Judgment
5, 1957

GDT. 6

No. 21 of 1956.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

CHARLES MARSHALL PROPRIETARY LIMITED . . . *Appellant* (*Respondent*)

AND

GERALD ALEXANDER COLLINS . . . . . . *Respondent* (*Appellant*)

RECORD OF PROCEEDINGS

PARK, NELSON & CO.,
11 ESSEX STREET,
STRAND,
LONDON, W.C.2,
Solicitors for the Appellant.

FRESHFIELDS,
1 BANK BUILDINGS,
PRINCES STREET,
LONDON, E.C.2,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1. WL6172-30539

No. 21 of 1956.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

CHARLES MARSHALL PROPRIETARY LIMITED . . . *Appellant (Respondent)*

AND

GERALD ALEXANDER COLLINS . . . . . . *Respondent (Appellant)*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

NO.	DESCRIPTION OF DOCUMENT	DATE	PAGE
	IN THE METROPOLITAN INDUSTRIAL COURT OF THE STATE OF VICTORIA		
1	Information of the Respondent with respect to an Offence against the Factories and Shops (Long Service Leave) Act 1953 (Victoria)	26th November 1954	1
2	Report of the evidence certified by H. B. Wade, Esquire, Stipendiary Magistrate	28th March 1955	2
3	Reasons for judgment of the Stipendiary Magistrate	28th February 1955	5
4	Certificate of Order of Metropolitan Industrial Court dismissing the Information	7th March 1955	6
	IN THE HIGH COURT OF AUSTRALIA.		
5	Order granting special leave to appeal to High Court of Australia	10th March 1955	7
6	Notice of Appeal	23rd March 1955	8
7	(*a*) Joint Judgment of Their Honours Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb., J., Fullagar, J., and Kitto, J., and (*b*) Judgment of His Honour Taylor, J.	11th August 1955	9 24
8	Order of the High Court of Australia allowing appeal	11th August 1955	32

UNIVERSITY OF LONDON
W.C.1.
25 FEB 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

49856

NO.	DESCRIPTION OF DOCUMENT	DATE	PAGE
	IN THE PRIVY COUNCIL		
9	Order of Her Majesty in Council granting special leave to appeal from the Order of the High Court of Australia	1st June 1956	33

EXHIBITS

EXHIBIT MARK	DESCRIPTION OF DOCUMENT	DATE	
A.	Direction of Minister for Labour and Industry to take proceedings	26th October 1954 ..	Original document
B.	Certificate of Incorporation of Charles Marshall Proprietary Limited	29th October 1954 ..	Original document
C.	Certified Copy of Annual Return of Directors of Company	29th October 1954 ..	Original document
D.	Typed transcript of conversation between Cyril Kemp and Bertie John Skilton	12th February 1954 ..	Original document
E.	Certified copy of Metal Trades Award	16th January 1952 ..	Printed separately

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

CHARLES MARSHALL PROPRIETARY LIMITED . *Appellant (Respondent)*

AND

GERALD ALEXANDER COLLINS . . . . *Respondent (Appellant).*

10

RECORD OF PROCEEDINGS

No. 1.

INFORMATION of the Respondent with respect to an Offence against the Factories and Shops (Long Service Leave) Act 1953 (Victoria).

In the Metropolitan Industrial Court of the State of Victoria.

No. 1. Information of the Respondent with respect to an Offence against the Factories and Shops (Long Service Leave) Act 1953 (Victoria), 26th November 1954.

IN THE METROPOLITAN INDUSTRIAL COURT at Russell Street, Melbourne.

In the Central Bailiwick.

GERALD ALEXANDER COLLINS, Inspector of Factories and Shops . . . . . . Informant

20 CHARLES MARSHALL PROPRIETARY LIMITED whose registered office is situate at Brunswick Street, Fitzroy, in the State of Victoria . . Defendant.

The information of the said Informant of Melbourne in the State of Victoria, who saith that the said Defendant on the twelfth day of February 1954 at Fitzroy in the City of Fitzroy in the said Bailiwick having been the employer of a worker to wit one Cyril Kemp for a period commencing on the twenty-third day of September 1940 and ending on the twelfth day of February 1954 did fail to grant to the said worker the amount of ordinary pay in respect of the long service leave to which he 30 was entitled in contravention of the provisions of the Factories and Shops (Long Service Leave) Act 1953. (5706–7, 9.)

(Sgd.) G. COLLINS,
Informant.

In the Metropolitan Industrial Court of the State of Victoria.

No. 1. Information of the Respondent with respect to an Offence against the Factories and Shops (Long Service Leave) Act 1953 (Victoria), 26th November 1954, *continued.*

To the said Defendant.

TAKE NOTICE that if you are convicted of the offence herein mentioned application will be made for an order for such sum as the Court may consider to be due for arrears.

Dated at Melbourne the twenty-sixth day of November 1954.

(Sgd.) A. V. BARNS, J.P.

No. 2. Report of the Evidence Certified by H. B. Wade, Esquire, Stipendiary Magistrate, 28th March 1955.

No. 2.

REPORT of the Evidence Certified by H. B. Wade, Esquire, Stipendiary Magistrate.

28th March, 1955.

The Crown Solicitor,
459 Lonsdale Street,
Melbourne, C.1. 10

Dear Sir,

Re Collins *v.* Charles Marshall Proprietary Limited.

Upon the hearing by me of the above-mentioned information in the Metropolitan Industrial Court on the 28th February, 1955, oral evidence was given on behalf of the parties, but I have no notes of the evidence.

The report of the evidence which has been prepared by the parties and which is attached hereto and marked with the letter " A " is in my opinion an accurate report of the evidence. 20

Yours faithfully,

(Sgd.) H. B. WADE,
Stipendiary Magistrate.

REPORT OF EVIDENCE, DATED 28/2/55

The information was heard on the 28th day of February, 1955 in the Metropolitan Industrial Court of Melbourne, constituted by Mr. H. B. Wade, Stipendiary Magistrate.

Mr. Gillbank of the Crown Solicitor's Office appeared for the Informant, and Mr. Aird of counsel appeared for the Defendant, which pleaded " not guilty " to the information. 30

At the commencement of the hearing Mr. Gillbank applied to amend the information by adding the words " the amount of ordinary pay in respect of " after the words " the said worker ". Upon Mr. Aird stating that he had no objection the Stipendiary Magistrate allowed the said amendment.

In the Metropolitan Industrial Court of the State of Victoria.

No. 2. Report of the Evidence Certified by H. B. Wade, Esquire, Stipendiary Magistrate, 28th March 1955, *continued.*

Mr. Gillbank tendered to the Court a form of direction by the Minister for Labour and Industry to take proceedings against the Defendant, a certificate of incorporation of the Defendant company, and a certified copy of an annual return of the directors of the Defendant company.

Cyril Kemp was then called, and after being duly sworn, gave the following evidence :—

" My full name is Cyril Kemp and I reside at 270 Gower Street, Preston. I am a metal worker employed at T. S. Gill, Preston. I was employed by Charles Marshall Proprietary Limited from the 10 23rd September 1940 to the 12th February, 1954—my only break was for service with the Australian military forces from the 27th February, 1942 to the 11th March, 1946.

I was a metal polisher from the commencement of my employment with Charles Marshall Proprietary Limited to the 6th July, 1949. Then I went onto traffic lights and remained there until my dismissal. On the 12th February, 1954 I went to the foreman and said I wanted to give a week's notice. He said " Don't give it to me, give it to Mr. Skilton." I said " You're the foreman and I'm giving it to you." I believe he gave it to Mr. Skilton. I was 20 later called to Mr. Skilton's office and was told not to leave the factory as I would be going onto collapsible gates. I refused to do so because I had never been on them before and it would have been ridiculous to put me on them for a week and I was then instantly dismissed. I was paid up to 2.15 that day. I did not receive any long service leave. I did not receive any pay in respect of long service leave."

In cross-examination Cyril Kemp said :—

" I recall Mr. Skilton speaking to me on the 11th February, the day before my dismissal. He did not say he wanted me to move 30 from traffic lights to collapsible gates. I was asked after I gave notice. I gave notice because I was dissatisfied with the conditions. The conversation on the 11th February concerned spray painting. The chaps would not spray because there was no suction plant. I knew nothing about collapsible gates. I believe Mr. Skilton suggested that the gates were urgent, and, therefore, I should move onto them. That was on Friday—not before. I was not told the day he wanted me to change. They had been good to me. When I gave notice I had particular reasons but it was not because I had been asked to move. When I gave notice to Mr. Laver, the foreman, 40 he did not say ' Alright Cyril.' He said ' Do not give it to me, give it to Mr. Skilton.' I had a job outside but I was ordered not to leave the factory. I did not leave. I was up at the bench talking to the chap on collapsible gates. Then I was on lights. I deny I could not be found. I had a conversation with Mr. Skilton about 1.30. Mr. Hawes, Junior, was present and a typist. Mr. Skilton said ' You have refused to make the collapsible gates.' I said ' Yes.' I would do anything except collapsible gates.

The book produced is in my handwriting. The second last item for the 11th February shows ' Coll. gates 4 hours.' I never

In the Metropolitan Industrial Court of the State of Victoria.

No. 2. Report of the Evidence Certified by H. B. Wade, Esquire, Stipendiary Magistrate, 28th March 1955, *continued.*

worked on the gates. Mr. Walker had told me there was some talk of my going onto collapsible gates. I spent 4 hours talking with a chap on the collapsible gate job. It was mentioned by Mr. Skilton on the 11th. We had a cosy chat. I told Mr. Skilton I didn't want to work on the gates. He didn't say ' Look Cyril we've done a lot for you—will you help us out ? ' "

Re-examined, Cyril Kemp said :—

" My normal weekly number of hours of work was 40. My Ordinary rate of pay was £14 17s. per week."

In answer to questions put to him by the Stipendiary Magistrate, Cyril Kemp said :— 10

" I finally decided to give notice a week before I did so. I had no other employment arranged. I was discontented with the conditions of the factory."

