act" is against *certiorari*. *Certiorari* does not lie to quash that which is void, and here, on the applicant's argument, the award would be wholly void—*The Queen v. Bristol and Exeter Railway Co.*, 11 A. & E. 202. The distinction between prohibition and *certiorari* appears in *The King v. Electricity Commissioners*, (1924) 1 K.B. 171 at 204. As to prohibition, the writ should not go, because the Court is *functus officio*—*Clifford and O'Sullivan*, (1921) 2 A.C. 570. And, in view of the difference of opinion on this point, see *The Vera Cruz*, 9 P. 96 at p. 98. Prohibition will be refused if there is nothing further to be done—*Reg. v. Call, Ex parte Braun*, 10 V.L.R. (L.) 359. *Clifford and O'Sullivan* (*supra*) was considered in *The King v. McGuire*, (1923) 2 I.R. 58. Judicial power is delimited under the Constitution, and prohibition having regard to sec. 75 (v.) of the "Judiciary Act" must be taken with reference to that fact, and be directed against the usurpation of Commonwealth judicial power. Prohibition is a device against invasion of individual rights under colour of judicial power—*Cox v. Lord Mayor of London*, L.R. 2 H.L. 239 at 254.

Bavin, A.-G., in reply.—Prohibition lies against any Federal officer whether exercising strictly judicial power or not—*The King v. Electricity Commissioners*,

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON, (1924) 1 K.B. 171 at 205. The limitation on sec. 75 of the "Judiciary Act" suggested has no authority. As to sec. 31 of the Arbitration Act, it is inconceivable that Parliament should have provided a set of conditions of jurisdiction, and concurrently declared that compliance with those conditions was immaterial.

Cur. adv. vult.

The following judgments were given:—

KNOX, C.J., and GAVAN DUFFY, J.—The Waterside Workers' Federation, an organisation registered under the "Commonwealth Conciliation and Arbitration Act 1904-1921," applied by motion on notice for an injunction to restrain Gilchrist, Watt and Sanderson Limited from committing breaches of an award (No. 77 of 1923) of the Commonwealth Court of Conciliation and Arbitration. After argument had been heard on that application, Gilchrist, Watt and Sanderson Limited obtained an order *nisi* for a writ of prohibition to restrain further proceedings on the same award, or alternatively, for a writ of *certiorari* to bring up the award to be quashed, and subsequently moved to have the order *nisi* made absolute.

In the view which we take, the relevant facts were as follow, viz.:—On the 21st December, 1922, the Federation requested certain employers of wharf labourers, including Gilchrist, Watt and Sanderson Limited (hereinafter referred to as the Company), to agree "that members of the Federation should have "preference over non-members," at Sydney and other places. The employers having refused to agree, and a compulsory conference having been held without result, the President referred the dispute into Court, under sec. 19 (d) of the Act.

The dispute referred by the order of the President was—so far as is relevant to this application—whether the members of the Federation should have preference of employment over non-members. The Company was made a respondent to the proceedings in the Arbitration Court, and is one of the respondents named in Schedule A to the award hereinafter mentioned.

After hearing evidence, the President, on the 24th December, 1923, made an award the material portions of which are as follow, viz.:—I award, order and prescribe—(1) (a) The respondents whose names are set out in Schedule A to this award shall—subject to the provisions of section 81A (1) of the "Commonwealth Conciliation and Arbitration Act," which prevents this Court from making any award or order which shall operate to prevent the employment of returned soldiers or sailors—give preference of employment over all persons but returned soldiers and sailors, other things being equal, to returned soldiers and sailors who are members of the Waterside Workers' Federation of Australia, when requiring wharf labourers' work to be done in Sydney, subject to the following conditions:—(b) The preference of employment referred to shall be over all other employees except returned soldiers and/or sailors, as no order can legally be made by this Court authoris-

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.
ing discrimination by the respondent against any returned soldier or sailor, whether a member of the Waterside Workers' Federation or not.

PROHIBITION.

The validity of this award was challenged, both on the motion for injunction and on the application for prohibition, on a number of grounds. For the reasons which we are about to state in dealing with the application for prohibition, we think the Court of Arbitration had no power to make the award in question, and the award being, in our opinion, invalid, we think it would be improper for this Court to exercise the discretionary power conferred by sec. 48 of the Act in order to enforce obedience to its prescriptions.

Turning to the application for prohibition, the first question to be considered is whether at any material time a dispute existed as to the preferring of returned soldiers generally or of returned soldiers members of the Federation over other members of the Federation, or over other persons generally. It is admitted that the only relevant dispute in existence between the parties was that constituted by the demand for preference of employment to members of the Federation over non-members and the refusal of that demand, and it was this dispute which was referred to the Court. It is, we think, obvious that a dispute as to whether returned soldiers should be given preference over persons who were not returned soldiers, or whether some members of the Federation should be given preference over other members, would not be the same as, or even included in, a dispute whether preference should be given to members of the Federation over non-members. The difference between the preference demanded and that awarded can be demonstrated by an illustration. Assume that *A* is a member of the Federation who is a returned soldier, *B* a member of the Federation who is not a returned soldier or sailor, and *C* a returned soldier who is not a member of the Federation. Suppose two vacancies exist for which *A*, *B* and *C* apply. The dispute which existed and was referred was whether both *A* and *B* should have preference over *C*; the award is that *A* shall have preference over *B*, the only reference to *C* being that he is a person who is protected by Act of Parliament from being postponed to either *A* or *B*.

This is an award, not of the preference sought or a part of it, but of an essentially different preference, which, in our opinion, was not within the ambit of the dispute which existed and was referred to the Court or substantially involved in or connected with it. It is, of course, well settled that the jurisdiction of the Court of Arbitration to make an award can only be exercised in respect of disputes which exist and of which it has cognisance. It follows that clauses 1 (*a*) and 1 (*b*) of the award are beyond the jurisdiction of the Court.

But there is another ground on which the award is in our opinion invalid, viz., that the Court of Arbitration has no power to award, as it has done in this case, preference of employment among members of an organisation, i.e., preference of some members over other members. The power to award preference is conferred by sec. 40 of the Act, and, in our opinion, by that section alone. Even if power to award preference would exist under the general jurisdiction of the Court, the power is, we think, limited by the provisions of sec. 40. The section clearly defines the classes between which preference may be awarded. The class that may be given the right to preference consists of "members of organisations," and the class over which preference may be given consists of "other persons offering or desiring service or employment at the same time." The *discrimen* prescribed is membership of the organisation; the contrast is between members of the organisation and other persons, and in this context "other persons" must, in our opinion, mean persons not members of the organisation.

But it was argued that, even if the award were made without jurisdiction or in excess of jurisdiction, prohibition would not issue to restrain proceedings on it. This argument was rested on two grounds, viz.:—(1) That when an award had been made, nothing remained to be done by the Court of Arbitration, and that the decision of the House of Lords in *Clifford and O'Sullivan*, (1921) 2 A.C. 570, established that in such a case prohibition would not lie; and (2) that sec. 31 (1) of the Arbitration Act deprived this Court of power to issue prohibition after an award had been made.

1. The right to issue prohibition to the Arbitration Court after award was asserted by this Court in the *Broken Hill Case*, 15 A.L.R. 416; the *Builders' Labourers' Case*, 20 A.L.R. 411; and the *Tramways Case*, No. 1, 20 A.L.R. 126. In *Hibble's Case*, 27 A.L.R. 84, prohibition was issued to restrain proceedings on an award of a special tribunal constituted under the "Industrial Peace Act." The position of the special tribunal in that case was not different in substance from that of the Court of Arbitration. It was said that these decisions were in conflict with the decision of the House of Lords in *Clifford and O'Sullivan* (*supra*), which was binding on this Court. The argument was founded on the following passage in the speech of Viscount Cave, at p. 584—"A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail." We think that this statement cannot be regarded as inconsistent with the view which we expressed in *Hibble's Case* (*supra*). In the case before the House of Lords the so-called tribunal against which prohibi-

tion was sought was not a Court or judicial tribunal, and did not claim to have any statutory or Common Law authority to act. It had no element of permanency, consisting as it did of a number of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of the commands contained in a proclamation, and of advising him as to the manner in which he should deal with the offences—see, *per* Viscount Cave, at p. 581. Having reported to the commanding officer, the officers comprising the "tribunal" were definitely dispersed—*per* Lord Sumner, at p. 591—and the so-called "tribunal," if it ever existed, ceased to exist.

There is no analogy whatever between such a "tribunal" and a permanent institution such as the Commonwealth Court of Conciliation and Arbitration, or between the advice given by the so-called military court to the commanding officer, and an award of the Court of Arbitration conferring rights and imposing obligations which can be enforced by proceedings in recognised Courts of law. Nor was there in that case any power in the "tribunal" to reconsider their decision or their sentence, while the Court of Arbitration is expressly authorised by sec. 38 (o) to vary its awards and to reopen any question. Moreover, the real ground of the decision of the House of Lords was that the officers who were said to constitute the tribunal "did not purport to act as a 'court in any legal sense'—*per* Viscount Cave, at p. 584. That this was the real ground of the decision appears clearly from the speech of Lord Shaw (at p. 585). The only express reference to the objection that the application was too late, except that made by Viscount Cave, is contained in the speech of Lord Sumner, who apparently attached some weight to the consideration that the "tribunal" had no power to reconsider its decision or alter its sentence—see p. 591.

In these circumstances we think we are at liberty, notwithstanding the decision in *Clifford and O'Sullivan* (*supra*), to adhere to the view we expressed in *Hibble's Case* (*supra*).

2. On the argument based on sec. 31 (1), it is sufficient to say that, inasmuch as the award purports to deal with matters which were not in fact in dispute, the question is, in our opinion, concluded by the decision in the *Builders' Labourers' Case* (*supra*) and the *Tramways Case, No. 1* (*supra*).

In our opinion, the order *nisi* for prohibition against proceeding on the award should be made absolute.

ISAACS and RICH, JJ.—This is an application under sec. 48 of the "Commonwealth Conciliation and Arbitration Act," made by the Employees' Federation to obtain an order in the nature of an injunction restraining Gilchrist, Watt and Sanderson Limited, a party to a Federal award, from committing breaches of the award. The particular award the immediate

subject of the application was made on the 24th December last by Mr. Justice Powers, and is No. 77 of 1923. The breaches actual or threatened which are relied on by the applicants are—(1) Preference to returned soldiers and sailors not observed in employing wharf labourers. (2) Discrimination against returned soldiers and sailors members of the organisation. (3) Discrimination against other members of the organisation. The respondent contends—(a) The respondent has not employed any wharf labourers. (b) The award does not prescribe preference to returned soldiers and sailors over any of the men actually employed. (c) The award does not prescribe anything against the employment of such returned soldiers and sailors as registered at the shipping bureau in preference to those who do not. (d) The award does not prescribe anything against the employment of wharf labourers who at its date were "permanently" engaged by the "shipping bureau" in preference to Federation members, including returned soldiers and sailors who were not so "permanently" engaged. (e) If the award does on construction permit preference, as in (c) and (d), it is *ultra vires* and invalid.

A preliminary point, however, presents itself, as to what is to be considered as the "award." Is it that document as actually framed, or is it that document plus the interpretation that has been put upon it by the learned President on 28th February, 1924? It is evident some highly important issues are involved, and these will be considered in order.

1. *The Interpretation Order.*—Ought this Court to take into consideration the "interpretation" declared by Powers, J., as President of the Arbitration Court on 28th February, 1924? During the argument the Court unanimously ruled in the negative, leaving reasons to be stated later. Our reasons are as follow. The declaration as to "interpretation" was made upon a substantive application made under sub-sec. (o) of sec. 38 of the "Conciliation and Arbitration Act." By that sub-section, with the governing words of the section, it is enacted—"The Court shall as 'regards every industrial dispute of which it has 'cognizance have power (o) to vary its orders and 'awards and to reopen any question and to give an 'interpretation of any term of an existing award.' The words "and to give an interpretation of any 'term of an existing award" were added by the amending Act of 1920 (No. 31), sec. 16. That is to say, the addition was made long after it was established by this Court that the Court of Arbitration was an arbitral tribunal only and not a branch of the Federal judicature. The Parliament consequently knew when those words were added to the Act they were not added as a function of one of the Courts of the Commonwealth in the strictly judicial sense. Moreover, they were added to a paragraph which as it stood referred to a new arbitral determination. And now the question raises very directly the point as to the function of the

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. tribunal as a Federal arbiter or as a branch of the Federal judicature. If the latter, the "interpretation" of 28th February, 1924, must stand, and unless reversed or varied on appeal, if there be an appeal, would govern the matter. If the former, then the true import of the added words has to be sought outside the ordinary judicial meaning of the word "interpretation." An award, as has been more than once expounded, and as held by four of the present Justices of the Court (whose opinions are referred to in the judgment on the prohibition motion), is in the nature of a legislative act. It is something which, authorised to be made by a Statute, is, when made, covered by and made of binding force by the Statute, just as is a Governor's regulation or a rule of Court, or a municipal by-law. It does not create instant rights or obligations of individuals. The moment after it is promulgated, no one could assert any right under it. Its operation is ordinarily prospective, like any other ordinance, governing future relations, and giving rise in appropriate circumstances to new possible rights and obligations.

Looking at paragraph (o), that paragraph as it now stands contemplates (1) variation, (2) reopening a question, and (3) interpretation of a "term" of an existing award. "Term" is a comprehensive expression, and includes any provision in the award—see, for instance, paragraphs (d), (d a) and (f) of sec. 38. But unquestionably (1) and (2) contemplate a new direction as part of the award unless the award stands exactly as before. In the collocation, and having regard to the nature of the tribunal and its functions, the third, namely, "interpretation" of a term, means also a new direction as henceforth part of the award. It is something which by way of a clause of interpretation is inserted in and becomes an integral part of the award. That is after examining the matter as arbitrator and not as a Court of judicature. Reading the judgment of the learned President on the application in question, it is clear that judgment proceeded on the judicial and not on the arbitral basis. That seems to be conclusively shown by the following extract:—"The award must 'be interpreted quite apart from any question 'whether there have been breaches of it, and in the 'same way as any other Court would do, namely, not 'to consider what was intended or what the Court 'could do, but what the Court did by the award. 'That can only be ascertained from the words used.' Clearly that is the 'interpretation' as a Court of judicature, and in the exercise of a function which cannot, in face of sec. 71 of the Constitution, be invested in any but a Court of judicature as exercising the judicial power of the Commonwealth. What the Court of Arbitration 'could do' and 'intended' to do, or thinks ought to be done, on the application for 'interpretation,' is what is intended by the words used, to be included in the statutory power. As the award stands, therefore, we have to construe it according to its own words and our own understand-

ing of its meaning, unaffected by the declaration of 28th February, 1924.

2. *Who is the Employer.*—The respondents say the men who perform the work of loading vessels are not in their employ at all, but are in the employ of an independent contractor called "the shipping bureau." "The shipping bureau," it is said, is a separate registered firm, who engage men, some permanently and some casually, as their servants. The terms of permanent men are that they register in the books of the bureau, upon application in writing, and then wait until some shipowner wants that class of work done. Until that happens the bureau guarantees a weekly wage, and when it happens the men are told off to work at A's ship or B's ship or C's ship, as the case may be. A, B or C does not pay them wages at all at any time, under any circumstances. True, he may, as a convenience and as agent for the bureau, pay such wages as the bureau owes them. But that is not as the men's employer. A's only obligation is to pay to the bureau a sum agreed upon between the bureau and A. The amount is arrived at by taking casual rates as a basis, but A does not pay it as "wages" to the man, but as an assessment to the bureau. All that is the view presented by the respondent.

As the bureau is not a party to the award, and never could be since it was not a party to the dispute, it is plain the bureau stands clear outside the award, and is not bound by any of its terms, wages, hours, preference or anything else. It might take any rate as the basis, and be free from the award, and impose any conditions of weight-carrying, &c., also free from the award. Moreover, it does not profess to do any business except that of "shipping labour bureau," which appears to be to provide labour for shipowners, and, having provided that labour, that is by sending men like any ordinary labour agency, its duties and responsibilities end. It does not as a principal enter into any contract to do the work itself, as in *Cameron v. Nystrom*, (1893) A.C. 308. There is not the least evidence that it enters into any contract to do anything. Not even to supply labour. It merely when requested sends such number of men on its register as a shipowner asks for. It would be difficult to imagine it incurred any duties or responsibilities under any law, State or Federal. The bureau then is not in the proper sense or any relevant sense a "contractor" for the work of loading ships, any more than was the Government of Queensland a contractor to pilot ships in *Fowles v. Eastern and Australian Steamship Company Limited*, (1916) 2 A.C. 556. Further, is it an "independent" body? It is registered as a "firm" under the "Registration of Firms Act 1902" of New South Wales. Registration, of course, cannot add to its character: it is a new statutory condition attached to every partnership that carries on business. The nature and character of the "firm" so registered and its relation to the respondent depend on other considerations.

It is simply a voluntary association of some fourteen shipowners and one stevedoring firm, who have agreed to call themselves "the shipping bureau." For the common purpose of selecting such labour as they or some of them may in future require, they appoint a gentleman, Mr. McKell, as manager, furnish him with suitable housing accommodation, and twenty-eight assistant clerks, call themselves "the shipping bureau," and register as such, stating their business to be "shipping labour bureau." That does not make the firm a separate entity; there is no new person—*per Farwell, L.J., in Sadler v. Whiteman, (1910) 1 K.B. at 889, and other cases.* Its members (apart from the solitary stevedore) are simply the same shipowners they were before. The arrangement may be a convenient method of obtaining labour. It may be so conducted as to be beneficial to all concerned. It may have rendered very meritorious service in the past in circumstances of an abnormal character and now ceased to exist. But it may also be made, or attempted to be made, the means of frustrating the will of the national Parliament of Australia in the settlement of industrial disputes, that affect the welfare of the whole community. And that, whatever the motive of its supporters may be, appears to be the inevitable result if "the shipping bureau" can be successfully maintained as a screen between the shipowners, parties to the award, and the Waterside Workers' Federation. It is perfectly evident that if such a device as here exists is successful for the purpose now sought, it is sufficient to break down any system of arbitration, Federal or State. If a firm can be formed of fifteen it can be formed of (say) two or three or six respondents, who may take any collective fancy name and register as a firm, their joint "business," or rather, function, being to engage and supply labour to each separately. Then, the "firm" being outside the award, they need not obey a single word of it, whatever else they may have to obey. And as individual parties to the award, none of the persons composing the firm need obey the award, because by the hypothesis not one of them is the "employer" of the men. As a consequence, the award would stand as an official but wholly inert declaration of imaginary rights, and as a means of correcting abuses or maintaining industrial peace it would be worse than if merely non-existent.

The evidence leads, quite apart from any affirmative evidence, to the conclusion, that "the shipping bureau" was no independent *persona*, and was never intended to be more than an instrument operated by and at the will of the various real persons who had combined for the purpose. It is a mere labour concentration camp, from which supplies can be drawn by the parties interested as and when they need them. All the complications of registry, and guarantee, and payment, and dockets, &c., are machinery and part of the method for doing indirectly and in association what each could do directly and singly. But there is affirmative evidence

of a conclusive character furnished by Mr. McKell himself in paragraph 26 of his affidavit. Speaking of a conference of 4th January, 1924, between the Federation and the employers' representatives, he says he was present at the conference, and that "the representatives of the Overseas Shipping Representatives' Association and the New South Wales Coastal Steamship-owners' Association clearly intimated that the employers they represented had complied with the award of the 24th day of December last by depriving casual loyalists of the privileges of the bureau, and that they intended to continue to carry out the award and give preference to approved returned soldiers and sailors, which would include returned soldier and sailor members of the said Federation." It may be mentioned that in par. 7 he states that the present respondents are included in the oversea shipping companies. The word "approved" means, according to the only possible inference, such as were previously registered at the bureau.

Then the affidavit continues—"Mr. Morris" (that is, the Federation secretary) "was handed the said employers' interpretation of the award, which was as follows:—(1) That in the engagement of casual wharf labour the employers will continue to give preference of employment to approved returned soldiers and sailors through the shipping labour bureau. (2) When further labour is required, and all approved returned soldiers and sailors are employed, members of the Federation who are not returned soldiers and sailors will be given equal opportunity of engagement with other labour."

It ought to be at once observed, that if that written statement, clearly prepared with great care and deliberately, were honestly made by the representatives, not of the shipping labour bureau, but of the Overseas Shipping Representatives' Association and the New South Wales Coastal Steamship-owners' Association, as Mr. McKell says it was, and as it no doubt was, then it is the shipowners, who are the employers of the men, and the shipping bureau is only their mechanical intermediary and agent, and is under their control, and to a much greater extent than as supplying labour to eight firms. Not only so, but had the position been then thought to be that which is now taken up since the legal proceedings have been begun, namely, that the bureau (and not the shipowners) was the true and real employer of the men, would not the employers' representatives, aided by the presence of Mr. McKell, have said so directly? Their case would have been then, and indeed it would have been before Mr. Justice Powers, when preference was sought—"We do not employ these men at all; they are not employed by any respondent to the award; they are not employed under the award; they are employed by a totally distinct independent contractor, unaffected by the award, as to hours, rates, preference or anything else, and you must look to the bureau."

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.

But as business men they knew that to be untrue and absurd as a fact, and they abstained from suggesting it to the Arbitration Court, and afterwards made their view permanent on paper. They were obviously right then, and their legal representatives' view is obviously wrong. The bureau was then regarded as, and is in fact, their "instrument," and nothing more. That being their attitude on 4th January, they proceeded to utilise the bureau. There were what the bureau calls its "permanent" men, and of these it kept a list which will be referred to later. But it is perfectly plain the first objection fails, and that the shipowners are the employers of the wharf labourers who load their ships.

3. *Preference in the Award.*—The true meaning of the provision made by the award itself with respect to preference is somewhat difficult to collect. The difficulty is not wholly attributable to the verbiage. It is due largely to the double and disconnected provisions of the Act as to (1) preference—sec. 40; and (2) returned soldiers and sailors—sec. 81A. The combined intention of the Legislature is to be sought from a consideration of the Act as a whole. Section 40 enables the Court to direct (*inter alia*) that as between members of organisations of employees and other persons (not sons or daughters of employers) offering service, preference may be given to such members. That is unlimited as to "other persons" except the limitation of sons and daughters of employers. Standing alone, for instance, it would enable returned soldiers and sailors who are members of an organisation to be preferred to returned soldiers and sailors outside the organisation. But it does not stand alone, and is not now intended to operate alone.

Section 81A says—"Nothing in any award or order made under this Act or in any agreement relating to industrial matters shall operate to prevent the employment of returned soldiers or sailors." It matters not what provision for preference is made in an award—there may be some such provision in unqualified form in an existing award—sec. 81A has the effect of preventing any preference against returned soldiers and sailors outside the organisation. There is then, by force of the operation of the award clause of preference under sec. 40, in view of the direct statutory provision of sec. 81A, this result: the union returned men stand in the front rank, and so do the non-union returned men, neither having any preference over the other. It would be against the law as represented by sec. 81A to put the non-union returned men behind the union returned men, and it is equally against the law as represented by the award to put the union returned men behind the non-union returned men. When clause 1 (a) of the award is read it is seen that the learned President has expressly referred to sec. 81A (1) as "preventing the Court from making any award which shall operate to prevent the employment of returned soldiers or sailors," and therefore it must be a wrong intention imputed to the clause itself, if it is read as

permitting the union returned men to be postponed to the non-union returned men.

What we have said, when the Act and the award are read together and as a whole, is the true intention of Parliament and Arbitration Court. This is greatly strengthened by reference to clause 2 (a), which assumes that the whole of the returned soldiers and sailors, both in and out of the organisation, are on the same level, and in the front rank as against all others, and fully guarded against discrimination in favour of men outside the Federation. Further, that the intention is to be gathered from the broad meaning of the award, and not from some cramped technical reading of its words, is shown by the general tenor of the enactment, and perhaps in this connection more particularly by sec. 28 (1), prescribing that—"The award shall be framed in such a manner as to best express the decision of the Court and to avoid unnecessary technicalities."

Looking, therefore, at the award in the light of the Act as a whole, and of its own terms as a whole unaffected by the interpretation of 28th February, 1924, the conclusion is that it provides—(a) Preference for returned soldiers and sailors members of the organisation, against all persons whatsoever, subject only to this, that, other things being equal, that they are not to be preferred to returned soldiers and sailors outside the organisation. This is, of course, subject as to operation of sec. 81A of the Act. It was contended, and not strongly denied, that the words "all persons in the preference clause" included fellow-members of the organisation. Whether denied or not, the construction of the award depends on its own language as framed by the learned President, and not on the view taken by either or both of the parties. We are of opinion that its true construction does no violence either to the Act or the Constitution. The dispute was in these terms—"The members of the Federation shall have preference of employment over non-members." Other words were added modifying the claim, but, reading it as a whole, it is clear that the preference claimed was not *inter familiam* of the union, but was as between union members on one side and "other persons," that is non-members of the union, on the other. It is obvious that where "preference" is asked for between two classes it means going the whole distance of placing class A before class B. Like every other demand, it may be granted in full or in part. If granted in full there is no necessity to talk of "non-discrimination," because the greater includes the less. But if granted not in full but partially, non-discrimination may be a necessary incident. Thus, as in the present case, the learned President went the whole way on the road to preference as to returned soldiers and sailors, but only half the way asked as to other members. He said "preference" as to the former, and non-discrimination as to the latter, always reserving the rights of returned soldiers and sailors outside as well as inside the union, and always (expressly in one

case and tacitly in the other) subject to "other (things being equal."

The words "all persons" in the preference clause 1 (a) must be construed on the principle that words in a contract or other instrument should be interpreted with reference to the proved subject-matter under discussion. If necessary, the principle *ut magis valeat quam pereat* would also apply. But, on full consideration of the Constitution and the Act, the latter maxim is not necessary. It is true that constitutionally a dispute is an essential condition of arbitral action and of the necessary legislative authority to arbitrate. Both constitutional power to legislate and the requisite legislative exercise of the power are necessary to sustain any award. There is no doubt that "preferential employment" is an industrial matter as to which an industrial dispute may be dealt with by arbitration—secs. 4 and 19 of the Act. But once conceding a dispute, the Legislature is free to legislate at discretion in applying arbitration to settle it. Section 40 is a section for this purpose, and, if read as broadly as its language reasonably permits and the subject-matter requires, is wide enough to sustain the award under consideration without contravening the Constitution. It provides that—"The Court by its award . . . may (a) direct that as between members of organisations "of . . . employees and other persons (not being "sons or daughters of employers) . . . desiring "service or employment at the same time preference "shall in such manner as is specified in the award ". . . be given to such members other things being "equal." It is observable that in the opening words of sub-clause (a) we find "members," not "the "members." This points to indefiniteness, which when the phrase "such members" is read in conjunction, indicates that the Court may select among the members of the organisation "such members" as are to have preference over "other persons," that is "other" than those to whom preference is given, whether those "other persons" are within or without the organisation. The section so construed is within the constitutional power of legislation providing remedies for an existing industrial dispute, and so construed the award is in terms supported by the section.

4. *Discrimination in the Award.*—Preference to A over B necessarily connotes discrimination against B in favour of A. The latter concept is the obverse side of the same medal. The preference given in fact to those returned soldiers and sailors who, whether unionists or non-unionists, obtain "bureau registry" over those who have only the "organisation membership," is, of course, an open discrimination against the latter class of returned soldiers and sailors. But it is said, and perhaps truly, that the award does not specifically forbid this, but leaves it to the operation of the affirmative preference above explained. The only express provision against discrimination relevant to this case is found in clause

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. 2 (a) of the award. That runs as follows:—"2 (a) "The respondents whose names are set out in Schedule "A shall not, when requiring wharf labourers' work "to be done in Sydney, discriminate—other things "being equal—against members of the Waterside "Workers' Federation not returned soldiers or sailors, "except in favour of returned soldiers and/or sailors." This negative provision against discrimination is irrespective of the affirmative provision for preference. The care to mention "returned soldiers and sailors" again shows that the learned President was zealous to protect all returned soldiers and sailors, and to keep them as among themselves on an even footing. Clearly he thought that between the two provisions and the Act all returned soldiers and sailors would stand on a common platform of equality among themselves, and preference as regards others outside the union, including the "loyalists."

5. *Loyalists.*—The learned President dealt expressly and specifically with the position of the loyalists in clause 8. Reading that clause with clause 2 (a), it is certain he gave them no preference. Accepting the award as he framed it, loyalists who are members of the Federation have the same rights as and no greater rights than the general members of the Federation. Of course, loyalists outside the union can have no greater rights. All returned soldiers and sailors who are members of the Federation have by the award preference over "loyalists" as such outside the union, if such loyalists are not themselves returned soldiers or sailors. The award is certainly specific as to this. But a mode of escape is suggested. It is said, first, that both "preference" and "discrimination" are referable only to men newly engaged after the date of the award. Next it is said that the loyalists (some 189) who are preferred to the members of the union, though they are not returned soldiers or sailors, are "permanent" employees, and consequently outside the preference and discrimination clauses. They are said to be "permanent" employees of the bureau; and, failing that, of each constituent member of the bureau. As to the bureau, that has been shown not to be the real employer for loading up ships. A labour agency giving a thousand men a sort of retaining fee to work for any designated employer when called on could not be said to convert the men into permanent employees of the employers bound by an award. Then it is said that the men registered at the bureau are the permanent employees of each and every member of the bureau. That will not bear the strain of investigation. If A, B and C are a firm owning a steamer called the "Caesar," and if A, X and Y are a firm owning a sailing vessel called the "Pompey," and A alone owns a collier called the "Grace," could it be reasonably said that the men constantly employed on the "Caesar" were the permanent employees of A in relation to the "Pompey" and the "Grace?" If that is followed as to his other partners in relation to the "Pompey," it becomes still more patently

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. wrong. The word "permanent" does not occur. It is first imagined and then stretched. Any document could be annihilated by such a process. At the root of the argument, however, there is something more reasonable. It is this, that a preference and a non-discrimination clause each contemplates—unless the contrary is stated—that existing contracts are not to be broken so as to create a cause of action if the award were not made. But, assuming without by any means deciding that to be correct, it does not include a case of a daily engagement which is tacitly renewed each day by conduct, or a weekly hiring which is renewed tacitly by a weekly continuance, notice, if necessary, being within the voluntary power of either party. In that case there is, by the mere continuance and abstention from exercising the unilateral power of refraining from renewing the employment, a disregard of the clause of preference to or of non-discrimination against others who are waiting to be employed and in whose favour the award is made.