Gerald Alexander Collins was then called, and after being duly sworn, gave the following evidence :—

" My full name is Gerald Alexander Collins. I am an inspector of factories and shops. On the 29th April, 1954, I interviewed Mr. Skilton, a director of the Defendant Company. I asked him if he employed a Cyril Kemp. He said ' Yes.' I read the complaint to him. He handed me a copy of a conversation which he said took place at the time of Kemp's dismissal. I produce the copy." 20

The document produced by Gerald Alexander Collins was tendered to the Court.

The informant's case was then closed.

Mr. Aird thereupon submitted that there was no case for the Defendant to answer, on the ground that the worker had terminated his own employment in circumstances that would not have given him an entitlement to long service leave under the terms of the Factories and Shops (Long Service Leave) Act 1953, namely, that he had terminated his employment in a manner other than as set out in Section 7 (2) (*c*) (ii) of the Act. Alternatively, if the employment was terminated by the Defendant it was terminated for a cause involving serious and wilful misconduct. After hearing argument the Stipendiary Magistrate held that there was a case to answer, stating that on the evidence of the prosecution the termination of the employment was by the employer, and that the conduct of the worker in refusing the work was not serious and wilful misconduct as contemplated by the Act. 30

Then Mr. Aird called Bertie John Skilton, who after being duly sworn, gave the following evidence :— 40

" My full name is Bertie John Skilton. I reside at 3 Hotham Road, Elsternwick. I am the manager and a director of Charles Marshall Proprietary Limited, the Defendant. We employed Kemp from 1940 to 1954. I had a conversation on the 11th February with Kemp. It was in the workshop. I said to Kemp ' Look Cyril we want you to work on the gates. Thompson's finishing up.' He said ' I don't want to go up there.' I said ' Think it over and

tell me in the morning.' The next morning the foreman said Kemp had given a week's notice just before 9 o'clock. Soon after I was told 'Kemp's gone out in the truck.' I said 'Tell him to report to me when he comes back.' He reported at 1.30 p.m. in my office. Mr. Hawes, Junior, and a typist were present. I asked the typist to take notes. Kemp said 'I did not refuse until I gave notice.' I said to him, he would sack himself."

In the Metropolitan Industrial Court of the State of Victoria.

No. 2. Report of the Evidence Certified by H. B. Wade, Esquire, Stipendiary Magistrate, 28th March 1955, *continued.*

In cross-examination Bertie John Skilton said :—

" Kemp had been working on the lights for some time. I said 'You are finished.' I was not going to let him work a week."

10

Mr. Aird then stated that since Skilton had admitted dismissing Kemp, no further defence was open to the Defendant on the facts.

Mr. Aird was then heard to address the Court in legal argument, and he tendered to the Court a certified copy of the Metal Trades Award dated the 16th day of January, 1952, and pointed out that at page 323 thereof the Defendant's name was included in the list of Respondents. Mr. Gillbank was heard to reply.

No. 3.

REASONS for Judgment of the Stipendiary Magistrate.

No. 3. Reasons for Judgment of the Stipendiary Magistrate, 28th February 1955.

20

" In this particular case the Metal Trades Award has set out in a fairly comprehensive manner the relationship which shall exist between employers and employees to that Award, and it has dealt particularly with holidays, rates of pay, etc. This Long Service Leave Act, if it operated, would in my opinion alter the terms as set out in the Award. One point struck me during the hearing of this case, that is that under the terms of the Metal Trades Award an employer may dismiss a man for malingering, inefficiency, neglect of duty or misconduct. That right is restricted by the Long Service Leave Act. He would only be justified so far as that Act is concerned, in dismissing an employee for serious and wilful misconduct. I think, therefore, that I must adopt the attitude that the State Act is inconsistent with the Award, and that so far as the Metal Trades Award is concerned, it is inoperative. The information will be dismissed with £10 10s. costs against the Informant."

30

28/2/55.

In the Metropolitan Industrial Court of the State of Victoria.

No. 4. Certificate of Order of Metropolitan Industrial Court dismissing the Information, 7th March 1955.

No. 4.

CERTIFICATE of Order of Metropolitan Industrial Court Dismissing the Information.

Extract from Register of Metropolitan Industrial Court of 28/2/55.

COPY. No. 120.

CERTIFICATE OF SUMMARY CONVICTION OR ORDER.

VICTORIA.

REGISTER OF CONVICTIONS, ORDERS, AND OTHER PROCEEDINGS IN THE METROPOLITAN INDUSTRIAL COURT, MELBOURNE, MONDAY, THE 28TH DAY OF FEBRUARY, 1955.

No.	Prosecutor, Informant Complainant or Applicant	Accused or Defendant	How before the Court (Arrest on View, Warrant or Summons)	Fees	Charge, Cause or Proceeding	Decision, Memo. of Conviction or Order	Remarks
1,199	Gerald Collins, Inspector of Factories and Shops	Charles Marshall Proprietary Limited	Summons, 26th November, 1954		Defendant at Fitzroy on 12th February, 1954, did commit a breach of Act No. 3677, Section 59, did fail to grant long service leave	Information dismissed; Informant to pay £10 10s. costs	H. B. Wade, Stipendiary Magistrate

I, being the Clerk of the Court at which this Register is kept, do hereby certify that the above is a true extract from such Register of the $\frac{\text{conviction}}{\text{order}}$ above set out.

Dated at Melbourne this 7th day of March, 1955.

J. G. GOFF, Clerk of Petty Sessions.

In the High Court of Australia.

No. 5.
Order granting Special Leave to Appeal to the High Court of Australia, 10th March 1955.

No. 5.

ORDER granting Special Leave to Appeal to the High Court of Australia.

IN THE HIGH COURT OF AUSTRALIA.
Principal Registry.

No. 10 of 1955.

IN THE MATTER of the Judiciary Act 1903–1950 of the Commonwealth of Australia

and

IN THE MATTER of the Justices Act 1928 of the State of Victoria

10

and

IN THE MATTER of an INFORMATION dated the 26th day of November 1954 for an offence against the provisions of the Factories and Shops (Long Service Leave) Act 1953 of the said State wherein GERALD ALEXANDER COLLINS an Inspector of Factories and Shops is Informant and CHARLES MARSHALL PROPRIETARY LIMITED is Defendant

and

IN THE MATTER of an ORDER made on the 28th day of February 1955 by HERBERT BARTON WADE, Esquire, a Stipendiary Magistrate sitting in the exercise of federal jurisdiction in the Metropolitan Industrial Court at Melbourne whereby it was ordered that the said Information be dismissed with ten guineas (£10 10s.) costs against the said Informant

20

PENDING IN THE METROPOLITAN INDUSTRIAL COURT AT MELBOURNE

Before Their Honours the Chief Justice Sir OWEN DIXON, Mr. Justice McTIERNAN, Mr. Justice WEBB, Mr. Justice FULLAGAR, and Mr. Justice KITTO, Thursday the 10th day of March, 1955.

30

UPON MOTION made to the Court this day at Melbourne by Her Majesty's Solicitor-General in and for the State of Victoria and Mr. Aickin of Counsel on behalf of Gerald Alexander Collins the above-named Informant for special leave to appeal from the above-mentioned order of the Metropolitan Industrial Court made on the 28th day of February 1955 AND UPON READING the affidavit of Albert George Booth sworn the 9th day of March 1955 and filed herein and the exhibits referred to in the said affidavit THIS COURT DOTH ORDER that special leave be and the same is hereby granted to the said Gerald Alexander Collins to appeal to this Court from the said Order of the Metropolitan Industrial Court.

40

By the Court.

(Sgd.) J. G. HARDMAN,
Principal Registrar.

(L.S.)

In the High Court of Australia.

No. 6. Notice of Appeal, 23rd March 1955.

No. 6.

NOTICE OF APPEAL.

IN THE HIGH COURT OF AUSTRALIA.
Principal Registry. No. 10 of 1955.

On Appeal from the Metropolitan Industrial Court of the State of Victoria.

Between GERALD ALEXANDER COLLINS (Informant) Appellant

and

CHARLES MARSHALL PROPRIETARY LIMITED . . . (Defendant) Respondent. 10

NOTICE OF APPEAL.

TAKE NOTICE that pursuant to special leave granted by the Full Court of the High Court of Australia on the 10th day of March, 1955, the said Full Court of the High Court will be moved by way of appeal at the first sittings in Melbourne of the said Full Court of the High Court for hearing appeals to be held after the expiration of six weeks from the institution of this appeal or as soon thereafter as Counsel can be heard on behalf of the above-named Appellant Gerald Alexander Collins for an order or judgment that the order of the Stipendiary Magistrate constituting 20 the Metropolitan Industrial Court of the State of Victoria made on the 28th day of February, 1955, whereby he dismissed an information duly laid on the 26th day of November, 1954, by the Appellant against the above-named Respondent Charles Marshall Proprietary Limited charging it with a breach by the above-named Respondent of the Factories & Shops (Long Service Leave) Act 1953 in that having been the employer of a worker to wit one Cyril Kemp for a period commencing on the 23rd day of September, 1940, and ending on the 12th day of February, 1954, did fail to grant to the said worker the amount of ordinary pay in respect of the long service leave to which he was entitled and whereby the Appellant 30 was ordered to pay ten guineas costs to the Respondent be set aside and reversed and that in lieu thereof an order be made that the Respondent be convicted of the offence charged in the said information and for a further order that the Respondent do pay to the Appellant the costs of this appeal and for such other order as the High Court may deem just AND TAKE FURTHER NOTICE that the grounds on which the Appellant intends to rely in support of the Appeal are as follows :—

1. The Magistrate was wrong in dismissing the said information and his decision was wrong in law and in fact.

2. Upon the evidence the Magistrate should have convicted the 40 Appellant of the offence charged in the said information as amended at the hearing before the said Magistrate.

3. The Magistrate was wrong in holding that the Factories and Shops (Long Service Leave) Act 1953 would, if it operated, alter or interfere

with the terms of the Metal Trades Award dated the 16th day of January, 1952, and made by a Conciliation Commissioner pursuant to the Conciliation and Arbitration Act 1904–1951 of the Commonwealth of Australia.

In the High Court of Australia.

No. 6. Notice of Appeal, 23rd March 1955, *continued.*

4. The Magistrate was wrong in holding that the Factories and Shops (Long Service Leave) Act 1953 was inconsistent with the said Award or with the Conciliation and Arbitration Act 1904–1951 or with the said Award and the said Act and was wrong in holding that the said Act was thereby inoperative in respect of persons subject to the said Award.