We therefore hold that the 189 loyalists now preferred and in favour of whom a discrimination is made, are not exempt from the clauses referred to.

6. *Breaches*.—The breaches are so obvious that it seems tedious to state why. But contrary arguments elaborately endeavoured to show the contrary, and, out of respect to them, the matter may be briefly stated.

There are 3500 men in the organisation entitled to the benefits of the awards. There are 321 so-called "permanent" men on the bureau registry, of whom 113 are returned soldiers and sailors, 189 are loyalists, and 19 are neither returned soldiers nor sailors nor loyalists. The registry is forbidden to any others as "permanent" men. Then there are men not necessarily unionists, but all of them returned soldiers and sailors, registered as "casuals." When the respondent requires wharf labourers' work to be done they are supplied exclusively from the registry of the bureau, taking that registry in order of "permanent" and then "casual." But the "bureau" will not permit the organisation members to register as they wish, and 500 of them were actually refused registration. That is, it is said, because no more men are yet needed. But that is fatal to the argument, because it is a confession that the "possibility" or "opportunity" of obtaining employment is denied to the members of the organisation as such, however skilful and able and willing they may be. Employment is confined to those whom the bureau chooses to register, even though they be less able or less skilful than members of the organisation. As to the returned soldiers and sailors on the bureau registry, they have a perfect right to preference over others who are not returned soldiers and sailors, but they have no right whatever to preference over their comrades who are returned soldiers and sailors and are not upon the bureau registry. Even the bureau admittedly discriminates against returned soldiers and sailors who

register with the bureau. A so-called "permanent" loyalist is placed ahead of a returned soldier or sailor on the casual list.

The whole operation of the bureau then is—(1) Non-recognition of the organisation membership as such. (2) Non-recognition of preference to returned soldiers and sailors by reason of the award. (3) Creation of an indispensable condition of employment by any individual shipowner in the position of the respondent, namely, admission to registration at the bureau, which may be and has been refused. (4) General attempt to be free from the operation of the award, since the individual employer claims not to be liable to pay any "wages" to the wharf labourers employed.

These considerations establish, not merely a breach, but a whole abandonment of the provisions of the award. That is only material now in relation to the specific breaches complained of, and these are manifest.

7. *Ultra Vires*.—The last suggested avenue of escape from the consequences of the system is the contention that the award is *ultra vires* of the Arbitration Court. This is asserted on several grounds, viz.:—(a) Section 40 does not permit preference to returned soldiers and sailors only, but either preference must be given equally to them and other members of the organisation, or no preference at all must be given. (b) Non-discrimination is outside the power of the Arbitration Court. (c) The dispute on which the award was made claimed "preference" generally, and that alone could be granted—if not granted *in toto* preference must be refused. (d) There was no dispute in fact about returned soldiers and sailors.

As to (a), the words are elastic enough to give full play to the wide discretion which an arbitrator having to survey the kaleidoscopic circumstances of industry must necessarily have. So far from limiting his discretion, there is even an obligation cast upon him by sub-sec. (2) which indicates the precise contrary of what is contended.

As to (b), the matter is plainly within the definition of industrial matters in sec. 4.

As to (c), the words are wide enough to include complete preference, and therefore the limited preference granted was within the ambit of the dispute. The point is really not arguable.

As to (d), so far as that is rested on the wording of the documents referring to the dispute, it becomes a matter of construction. So far as it rested on the absence in fact of any dispute, it is of a graver nature and touches the Constitution. But to all of these objections there is also one common answer. In this proceeding this Court is exercising a jurisdiction conferred upon it, not by the Constitution, but by Parliament using its discretion under the authority of the Constitution—sec. 76. The jurisdiction is contained in the "Arbitration Act," sec. 48, and must be exercised on the terms and subject to the limitations Parliament has thought fit to declare. One of

those terms and limitations is contained in sec. 31, which forbids an award once made to be challenged by any means whatsoever in any Court of law. Without exceeding our jurisdiction, we cannot consider on this proceeding the objection of *ultra vires*. Section 31 is a legislative command for the purposes of the Act, and sec. 48 is a part of the Act—every Court shall refrain from entertaining an objection to the validity of an award once it is made. Whether the Court would have any or what restriction in a proceeding under sec. 75 (v.) of the Constitution is quite another matter, as to which nothing is said.

In our opinion, the respondent Company should be enjoined against breaking the award by—(1) Preferring any person whatsoever to returned soldiers and sailors who are members of the Waterside Workers' Federation. (2) Discriminating in favour of any person whatsoever against returned soldiers and sailors who are members of the Federation. (3) Preferring to or discriminating against members of the said Federation in favour of any person whatsoever by reason of such person being registered by or at or affiliated to "the shipping bureau."

PROHIBITION.

Two orders *nisi*, one for prohibition and the other for *certiorari*, in respect of two Federal awards or alleged awards. Besides the problems presented by the rival arguments, another question arises. It is perhaps novel, but attended with great consequences, not merely to the thousands of individuals immediately concerned in the awards under consideration, but also possibly to hundreds of thousands who base their daily life on the supposed stability of other awards. If the recorded judicial determinations of four of the present members of this Court as hereinafter quoted, that of an absolute majority of the Court, are to govern the decision, then the respondents succeed, and the award of preference to returned soldiers and sailors will stand, even if by inadvertence or even by misconstruing some of the difficult statutory provisions, the directions of the Legislature in the "Conciliation and Arbitration Act" have not been strictly followed. We are of opinion that the preference award should stand, and the orders *nisi* should be discharged. Though the grounds upon which both orders *nisi* are supported are identical, it is desirable, in the circumstances of this case, to deal with each process separately.

Before doing so it is necessary to mention certain facts. One is that, with one exception, all the grounds relied on were raised by way of objection to an injunction motion recently made by the Waterside Workers' Federation against the present relators under sec. 48 of the "Commonwealth Conciliation and Arbitration Act," and now standing for judgment. During the course of the case one of the grounds now raised was definitely ruled upon. This will be detailed later. The one exception referred to is the contention that the Constitution has been incurably

infringed, because, so it is said, preference has been given by the President of the Arbitration Court to returned soldiers and sailors who are members of the organisation over those members of the organisation who are not returned soldiers or sailors, there having been no dispute between those classes of members as to preference really *inter familiam*.

Another circumstance which should be mentioned at once is that the present applications to annihilate the awards or alleged awards are made on the relation of only one out of forty employers parties to them, none of the remaining thirty-nine being party to the present applications, though for all that appears those parties, or some of them at least, may be opposed to what in the language of the learned President of the Arbitration Court "would irritate an industrial sore"—see (1922) C.A.R., vol. XVI., at p. 1011. These proceedings being to destroy the awards *in rem*, we are of opinion they cannot succeed in the absence of parties directly interested. That is elementary justice, and in our view, unless the necessary parties are added, the defect should end the matter at the threshold. If it does not, then an utter stranger could proceed in the same way, without notice to any of the parties interested. The Court should, even were this the sole reason, refuse to grant the application. It is, however, necessary for us to proceed further.

That there was a very serious "industrial sore" is beyond question. That it would be irritated anew, thereby imperilling the continuance of necessary services to the community if these applications were acceded to, is on the very surface extremely likely. The main award, dated 23rd October, 1922, was by the Arbitration Court declared to operate only until 30th September, 1923. It is, however, still current—*Waterside Workers' Federation*, 26 A.L.R. 233—not, however, by force of arbitration, but solely by force of direct legislation. This is an important circumstance in determining how far the arbitral function is ever of a judicial or a quasi-legislative nature. For it cannot be imagined that the Commonwealth Parliament assumed, or that this Court held, that Parliament had assumed jurisdiction by force of its direct will to extend the force of a "judicial order" beyond the period fixed by the tribunal. Nor can one imagine a Court entertaining an application for prohibition or *certiorari* directed to the arbitration tribunal, in respect of an award which has passed the utmost period fixed by that tribunal, and which henceforth exists and operates as the main award does at this moment by the mere will and direction of the Commonwealth Parliament. Such remedies are unheard of to control Parliament.

But if that be true, it indicates that Parliament regards an award simply as a "factum," which, unlike a judicial decree, of itself imposes no obligation and affects no rights. Obligations are imposed and rights are affected by the Act operating on the *factum* of the award. And this is a decisive consideration.

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.

It shows that an "industrial award" is in its essential nature not a judicial decision, but a step in legislation. Reference will be made to this later. The main award, however, though settling wages, hours, conditions of labour, including the maximum loads to be lifted by wharf labourers, settled those matters as between the organisation and the forty respondents, and between them only. But, by reason of the system adopted by the shipowners, it had become at least to a large extent a dead letter. This was so because by means of what was called "bureau" registration, more particularly dealt with in the injunction application, a system of discrimination was pursued to the disadvantage of members of the Federation. To prevent this, and manifestly to safeguard the very existence of the Federation, the learned President, by award No. 77 of 1923, prescribed—(1) Preference to returned soldiers and sailors members of the union—other things being equal—except as against other returned soldiers and sailors—sec. 81A of the Act; and (2) non-discrimination against members of the union who were not returned soldiers and sailors, except in favour of returned soldiers and sailors.

These facts are referred to for two reasons, the first because we cannot assume that all the employers parties to the main award desire to revive the old "industrial sore," and the second because they are material as affecting the discretion of this Court upon the present occasion.

Prohibition.—Two facts are incontestable and are desirably mentioned at once. (a) The awards or alleged awards now challenged are complete, and nothing is needed or possible to perfect them according to their present directions. They are as formal as they can ever be. Unless and until some substantive application is made to vary or in some way alter them there is no authority in the Court of Conciliation and Arbitration to do anything with regard to them—sec. 39 of the Act. (b) The learned President, as a formal party to these proceedings, has, in courtesy to this Court, by Counsel informed the Court that there has been no application to vary or interpret either award, and that he is not doing and has no present intention of doing, anything in relation to them. Very properly, learned Counsel for the relators relied upon *Hibble's Case*, 27 A.L.R. 84. In that case the Court being equally divided, it was held by force of statutory majority that prohibition lies to a tribunal, even though that tribunal is *functus officio*.

Learned Counsel for the respondent Federation advanced two reasons, independent of the substantive law of the awards, why prohibition should be refused. They were—(1) The arbitral tribunal is *functus officio*; and (2) the functions of that tribunal are not of a judicial nature, having regard to the Australian Constitution.

As to the first reason, having regard to the constitution of the Court that decided *Hibble's Case* (*supra*) and of the Court that is called upon to decide

this, no reconsideration of that fundamental proposition would be profitable or proper if it were not for a very material circumstance that has happened since. *Hibble's Case* (*supra*) was determined in December, 1920. But in the following July four learned Lords out of five (the fifth expressing no opinion on the particular point) gave, in *Clifford and O'Sullivan*, (1921) 2 A.C. 570, a pronouncement upon that identical proposition which appears to us so unmistakably clear and decisive, that, but for a suggestion which was made to the contrary, we should have done no more, so far as this point is concerned, than simply refer to the case. That suggestion, however, being made, it is right, where so much is involved, to make very clear why we hold the opinion stated.

Clifford and O'Sullivan (*supra*) was an appeal from the Court of Appeal. There was a preliminary objection that the appeal being in a criminal cause or matter was incompetent—see p. 579. Viscount Cave, L.C. (at that page), said—"It is desirable to deal 'first with the preliminary objection,' and down to the middle of page 582, His Lordship considered that preliminary objection and ruled against it. Then the Lord Chancellor had to deal with the appeal free from any preliminary objection. The question arose 'whether, on the assumption that the appellants are 'right in their view of the facts and of the law applicable to them'—that in assuming the sentence was utterly invalid, and even though it concerned life—"a writ of prohibition could have been granted." The learned Lord proceeded at once to state that "the writ should only issue to (1) a Court having some 'jurisdiction, (2) which it is attempting to exceed.'" For convenience of consideration we have inserted the figures, because both branches were dealt with separately.

In the first place, Lord Cave dealt with (1) "a Court having some jurisdiction," and held that the broad doctrine of "a pretended Court" was not law. He also referred to the opinion of Brett, L.J., in *R. v. Local Government Board*, 10 Q.B.D. at 321, and assumed it without accepting it. On this first branch the Lord Chancellor held that prohibition would not lie. But then he went further, and deliberately dealt with the second branch, that is, with the very point decided in *Hibble's Case* (*supra*). He said (p. 584)—"A further difficulty is caused to the appellants by 'the fact that the officers constituting the so-called 'military Court have long since completed their investigation, and reported to the commanding officer, 'so that nothing remains to be done by them, and a 'writ of prohibition directed to them would be of 'no avail—see *In re Poe*, 5 B. & Ad. 681; and *Chabot v. Lord Morpeth*, 15 Q.B. 446. What the appellants 'really desire is an order restraining General Macready and General Strickland from confirming and 'carrying out the sentences; and it is clear that as 'against these officers, who are in no sense the officers 'or agents of the military Court, prohibition could 'not be granted."

Some of the very authorities relied upon in *Hibble's Case* (*supra*), in the minority opinion notably, *Short and Mellor* (2nd ed.), pp. 252, 253; *In re Poc*, 5 B. & Ad. 681; and *Chabot v. Lord Morpeth*, 15 Q.B. 446, were cited by the Lord Chancellor, whose view as to the law coincided on this point precisely with that opinion. The Lord Chancellor's opinion was shared by Lord Dunedin, Lord Atkinson and Lord Sumner. One sentence from the judgment of Lord Sumner should be quoted, because it appears to us to be in definite accord with the minority opinion in *Hibble's Case*. He said (p. 591)—"True, judgment, though given, is not yet executed, but the execution is not in the hands of these officers or of any one acting under their directions or authority." The contrary suggestion to which we alluded is that Lord Cave and the other learned Lords intended to limit their observations as to "*functus officio*" to a body having no legal jurisdiction whatever, and therefore coming within his observations on the first branch of the definition. The suggestion was founded on some words of Atkin, L.J., in *R. v. Electricity Commissioners*, (1924) 1 K.B. 171 at p. 206. Those words are—"I am satisfied that the observations of the Lord Chancellor in that case were directed to the 'first point.' One might in *limine* ask, seeing that Lord Cave's words could not possibly have been directed to the preliminary point, what in Lord Justice Atkin's view is it suggested was Lord Cave's first point, and what was his second point? When the judgment of the learned Lord Justice is examined, and his quoted words are read with what precedes and with what follows them, neither from a legal nor from a literary aspect can the suggestion be maintained. His Lordship was dealing with an argument which sought to exclude the Electricity Commissioners from liability to prohibition on the ground that they were not a "Court," and on the ground that Lord Cave's judgment in *Clifford and O'Sullivan* (*supra*) "defines the scope of the writ of prohibition in terms much more restricted than those of Brett, L.J., in *R. v. Local Government Board*"—see foot of p. 185 and top of p. 186. It is obviously to Lord Cave's observations, on the judgment of Brett, L.J., in relation to the first branch of the definition, that the quoted words of Atkin, L.J., are directed. The immediately succeeding words on p. 206 are inconsistent with any other view.