5. The Magistrate was wrong in holding that the Factories and Shops
10 (Long Service Leave) Act 1953 purported to restrict or interfere with the terms of the said Award or with the terms of the said Award relating to the right of an employer to dismiss an employee.

6. The Magistrate should have held that the Factories and Shops (Long Service Leave) Act 1953 was not inconsistent with the said Award or the Conciliation and Arbitration Act 1904–1951 and was not inconsistent with both the said Award and the said Act and should have held that the said Award did not and/or was not intended to and/or did not purport to deal exhaustively or exclusively with the relationship between employers and employees who were bound by the said Award.

20 7. There was no evidence upon which the Magistrate could find that the said Award dealt with and/or was intended to deal with and/or purported to deal with the subject of long service leave within the meaning of the Factories and Shops (Long Service Leave) Act 1953 or dealt with and/or was intended and/or purported to deal exhaustively or exclusively with the relationship between employers and employees who were bound by the said Award.

Dated the 23rd day of March, 1955.

(Sgd.) THOMAS F. MORNANE,
Solicitor for the Appellant.

30

No. 7 (a).

JOINT Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955.

COLLINS

V.

CHARLES MARSHALL PROPRIETARY LIMITED.

This is an appeal by special leave from an order of a Stipendiary Magistrate constituting the Metropolitan Industrial Court of the State of Victoria. The order dismissed an information by the Appellant against the Respondent charging the latter with a breach of the provisions of the
40 Factories and Shops (Long Service Leave) Act 1953 No. 5706 of Victoria. It is an offence under sec. 17 (1) (*d*) of that Act to contravene or fail to

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

comply with any provision of the Act. Under sec. 7 (1) and (2) (*c*) (i) a worker who has completed at least ten years but less than twenty years' continuous employment with his employer and whose employment is terminated by his employer for any cause other than serious and wilful misconduct is entitled to long service leave on ordinary pay for a period equivalent to one-eightieth part of the period of his continuous employment. In consequence of sec. 9 (2) and (4) he is deemed to take his leave when his employment terminates and must be paid his ordinary pay by his employer, either in full then and there or at the same times as it would have been paid if he were still on duty or in some other way agreed between them. 10 The charge against the Respondent Company was that, having been the employer of a worker named Kemp for a period of some thirteen years ending on 12th February, 1954, it failed to grant him the amount of long service leave to which he was entitled, in contravention of the Act. In fact the Defendant Company terminated Kemp's employment on 12th February 1954. Among the grounds upon which the Respondent Company relied by way of defence to this charge was the contention that the employment was regulated completely by an award made by a Conciliation Commissioner in pursuance of the Conciliation and Arbitration Act 1903–1952 with which the operation of the Victorian Act was 20 incompatible so that as a result of sec. 109 of the Constitution the material provisions of the Victorian Act were *pro tanto* invalid. The Magistrate accepted this view and dismissed the information.

The Metropolitan Industrial Court was established at the beginning of 1937 under Act No. 4461 but it is now governed by sec. 190 of the Labour and Industry Act 1953, No. 5771 which came into operation on 1st July, 1954, that is to say after the date of the alleged offence and before the date of the information. It is a consolidating Act which also includes in Div. 4 of Part VIII the provisions of the Factories and Shops (Long Service Leave) Act 1953. Although the Metropolitan Industrial Court came into being 30 after the passing of the Judiciary Act 1903 that would not prevent sec. 39 of that Act applying to it; *Commonwealth* v. *District Court of Sydney* (1954) A.L.R. 346. Because the defence accepted by the Magistrate involved the interpretation of the Constitution, the Magistrate exercised federal jurisdiction and upon the footing the appeal was brought under sec. 73 (ii) of the Constitution by special leave granted under sec. 39 (2) (*c*) of the Judiciary Act 1903–1950. No attempt was made to appeal as of right pursuant to sec. 39 (2) (*b*) of the Judiciary Act because of sec. 47 of the Labour and Industry Act 1953.

On the application for special leave the attention of this Court was 40 directed to sec. 31 of the Conciliation and Arbitration Act 1904–1952 as a provision which might seem to take the matter out of the appellate jurisdiction of this Court but which, as it was said, did not amount to an exception under sec. 73 of the Constitution from this Court's appellate jurisdiction and moreover did not cover this case and in any event was invalid. On the hearing of the appeal the question whether sec. 31 operated to deprive the Appellant of the right which would otherwise exist to appeal by special leave to this Court was argued. Counsel for the Appellant and for the Respondent united in attempting to place upon the provision one meaning or another which would ensure that it would not have 50 this effect. We thought it desirable however to hear counsel for the

Appellant in respect of certain of the constitutional grounds upon which he attacked the validity of sec. 31 or sought to limit the application or operation it might otherwise receive. Counsel for the Commonwealth intervened to argue against one such ground, a ground going to total invalidity, but otherwise he stood aloof.

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

Sec. 31 is as follows : " (1) There shall be an appeal to the Court from a judgment or order of any other Court (*a*) in proceedings arising under this Act (including proceedings under section fifty-nine of this Act or proceedings for an offence against this Act) or involving the interpretation of this
10 Act ; and (*b*) in proceedings arising under an order or award or involving the interpretation of an order or award, and the Court shall have jurisdiction to hear and determine any such appeal. (2) Except as provided in the last preceding sub-section, there shall be no appeal from a judgment or order from which an appeal may be brought to the Court under that sub-section."

The proceedings before the Metropolitan Industrial Court was not, of course, a proceeding " under " the Conciliation and Arbitration Act or " under " an order or award made pursuant to that Act. It was " under " the provisions of the Factories and Shops (Long Service Leave) Act 1953
20 as operating upon the case through the Acts Interpretation Act 1928 to 1950 (Vic.) sec. 6. But the defence to which the Magistrate gave effect called for a consideration of the character and scope of the award of the Conciliation Commissioner for the purpose of applying sec. 109 of the Constitution to the Conciliation and Arbitration Act according to the principles expounded in *Ex parte McLean* (1930) 43 C.L.R. 472. In this sense the " proceeding " may involve the interpretation of the award within the meaning of sec. 31 (1) (*b*). It was for that reason that the proceeding before the Metropolitan Industrial Court appeared prima facie to fall within the description given by sec. 31 of proceedings in which an
30 appeal is to lie to the Court of Conciliation and Arbitration and not elsewhere.

There is a number of difficulties of a constitutional character in applying the section according to what might be considered the natural meaning of its terms. In the first place it is obvious that the words " appeal . . . from a judgment or order of any other Court " cannot include judgments or orders of this Court. For the High Court is the Federal Supreme Court under sec. 71 of the Constitution ; an appeal lies to it from any other federal court under sec. 73 (ii) ; and under sec. 75 (v) its jurisdiction extends to awarding mandamus prohibition or injunction against judicial officers constituting other federal courts. Parliament could not, and we may be
40 sure did not, intend to include this Court in the expression " any other Court " in the opening words of sec. 31 (1). In the next place sub-sec. (2) cannot constitutionally operate to exclude from the appellate jurisdiction of this Court a judgment decree order or sentence of a Supreme Court of a State in a proceeding arising under the Conciliation and Arbitration Act or arising under an order or award or involving the interpretation of that Act or such an order or award, if the matter is one in which at the establishment of the Commonwealth an appeal lay from the Supreme Court to the Privy Council. For by sec. 73 of the Constitution it is provided that no exception or regulation prescribed by the Parliament shall prevent the
50 High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

Commonwealth an appeal lies from such Supreme Court to the Queen in Council. If this means " lies as of right," such an appeal lay in effect in the case of every such Supreme Court, except that of Tasmania, where the judgment involved £500 or more. In the case of the Supreme Court of Tasmania the amount was £1,000. (See Quick and Garran, Constitution, pp. 739–740.) It was suggested too that the language of subsec. (2) of sec. 31 is not very apt to express an intentional exercise of the power conferred on the Parliament by sec. 73 of the Constitution to make exceptions from the subject matter of the appellate jurisdiction of this Court. It was contended that an interpretation of subsec. (2) which treated it as not meaning to exclude an appeal to the High Court was justified by these three considerations, namely the inapplicability of the phrase " any other Court " to the High Court, the incompetence of subsec. (2) to exclude all appeals of the stated description from the Supreme Courts to the High Court and the use of general and not very apt language if an exercise was intended of the power to make exceptions. But if we are seeking the real meaning of the legislature, it is difficult to resist the impression of a general intention to confine all appeals of the description stated to the Court of Conciliation and Arbitration. For the same reason it is difficult to adopt the suggestion made by counsel intervening for the Commonwealth that subsec. (2) is dealing only with appeals as of right to other courts so that it does not derogate from this Court's jurisdiction to grant special leave under sec. 39 (2) (*c*) and presumably sec. 35 (1) (*b*). It is therefore necessary to turn to the grounds which go to the validity of sec. 31, either wholly or in part. The first to be considered is an excess of the constitutional power in supposed reliance upon which it is assumed that the provision was enacted. It is assumed that, treating the Court of Conciliation and Arbitration as established under the power conferred by the words " such other federal Courts as the Parliament creates " in sec. 71 of the Constitution, the legislature sought to exercise the power conferred by sec. 77 (i) which, with respect to any of the matters mentioned in secs. 75 and 76, enables the Parliament to define the jurisdiction of any federal Court other than the High Court. That of course implies that sec. 77 (i) was invoked on the footing that it applied to appellate as well as to original jurisdiction of federal Courts. On any footing the jurisdiction which may be " defined " is restricted to the nine descriptions of " matter " contained in the five paragraphs of sec. 75 and the four paragraphs of sec. 76. Sec. 31 of the Act is based on none of these paragraphs with the exception of sec. 76 (ii)—matters arising under any laws made by the Parliament. It is conceivable that within a proceeding arising under the Act or an order or award or involving the interpretation of the Act or an order or award, a matter capable of satisfying one or more of the other paragraphs might be found. It might for example be a case in which an injunction was sought against an officer of the Commonwealth or a case in which the parties on the respective sides of the record in the primary court were residents of different States. But that would be an accidental feature of the proceedings, not one on which the appeal which sec. 31 (1) attempts to give is based. There is in fact nothing in secs. 75 and 76 of the Constitution other than sec. 76 (ii) that lends any support to sec. 31 of the Act. But the support it lends could not on any footing go far enough. It is limited to matters arising under any laws made by the Parliament. Now subsec. (1) of sec. 31 describes proceedings in terms which must bring into

contrast " proceedings arising under this Act " not only with " proceedings involving the interpretation of this Act " but with " proceedings arising under an order or award " and finally with " proceedings involving the interpretation of an order or award." " Proceedings " are not necessarily co-extensive with " matters " : see *re the Judiciary Act and Navigation Act*, 1921, 29 C.L.R. 257 at p. 265, but the distinction can for the moment be put aside.

Clearly enough a matter or a proceeding may involve the interpretation of the Act or of an order or of an award, although the proceeding does not 10 arise under the Act. This very case is an example and it may be said that almost always it will be so where the Act order or award is relevant only to some matter of defence to a proceeding based on some cause of action or ground which is prima facie independent of the Act order or award. Further, there is a difference between a proceeding arising under the Act and a proceeding arising under an order or award and this difference the language of sec. 31 (1) marks. It may be supposed that if a proceeding can properly be said to arise under an award or order, it will usually be true that it can also be said that it arises under the Act. But there is not necessarily an invariable identity and an order or award of a Conciliation 20 Commissioner or of the Court of Conciliation and Arbitration is not a law of the Commonwealth : *Ex parte McLean* (1930) 43 C.L.R. 472, at pp. 479 and 484. Where is to be found the legislative authority for conferring jurisdiction in matters arising under an order or award, as distinguished from under the Act ? Where is the legislative authority for conferring jurisdiction in matters which do not arise under the Act but which do involve the interpretation of the Act or of an order or of an award ? It cannot be found in the operation of sec. 76 (ii)—any matter arising under any laws made by the Parliament—upon sec. 77 (i)—defining the jurisdiction of any federal Court with respect (inter alia) to such matters. And 30 it cannot be found elsewhere. It follows that independently of any other ground of invalidity so much of sec. 31 (i) must be void as attempts to give an appellate jurisdiction to the Court of Conciliation and Arbitration in proceedings that do not arise under the Conciliation and Arbitration Act but do involve the interpretation of the Act or of an order or of an award or do arise under an order or an award. It follows that subsec. (2) on its very terms cannot apply to such proceedings. This case, which at best involves the interpretation of the Act and of an award, must therefore fall outside both subsec. (1) and subsec. (2) of sec. 31.

Two further points which have not been discussed are involved in 40 what precedes. One is that if sec. 77 (i) would suffice to empower the Parliament to confer appellate jurisdiction over State Courts in matters arising under a law made by the Parliament, it is the appeal and not the original proceeding that must answer the description. It may often be a distinction without a difference. But it need not always be so. In a " proceeding under the Act " in the primary court the whole matter so far as it rests on the Act may be confessed and reliance may be placed wholly on matter in avoidance which has nothing to do with the Act or an order or award and to that alone the appeal may be addressed. Yet it seems certain that the Court the jurisdiction of which is defined in terms of 50 sec. 73 (ii) can receive jurisdiction only in respect of what when that Court becomes seised of it is a matter arising under the law

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

of the Parliament. The same distinction between the character of the original cause and of an appeal from the decision thereof sometimes arises in connexion with sec. 76 (i) under sec. 39 (2) of the Judiciary Act. An ordinary proceeding in a Court of Petty Sessions under State law may be decided without the intrusion of the federal Constitution or any other federal element. Thus there is no federal jurisdiction. On an appeal to General Sessions or on an order nisi to review, an argument may be raised, for example, under one or other of secs. 90, 92, 109, 117 or 118 of the Constitution. At once the appeal becomes one in federal jurisdiction with all the consequences under secs. 39 (2), 40, 79 and 80 of the Judiciary Act. Sec. 31 (1), however, "defines" the jurisdiction by reference to what arises in the original proceeding. The other matter is the distinction already adverted to between a "matter" and a "proceeding". It is a distinction which sec. 31 (1) fails to make and it may be that if pursued to its logical consequences this failure might prove in itself fatal. It is enough to quote the following passage from the joint judgment in *re the Judiciary and Navigation Act*, 1921, 29 C.L.R. 257 at p. 265: "It was suggested in argument that 'matter' meant no more than legal proceeding and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word 'matter' in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one."

But, independently of the foregoing considerations, sec. 31 must be held to be *ultra vires*. It attempts to give an appeal from State Courts although the State Courts may not be exercising federal jurisdiction whether conferred by sec. 39 (2) of the Judiciary Act or by some other federal law. Indeed sec. 31 entirely disregards the distinction between State and federal jurisdiction. The only basis that can be put forward for an attempt to clothe a federal Court with appellate power over State Courts exercising State jurisdiction consists in a combination of sec. 71 and sec. 77 (i) of the Constitution. Taking the Court of Conciliation and Arbitration as a federal Court created under the words of sec. 71 "such other federal courts as the Parliament creates", counsel intervening for the Commonwealth maintained that sec. 77 (i) enables the Parliament with respect to any matter within the nine categories mentioned in secs. 75 and 76 to confer appellate jurisdiction on that Court. No constitutional reason exists, it is said, why the power should not extend to conferring jurisdiction to entertain appeals from a State Court exercising federal jurisdiction or State jurisdiction. In the course of his judgment in *Ah Yick* v. *Lehmert* (1905) 2 C.L.R. 593 at p. 604, Griffith, C.J., said: "Taking sec. 71 into consideration, sec. 77 (i) means that the Parliament may establish any Court to be called a federal Court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either by way of appellate or

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

original jurisdiction." This dictum does of course give support for the argument. It does not draw the distinction between the State and the federal jurisdiction of the Court to be appealed from but it may be that the learned Chief Justice only had courts exercising federal jurisdiction before his mind. The distinction is important because the view is open that when a State Court is invested with original federal jurisdiction under sec. 77 (iii) it may be done conditionally and one of the conditions may be that an appeal shall lie to some other Court. Thus of sec. 39 (2) Isaacs, J., says in *Baxter* v. *Commissioners of Taxation* (N.S.W.) (1907) 4 C.L.R. 1087 at p. 1143 : 10 " The grant is expressed to be ' subject to the following conditions and restrictions.' Then follow four separate and distinct provisions. The first relates to the Supreme Court alone and applies, needless to say, to federal jurisdiction only. The second relates to inferior Courts from which an appeal lies to the Supreme Court ; the third to inferior Courts whether an appeal lies to the Supreme Court or not ; the last to Courts of summary jurisdiction." In *Attorney-General* v. *Sillem* (1864) 10 H.L.C. 704 : 720 ; 11 E.R. 1200 : 1208, Lord Westbury speaks of a new right of appeal as " in effect a limitation of the jursidiction of one Court and an extension of the jurisdiction of another." It may be that in investing a State Court 20 with federal jurisdiction the limitation may be imposed wherever the power to extend the jurisdiction of the other Court exists. But does the Constitution contemplate the imposition by the Federal Parliament of such a limitation or condition on the jurisdiction or the finality of the jurisdiction of State Courts exercising State jurisdiction ? The Commonwealth Constitution is unlike the Constitution of the United States in the manner in which the relation of federal judicial power to State Courts is dealt with specifically. Sec. 73 (ii) is very specific in defining the jurisdiction of this Court to hear and determine appeals from State Courts. Sec. 77 (iii) gives a specific power to invest State Courts with federal jurisdiction and sec. 77 (ii) a 30 specific power to define the extent to which the jurisdiction of a federal court shall be exclusive of the jurisdiction belonging to the Courts of the States. On the face of the provisions they amount to an express statement of the federal legislative and judicial powers affecting State Courts which, with the addition of the ancillary power contained in sec. 51 (xxxix), one would take to be exhaustive. To construe the very general words of sec. 71 relating to the creating of other Federal courts and of sec. 77 (i) relating to the definition of their jurisdiction as containing a power to establish a further appellate control of State Courts exercising State functions would seem to be opposed to the principles of interpretation, 40 particularly those applying to a strictly federal instrument of government. When the content of sec. 73 (ii) is examined two very important considerations telling against such an interpretation are seen. In the first place a new federal court of appeal if brought into existence would clearly be a federal court from which an appeal would lie to the High Court under sec. 73 (ii). It may be assumed that when that provision speaks of a court from which an appeal lies to the Privy Council that means lies as of right. If the Court subject to the appeal to the supposed new federal court of appeal was a Supreme Court of the State or a court whence an appeal lay as of right at the establishment of the Commonwealth, there would be a parallel 50 right of appeal to the High Court. This would be true too if the primary court were exercising federal jurisdiction. That would mean that alternative rights of appeal would exist from State Courts to different federal

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

courts of appeal, one being subject to appeal in its turn to the other. It is true that the Parliament has a power of making exceptions from the subject matter of the appellate jurisdiction of the High Court, but the power is limited in the case of Supreme Courts in the manner already described and moreover after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by sec. 73. For example, if the Interstate Commission were established the power could hardly extend to excepting all judgments decrees orders and sentences of that body from the appellate jurisdiction of the Court. In any event it is the intention of sec. 73 (ii) that is important and according to that intention, until an exception were validly made, an appeal would lie to the High Court from Courts which, on the hypothesis required, would be subject to an alternative appeal to the supposed new federal appeal Court. In the second place it is apparent from sec. 73 (ii) that the principle or policy which it embodies was to place the Court that is supreme in the State judicial hierarchy under the appellate jurisdiction of the High Court and no other State Courts, unless they were invested under sec. 77 (iii) with federal jurisdiction. It would be incongruous with this principle to give at the same time a constitutional power to create other subordinate federal courts to hear appeals from State courts exercising State jurisdiction.