Other passages in the judgment of Atkin, L.J., are also inconsistent with the suggestion. For instance, at p. 204 he says—"Prohibition restrains the tribunal from proceeding further in excess of jurisdiction." At p. 206 the Lord Justice refers to the dissenting judgment of Phillimore, L.J. (now Lord Phillimore), which deserves separate mention. Atkin, L.J., says further in accord with that dissenting judgment—"If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining 'matters,' &c. On the same page he says, with reference to *Clifford and O'Sullivan*, that the House of

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. Lords held prohibition would not lie (1) "because the so-called Courts were not claiming any legal authority other than the right to put down force by force; and (2) because the so-called Courts were "*functus officio*."

It may not be out of place to note that the very foundation of prohibition is that it prevents judicial power being usurped by force. Willes, J., in *Mayor of London v. Cox*, L.R. 2 H.L. at page 254, says—"Any exercise, however fitting it may appear, of jurisdiction not so authorised, is an usurpation of the prerogative, and a resort to force unwarranted by law." The remedy, however, by prohibition for such force is only where its jurisdiction is exceeded by some tribunal being a "Court," not necessarily in the strict sense but yet armed with some Royal curial authority. We cannot do the learned Lord Justice the wrong of supposing he thought that for the first reason the so-called Courts were free from prohibition, whether they were *functus officio* or not; and for the second reason, but peculiar to themselves, were free provided they were *functus officio*. Clearly, "*functus officio*" applies only where the tribunal has, or, for the sake of argument, is supposed to have, an "*officium*" but has discharged it. The second reason is independent of the first.

We have yet to quote Lord Phillimore's opinion in the Court of Appeal in *Rex v. Board of Trade*, (1915) 3 K.B. 536. There he said (at p. 548), in words which have an important bearing on two parts of this judgment—"But I should express my doubt whether, supposing the Light Railway Commissioners to be a tribunal to which a writ of prohibition could appropriately issue, they were shown to be at the time when the rules were applied for doing or about to do anything in excess of their so-called jurisdiction." These new events, particularly the judgment of the House of Lords, added to, if that be legally possible, by the opinion of Phillimore, L.J., and Atkin, L.J., do not merely, in our opinion, leave us free to act upon the view we expressed in *Hibble's Case* (*supra*) on the subject of prohibition in relation to a tribunal *functus officio* as to the particular decision complained of. They really, though not technically, control us. The law declared in *Clifford and O'Sullivan* (*supra*) has in Great Britain the effect of a Statute. The same learned Lords, sitting as the Judicial Committee, would of course enunciate the same law as they did sitting in the House of Lords. We therefore feel bound to adhere to our former judgment on this point.

It was also suggested, though not vigorously, that the learned President was not *functus officio* *quâ* the awards or alleged awards in question, because the Act enables the tribunal in certain cases to vary or reopen or interpret an award. But the law is clear he must first be set in motion as "the Court" by some method indicated in the Act, and even then it may be for the purpose of doing something entirely

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. within his admitted jurisdiction, or possibly for the purpose of striking out an objectionable term. This is very plainly indicated in the judgment of Powers, J., in the *Federated Gas Employees' Union v. Metropolitan Gas Co. Limited*, 25 A.L.R. 225 at 235, where the learned Justice points out that "the old dispute is 'settled by the award,' but that a variation may be made within the ambit of the old dispute, provided 'a new dispute' arises. Obviously and necessarily that judgment connotes that until 'a new dispute' arises within the ambit of the old dispute, in effect a recrudescence of some part of the old dispute, the tribunal is *functus officio*. In any event the undeniable fact is that, employing the words of Lord Phillimore, he is not 'shown to be at the time when 'the rules were applied for doing or about to do 'anything' in relation to those awards. By his Counsel, as already stated, he expressly informed the Court to the contrary. The law (sec. 39) says he is incapable of taking any further step in relation to them except in circumstances that have not arisen. For reasons which have been expressed at length in *Hibble's Case*, we have stated, and our brother Higgins has stated, why the Arbitration Court in such a case is *functus officio*. Without repeating them we adhere to those reasons. We must, however, direct special attention to one circumstance which is too often overlooked.

Observations of Justices of this Court, culled from former judgments, are sometimes quoted without reference to the changes which Statutes or later decisions have brought about. For instance, before *Alexander's Case*, 24 A.L.R. 341, it was frequently said that prohibition to the Court of Conciliation and Arbitration was appropriate, even after an award where the Court was involved. But that was because the Court was supposed to be in the position of any other tribunal having the power and duty to see its orders enforced. For instance, in the *Tramways Case*, 20 A.L.R. 126 at p. 135, it was clearly stated by Isaacs, J., that though the Arbitration Court was not a "Court" within the meaning of the judicature provisions of the Constitution, it was (as was then thought) a Court well constituted for the enforcement of the award. At the same page it is said—"The tribunal which in this case is sought to be prohibited is therefore a Court in the strict sense; 'and the question is, does prohibition ever lie to it, 'even when it is proceeding to exceed its jurisdiction?' That is the kernel of the position at the time, and resting on the assumption that the one tribunal was both arbitral and judicial in the strict sense. But *Alexander's Case* (*supra*) dissipated that view. That was in September, 1918. In December of that year (Act No. 39) Parliament, in consonance with that decision, eliminated from the Act all attempts at judicial power whatever from the structure of the arbitral tribunal, and placed it in the hands of Courts strictly so called. Consequently, judicial observations prior to that date on the sub-

ject of prohibition respecting awards have to be read by the light of that fact.

As to the second reason advanced for refusing prohibition, judicial dicta to the effect that the nature of the functions of the Arbitration tribunal are judicial or quasi-judicial in the sense of constitutional judicial power, or of attracting prohibition, are similarly to be regarded with reference to *Alexander's Case* (*supra*). It there became necessary, not merely to separate the judicial from the arbitral functions, but also to definitely ascertain the nature of the latter.

In *Hibble's Case*, 27 A.L.R. 84 at page 92, we summarised the position in the following passage:—"6. The 'award' is not an exercise of the judicial power of the Commonwealth; it is not like an order of a Court, as to which as the House of Lords has said, the Court is not *functus officio* until the order is fully obeyed. It is a part, and a necessary part, of the method of legislation by sec. 51 (xxxv.), and when the Arbitrator's opinion (for that is all the award amounts to) as to the dispute is announced, the Statute takes it up (sec. 17) and stamps it with legislative force as a legal obligation, the duty of enforcement being in the hands, not of the Coke Tribunal, but of the ordinary Courts. We have fully expounded our views as to this in *Alexander's Case*, 24 A.L.R. 341, at pp. 351, 352, and our brother Powers' view, at p. 360, is, as we read it, in accordance with our own. It is also held by our brother Higgins, in *Australian Boot Trade Employees' Federation v. Whybrow and Co.*, 16 A.L.R. 185, at p. 209, basing it, as we have based it in *Alexander's Case*, on the principle laid down by the Privy Council in *Powell v. Apollo Candle Co.*, 10 A.C. 282 at p. 291. It stands, therefore, on the authority of four, that is, an absolute majority, of the present members of this Court, that an award is of a 'legislative' nature because it is a '*factum*' on which 'the law operates.'

Since *Alexander's Case* (*supra*), but a few months before *Hibble's Case* (*supra*), a further step was taken. In the *Waterside Workers' Federation v. The Commonwealth Steamship - owners' Association*, 26 A.L.R. 233, a decision was given that Parliament can validly enact that awards shall continue as long as it thinks fit. The necessary effect of that decision is that the conditions of employment approved by the Arbitration tribunal constitute a *factum* as to which Parliament may say it shall be the law between the parties for whatever period it chooses, irrespective of any limit of time chosen by the Arbitrator. This goes even further than the view taken by our brother Powers and ourselves, and even further than as stated in the *Boot Trade Case*, 16 A.L.R. 185. But the decision in the *Waterside Workers' Case*, 26 A.L.R. 233, introduces a new element, namely, that admitted by Bankes, L.J., in *R. v. Electricity Commissioners* (*supra*, at p. 197), with reference to the Irish case of the *Local Government Board* there mentioned. The

learned Lord Justice says that if the function were "quasi-legislative that is a proceeding towards legislation," the decision goes far to support the argument of the Attorney-General, that is, that prohibition would not lie. This view is again made plain by Dodd, J., in the Irish Free State case of *Kelly v. Maguire*, (1923) 2 I.R. at p. 64.

It becomes of extreme importance from the decision of the House of Lords in *Clifford and O'Sullivan* (*supra*). The House repelled the old idea that even "a pretended Court" was amenable to prohibition, and adhered in prohibition to the central idea in the words quoted with approval from *Short and Mellor*, "to compel Courts entrusted with judicial duties to 'keep within the limits of their jurisdiction,' without limiting the word 'Courts' to the old strict form of Courts. The tribunal there under consideration, without any pretence of Royal authority to dispense justice, illegally assumed judicial functions. It was not and did not claim to be a Court or judicial tribunal in any legal sense—p. 581. In that it differed from the true court-martial in *Re Poe* (*supra*). Prohibition was therefore inappropriate. But it seems to us to follow necessarily, that if the definition adopted by the House was decisive as to the word "Courts," it must be equally decisive as to the nature of the jurisdiction to be superintended by "prohibition." That jurisdiction must *ex vi termini* be "judicial" in the true sense, namely, dispensing Royal justice in relation to existing rights and liabilities. Whatever the nature of the tribunal may be, that is selected by law (or possibly by what is by some misapprehension on the part of the Executive assumed to be law, so that it has some *primâ facie* Royal authority), the function prohibited must be "judicial" in the true and legal sense, and adhering to the central idea of curial functions, though not restricting that term to the old strict form of Courts, to which ordinarily the idea of "judicial acts" attaches—the House of Lords has, we think, laid down the law of the ancient remedy in a way that compels every other Court to reconsider the position. It is true, as Atkin, L.J., says, and as indeed all the Lords Justices thought in the *Electricity Commissioners' Case* (*supra*), that there was no overruling of all the cases which had been considered "judicial" for the purpose of prohibition or *certiorari*. But the Lord Chancellor threw no doubt on the necessary nature of the appropriate function, and that has to be ascertained in every case from the source of the tribunal's authority.

Having examined carefully most of the cases referred to, we think we may say all the important ones within reach, it appears to us that no general principle can be extracted from them, except that they purport to follow, by reason of the legal function of the organ concerned, the central definition mentioned in the House of Lords case. For instance, if we look at page 193, *Rex v. Glamorgan-shire*, 1 Lord Ray. 580, is mentioned. That case had

reference to an order by Justices to levy money under the authority of an Act of Elizabeth, the Statute itself placing definite proportionate liabilities in the County of Glamorgan and the Town of Cardiff for repairing a bridge. The objection was, the jurisdiction was new, being newly created by Act of Parliament. The Court held that was no objection, and said—"For this Court will examine the proceedings 'of all jurisdictions erected by Act of Parliament.'"

Then as to *Re Ystradgumlais* and *Re Appledore*, both in 8 Q.B., they were decided under Acts which variously described the decision of the Commissioners as an "order or adjudication," and to be made "if any 'suit be pending,' &c., and as a 'judgment or determination' as a 'decision,' and declared it 'final and conclusive.'" In *Chabot v. Morpeth*, 15 Q.B. 446, the subject of consideration was a trial before a jury, with a verdict and an order thereupon. In *R. v. Clerkenwell Commissioners of Taxes*, (1901) 2 K.B. 879, the application had reference to an appeal to the respondents under the Act of 1880. Sections 57 to 59 inclusive leave no doubt of the truly judicial nature of their functions. In *Caledonian Railway Co. v. Banks*, 1 Tax Cases at 499, Lord Gifford spoke of "the 'determination that is the decision in law which 'the Commissioners have pronounced upon the facts 'proved or admitted before them.'"

In *Re Hall*, 21 Q.B.D. 137, there was made what A. L. Smith, J., called (at p. 142) "one of the most 'novel applications' he had ever heard. Prohibition was refused on a ground rendering it unnecessary to decide the present point, and Counsel for respondent were not called upon to argue. In *R. v. Light Railway Commissioners*, (1915) 3 K.B. 536, the Act was of a different character, and the question turned upon its true construction. If we may, we respectfully share the evident doubt entertained by Lord (then Lord Justice) Phillimore, at p. 548, as to the Commissioners being a tribunal to which a writ of prohibition could appropriately issue. In *Board of Education v. Rice*, (1911) A.C. 179, Lord Loreburn, L.C., at p. 182, when saying—"In such cases the Board 'of Education will have to ascertain the law and 'also to ascertain the facts,' was obviously, when the rest of that page is read in collocation, indicating that Parliament, in accordance with modern practice, had entrusted to a special and administrative tribunal some functions exactly similar to those of a Court of Justice, though the decision was to be in the form of an award, and that these functions were from their nature subject to *certiorari*."

In *R. v. London County Council*, (1893) 2 Q.B. 454, considerable doubts were expressed by all three members of the Appeal Court as to whether prohibition lay at all, even supposing invalidity in the order. The question comes down to the true connotation of "judicial" functions within the meaning of the definition of prohibition and *certiorari*. In *Rex v. Woodhouse*, (1906) 2 K.B. at 535, Moulton, L.J., said "judicial" in that sense meant as distinguished from

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. "purely ministerial." But in 1914 Lord Moulton, in *Local Government Board v. Arlidge*, (1915) A.C. 120, had to deal with a case where the Local Government Board, after considering evidence taken on a public inquiry before an inspector designated for the purpose, and also his report, confirmed an order of a borough council closing a dwelling-house. In one sense it was certainly a judicial function, as opposed to purely ministerial duty. But Lord Moulton was fully conscious that statutory acts of legislatively created bodies were not exhaustively to be described as either "judicial" or "ministerial." He said (at page 149)—"I do not wish by this judgment to give any countenance to the view that *certiorari* is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued, and I therefore assume in favour of the respondent that the procedure he adopted was correct." See, also, *per* Lord Chancellor Haldane (at p. 132), where "judicial" functions are contrasted with "executive" functions; and *per* Lord Parmoor (at p. 140), where judicial functions are stated to extend to powers "to impose a liability or to give a decision which determines the rights or property of the affected parties."

It is well worth while, when considering the true import of the observations of Brett, J., in the *Local Government Case* (*supra*), to read what Lord Sumner (when Hamilton, L.J.) said in *R. v. Local Government Board, Ex parte Arlidge*, (1914) 1 K.B. at pages 201-202, viz.:—"The Local Government Board here is a statutory tribunal, anomalous as compared with common law Courts, created by the Legislature for a special class of appeals and endowed by it with the power of formulating its own procedure. We must assume that a department which the Legislature has trusted will be worthy of the trust. The judgment of such a tribunal, regular on its face, is surely entitled to as much credit as that of a foreign Court." The words of Lord Haldane, Lord Parmoor and Lord Sumner, look to powers creating instant liability in specified persons or instantly determining their rights duties or property on the basis of some previously existing legal standard. But their words seem very far from a regulation as to industrial conditions, which creates no enforceable instant obligations or rights whatever between specific persons, which may never eventuate in any obligations or rights, for the employers may never employ any member of the organisation, but which merely lays down a rule or standard of conduct for the future, which will, if certain contractual relations be created between persons of designated classes, eventuate by force of law in the prescribed rights and obligations, some mutual and some not.

To put the matter concretely. Suppose an award between an organisation of employers and an organisation

of employees in the given industry. How could it be predicated that the award itself imposed liabilities or duties upon individuals? The first organisation does not employ the second. Not all the members of the first employ all the members of the second. The individuals who are members of the first may cease the next day to employ any of the members of the second, or if so employing them, they may cease to be members of the first. The members of the first organisation may even employ the same individual employees, who, however, cease to be members of the second organisation. Indeed, members of the first organisation may cease to be such members. In none of these cases does the award apply. The award becomes a mere code, framed by an "arbitrator," and when framed is brought into legal force by the Act—*Powell v. Apollo Candle Co.*, 10 A.C. at 291. It needs for its application, and it is generally a very varied application, the ascertainment of new circumstances, and this ascertainment and the enforcement of the provisions of the new industrial code is itself properly the subject of subsequent judicial procedure. Though "arbitration," it is not of the same species, as ordinary arbitration as to existing rights. It is more of the nature of wages board determinations, the distinction between the two being that one is arrived at without an actual dispute, the other after actual dispute has arisen. But the essential feature of each is a legislative (though indirect) regulation of industrial conditions. Whether, therefore, the actual decision in the *Electricity Commissioners' Case* conforms or not to the line of thought indicated by previous governing authorities, is dependent entirely upon the construction of the relevant Statute. The principle of the case is that no new doctrine is suggested, and the former cases are recognised as binding. A very late case in the House of Lords decided shortly before *Clifford and O'Sullivan's Case* confirms this view.

Everett v. Griffiths, (1921) 1 A.C. 631, was a case where a Justice of the Peace made an order for the reception of the appellant as a lunatic into an asylum, under the "Lunacy Act 1890," sec. 16. The question of the effect of entrusting some "quasi-judicial" powers to bodies other than Courts and Judges is one that is still in process of development—see, *per* Viscount Haldane, at p. 659. It has for many purposes to be solved by reference to the terms of the Act which creates the powers and confers them. The applicability of prohibition was not within the sphere of consideration in *Everett v. Griffiths* (*supra*), but some very valuable opinions were expressed extremely pertinent to this case. For instance, at page 682, Lord Atkinson says that a proceeding may be a "judicial proceeding" although the person conducting the proceeding is not a superior Court Judge or an inferior Court Judge, or a Justice of the Peace, and although the ordinary formalities of a Court are wanting. His Lordship adds—"Whether a proceeding is a judicial proceeding or merely an ad-

"ministrative proceeding, depends much more on what 'is authorised to be done by the named authority: 'what is done, and the effect of the act upon the 'rights and interests of others.' He approves of the definition of judicial act by May, C.J., in *R. v. Dublin Corporation*, 2 L.R. Ir. 371, 376, of which the potent words are "imposing liability and affecting the rights 'of others."

As to the proper interpretation of those words something will be said presently. But to complete the reference to Lord Atkinson's judgment, the cases he quotes are, when examined, each and all of the class described in the analysis of the cases cited in the *Electricity Case* (*supra*), and they respond to the formula stated above. The definition of May, C.J., was approved and explained in *R. v. Local Government Board*, (1902) 2 I.R. 349. Palles, C.B., at p. 373, emphasises the words "imposing" and "affecting." He says further (pp. 373 and 374)—"I mean 'that the liability is imposed or the right affected by 'the determination only, and not by the fact determined.'" FitzGibbon, L.J. (at p. 384), seems to state properly and accurately the position when he says "I can find no one word that will adequately describe 'all the acts which are not judicial in the sense 'required except the contradictory 'non-judicial.'" He adds usefully, "of other words, 'ministerial' is 'as good as any; its use is sanctioned and its meaning has been elucidated by authority. As so elucidated, 'judicial' and 'ministerial' conveniently 'describe the acts which are and the acts which are 'not subject to control by *certiorari*." The foregoing conclusions are further supported by the following recent cases:—*Keller v. Potomac Co.*, 261 U.S. at p. 428; and *O'Connell's Case*, (1924) 2 I.R. p. 109.

With reference to the second *Hibble's Case*, 27 A.L.R. 199, while it is true prohibition was granted to restrain a special tribunal under the "Industrial Peace Act 1920," it is no doubt a very weighty fact. But the following considerations should be mentioned: (1) Neither in the argument nor in the judgments is the point as to the non-judicial character of the tribunal discussed or mentioned. (2) If it had been, the House of Lords had not then decided *Clifford and O'Sullivan's Case*, (1921) 2 A.C. p. 570, limiting with supreme authority (p. 582) the office of prohibition in accordance with the well-known definition to "Courts entrusted with judicial duties" to keep within the limits of their jurisdiction. It is also worthy of observation that that decision excised the long practice of Courts, both in England and Australia, to be guided by *Chambers v. Jennings*, 2 Salk. p. 553, based on "pretended Court," a practice which was of long duration, and is probably the root of some of the doctrine prevailing before *Re Clifford and O'Sullivan* (*supra*). It had influence, for instance, in *Whybrow's Case*, 16 A.L.R. at p. 380.

We therefore think the House of Lords case cited is of commanding force, and should guide our de-

cision whatever the previous practice of this Court has been.

We may summarise the position as to prohibition thus—

(a) The function of a tribunal amenable to prohibition or *certiorari* must be judicial in the same sense that the function of a strict Court is judicial, whatever the constitution or the appropriate procedure of the tribunal may be—*Clifford and O'Sullivan* (*supra*), *Board of Education v. Rice* (*supra*), *Arlidge's Case* (*supra*), and *Everett v. Griffiths* (*supra*).

(b) That sense is that the determination of the tribunal must itself, and of its own direct force, instantly impose an obligation or affect the rights of the parties concerned (*ib.*).

(c) A function that is substantially executive or legislative in its nature is not judicial in the necessary sense—*Rice's Case* (*supra*), *Arlidge's Case* (*supra*), *Woodhouse's Case* (*supra*), *Kingstown Case* (*supra*).

(d) Federal arbitration is in its nature legislative, and not judicial in the necessary sense. So held by four of the present Justices of this Court, and in necessary effect by the decision in the *Waterside Workers' Case*, 26 A.L.R. 233; see, also, *Whybrow's Case*, 16 A.L.R. 373.

(e) A plenary Legislature may, as in England in the cases cited, entrust "judicial" functions in the requisite sense to any person or department, executive or otherwise. But the Commonwealth Constitution requires such functions to be vested in Courts strictly so called—sec. 71; and *Alexander's Case* (*supra*).

(f) It follows that it is legally impossible that the arbitral functions of the so-called Courts of Conciliation and Arbitration are of a character amenable to either prohibition or *certiorari*.

(g) But whether ever amenable to prohibition or not, that remedy is inappropriate once an award is made, for then the tribunal is *functus officio*. This, as well as proposition (d), is held by four of the Justices at present constituting the Court—Higgins, J., in *Hibble's Case* (*supra*); Powers, J., in *Gas Company's Case* (*supra*), and ourselves.

We would suggest that the chance circumstance of the absence of one of those four Justices from Australia, and the unwritten practice (not prescribed by any law) whereby the Justice who happens to be the President of the Arbitration Court, whether he has or has not had anything to do with the award challenged, refrains from sitting to determine constitutional and other legal questions, ought not to detract from the force of their opinions already judicially expressed. It may be worth the consideration of the Legislature to say definitely whether, on questions of law, which as President, the head of the Arbitration tribunal has no jurisdiction to determine, and does not determine in any binding sense, but merely construes, as he is bound to do for the purpose of his arbitral duty, the Commonwealth and the States are

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. to be deprived of his opinion as a Justice of the High Court when it becomes necessary to consider such questions judicially. The Constitution may be interpreted quite differently, and legislation may be construed quite differently according to the presence or absence of a Judge, not merely by his own ultimate judgment, but also by the aid he affords towards the general opinion of the Court. Before passing from prohibition, it should be observed that sec. 31 of the Act was greatly discussed, but principally in connection with non-constitutional excess of jurisdiction. This section, which is of very special importance, is more appropriately considered later.

Certiorari.—The mere circumstance that a Court is *functus officio* is no bar to *certiorari* where all other conditions for its applicability exist. What we have already said is, however, if correct, decisive of the inappropriateness of the remedy here. But assuming that to be incorrect, should the order be made absolute? As to one of the instruments attacked—the "interpretation" award, the order should not, in our opinion, be made absolute, for the following reason.

Before the order *nisi* was applied for, the Full Court had already upon the injunction motion definitely ruled its invalidity. Reasons remained to be given, but for all legal purposes in Australia the so-called interpretation award was null and void.

As to the preference and discrimination award, we assume, contrary to our actual views expressed in the injunction motion, that the award offends against sec. 40 of the Act. We will also for the moment assume that it offends against the Constitution by awarding a preference *inter familiam*, when there was no dispute *inter familiam*. What then? Must the Court award *certiorari* to quash the award *in toto*? Or is it a matter within the sound discretion of the Court?

In the case of *R. v. Glamorganshire*, 1 Ld. Raym. 580, the Court, as early as the year 1700, was careful to see that no avoidable public damage was done by *certiorari*. It said—"As to the cases of orders made by the commissioners of sewers, and of the fens, the court is cautious in granting *certiorari*; and first they make inquiry into the nature of the fact, and what will be the consequence of granting the writ, because the country may be drowned in the meantime, while the commissioners are suspended by the *certiorari*. But that is only a discretionary execution of the power of the Court." Lord Sumner (when Hamilton, L.J.) said, in *Rex v. Local Government Board*, (1914) 1 K.B. at 204—"The grant or refusal of a rule absolute for a *certiorari* is always a matter of judicial discretion." This is in accord with Bramwell, L.J., in *R. v. Sheward*, 9 Q.B.D. 742. This is certainly so where the prosecutor is not a "party aggrieved, that is who substantially brings error to redress his private wrong"—*R. v. Justices of Surrey*, L.R. 5 Q.B. at 473.

The case last mentioned, *R. v. Justices of Surrey* (*supra*), was decided in 1870, and the line of demarcation there drawn between "a party aggrieved" and other persons was somewhat new. No doubt the fact that the applicant in a given case is "aggrieved" is a material element in determining the mind of the Court, but that it is anything more than an element of degree and not of kind is quite another question. There is also no doubt that in several cases since 1870, and quite recently also, in 1914, 1919, 1920 and 1921, the Court of King's Bench Division has more or less acted on the rule of *R. v. Justices of Surrey*. Still, even there it has been recognised—see *R. v. Richmond*, (1921) 1 K.B. at 256—that "the interest may be so slight as not to be acted on." That is not very far if at all removed from discretion, and it may be after all the decision referred to establishes merely the practice of the Court. For a man's absolute right, however small, is a matter that a Court of law must give effect to if regularly approached.

On the other hand, the judgment of Lord Sumner (then Hamilton, L.J.), in *Rex v. Local Government Board* was given in a case brought by a party aggrieved, and expressly the learned Lord Justice acted upon "judicial discretion." But there is really a very strong body of authority in support of the opinion of Lord Sumner and Bramwell, L.J., which was indeed concurred in by both Bagallay, L.J., and Brett, L.J., though other reasons were added. In the Court below—see 5 Q.B.D. 179—Manisty, J. (for Lush, J., Bowen, J., and himself), made it very clear, at page 182, that it was discretionary in the Court, notwithstanding the applicant was a party aggrieved, to grant or refuse a *certiorari*, and the case of *R. v. South Holland Drainage Committee*, 8 A. & E. 429, was approved. Lord Denman's judgment in the latter case was unmistakably clear that the Court had a discretion even where a defect appeared on the face of the proceedings. Earlier authorities—as *Hawkins*, vol. II., c. 27, sec. 27; *R. v. Lewis*, 4 Burr. 2456; and *R. v. Bass*, 5 T.R. 251—support that position. Indeed, in 1869, the year before *R. v. Justices of Surrey* (*supra*), it was held by Lush and Hayes, JJ., in *R. v. Newborough*, L.R. 4 Q.B. 585 at 589, a case of a party "aggrieved," that "it is in the discretion of the Court to grant or to refuse a *certiorari*, and it is not a matter of right." The discretion was exercised by refusing *certiorari*, though the order impeached was invalid. See, also, *R. v. Leicester Justices*, 29 L.J. M.C. 203; and *R. v. Londonderry Justices*, (1905) 2 I.R. 318. But lastly, and decisively for us, the Privy Council has so held. In *Colonial Bank of Australasia v. Willan*, L.R. 5 P.C. at p. 450, a case of *certiorari* for want of jurisdiction and fraud, it is said—"The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary," &c. At the foot of that page, it will be observed, their Lordships not only recognised but also described the applicants as "the parties aggrieved." That case was

decided four years after *R. v. Surrey Justices (supra)*. We therefore think the jurisdiction in *certiorari* is in all cases discretionary. Judicial discretion, however, is not capricious, but must be exercised in a reasonable manner according to the circumstances.

As to other grounds of complaint, the present applicant may or may not be right in asserting it is a party aggrieved, but in respect of this particular ground of complaint the applicant is really no more concerned, upon the facts before us, than any stranger to the award.

Let us see how it would stand if this were the only ground. The objection is that returned soldiers and sailors within the union are to be preferred when seeking employment, and all things being equal, to other union members. It is purely an internal preference. Well, unless the applicant desires to discriminate against returned soldiers and sailors in the union in favour of members who are not returned soldiers or sailors, there is no individual grievance. The applicant has not in so many words said it does desire so to discriminate. Unless, therefore, notwithstanding the declared and recognised policy of this country, it is to be held rigidly that the individual arbitrary power to discriminate against returned soldiers and sailors is a right that can demand to be conserved by a Court, even at the cost of destroying the whole provision for preference and against discrimination and irritating anew an industrial sore, or is a right that ought to be protected even to the public detriment, we do not see why that extreme course should be followed in this case. The Court is not obliged to take that course, and, in our opinion, sound discretion points to refusal so far as this ground is concerned. As to the other grounds, they are not based on any alleged infringement of the Constitution, but on failure to follow the provisions of the Act, that is, of the Legislature.