If one turns to the situation under Article III of the Constitution of the United States it is not difficult to see reflected in the more important variations from Article III which appear in Chapter III of our Constitution an appreciation on the part of the framers of some of the difficulties encountered in the United States. Sec. 1 of Article III corresponds with sec. 71 in that it provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. Sec. 2 then enumerates the matters or " cases " comprised within the judicial power :—" The judicial power shall extend to all cases in Law and Equity " and so on. The enumeration of ' cases ' though in different terms covers eight of the nine matters mentioned in our sec. 75 and 76, our sec. 75 (v) forming no part of Article III but being inspired by the provision of the American Judiciary Act held invalid in *Marbury* v. *Madison* (1803), 1 Cranch 137 : 2 L.Ed. 60. Sec. 2 goes on to provide that in cases affecting Ambassadors and the like and cases in which a State is a party the Supreme Court shall have original jurisdiction and in all others appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make. But this has never been construed as an effective constitutional grant *per se* of appellate jurisdiction. " By the Constitution of the United States the Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress ; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes," per Taney, C.J., for the Court, *Barry* v. *Mercein* (1847) 5 Howard 103 at p. 119 : 12 L.Ed. 70 at p. 77. In sec. 73 the contrary course was taken of making a complete and effective grant to the High Court of appellate jurisdiction and defining its content and in secs. 75 and 76 of dealing specifically with the original jurisdiction the Court shall have and that which may be conferred upon it.

Under the United States Constitution no federal jurisdiction could exist in State Courts. Yet it was obvious that in the course of exercising State jurisdiction State Courts must often pass upon the validity, meaning and effect of the laws made by Congress and upon questions arising under the Constitution of the United States, particularly when the consistency of State Law with that Constitution fell to be decided. By what proved a famous provision of the Judiciary Act passed in 1789 by Congress, sec. 25, it was enacted that when such matters were drawn in question before State Courts and decided against, to state it compendiously, federal authority or interest or in favour of State authority or interest, then the judgment or decree, if of the highest court of law or equity of the State, might be " re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." For some time States and State Courts impugned the validity of this provision and denied the authority of writs of error directed to State Courts under it. Virginia was notable in her resistance. In *Martin* v. *Hunter's Lessee* (1816) 1 Wheaton 303 : 4 L. Ed. 97, the Supreme Court affirmed the validity of the provision in face of the express refusal of the Court of Appeal of Virginia to obey the mandate of its writ, but there was not a general acceptance of this jurisdiction until the judgment of Marshall C.J. in *Cohens* v. *Virginia* (1821) 6 Wheaton 264 : 5 L. Ed. 257, prevailed. In no small measure the conclusion was based upon the paramountcy within their spheres of the organs of government of the United States, upon the fact that the judicial power of the United States was designed for the purpose of maintaining the paramountcy of the Constitution and laws of the United States, upon the manner of distribution of the judicial power which bestowed on the Supreme Court appellate power only over the greater and most vital part of the subject matter, and finally upon the impossibility of an interpretation which meant that the Constitution had " provided no tribunal for the final construction of itself, or of the laws or treaties of the nation ; but that this power may be exercised in the last resort by the courts of every state of the Union " : *Cohens* v. *Virginia* (1821) 6 Wheaton 264 : 377 ; 5 L. Ed. 257 : 284. It is, according to text writers, no more than an implied power : Curtis, Jurisdiction of the United States Courts, 2nd Ed., p. 24 : Bunn, Jurisdiction & Practice of the Courts of the United States, 4th Ed., p. 138. The latter says : " This result was finally acquiesced in by the whole country, and is one of the many instances proving the commanding influence of Chief Justice Marshall and his associates. The power is an implied one, resting on the second clause of the sixth article of the Constitution, providing that the Constitution of the United States and the laws of Congress made under its authority shall be the supreme law of the land." In our Constitution all these difficulties have been met—(1) by conferring definitely a general appellate power upon the High Court over the Courts of last resort in the States, (2) by authorising the Parliament to invest Courts of the States with federal jurisdiction, (3) by giving an appeal to the High Court from all Courts exercising federal jurisdiction. It may be that the Australian scheme was defective but what has so far proved an effectual remedy for the defects was provided by the legislature in secs. 39 and 40 of the Judiciary Act. A consideration of the history of the matter in the United States and the different framework of the judicature chapter of our Constitution tends to confirm the view that appellate power over

State Courts exercising State jurisdiction cannot be conferred upon a federal Court by the Parliament. It is perhaps not unworthy of remark that Congress has not attempted to arm any court but the Supreme Court with authority to entertain appeals from State Courts.

For the foregoing reasons sec. 31 (1) is *ultra vires* and of course, subsec. (2) can have no operation. The Solicitor-General for Victoria on behalf of the Appellant was prepared for the purpose of destroying sec. 31 to advance a further argument, which he described as far-reaching. The argument was that constitutionally the Court of Conciliation and Arbitration could not be regarded as created under sec. 71 (cf. 272 U.S. at pp. 700–1). As we were disposed to accept the view that in any case sec. 31 could not validly operate to render the appeal incompetent, this argument was not heard.

As the appeal is competent it becomes necessary to deal with the question of substance which it raises. The award which the Magistrate held to have the effect of rendering inoperative *pro tanto* the provisions of the Factories and Shops (Long Service Leave) Act 1953 (Vic.) is called the Metal Trades Award. It was made by a Conciliation Commissioner and was expressed to come into operation in February 1952 and remain in force for one year. The fixed period of the award has therefore expired and its operation is continued by sec. 48 (2) of the Conciliation and Arbitration Act. The decision of the Magistrate depended upon sec. 109 of the Constitution. He did not advert to the provisions of sec. 51 of the Conciliation and Arbitration Act. During the course of the argument these provisions were discussed but neither the Appellant nor the Respondent regarded them as supporting any conclusion which would not be arrived at under sec. 109 alone. The State law has been held inoperative on the ground of inconsistency with the federal law composed of the Conciliation and Arbitration Act and the award of the Conciliation Commissioner made thereunder. The inconsistency has been found in the co-existence of the two provisions. Before us the ground has been taken that it is impossible to obey both instruments in all respects simultaneously. But the chief ground relied upon is that federal law has dealt with the industrial regulation of the relations between the employer and the worker completely, exhaustively or exclusively so as to show an intention that the award alone shall govern all the matters with which it is concerned. It is said that the State law, if valid, would deal with an industrial question falling within the field which federal law itself exclusively or exhaustively governs. Both as an aid to this conclusion and as an independent reason for saying that the State Act is inoperative the Respondent contends that in particular provisions of the State law there are inconsistencies with particular provisions of the federal award. It will be seen that there are therefore two different aspects of inconsistency with which it is necessary to deal.

The basis of the application of sec. 109 to a State law affecting industrial relations regulated by an award is not that the award is a law of the Commonwealth within the meaning of sec. 109 but that the Conciliation and Arbitration Act constitutes the inconsistent federal law inasmuch as it means that an award purporting to make an exhaustive regulation shall be treated as the exclusive determination of the industrial relations which it affects. " The award itself is, of course, not law, it is factum merely. But once it is completely made, its provisions are by the terms

of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award "—per Isaacs C.J. and Starke J., *Ex parte McLean* (1930), 43 C.L.R. 472, at p. 479. The theoretical principles upon which the prior decisions of this Court dealing with the matter proceed were stated in the same case as follows: "The view there taken, when analysed, appears to consist of the following steps, namely: (i) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial
10 disputes extending beyond the limits of any one State enables the Parliament to authorize awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law; (ii) the Commonwealth Conciliation and Arbitration Act confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded; (iii) sec. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation " per Dixon J.,
20 *ibid*, pp. 484–5.

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

The operation of sec. 109 in the case of an industrial award presents many difficulties. For instance the operation of the State law can only be excluded in its application to the particular individuals governed by the award. Further, when the award is kept in force after the period specified by the Conciliation Commissioner for its duration it is the Act which continues to give it effect. The intention or will of the arbitrator appears to be spent. The consequence seems to be that to the legislature then must be ascribed the intention of keeping in force an industrial regulation as an exclusive measure of the rights and duties of the parties
30 bound thereby. Apparently the true doctrine is that in such a case the "extent of the inconsistency " is to be ascertained so far as time and persons are concerned by reference to the period during which sec. 48 (2) of the Act keeps the award in force and by reference to the classes of persons bound by the award.

Sec. 51 of the Conciliation and Arbitration Act provides that when a State law, or an order, award, decision or determination of a State Industrial Authority, is inconsistent with, or deals with any matter dealt with in, an order or award, the latter shall prevail, and the former shall, to the extent of the inconsistency, or in relation to the matter dealt with,
40 be invalid. In terms this provision goes beyond any operation possessed by sec. 109 because it relates not only to inconsistencies but to the valid application of State law to a matter dealt with in an order or award. It may be that no contrast was intended between the latter conception and the conception of actual inconsistency. But if a distinction is intended the extension seems unwarranted. The words in question did not occur in the section as it was first enacted. In its earlier form as sec. 30, it is discussed in *Federated Saw Mill etc. Employes' of Australasia* v. *James Moore & Sons Pty. Ltd.* (1909) 8 C.L.R. 465, by O'Connor J. at p. 509, by Isaacs J. at p. 538 and by Higgins J. at p. 547, and also in *R.* v.
50 *Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow* (1910), 11 C.L.R. 1 by Isaacs J. at p. 52. His Honour said: "Sec. 30

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

has in itself no effect as a repeal or amendment of any State law or award. Any supersession or paramount operation by federal decision over State laws or awards must arise by virtue of the power that enables it to be made, and its own repugnancy to those laws and awards, and cannot be effected by means of their attempted direct repeal by the Federal Parliament." The provision may be used as indicating an intention on the part of the Federal Parliament that the power of the arbitrator to determine an industrial dispute enables him to make an exhaustive provision completely governing matters within the ambit of the dispute to the exclusion of any other regulation. But it is difficult to support the provision as directly operating to amplify or extend sec. 109. For the purposes of this case it may be ignored.

To ascertain whether the State Factories and Shops (Long Service Leave) Act 1953 is inconsistent with the federal regulation that flows from the operation of the Conciliation and Arbitration Act upon the award it is necessary first to examine the award then the State Act. The award applies to a number of employees' organisations and to very many employers and is of an extensive character. It deals separately with employees engaged in a large number of separate operations. It provides a basic wage for adult males and adult females which, of course, varies somewhat in amount from State to State and place to place. It then provides margins for skill for a very great number of classifications of employment. It deals in detail with the subject of apprenticeship in various trades, with special rates for particular work, hours of work, shift work, overtime and holidays. It deals also with a large number of other matters which arise out of the relation of employer and employee in the industries affected. There are three matters of particular importance for the purpose in hand. One is a clause which deals with the payment of wages; another is the clause which, under the heading of "contract of employment," provides that an employee not attending for duty shall, subject to an immaterial exception, lose his pay for the actual time of such non-attendance; and another is a clause making elaborate provision for annual leave. The period of annual leave is to be fourteen consecutive days allowed annually to an employee after twelve months continuous service as an employee on a weekly hiring.

As has already been said, the award is that of a Conciliation Commissioner. An important consideration arises from the fact that a Conciliation Commissioner has no power in relation to long service leave with pay. That is a matter for the Conciliation and Arbitration Court. At the date when the award was made sec. 13 (1) (*c*) of the Conciliation and Arbitration Act provided that a Conciliation Commissioner shall not be empowered to make an order or award . . . (*c*) providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay or long service leave with pay. But by subsec. (2) of sec. 13 it was provided that subsec. (1) should not prevent a Conciliation Commissioner from including in an order or award provisions for annual or other periodical leave with pay or sick leave with pay, being provisions to the same effect as provisions contained in an order or award which is superseded by the first mentioned order or award. Presumably the awards which were superseded by the Metal Trades Award coming into force in February 1952 did include a provision relating to annual leave and it is that which

accounts for the presence in the existing award of the clause relating to the subject. Sec. 25 of the Conciliation and Arbitration Act provides that the Court may, for the purpose of preventing or settling an industrial dispute, make an order or award . . . (*c*) providing for, or altering a provision for, annual or periodical leave with pay, sick leave with pay or long service leave with pay. The contention that the State Act is inconsistent with the federal industrial regulation resulting from the award cannot but suffer a handicap from the circumstance that the authority making the award, namely the Conciliation Commissioner, had no power to deal with the very
10 subject to which the State Act is directed. The Court in which the power resides has made no order or award upon the subject. Indeed there is no reason to suppose that the subject was within the area of the original dispute for the settlement of which the award was made. We know nothing about that dispute. The logs of claims are not in evidence. It is, of course, to be presumed *prima facie* that the award before us is validly made and that involves an inference that the dispute which it settled was as wide in its ambit as the terms of the award. But it involves no further inference.

The State Act deals with the whole subject of long service leave
20 as it affects employees and employers in Victoria. Sec. 7 (1) of the Act provides that every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer. A worker means any person who is employed by an employer to do any work for hire or reward, including an apprentice : sec. 2 (1). " Ordinary pay " means remuneration for a worker's normal weekly number of hours of work calculated at his ordinary time rate of pay as at the time of the accrual to the worker, or if he dies of his personal representative, of the entitlement concerned (that is, of the entitlement to annual leave) : sec. 2 (1). The continuous employment by an employer
30 of a worker who is employed by him at the commencement of the Act shall, for the purposes of the Act, commence at the actual date, before the commencement of the Act, of such employment : sec. 4 (1). A break in the period of service because of service with the naval, military or air forces is not to be counted : sec. 3 (5) (*a*). The Act begins so to speak with a primary period of long service leave to which a worker is to be entitled and it is subject to variations if his employment is terminated before he takes his leave. After a worker has completed twenty years of continuous employment with his employer he is entitled to thirteen weeks of long service leave and thereafter to an additional three and a quarter week's
40 long service leave on the completion of each additional five years of employment with such employer : sec. 7 (2) (*a*). But if a worker has completed more than twenty years' continuous employment with his employer and his employment is terminated by the employer for any cause other than serious and wilful misconduct or if the worker on account of illness, incapacity or domestic or any other pressing necessity justifiably terminates his employment, he is entitled to such amount of long service leave as equals one-eightieth of the period of his continuous employment since the last accrual of entitlement to long service leave : sec. 7 (2) (*b*). If a worker has completed at least ten but less than twenty years of continuous
50 employment with his employer and his employment is terminated by the employer for any cause other than serious and wilful misconduct or it is

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

terminated by the worker for any of the causes already mentioned, he is entitled to such amount of long service leave as equals one-eightieth of the period of his continuous employment: sec. 7 (2) (*c*). In the present case Kemp fell within the last category. He had been employed, counting his military service, for about thirteen and a half years by the Respondent company. Sec. 8 makes provisions for the death of a worker before or while taking leave to which he is entitled. Amounts representing his ordinary pay varying with the period of leave to which he is entitled are to be paid to his personal representative. Sec. 9 (1) provides that when a worker becomes entitled to long service leave under the Act such leave shall 10 be granted by the employer as soon as practicable having regard to the needs of his establishment. This is qualified by provisions enabling the date to be postponed or advanced and by an exception postponing the obligation until the end of 1954. Subsec. (4) of sec. 9 provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid in one of the following ways: " (*a*) In full when the worker commences his leave; or (*b*) At the same times as it would have been paid if the worker were still on duty . . . or (*c*) In any other way agreed between the employer and the worker— and the right to receive ordinary pay in respect of such leave shall accrue 20 accordingly."

The provision which deals with Kemp's actual case is subsec. (2) of sec. 9 which is as follows:—" Notwithstanding anything in the last preceding sub-section where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly." It will be seen that this provision 30 is based upon the condition that the actual employment of the worker is for some reason terminated before he takes his long service leave. Kemp's service was actually so terminated. The sub-section then requires that he shall be deemed to have commenced to take his leave on the date of such termination of employment and provides that he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly. It is to be noticed that it does not say that the worker shall be deemed to be employed by the employer. No doubt in the ordinary case of an employee taking long service leave his employment continues. But in the special case dealt with by subsec. (2) of sec. 9 40 the very basis of its operation is the termination of his employment. It is concerned only to see that he obtains advantages which otherwise the termination of his employment would destroy and for that purpose says that he shall be deemed to commence his long service leave at the end of his employment and then shall be entitled to be paid ordinary pay, that is to say, in the manner specified by subsec. (4). Sec. 14 (1) of the Act provides that no worker shall during any period when he is on long service leave engage in any employment for hire or reward. It is by no means clear that this provision operates in the case of a person to whom the benefit of long service leave is preserved by subsec. (2) of sec. 9. In 50 the first place, the definition of " worker " makes that word mean any

person employed by an employer, etc. *Ex hypothesi* a person deemed to commence long service leave by subsec. (2) of sec. 9 is not employed. Be that as it may, however, the provision is not of direct importance in relation to the present case. The failure of an employer to comply with the provisions of the State Act which have been mentioned becomes an offence by virtue of sec. 17 (1). Any amount due and owing by an employer to a worker or his personal representative under the Act remains due and owing until paid and is treated as arrears of pay for the purposes of the provisions of the law which enable a court before whom an offence is established to make an order for their payment : sec. 18.

It is not easy to see why the award should be treated as covering so extensive a field so as to exclude the operation of provisions like those contained in the State Act. It may be an exhaustive statement of the relations of employer and employee in the industries concerned upon the matters which it determines or regulates. But long service leave is an entirely distinct subject matter, one to which the award is not and cannot be addressed. It cannot be addressed to the subject matter because it is one outside the authority of the Conciliation Commissioner who made the award. Plainly there is no attempt in the award to deal with that subject matter. Whether the Conciliation Commissioner in making any of the provisions which the award contains took into his consideration the fact that he could not deal with long service leave does not appear. It does not appear whether long service leave was sought by the log of claims and, if so, whether the claim was dealt with by the Court of Conciliation and Arbitration which alone had authority over it. But whatever his thoughts on the subject of long service leave may or may not have been, they can have no relevance. Long service leave simply is not a subject within the purview of the award.

When the award is examined in detail it discloses no real conflict between any of its provisions and those of the State Act. The State Act is entirely concerned with prescribing conditions entitling an employee to long service leave with pay and with providing for its commencing period and the rate of pay in respect of the period and with making ancillary and incidental provisions. All these are matters which are concerned not with the general conditions governing employment, nor with the performance of work, but with a period of paid suspension from duty. The award has nothing to say against suspension from duty and payment to the workman during a period of suspension. Annual leave is an entirely distinct conception from long service leave. If by any chance a period of annual leave coincided with a portion of the period of long service leave there would be no conflict between the clause in the award entitling the worker to annual leave and the sections of the Act entitling him to long service leave. At least both could be concurrently observed. No doubt under the award an employee is not entitled to pay unless he attends for duty. Clause 19 (2) provides that an employee not attending for duty, subject to certain exceptions, shall lose his pay for the actual time for such non-attendance. This does not mean that the employer is prohibited from allowing him his pay. It merely means that he loses his right or title to pay under the award.

There are provisions in the State Act for settlement by Courts of Petty Sessions of disputes in relation to long service leave including a

In the High Court of Australia.

No. 7 (a). Joint Judgment of Sir Owen Dixon, C.J., McTiernan, J., Williams, J., Webb, J., Fullagar, J., and Kitto, J., 11th August 1955, *continued.*

dispute as to the rate of ordinary pay and there may be an appeal to the Industrial Appeals Court from the decision of the Court of Petty Sessions: see secs. 10, 11 and 12 of the Act. But these provisions do not affect the operation of the award in any way and are concerned only with the ascertainment of the benefits to be received under the State Act. In cases, therefore, which, unlike that of Kemp, relate to long service leave without a break in the employment, there is no opposition between the award and the Act. In a case like Kemp's where the employment is terminated, the award has nothing to say with respect to the subsequent relations of the employer and the employee. If the relationship is 10 terminated the award no longer operates. There is nothing in the award, therefore, which could affect sec. 9 (2) of the Act.

For these reasons the appeal should be allowed, the order of the Metropolitan Industrial Court should be set aside and the information should be remitted for rehearing.

No. 7 (b). Judgment of Taylor, J., 11th August 1955.

No. 7 (b).

JUDGMENT of Taylor, J.

GERALD ALEXANDER COLLINS

v.

CHARLES MARSHALL PROPRIETARY LIMITED. 20

JUDGMENT.

TAYLOR, J.

I agree that section 31 of the Conciliation and Arbitration Act 1903–1952 does not render this appeal incompetent. The order appealed from was made by a magistrate in the exercise of federal jurisdiction since, in the manner already referred to, the matter before him involved the interpretation of the Constitution and, in respect of matters of this character, the several courts of the States have, within the limits of their several jurisdictions, been invested with federal jurisdiction. Accordingly the order was one from which, subject to the valid prescription of any 30 relevant exception, an appeal lies to this Court pursuant to section 73 of the Constitution.