For reasons given on the injunction motion and for the reasons we shall now give in connection with sec. 31 of the Act, a complete answer exists as to those other grounds, even assuming there was the alleged failure, and even assuming further that, apart from that section, there was no discretion to refuse the remedy.

3. *Section 31 of the Act.*—It must be conceded the will of the Legislature in sec. 31 is as potent as its will in any other part of the Act. If it says, as in effect it does say by sec. 31—"Though until an award "or order is actually made parties may insist on compliance with our directions and advantage may be "taken of the means provided by the Act to prevent "departure from those directions yet once the award "or order is made and the Commonwealth's decision "terminating the dispute is formally published it "shall for the sake of industrial peace within the "Commonwealth be as though all our directions had "been followed"—why is the Court to interpose and deny that result, to the obvious disturbance of the public peace? Where a Legislature prescribes various

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. safeguards for the formation of statutory companies, safeguards which as enacted are essential to the very existence of a company, and yet makes a registrar's certificate conclusive evidence of regularity, no one questions its efficacy. The House of Lords itself, in a well-known decision, admits coercion by the legislative will in such a case. But where the services of a whole continent internally and externally in relation to its multiple industries is concerned, it is gravely argued that even so emphatic a declaration as sec. 31 is to be disregarded. We are unable to approve the argument. Indeed, except so far as it rests on the contention of utter invalidity, we have to confess our inability even to understand it. We shall state why we do not accept the argument.

As to its general nature and effect, we have, in conjunction with our brother Powers, stated our opinion in the contemporaneous case of *Ince Brothers v. Federated Clothing Union*, 30 A.L.R. 310. We incorporate that opinion, and add the following, solely appropriate to the present case. The problem as to sec. 31 relates both to its interpretation and its legal effect so interpreted. It was sought, first, to interpret the section as an attempt to exclude judicial interference with awards even if they openly violate the Constitution, with the legal effect of the complete nullity of the section. The interpretation of any legislative enactment consists simply of declaring the intention of the legislator ascertained from the words used. The *prima facie* meaning of words is their primary or natural sense. But a secondary or more limited sense may be required by the subject or the context—*Ontario v. Mercer*, 8 A.C. 767 at p. 778.

Sub-section (1) of sec. 31 says—"No award or "order of the Court shall be challenged appealed "against reviewed quashed or called in question or be "subject to prohibition mandamus or injunction in "any other Court on any account whatever." The words used are certainly, in their literal signification, as sweeping as any that could be used. Literally, therefore, they confer on every "award or "order" of the Arbitration Court complete immunity from curial review and supervision of every kind. They unmistakably cover in their literal signification even departures from all jurisdictional limits which have been prescribed. In the case of a plenary legislature no one would, we think, venture to dispute that such is the literal and primary ambit of the words used. But before we so determine in the present case we must have regard to the nature of the legislator and to the subject of the legislation. For it is always material in construing a document to inquire whose instrument it is and what are the surrounding circumstances. The legislator is the Commonwealth Parliament, a Legislature of enumerated powers, and in this case of a power limited in more than one way. It is a well-established principle of construction of even English Statutes to limit general words by considerations which in *Stradling v. Morgan*, Plowden 204, are called "foreign circumstances."

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. The latest case of supreme authority is that of *Viscountess Rhondda*, (1922) 2 A.C. 339. In that case Viscount Birkenhead, L.C. (with whom concurred Lord Atkinson, Lord Buckmaster, Lord Sumner and Lord Carson), said (p. 365)—"The words of the Statute 'are to be construed so as to ascertain the mind of 'the Legislature from the natural and grammatical 'meaning of the words which it has used, and in so 'construing them, the existing state of the law, the 'mischiefs to be remedied, and the defects to be 'amended, may legitimately be looked at, together 'with the general scheme of the Act.' The learned Lord Chancellor refers, among other things, to 'a 'constitutional question of the utmost gravity.' See, also, *per* Lord Dunedin at p. 390, and by Lord Wrenbury at p. 397, the latter approving *Stradling v. Morgan* (*supra*).

Numerous prior examples are found of "foreign 'circumstances,' that is circumstances extraneous to the enactment interpreted, limiting the generality of its terms. Among them are—*Jefferys v. Boosey*, 4 H.L.C. 815; *Ex parte Blain*, 12 Ch. D. 522; and *Cooke v. Vogeler*, (1901) A.C. 102. These authoritative decisions indicate that even where Parliament confessedly possesses plenary power within its own territory, the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would be *prima facie* expected to respect. Something unequivocal must be found either in the context or the circumstances, to overcome the presumption. But if that is the case where Parliament has the power to go as far as the words themselves would literally extend, how much greater is the obligation of reducing the generality of words, if that be reasonably possible, where the Parliamentary power is restrained by a written Constitution, and where the full imputed intention would entirely nullify the enactment! The maxim *ut magis valeat quam pereat*, as applied in *Macleod v. Attorney-General*, (1891) A.C. 455, is applicable to sec. 31 (1)—see *Jumbunna Case*, 14 A.L.R. at 720, 721; *Irving v. Nishimura*, 14 A.L.R. at 204; and *McArthur v. Queensland*, 27 A.L.R. 130 at 138. This is, indeed, a rule of very general application—see cases cited in Broom's *Maxims* (7th ed.), at page 399. There is no reason for imputing to Parliament a wilful transgression of the Constitution, nor anything but a strong determination to prevent, after the completion of an award, any of its own provisions from being fatal to the establishment of the industrial peace, which is the sole *raison d'être* of the Statute. The words "on any account whatever" are properly construed as referring to the effect of Commonwealth legislation. They go to the very limit of the Parliament's power, but no further. The sub-section, which was penned originally when the "Court of Arbitration," so-called, was thought to be both arbitral and judicial, covers every conceivable mode of attack, and for every conceivable reason, jurisdictional or other-

wise. But that is always clear of conflict with the Constitution. The first interpretation suggested is therefore, in our opinion, inadmissible.

Then failing that, it was argued that defects of jurisdiction, even if the creation of Parliament, were not within the protective scope of the sub-section. For this *Clancy's Case* (*supra*) was cited—1 C.L.R. 175. That was a case under a New South Wales Statute. This Court held a section which enacted (*inter alia*) that "no award . . . of the Court "shall be liable to be challenged, appealed against, "reviewed, quashed or called in question by any "Court of judicature on any account whatsoever," was similar to sections taking away the right to *certiorari* and other remedies, and "had always been "construed as not extending to cases in which a "Court with limited jurisdiction has exceeded its "jurisdiction." That passage (pp. 196 and 197) was relied on in this case. That case overruled the judgment of the Supreme Court of New South Wales. There were other reasons given for arriving at the conclusion besides what was held to be the similarity of the well-known form of *certiorari* sections. But later cases have to be taken into account when dealing with the present sec. 31 (1).

Two cases in this Court, viz., *Baxter's Case*, 16 A.L.R. 461; and *Minister for Labour v. Mutual Life Company*, 28 A.L.R. 252, are important. *Baxter's Case* (*supra*) was a case arising on the New South Wales Statute amended to meet *Clancy's Case* (*supra*) by adding "prohibition." Diversity of opinion appears in the judgments, and the judgments of O'Connor, J., and Isaacs, J., would in the present case make in favour of refusing prohibition and *certiorari*. The case of the *Minister for Labour*, 28 A.L.R. 252, was decided on the New South Wales "Industrial Act 1912." No doubt the observation applies that the construction of that Act does not govern the construction of sec. 31 of the Commonwealth Act. But it must be noted that, in sec. 55, the words "no other "proceeding . . . by prohibition shall be allowed" were not thought to be governed by *Clancy's Case* (*supra*).

Another case to be taken into account is *Rex v. Nat Bell Liquors Limited*, (1922) 2 A.C. 128. That case is important for several reasons. It does not, of course, control the present case, because the construction of one Act cannot control the construction of another in different language. But it enforces with supreme authority what has not always been recognised, that the language of the ordinary privative section in English legislation is always in a form which is very limited. The words ordinarily used are such as "final" and "without appeal;" and, so says Lord Sumner for the Judicial Committee (at p. 160)—"Again and again the Court of King's Bench "had held that language of this kind did not restrict "or take away the right of the Court to bring the "proceedings before itself by *certiorari*. There is no "need to regard this as a conflict between the Court

"and Parliament; on the contrary, the latter, by "continuing to use the same language in subsequent enactments, accepted this interpretation." We may add some other words which had the same effect namely, "remove" and "removable," which frequently went with the words "final and without appeal." See, for instance, 13 Geo. III., c. 78, sec. 81; 7 and 8 Geo. IV., c. 53; 24 and 25 Vict., c. 96, sec. 111, c. 97, sec. 69, and c. 100, sec. 72.

It is to cases decided on provisions of that nature that the Privy Council, in *Willan's Case*, L.R. 5 P.C. at page 442, referred when it said—"There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*," that is for manifest want of jurisdiction or for manifest fraud. That observation was apparently extended to *Clancy's Case*, and as we suggest, in misapprehension. No case was cited to us or is known to us which affords a precedent for such extension. Lord Sumner, in *Rex v. Nat Bell Liquors* (*supra*), proceeds to show how the Common Law jurisdiction of the Court of Queen's Bench was limited in its exercise by a mere change in procedure. By a statutory provision as to the contents of a record what was "manifest" before ceased to be manifest afterwards, and so the jurisdiction for that reason only was incapable of exercise in future. The case of *Rex v. Nat Bell Liquors* (*supra*) does not directly assist us further. But it very materially assists indirectly, and for this reason. At page 159 the learned Lord, speaking of the new statutory provision's effect on the Common Law jurisdiction of the Queen's Bench, and after observing "it did not stint the jurisdiction of that Court," says—"What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer; it was the inscrutable face of a sphinx." At p. 161 he says—"The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending Statutes directed to the removal of difficulties in the administration of the law which arose out of common law rules and forms no longer adapted to the purposes of the day." And finally (at p. 162) the learned Lord, with manifest appositeness to the present case, after alluding to the established position created by English legislation, and the presumption in Canada from similar legislation, observes—"Of course, it is competent for the Legislature to go further than this, and where the language used shows such an intention, the presumption above stated is negated. This may be done notably in two ways. The one is to take away *certiorari* explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as 'final' or 'without appeal'; the other is, on the other hand, to restore it to its pristine

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.
"rigour by restoring to the record a full statement of the evidence." The second course is certainly not taken; the first incontestably is taken.

The Commonwealth Parliament, it is patently plain, has endeavoured, like the State Legislatures, to escape from the judicially restricted forms of expression referred to in *Willan's Case* (*supra*), and when dealing with the new industrial legislation by words intended "to disarm the exercise" of prohibition and *certiorari* for departure from its own directions, and to displace *certiorari* entirely by words not within the older decisions upon such words as "final" and "without appeal," and thereby to make its "awards"—that is its legislative codes—as stable and as free from judicial supervision as possible, except by the tribunal expressly constituted for the purpose and specially conversant with the subject in hand. Unless the doctrine that, even the express words of Parliament are not sufficient for the purpose, is to be the rule of this Court, we can see no loophole in sec. 31 (1) whereby prohibition or *certiorari* can creep in for any statutory defect, once an award is duly made and perfected. The mere use of the word "prohibition" seems decisive, for there is no room for its exercise except for lack of jurisdiction. Again, the words "on any account whatever" challenge the ingenuity of a draftsman to find any expression more complete. Nor does the fact that sec. 75 (v.) of the Constitution confers inalienable jurisdiction by way of "prohibition" on this Court—not *certiorari*, be it observed—carry the matter any further. That jurisdiction exists, but it needs a proper case for its exercise. Such a case exists wherever Parliament evinces its intention that curial action shall bind only when certain conditions are satisfied. But if Parliament in one section says that certain conditions shall be observed, and in a later section enacts expressly that, notwithstanding they are not observed, the arbitral action is not to be challenged, there arises what Griffith, C.J., in *Baxter's Case* (*supra*, at p. 466), describes as "a contradiction in terms." As he says, "effect must be given to the whole Statute." But how is the apparent contradiction to be reconciled, and what is the effect of the Statute in this case? The effect is that, before an award is made ample opportunity is given to ascertain, by legal process of various kinds, whether the new industrial code in question shall be promulgated for the co-operators in the industry. But once the code is promulgated formally, that shall be the law of the Commonwealth, and industry may safely proceed on that basis, peace shall be preserved, and the community need not fear an interruption in the satisfaction of its needs. That is the broad intention written in bold terms on the face of the Act, and that is the dominant feature of the legislation. To read sec. 31 otherwise is to create what Lord Sumner calls "a conflict between the Court and Parliament," and, we add, a disastrous conflict in a domain fully within the legislative competence of Parliament.

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.

For the reasons we have felt constrained to state with elaboration to meet the complex and in some respects meticulous objections that were gathered together in argument to destroy the awards in question, we are of opinion that the application must be refused.

STARKE, J.—The Waterside Workers' Federation applied to this Court, pursuant to the "Arbitration Act 1904-1920," sec. 48, for an injunction restraining Gilchrist, Watt and Sanderson Limited—which I shall call the Company—from contravening certain provisions of an award of the Arbitration Court, and the Company obtained an order *nisi* from this Court calling upon the President of the Arbitration Court and the Federation to show cause why further proceedings upon the award should not be prohibited, or, in the alternative, why a writ of *certiorari* should not issue, directed to the Arbitration Court and the President thereof, to remove the proceeding before that Court and the award into this Court. In 1922 the Federation requested certain shipowners, including the Company, to adopt the following condition of employment of members of the Federation, namely, "that members of the Federation should have preference of employment over non-members. If at any time the Federation fails to supply a sufficient number of competent men approved of by the employer for his requirements, such employer may engage non-union labour to make up the deficiency at the rates and conditions set out in the last award of the Court. A failure to supply a sufficient number of competent men approved of by the employer shall mean a failure to do so within one hour, meal hours excluded, after a request in writing (by any employer directed to the secretary of the local branch) shall have been lodged at the registered office of the local branch marked Labour, with the secretary, clerk or caretaker thereof, during business hours. The said condition is to apply to Sydney, Melbourne, Tasmania and the local work at Port Pirie, South Australia, also Albany, West Australia." The request was not acceded to, and a compulsory conference was summoned, pursuant to sec. 16A of the Arbitration Act, and no agreement being reached, the dispute—as the request is now called—was thereupon referred to the Arbitration Court, pursuant to sec. 19 (d) of the Act. Subsequently an award was made which is the subject of these proceedings.

The document is curiously phrased and its meaning by no means clear, but it provides in substance—so far as its provisions are material to these cases—(1) That the respondents in the proceedings requiring wharf labourers' work to be done in Sydney give preference of employment over all persons, other things being equal, to returned soldiers and sailors members of the Federation, subject, however, to the express provisions of sec. 81A of the Arbitration Act, that nothing in any award shall operate to prevent the employment of returned soldiers or sailors. 2.