Neither party was concerned to argue that the appeal does not lie but, in the course of argument, there was some discussion whether section 31 of the Conciliation and Arbitration Act could properly be regarded as constituting the prescription of an exception or exceptions having the effect of destroying the jurisdiction of this Court, initially given by section 73 of the Constitution, to hear appeals of this character. This is a question which depends to some extent upon considerations relevant generally to the problem of the validity of section 31 and it is convenient 40 to make some brief general observations upon the relevant provisions of Chapter III of the Constitution.

Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction. The expression "the judicial power of the Commonwealth" is of course adequate to describe both original and appellate jurisdiction. By section 73 the High Court is invested with jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of any Justice
10 or Justices exercising the original jurisdiction of the High Court and of any other federal court or court exercising federal jurisdiction and of the Supreme Court of any State. Section 75 confers original jurisdiction upon the High Court in a number of matters none of which is relevant to a consideration of this case whilst section 76 specifies an additional group of matters in respect of which Parliament may confer original jurisdiction upon the High Court. The only matters specified in the latter section to which reference need be made are matters "arising under this Constitution or involving its interpretation" and matters "arising under any laws made by the Parliament." Thereafter section 77 is in
20 the following terms :—

> "With respect to any of the matters mentioned in the last two sections the Parliament may make laws—
>
> (i) Defining the jurisdiction of any federal court other than the High Court :
>
> (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States :
>
> (iii) Investing any court of a State with federal jurisdiction."

Concerning this section two observations should be made at once.
30 The first is that section 77 (iii) is the "sole source of power to confer jurisdiction on State Courts" (*per* Dixon and Evatt JJ. in *The King* v. *Federal Court of Bankruptcy ex parte Lowenstein*—59 C.L.R. 556 at 586). Likewise sub-sections 77 (i) and (ii) express the full measure of the power to confer jurisdiction on any federal court other than the High Court and to prescribe the extent to which the jurisdiction of any such federal court shall be exclusive of that which belongs to or is invested in the Courts of the State. In each case the relevant powers are exerciseable only with respect to "any of the matters mentioned in the last two sections" and, of those matters, those which are relevant to the present
40 inquiry are the two categories to which reference has already been made.

Coming now to section 31 of the Conciliation and Arbitration Act we find that it purports to do two things. In the first place it purports to create a right of appeal to the Court of Conciliation and Arbitration from "any other Court"—which expression in its context includes State courts—in "proceedings" of any of four specified characters. Secondly, it provides that there shall be no other appeal from a judgment or order in proceedings of any of the specified characters. The first step, if legally justifiable at all, is justifiable only pursuant to section 77 (i) of the Constitution as the "definition" of the jurisdiction of the Arbitration

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

Court as a federal Court whilst the second, in so far as it purports to declare that the jurisdiction of the Arbitration Court is to be exclusive of that of courts of a State, can be justified only, if at all, as the definition of the extent to which the appellate jurisdiction of that court shall be exclusive of that which belongs to or is invested in the courts of the State. These considerations immediately direct attention to the character of the matters in respect of which such provision is made, for unless they are matters which are mentioned in section 75 or section 76 there is no constitutional foundation for the provisions of section 31. The four categories specified by the last mentioned section are :— 10

(1) proceedings arising under the Act ;

(2) proceedings involving the interpretation of the Act ;

(3) proceedings arising under an order or award ; and

(4) proceedings involving the interpretation of an order or award.

Quite apart from the difficulties which arise from the use of the word "proceedings" it is clear that neither matters involving the interpretation of the Act nor matters involving the interpretation of an order or award, by virtue of that character alone, fall within the specification of matters contained in sections 75 and 76. Nor, I should think, do matters "arising 20 under an order or award." Matters of these descriptions may on occasions, of course, present other features which would bring them within the purview of those sections as they would, for example, if they arose between residents of different States, or if any such matter should also involve the interpretation of the Constitution or if it arose under any laws made by Parliament, but the descriptions which have been selected by section 31 are quite inappropriate, in the main, to describe matters in respect of which the High Court is given original jurisdiction under section 75 or in respect of which it may be conferred upon it by section 76.

This being so they are not matters with respect to which Parliament 30 may make laws either defining the jurisdiction of the Arbitration Court or defining the extent to which the jurisdiction of that court shall be exclusive of that which belongs to or is invested in the courts of the State. I doubt if it is possible to read the section down in any way but, whether this be so or not, it is beyond doubt that there could not be any residual operation of the section capable of application to matters, such as the present, which do not arise under the Act but which answer the description of "proceedings involving the interpretation of an order or award" and, possibly, the interpretation of the Act. Accordingly, I am of the opinion that the appeal is competent. 40

These observations take no account of two other problems which were discussed during the course of the appeal. The first of these was concerned with the provisions of section 73 of the Constitution, the provisions of which I have already set out. The question involved in this problem is whether section 31 of the Act constitutes an exception within the meaning of the opening words of section 73. If it was intended by those words to prescribe an exception—which I very much doubt—the basis chosen for the exception, it seems to me, was quite inappropriate.

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

Given an operation co-extensive with its literal terms, section 31 would except from the jurisdiction of the High Court appeals from judgments and orders given or made in *proceedings* concerned with the matters specified, that is, those arising under the Act or involving its interpretation or arising under or involving its interpretation or arising under or involving the interpretation of an order or award. In effect the condition for the operation of the excepting words is to be found in some feature of the proceedings in which a judgment or order has been given or made and not in any characteristic of the subject matter of the suit or in the relevant
10 judgment or order itself. But what section 73 appears to permit is legislation prescribing that appeals from judgments, decrees, orders and sentences of a specified class or classes shall be excepted from the appellate jurisdiction of the High Court. Primarily the High Court is to have jurisdiction to hear appeals from all judgments and orders of any court exercising federal jurisdiction. But exceptions from the jurisdiction to entertain appeals from such judgments or orders may be made. That is to say that it is permissible to except from the jurisdiction appeals from specified judgments or orders. To me the language of section 73 is more appropriate to authorise the prescription of exceptions by reference to
20 specified characteristics of judgments or orders of courts exercising federal jurisdiction rather than by reference to some feature of the proceedings, incidental or otherwise, in which any such judgment or order has been given or made. To conclude otherwise would be to entertain the view that appeals in specified types of *matters*, or indeed in any and every class of matter, might be made the subject or subjects of exception and such a view is clearly inconsistent with the substance of the section. But the prescription of exceptions dependent upon some characteristic of the judgment or order of the lower court, for example, the fact that the order is interlocutory only or the fact that the judgment or order is insubstantial,
30 would be in keeping with recognised conceptions and the language of the section appears to be more appropriate to such an understanding of its provisions. The same opening words authorise the prescription of exceptions with respect to appeals to the High Court from *all* judgments, decrees, orders and sentences of " any other Federal Court " and of " the Supreme Court of any State " though in the case of appeals from the latter tribunals the authority of Parliament is qualified by the second paragraph of section 73. In the application of the provisions of the section to such cases there is again discernible the notion that the exceptions which may be prescribed are those prescribed by reference to some characteristic of
40 the judgment or order of the lower court and not by reference to the type of matter in which they may be given or made. This conception is, I think, particularly noticeable in the transitional provisions of the last paragraph of section 73. These observations express a view of Parliament's authority to prescribe exceptions which is much narrower than that entertained by Isaacs J. (*The Tramways Case* 18 C.L.R. p. 54 at p. 76) and to which Gavan Duffy and Rich JJ. subscribed in the *Federated Engine Drivers' and Firemen's Association of Australia* v. *The Colonial Sugar Refining Co. Ltd.* (22 C.L.R. 103 at 117–8). But in this case it was assumed that the decision of the Court in *The King* v. *Murray and*
50 *Cormie* (22 C.L.R. 437) concluded the point which they were called upon to consider. In the latter case, however, the " exception " under consideration bore no relation to the nature of the proceedings in the lower

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

court but was solely concerned with the period of time within which an appeal to the High Court should be instituted. Even if such a provision could not be justified as "regulation" it would be justifiable as an exception on the views which I have expressed. Those views would furnish an additional ground for holding that this appeal is competent but holding the opinion, as I do, that section 31, insofar as it purports to prohibit appeals of this nature to this Court, is invalid for other reasons, it is unnecessary to express a final view on this point.

The second problem which I mentioned is concerned with the question whether the expression "jurisdiction," which is used three times in section 77 of the Constitution, refers to both original and appellate jurisdiction. If it does then Parliament may create federal appellate courts in addition to the High Court and it may declare that the appellate jurisdiction of such courts shall be exclusive of "that which belongs to or is invested in the Courts of the State." On the other hand if it does not then section 31 (1) of the Conciliation and Arbitration Act must be invalid for the only constitutional provision upon which it may be rested is section 77 (i). It is clear, however, from a survey of the provisions of Chapter III that the High Court is the supreme appellate tribunal within the Commonwealth and that if other federal appellate courts may be created they will be subordinate to the High Court. It is equally clear that, pursuant to section 73, the High Court would have jurisdiction to hear and determine appeals from judgments and orders of any such court and that, notwithstanding the creation of any such court, the High Court would continue to have jurisdiction to hear and determine appeals from judgments and orders of any other federal court and from the Supreme Courts of the States and from any court exercising federal jurisdiction. In each case the jurisdiction of the High Court would be subject only to such exceptions and regulations as Parliament might prescribe. These and other considerations which arise upon examination of Chapter III tend to support the contention that the provisions of section 77 (i) were intended to relate to original jurisdiction only and that it was not intended to authorise the Parliament of the Commonwealth to create a hierarchy of federal courts with appellate courts interposed between federal courts exercising original jurisdiction and State Courts exercising original federal jurisdiction on the one hand and the High Court on the other. But in my view the language of section 77 does not admit of any such restricted meaning. Nor, indeed, has it been so understood. In *Ah Yick* v. *Lehmert* (2 C.L.R. 593) the High Court was squarely faced with the question whether section 39 of the Judiciary Act 1903 validly operated to confer jurisdiction upon the Court of General Sessions in Victoria to hear and determine an appeal from a conviction before a magistrate in respect of an offence against section 7 of the Immigration Restriction Act 1901 (Commonwealth). Section 39 (2) of the Judiciary Act 1903 provided that: "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions." It was clear that the only possible source of constitutional authority for this provision

was section 77 of the Constitution and speaking of the contention that this section did not authorise Parliament to invest new federal courts or State courts with federal appellate jurisdiction Griffith C.J. (at pages 602–604) said :—