That the employment of men at the weekly rates of wages, who are not returned soldiers or sailors, shall not be a breach of the award as to preference if the respondents first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates. 3. That the respondents to the proceedings requiring wharf labourers' work to be done in Sydney shall not discriminate, other things being equal, against members of the Federation other than returned soldiers and sailors.

In February, 1924, an application was made to the Arbitration Court, pursuant to sec. 38 (o) of the Arbitration Act, to give an interpretation of this award. That Court, however, quite misunderstood its powers, and proceeded to determine the true meaning of the award in point of law, and therefore attempted to exert the judicial power of the Commonwealth. Thus the Court asserts that—"The award must be interpreted quite apart from any question whether there have been breaches of it, and in the same way as any other Court would do, namely, not to consider what was intended or what the Court did by the award, that can only be ascertained from the words used." No part of the judicial power of the Commonwealth is or can be vested in the Arbitration Court as at present constituted—*Alexander's Case*, 24 A.L.R. 341—and therefore sec. 38 (o) cannot confer that power. The "interpretation" given by the Arbitration Court to its award of December, 1923, is a nullity, and cannot therefore be relied upon in these cases. I do not stay, in this view, to consider the validity or effect of sec. 38 (o) as to interpretation; but, as I am at present advised, this provision does not appear to me to add anything to the power to vary awards and orders and to reopen questions contained in the preceding words of the sub-section.

We are consequently thrown back upon the award itself, and the Federation contends that the Company has contravened its terms, because it refuses preference to returned soldiers and sailors, and discriminates against members of the union in the employment of labour. A firm called the Shipping Labour Bureau is registered under the "Firms Act" in New South Wales. The members of this firm comprise shipowners, shipping representatives, including the Company, and stevedores. It engages, apparently, two classes of wharf labourers, one which it calls "permanent hands," paid upon a weekly basis, and another which it calls "casuals," paid at an hourly rate. These permanent hands and casuals must be registered at the bureau, and unless so registered cannot work through the bureau. The permanent hands consisted of returned soldiers or sailors within the meaning of the "Returned Soldiers and Sailors Employment Act 1917" of New South Wales; "loyalists," i.e., persons in whose favour certain shipowners or shipping representatives, including the Company, might discriminate under an award of the Arbitration Court, dated June, 1918—see 12 C.A.R. p. 293—and a

few other persons who were neither returned soldiers or sailors, nor "loyalists." The casual hands, prior to the award of December, 1923, consisted of returned soldiers and sailors, some of whom I understand were members of the Federation, and "loyalists," but since the award the "casuals" have consisted of returned soldiers or sailors only. Admittedly, since the award, "permanent hands," that is to say, returned soldiers and sailors, "loyalists," and possibly some of the few men neither returned soldiers or sailors, nor "loyalists," have been doing wharf labourers' work in and about ships controlled by the Company. Moreover, the Company insists that this employment is lawful and in no wise a contravention of the award. But the fact remains as to the permanent hands, that the Company did not give preference, in connection with wharf labourers' work which it required to be done, to returned soldiers and sailors members of the Federation, over the "loyalists" and the few other men already referred to, as prescribed by the award. It follows, I think, that discrimination is exercised in favour of these "loyalists" and "other men" against members of the Federation. So far as the "casuals" are concerned, no contravention whatever of the award has been proved. They are all returned soldiers and sailors, and the award does not prohibit employers from selecting for work those whom they please within the preferred class. And, by the terms of the award itself, discrimination is allowed in favour of returned soldiers or sailors against members of the Federation. The bureau, in order to comply with the award, notified some 200 "loyalist" wharf labourers who were "casuals" not to use the bureau again. Those who are acquainted with the history of the "loyalists," which is set out by my brother Higgins when President of the Arbitration Court, in the 12th volume of the *Arbitration Court Reports*, at p. 293, may feel that the December award did not, through some lack of appreciation of the facts, sufficiently provide for the protection of these unfortunate men, but that is in truth a matter wholly for the consideration of the Arbitration Court.

The practical object of the injunction proceedings now before us is to oust the permanent hand "loyalists" and "other men" from the wharf labourers' work required by the bureau or its members to be done in Sydney. Preference to soldiers and sailors members of the Federation will exclude the "loyalists," because the former class will absorb most, if not all, of the wharf labourers' work required by the Company and other members of the bureau. Again, the clause in the award providing that the Company and other members of the bureau shall not discriminate against members of the Federation, also seriously affects the position of the "loyalists" and their chance of employment. A pious declaration is set forth in clause 8 of the award that the members of the Federation will not unduly interfere with or make things unpleasant for the

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON.
"loyalists" who may be employed from time to time during the award, and will favourably consider applications of competent and eligible "loyalists" to become members of the Federation. It does not surprise me that the Company makes a last stand for these "loyalists" and others, numbering some 200 men. They have never been heard by any Court, but are described as "highly efficient, obedient, speedy, dependable and honest workmen, and willing to undertake the handling of any class of cargo." According to the Federation, the Arbitration Court requires, in the interests of industrial peace, that these men should be sacrificed, in the manner already indicated, and their skill lost, I fear, to the waterfront of Sydney.

The Company seeks to avoid this result, and to justify or excuse its action in allowing these men to do wharf labourers' work in and about ships controlled by it, on several grounds—

1. That the men are not employed by the Company, and the duty prescribed by the award is to give preference of employment, when requiring wharf labourers' work to be done. The bureau, so it was argued, and not the Company, employed the men. I pass by the fact that the Company was one of the members of the bureau, and therefore a member of the firm which employed the men, because it is simpler to treat the bureau, for the purposes of the present case, as a separate and independent entity. The bureau, in my opinion, acted simply as a supplier of labour to its members: it hired the services of wharf labourers to such members at an agreed amount; it engaged the "permanent hands," and if a member required wharf labour, then he notified the bureau, which supplied the number of men required—from the "permanent hands" in the first place, and, in the event of a shortage, from the "casual hands." The members did not pay the men for their services, but paid the bureau; and they did not exercise the power of dismissing the men for misconduct, unskillfulness, or any other reason, but made complaint in such cases to the bureau, and the bureau then dealt with the matter. The control and direction of the men, however, in loading and unloading the Company's ships, was, I am satisfied, in the hands of the member using their services, namely, the Company, and the men were bound in the course of their work to conform to the orders of that member. In such cases the law is clear enough—when an employee is sent by his employer to do work for another, it is a question of fact whether he becomes *quoad hoc* the employee of the person for whom he is for the time being working, or whether he remains in all respects the employee of his ordinary employer—see *Salmond, Torts* (5th ed.), p. 99; *Donovan v. Laing Syndicate*, (1893) 1 Q.B. 629; *Jones v. Scullard*, (1898) 2 Q.B. 565; *Hall v. Lees*, (1904) 2 K.B. 602. The facts of the present case make it abundantly clear to my mind that *quoad* the loading and discharging of the Company's ships,

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. the wharf labourers were in its employ and under its directions.

2. That the Court had no jurisdiction to prescribe that the Company should not discriminate against members of the Federation. The opinion of my brother Higgins, in the *Engine-drivers Case*, 7 C.A.R. at page 147, when sitting as President of the Arbitration Court, was strongly relied upon in support of this proposition. Preference was claimed, but the Court is not restricted to the relief claimed, and may give such relief, within the ambit of the claim, as seems to it expedient—Arbitration Act, sec. 38B. Now, the Court refused the full claim to preference, but granted it in part; and also a lesser remedy, namely, that the employers should not discriminate against members of the union. Such a provision as this is, in my opinion, clearly within the ambit of the claim, and is an industrial matter which the Arbitration Court is competent to award—Arbitration Act, sec. 4.

3. That the award prescribing preference relates to men paid on the hourly basis ("casuals") and not to men paid on the weekly basis (permanent hands). The argument was based on the fact that the main award of the Arbitration Court in relation to waterside workers only prescribed an hourly rate of wage. Therefore, it is said, the award cannot apply to men who are not engaged on an hourly basis. A minimum wage at an hourly rate is prescribed by the award, however, for waterside workers members of the Federation, if employed by the Company and others; apart from some special provision in the award, employment on a weekly basis and payment at a weekly rate would not enable the employer to escape payment of the minimum wage fixed at the hourly rate if the weekly sum fell below that amount. The argument is as faulty in logic as it is bad in law. But then it was claimed that the men employed at weekly rates were exempted from the preference clause by reason of the express provision of the December award—"The employment of men at weekly rates of wages who are not returned soldiers or sailors shall not be deemed a breach of this award as to preference if the respondents (who include the Company) first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates instead of at casual rates." This argument fails for two reasons—one, that the Company did not employ men at weekly rates; it hired them on terms from the bureau, and paid the bureau for their services at a rate based on the number of hours worked; the other, that it did not offer weekly employment to all the preference men, at weekly rates or at all.

4. That preference to returned soldiers and sailors members of the Federation was contrary to the provisions of the law of the State of New South Wales—"Returned Soldiers and Sailors Employment Act 1919" (No. 38), sec. 3—and therefore beyond the constitutional power of the Commonwealth. The

argument is based upon the *Woodworkers' Case*, 15 A.L.R. 374; and *Whybrow's Case*, 16 A.L.R. 185—and if those cases be still law I should be prepared to assent to the argument. The State Act provides that every employer "shall give preference in employment 'in an industry to a returned soldier or sailor who . . . is registered for employment in that industry 'under sec. 10 of the Act or applies in writing for 'such employment and is not excluded from the benefit of the Act as against any other person offering 'his services at the same time.'" But, by force of the definition in sec. 4, the returned soldier must be resident in New South Wales, and his enlistment must have terminated. Now, the Federal award is less extensive in some respects than this provision, and more extensive in other respects. Thus the preference under the award is limited to soldiers and sailors members of the Federation, but is not conditioned upon residence in New South Wales or upon registration under the State Act. There may be some returned soldiers and sailors who fall within the terms of both the State law and the Federal award, and who can claim preference under each provision—cf. *Engine-drivers' Case*, 26 A.L.R. at p. 174. But in the main, the State Act and the award must conflict in operation, and both cannot be obeyed. The award is, therefore, in my opinion, inconsistent with the State law. It is impossible, however, to my mind, to reconcile the principles underlying the decisions in the *Woodworkers' Case* and *Whybrow's Case* with the decision of this Court in the *Engineers' Case*, 26 A.L.R. 337, at p. 344, where the Court said—"However valid "and binding on the people of the State, where no "relevant Commonwealth legislation exists, the "moment it" (that is the State legislation) "encounters repugnant Commonwealth legislation "operating on the same field, the State legislation "must give way." An award made under the authority of the Commonwealth legislation takes its sanction and its force from that legislation, and has therefore supremacy over the State law. Consequently this argument also fails.

5. That the award of preference to returned soldiers and sailors members of the Federation over all persons, subject to the provisions of sec. 81A, transcends the constitutional power of the Commonwealth, and exceeds the authority of the Arbitration Court. The preference prescribed is "over all persons," but subject to the provisions of sec. 81A of the Act, and that no doubt gives the selected class, subject as aforesaid, preference over other members of the Federation, as well as over persons who do not belong to it—non-unionists as they are called. The Federation did not claim preference for some of its members over other members, but over non-members. But there can be no doubt that the Arbitration Court might obtain cognisance of an industrial dispute involving a claim for preference of a selected class of unionists over "all other persons," and make an award with respect thereto. An industrial dispute includes a dispute as

to industrial matters, and industrial matters include the employment, preferential employment, dismissal, or non-employment of any particular persons—see Arbitration Act, secs. 4, 19, 24.

The question is whether the Arbitration Court can make such an award if no dispute or claim was raised as to the particular matter awarded and now in controversy. Two sections were relied upon for this purpose, namely, secs. 38B and 40. I pass by sec. 38B, because the provisions of sec. 40 warrant, in my opinion, the award made by the Court. That section is not a limitation but an expansion of the authority of the Arbitration Court; it is a substantive grant of authority to the Court in connection with industrial disputes, of which it has cognisance, whether preference has or has not been put in dispute by the parties, or claimed in the proceedings before it. It may be exerted, even after an award has been made, on the application of any organisation or person bound by the award, and whenever, in the opinion of the Court, it is necessary for the prevention or settlement of an industrial dispute or for the maintenance of industrial peace or for the welfare of society. As a matter of construction, the section enables the Court, in my opinion, to select the members of organisations who shall have preference, and that selection may be for or against all the members of an organisation, or for or against a limited class among them. But the selection being made, then, other things being equal, preference "shall . . . be given to such members"—that is to the members selected—over "other persons"—which phrase must, to my mind, denote all persons but the selected class. There is no reason that I can understand for limiting the words "other persons" to persons who are not members of the organisation.

It has been suggested that this construction of sec. 40 exceeds the constitutional power of the Commonwealth. But the Parliament has "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," and while the power of the Parliament is limited and cannot be transcended, yet within the ambit thereof the Parliament is supreme, and "may use any means which are conducive to the exercise of a power granted by the Constitution"—*Stemp v. Australian Glass Manufacturers*, 23 A.L.R. 273 at p. 276; "you may complement, but you may not supplement, a granted power"—*Whybrow's Case*, 16 A.L.R. 513 at p. 522. Now, implicit in sec. 40 is the necessity of some industrial dispute before the powers conferred by that section can be exercised. The constitutional power is not limited to a determination by means of arbitration of the matters or items in dispute, but is a power to make laws with respect to arbitration for the prevention and settlement of industrial disputes. Given a dispute, actual or threatened, it is within the com-

petence of Parliament to say what means, what powers and authorities, the arbitrator may use for the purpose of settling or preventing that dispute. If industrial peace be the object of the Constitution and the Arbitration Act, and the Legislature attempts to attain that end by means of a power conferred upon the arbitrator to grant preference, then Courts of law cannot deny that the end justifies the means, however severely some individuals may suffer—see *Adkins v. Children's Hospital* (Holmes, J.), 261 U.S. at p. 571. In my opinion, the provisions of sec. 40 complement, and do not supplement, the constitutional power of the Commonwealth, and are competent and valid provisions—*cf. Waterside Workers' Case*, 26 A.L.R. 233.

Consequently, it appears to me that an injunction must issue against the Company restraining further contravention of the award of the Arbitration Court. It follows, of course, that the order *nisi* for prohibition and *certiorari* must be discharged.

I should have been glad to leave the matter here, but the opinions prepared by my brother Isaacs in these cases and in *Ince's Case* make desirable some reference to sec. 31 of the Arbitration Act, and to the power to issue prohibition to the Arbitration Court. So far as sec. 31 is concerned, no one can deny that the Parliament cannot transcend the Constitution by any form of words or by any device. "From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify Acts of the Parliament, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law"—*Adkins v. Children's Hospital* (*supra*, 544). Thus, sec. 31 cannot affect the grant of jurisdiction to this Court contained in sec. 75 (v.) of the Constitution. Nor can it give to an award which transcends the constitutional power of the Commonwealth any validity or force. Some remedies, such as prohibition, *mandamus*, or injunction, so far as they be within the power of Parliament, may be withdrawn from the Courts, but still that does not make such an award efficacious; it is still beyond the power of the Commonwealth, and binding upon no one. So that if Parliament, as in sec. 31, enacts that the award shall not be challenged in any Court, still, if that award transcends the Constitution, it is of no effect. The supreme law must prevail, and the provisions of sec. 31 must be rejected. Consequently I should have felt no difficulty in refusing an injunction in this case if I were of opinion that the provisions of sec. 40 exceeded the constitutional power of the Commonwealth. But I

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. will not further pursue the consideration of sec. 31, for I realise that the views I have expressed are mere opinions and quite unnecessary for the determination of these cases.

The power of the High Court to issue prohibition to the Arbitration Court has been affirmed on many occasions. Every member of this Court, both past and present, has affirmed and acted upon the power, and no question has been more hotly contested or more thoroughly expiored before it. The long history of the controversy may be found in the following cases:—*Broken Hill Case*, 15 A.L.R. 416; *Whybrow's Case*, 16 A.L.R. 373; *Tramways Case*, 20 A.L.R. 126; *Builders' Labourers' Case*, 20 A.L.R. 411; *Holyman's Case*, 19 A.L.R. 429; *Tramways Case (No. 2)*, 20 A.L.R. 470; *Alexander's Case*, 24 A.L.R. 341; *Hibble's Case*, 27 A.L.R. 84; *Hibble's Case (No. 2)*, 27 A.L.R. 199. To which may be added two cases relating to proceedings for prohibition to State industrial tribunals, namely—*Clancy's Case*, 1 C.L.R. 181; *Haberfield's Case*, 14 A.L.R. 224.

It is now suggested that the power does not exist—firstly, because the award of the Arbitration Court is legislative and not judicial in character; and secondly, because prohibition cannot in any case be granted after an award has been made, for the arbitrator is then *functus officio*. Neither argument has escaped the attention of the Court. In *Whybrow's Case*, 16 A.L.R. 373 at p. 380, Griffith, C.J., said—"A prohibition is a writ directed to the Judge and parties in an inferior Court, and does not lie except to persons or bodies exercising judicial or quasi judicial functions. It lies to a pretended Court as well as to a real one—*Chambers v. Jennings*, 2 Salk. 553. When, therefore, the Constitution speaks of a prohibition against an officer of the Commonwealth, it means an officer whose functions are judicial or quasi judicial. It cannot be denied that the Judge of the Arbitration Court is an officer of the Commonwealth or that his functions are judicial." And in the *Tramways Case*, 20 A.L.R. 126 at p. 134, my brother Isaacs was even more explicit—"It is necessary to define the exact point arising for our decision. The application is to prohibit the Arbitration Court, as I term it for brevity, from enforcing an award, already made and completed; that is to say, it is not an application to prevent the President from proceeding to make an award. The difference is precisely as if, in ordinary State jurisdiction, a private arbitrator made an award between parties, and it were then filed as a rule of Court, or an action were brought upon it in the Supreme Court. The fact that the Arbitrator happens to be personally identical with the individual who presides in the Court is irrelevant. The tribunals are distinct; and the question is whether 'a Court' can be prohibited under sec. 75 (v.) of the Constitution. The well-known rule that a judgment given without jurisdiction can be prohibited so long as anything remains to be done under it

does not touch this point. The Legislature has assumed to create a Court of record for all purposes, preliminary and consequent, as well as for the actual settlement of the dispute. And no doubt the nature of the function of the arbitrator in actually determining the dispute is quasi judicial in the sense indicated by Lord Selborne, in *Spackman v. Plumstead Board of Works*, 10 A.C. 229 at p. 240. That would be sufficient, according to the established authorities, to attract prohibition in a proper case. See, for instance, *Church v. Inclosure Commissioners*, 11 C.B.N.S. 664; *R. v. Local Government Board*, 10 Q.B.D. 309 at p. 321; *Great Western Railway v. Waterford and Limerick Railway Co.*, 17 Ch. D. 493; *In re Local Government Board, Ex parte Kingstown Commissioners*, 18 L.R. Ir. 509 at p. 514; *Partridge v. General Council of Medical Education*, 25 Q.B.D. 90 at p. 96; *R. v. Clerkenwell General Commissioners of Taxes*, (1901) 2 K.B. 879." (To these I would add the late case of *R. v. Electricity Commissioners*, (1924) 1 K.B. 171.) "But in the sense that constitutes a judicial tribunal a Court of justice, one of the kind of Courts in which the Constitution vests the judicial power, the arbitrator is not a 'Court,' and in my view—reasons for which appear in the *Saunders' Case*, 15 A.L.R. at p. 393, and following; and in the *Boot Employés' Case*, 16 A.L.R. at p. 203 and following—the Legislature cannot convert him into a 'Court' within the meaning of the judicature provisions of the Constitution. So much of the Arbitration Act as assumes to do so may, in my opinion, be simply disregarded. The President has all necessary powers, and the mere fact that he is called a Court does not affect his powers. But in respect of the enforcement of an award, the position is entirely different. The award, when made, creates and settles rights, and those rights may be judicially enforced in the manner prescribed by the Legislature, by any recognised Court, and in my opinion, by no other, because such enforcement, including interpretation, is properly within the judicial power. In this domain the Court is well constituted, and none the less by reason of the wide provisions of sec. 25 of the Act. That section should be read as a procedure section, and it does not except 'rules of law,' as was the case in *Moses v. Parker*, (1896) A.C. 245, a circumstance that seems to me to have been the real point of the judgment of the Privy Council. And see *Canadian Pacific Railway v. Toronto Corporation*, (1911) A.C. 461. The Legislature, so far from contemplating the Court being free from any rules of law, clearly intends that the rights of the parties shall be fixed by the award, and that those rights are to be enforced by the methods prescribed—see, for instance, secs. 32 and 48. The tribunal which in this case is sought to be prohibited is therefore a Court in the strict sense; and the question is, does prohibition ever lie to it, even when it is proceeding

"to exceed its jurisdiction. I would here introduce a word of caution to avoid further misapprehension. This is not a question whether—whatever be the law as to the nature of an industrial dispute, or the validity of the enactment of preference—that Court has or has not jurisdiction to entertain an application to enforce an award *de facto* made by the arbitrator, or to decide the validity of any award in whole or in part. That may yet have to be determined. It is simply a question whether, assuming the Court itself to be proceeding without or in excess of jurisdiction, it may be prohibited. . . . On the whole, therefore, I am opinion that, notwithstanding sec. 31 of the 'Commonwealth Conciliation and Arbitration Act,' it is within the competence of this Court, under sec. 75 (v.), to grant prohibition to the Arbitration Court in a case where that Court is proceeding to act without jurisdiction"—at page 138.

Alexander's Case, 24 A.L.R. 341, established as a decision the opinion given by my brother Isaacs in the *Tramways Case*, that "in the sense that constitutes a judicial tribunal, a Court of justice—one of the kind . . . in which the Constitution vests the judicial power—the Arbitration Court is not a Court, and that so much of the Arbitration Act as assumes to so treat it might be disregarded. But in none of the judgments is any doubt thrown upon the other proposition, so explicitly stated in the opinion of my learned brother. In *Hibble's Case*, 27 A.L.R. p. 84, the whole Court, excepting my brother Isaacs, who took no part in the case, concurred in granting prohibition to a special tribunal under the Arbitration Act, and it is inconceivable that *Alexander's Case* was overlooked or forgotten by any member of the Court.

Thus the settled law of the Court is that prohibition may issue to the Arbitration Court. *Clifford and O'Sullivan*, (1921) 2 A.C. 570, is said to conflict with these decisions. But the body there sought to be prohibited, though called a military Court, "was not a Court in any legal sense." "It was not a Court-martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands . . . and its 'sentences,' if confirmed, derived their force, not from the decision of the military Court, but from the officer commanding His Majesty's forces in the field." Prohibition, it was held, did not lie in such a case, because the officers constituting the military Court did not claim to act as a judicial tribunal in any legal sense. But the Lord Chancellor, with whom Lords Atkinson and Shaw concurred, said (at p. 583)—"It is true, also, that in *Reg. v. Local Government Board*, 10 Q.B.D. 309, 321, Brett, L.J., expressed the opinion that the Court should not be chary of granting prohibition, and that wherever the Legislature entrusts to any body of persons, other than the

WATERSIDE WORKERS' v. GILCHRIST, WATT & SANDERSON. superior Courts, the power of imposing an obligation upon individuals, the Court ought to control those persons if they attempt to go beyond the powers given them by Act of Parliament; but even if this view be accepted, it cannot cover the case of a body of persons to whom no such powers have been entrusted, either by Parliament or by the common law. It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of a writ against a body which has no statutory or common law authority to do either and which claims no such authority." A reversal of the whole of the decisions and practice of this Court cannot be justified on the strength of anything decided in *Clifford's Case*.

Again, this Court has determined that prohibition can issue to the Arbitration Court after an award has been made—that the Arbitration Court is not then *functus officio*—*Tramways Case*, 20 A.L.R. 126; 20 A.L.R. 470; *Builders' Labourers' Case*, 20 A.L.R. 411. In *Clifford's Case* the Lord Chancellor said (at p. 584)—"A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail—see *In re Poe*, 5 B. & Ad. 681; and *Chabot v. Lord Morpeth*, 15 Q.B. 446." But, in the case of the Arbitration Court, established under the Federal law, its award is subsisting and operative, and the proceeding in which it issues remains pending in the Court. Any question can be reopened, and any award or order can be varied—sec. 38 (o) and sec. 39. Nothing in *Clifford's Case*, however, throws any light upon the proper application of the well-known and long-established legal principle mentioned therein to tribunals lawfully established as Courts, with arbitral functions and statutory authority. It seems to me that the members of this Court should stand upon its decisions, and upon the law so declared, and that they ought not individually to depart from them. "It is," of course, "impossible," as Griffith, C.J., said in the *Tramways Case*, 20 A.L.R. at p. 130, "to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as for instance if it . . . is contrary to a decision of another Court which this Court is bound to follow: not, I think, upon a mere suggestion that some or all of the members of the latter Court might arrive at a different conclusion if the matter were *res integra*. Otherwise there would be grave danger of a want of continuity in the interpretation of the

COMMISSIONER OF STAMP DUTIES v. CHAILLE.

"law." And in any case we did not, in the cases now before us, assume the responsibility of reopening the former decisions and reconsidering the reasons upon which they were rested.

ISAACS, A.C.J.—The order *nisi* for prohibition or *certiorari* will be discharged, and upon the motion for injunction the order will be—The Company enjoined against (1) preferring any person whatsoever to returned sailors and soldiers who were members of the Waterside Workers' Federation, subject to the provisions of sec. 81A of the "Commonwealth Conciliation and Arbitration Act 1904-20;" (2) discriminating in favour of any person whatsoever against returned sailors and soldiers who were members of the Federation, subject, however, to the provisions of the Act.

Injunction granted. Order nisi for prohibition discharged.

[Solicitors—For the company, H. de Y. Scroggie and E. S. Dunhill, Blake and Riggall; for the Federation, Farlow and Barker, J. B. Moffatt; for the President, G. H. Castle, Crown Solicitor.] S. K. H.

[Knox, C.J., was absent on leave when judgment was given.]

H. V. E.

FULL COURT—(Isaacs, A.C.J., } June 23, 24.
Rich and Starke, JJ.) }
(Brisbane.)

THE COMMISSIONER OF STAMP DUTIES,
Appellant v.
CHARLOTTE ANN CHAILLE and Others,
Respondents.

*Stamps—Settlement—Creation of trust for sale and conversion—Will—Stamp Acts 1894 to 1918 (Q'ld.), secs. 2, 4, 1st Schedule (Settlement).**

By his will a testator gave, devised and bequeathed all his real and personal estate to his executors and trustees, upon trust to pay the rents, profits and income thereof to his wife during her life, and from and after her decease in trust for his children living at his death in equal shares. The will contained no power of sale and investment. The executors and trustees obtained probate of the will, and subsequently an indenture was executed, to which the parties were the trustees, the widow and the children, who sur-

vived the testator. By that indenture the widow and the children authorised and empowered the trustees, as executors and trustees of the will, to sell, call in and convert the whole or any part of the testator's real and personal estate, to invest the proceeds, and to hold them and the securities representing them upon trust to pay the annual income thereof to the widow during her lifetime; and it was also agreed between the widow and the children that after the death of the widow the children should be entitled to the whole of the real and personal estate in equal shares as tenants in common.—

Held, that the instrument was a "settlement" within the definition of that word in section 2 of the Stamps Acts 1894 to 1918 of Queensland, and was chargeable with *ad valorem* duty as a settlement, and not with a fixed duty as an agreement under seal.

Judgment of the Full Court of Queensland reversed.

APPEAL FROM THE FULL COURT OF QUEENSLAND.

By his will James Mapon Chaille, of Esk, in the State of Queensland, grazier, appointed the respondents, his wife, Charlotte Ann Chaille, and his sons, Harold and Ralph, executors and trustees, and gave, devised and bequeathed all his property, real and personal, to his trustees "upon trust to pay the rents "profits and income thereof to my said wife during "her life and from and after her decease in trust for "my children living at my death share and share "alike." The testator died on 6th August, 1922, and probate of his will was granted to the executors and trustees, who are hereinafter referred to as the will trustees. The respondents, Harold, Ralph, Estelle, Leila and Mabel, were the only children of the testator living at his death. On 31st December, 1922, an indenture was made between the widow and the testator's five surviving children (who were all of age) of the one part, and the will trustees of the other part. That indenture recited (*inter alia*) that no provision had been made in the will for the sale or conversion of the whole or any part of the real and personal estate of the testator, or for the investment of the proceeds of sale during the life of the widow, and that the parties of the first part had agreed that the will trustees, as trustees and executors, should have the power of sale and investment thereinafter mentioned. It then witnessed that, in pursuance of the recited agreement and in consideration of the premises, the widow and the said children of the testator authorised and empowered the will trustees, as trustees and executors of the will, "to sell, call in and "convert into money either the whole or any part of "the real and personal estate of the said testator, or "such part thereof as shall not consist of money, and "to invest the proceeds" in specified securities, "and "to stand possessed of the said moneys and the investments for the time being representing the same "upon trust to pay the net annual income thereof to "the widow during her lifetime. And the indenture also witnessed that, in further pursuance of the said agreement and in consideration of the premises, the widow and children agreed that "the said five children

* Stamps Acts 1894 to 1918 (Q'ld.).—

Sec. 2. "In this Act unless the context otherwise requires the expression 'settlement' means any contract deed or agreement (whether voluntary or upon any good or valuable consideration other than a bona fide pecuniary consideration) whereby any property real or personal is settled or agreed to be settled in any manner whatsoever."

By the First Schedule to the Act a duty of 10s. is charged on "a deed of any kind whatsoever not described in this Schedule." On a "settlement (not being the appointment merely of a new trustee) of any property containing any trust," *ad valorem* duty is charged at a rate of 5 per cent. when the value of the property exceeds £9000.