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

" Whether the Court of General Sessions had jurisdiction to entertain this appeal depends upon the terms of the Constitution and of the Judiciary Act 1903. The Constitution (sec. 71), provides that : ' The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction.' I pause there to remark that judicial power is an attribute of sovereignty which must of necessity be exercised by some tribunal, that tribunal must be constituted by the sovereign power, and that the limits within which the judicial power is to be exercised by the tribunal must be defined. In the case of the High Court, the extent to which that court may exercise judicial power is defined by the Constitution ; in the case of other Courts it is not defined by the Constitution, and must, again of necessity, be defined by the Commonwealth law which creates those Courts or invests them with federal jurisdiction. The term ' federal jurisdiction ' means authority to exercise the judicial power of the Commonwealth, and again that must be within limits prescribed. Then ' federal jurisdiction ' must include appellate jurisdiction as well as original jurisdiction. The whole scheme of the Constitution assumes that the judicial power includes both in the case of the High Court, and from the history of the Constitution and the practice in English-speaking countries, it must be taken for granted that the judicial power was known by the framers of the Constitution to include both, and that those framers intended that the judicial power might be exercised by Courts of original jurisdiction or by Courts of appellate jurisdiction. Then sec. 73 of the Constitution defines the appellate jurisdiction of the High Court. Amongst other matters of appellate jurisdiction the High Court is authorised to hear appeals from all Courts having federal jurisdiction, ' with such exceptions and subject to such regulations as the Parliament prescribes,' and none have been prescribed which affect the present case. Sec. 75 defines and enumerates five classes of cases in which the High Court has original jurisdiction, and sec. 76 four others in which Parliament may confer original jurisdiction upon the High Court. In all other matters, as at present advised, I think the High Court has no original jurisdiction, and cannot, *qua* High Court, have it. Then sec. 77 provides that Parliament may make laws . . . ' (i) Defining the jurisdiction of any federal Court other than the High Court,' ' and (iii) Investing any Court of a State with federal jurisdiction.' Now, the power to create a federal court depends upon sec. 71. The judicial power exists as an attribute of sovereignty, and, so far as it is not left to the High Court, it is for the Parliament to say what jurisdiction each Court shall have. Taking sec. 71 into consideration, sec. 77 (1) means that the Parliament may establish any Court to be called a federal court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

by way of appellate or original jurisdiction. Sub-sec. (iii) must receive a precisely similar interpretation. Parliament may invest any Court of a State with authority to exercise federal judicial power, again to the extent prescribed by the Statute. There is nothing to restrict that judicial power to original jurisdiction any more than to appellate jurisdiction, and there is no reason why there should be a restriction. There can be no doubt that Parliament might think fit to invest one Court exclusively with original jurisdiction, another with appellate jurisdiction, and another with both. There is nothing to limit that power. Any power that falls 10 within the words 'federal jurisdiction' may be conferred on any Court which Parliament thinks fit to invest with federal jurisdiction."

With this view Parton J. agreed whilst Isaacs J. in the *State of New South Wales* v. *The Commonwealth* (20 C.L.R. 54 at p. 90) expressed a similar opinion. The same view seems to me to be implicit in the reasoning of the Court in *Lorenzo* v. *Carey* (29 C.L.R. 243) and to be expressly accepted by the observations of Starke J. in *The Commonwealth* v. *Limerick Steamship Company Limited* v. *Kidman* (35 C.L.R. at pp. 114 and 115). I do not understand it ever to have been said that section 77 of the Constitution extends so far as to authorise the Parliament to create new 20 federal appellate courts with a *general* jurisdiction, either exclusive or otherwise, to hear and determine appeals from State courts exercising State jurisdiction. But if it should be suggested the answer is clear. The constitutional authority to create new federal courts is limited. The extent of the jurisdiction which Parliament may confer on any such court is determinable solely by reference to the matters mentioned in sections 75 and 76. Within the same limits, and not otherwise, Parliament may define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the State. To create a new federal court as an exclusive appellate court 30 from State courts exercising a *general* State jurisdiction would at one and the same time exceed both the power to create new federal courts and the power to define the extent to which the jurisdiction of any such court should be exclusive of that which belongs to or is invested in the courts of the State. But the views which I have expressed may, perhaps, be taken to suggest that Parliament may create a new federal court with jurisdiction to hear and determine appeals from judgments or orders of State courts in matters answering to the descriptions contained in sections 75 and 76 even in the absence of legislation investing those courts with federal jurisdiction in such matters. In the latter circumstance the 40 judgments or orders in question would be given or made in the exercise of State jurisdiction. But if upon a literal reading of sec. 77 such a course be thought to be permissible, sufficiently cogent reasons to the contrary, which have been judicially recognised, readily present themselves upon an examination of the federal structure erected by the Constitution. Moreover the existence of a right of appeal to the High Court from orders of State courts in such matters, other than the general right of appeal from the Supreme Courts of the several States pursuant to sec. 73, depends, not upon the character of the matters involved, but upon whether or not the orders or judgments appealed against have been made in the 50 exercise of federal jurisdiction, or, in other words, upon whether the court

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, *continued.*

from which the appeal has been brought has exercised federal or State judicial authority. This, of course, depends in turn upon the extent to which Parliament has seen fit to exercise its legislative authority under sec. 77 (iii) and not merely upon a consideration on the matters with respect to which legislative authority has been conferred by that section. I see no reason to suppose that similar considerations should not apply with equal force in considering the extent to which any new or existing federal court may be invested with appellate jurisdiction. Indeed, to conclude otherwise would be to permit direct interference with the exercise 10 by the courts of the States of State judicial functions, and such a notion is, as I have already said, inconsistent with the maintenance of federal and State judicial authority under the federal system erected by the Constitution. These considerations are not displaced by asserting that the substance of the matters specified in secs. 75 and 76 determined their selection as matters appropriate for the exercise of federal jurisdiction and, therefore, that in considering whether jurisdiction to hear and determine appeals in such matters from inferior courts of the State may be conferred upon a new or existing federal court, it is unnecessary to distinguish between orders and judgments made or given in the exercise of federal jurisdiction 20 and those made in the exercise of State jurisdiction. It may, of course, be said that the order of any such inferior court will produce exactly the same result in the matter and have precisely the same legal effect whether made in the exercise of one type of jurisdiction or the other. But, in my view, although sec. 77 (i) may authorise the creation of new appellate tribunals, it does not authorise Parliament to invest any federal court with jurisdiction to entertain appeals from the orders and judgments of State courts made or given in the exercise of State judicial authority, even though such orders and judgments have been made or given in any one of the matters specified in secs. 75 and 76. Indeed, it is difficult 30 to see how it can be said that such an appellate jurisdiction would constitute part of the judicial power of the Commonwealth and the provisions of sec. 77 (i) must be taken to be limited by this concept.

The appeal being competent, it becomes necessary to consider whether the existence of the Metal Trades Award in the form in which it was proved to exist at the time of the Appellant's dismissal from his employment operated to preclude him from obtaining the benefits to which, otherwise, he would have been entitled under the Factories and Shops (Long Service Leave) Act 1953. The provisions of the award and of the Act have already been analysed and the opinion expressed that there is no conflict between 40 their respective terms. I agree with this conclusion basing my opinion upon the view that the award does not in any way deal with the subject of long service leave nor can it be regarded as an exhaustive declaration of the conditions binding upon the parties with respect to service and employment in the industries specified in the award. At the most it is exhaustive only so far as it purports to deal with those matters which were in dispute between the parties and it is quite silent on the question of long service leave. It is, I think, quite clear that the Act does not purport to, or in fact, cover any part of the ground covered by the award and in so far as the Respondent's argument is based on the contrary proposition it must fail. 50 Nor do the provisions, speaking in their respective fields, conflict with one another. Perhaps the strongest illustration of their supposed conflict

In the High Court of Australia.

No. 7 (b). Judgment of Taylor, J., 11th August 1955, continued.

is to be found in a comparison of Clause 19 (*c*) and section 9 (4) of the Act. The former provides that an employee not attending for duty shall, with certain immaterial exceptions, lose his pay for the actual time of such non-attendance whilst the latter provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid to him in one of three specified ways. It was strongly contended that these provisions were repugnant to one another, the former being said to mean that an employer bound by the award shall not be bound to pay the prescribed wages to an employee who does not attend for duty whilst the act provides that he shall be so bound during any period of long service leave. There is, however, no such inconsistency. The two provisions deal with quite different subject matters, the former being intended merely as a provision restricting the rights of employees to receive wages *by force of the Award*, with certain irrelevant exceptions, to wages payable for work done. I agree that the appeal should be allowed.

No. 8. Order of the High Court of Australia Allowing Appeal, 11th August 1955.

No. 8.

ORDER of the High Court of Australia Allowing Appeal.

No. 10 of 1955.

IN THE HIGH COURT OF AUSTRALIA.
Principal Registry.

On Appeal from the Metropolitan Industrial Court of the State of Victoria.

Between GERALD ALEXANDER COLLINS . . Appellant (Informant)

and

CHARLES MARSHALL PROPRIETARY LIMITED . . . . . . Respondent (Defendant).

Before their Honours The Chief Justice Sir OWEN DIXON, Mr. Justice McTIERNAN, Mr. Justice WILLIAMS, Mr. Justice WEBB, Mr. Justice FULLAGAR, Mr. Justice KITTO and Mr. Justice TAYLOR, Thursday, the 11th day of August 1955.

THIS APPEAL from the Order made on the 28th day of February 1955 by Herbert Barton Wade, Esquire, a Stipendiary Magistrate constituting the Metropolitan Industrial Court of the State of Victoria whereby it was ordered that an information for an offence against the provisions of the Factories and Shops (Long Service Leave) Act 1953 of the said State wherein the above-named Appellant was Informant and the above-named Respondent was Defendant be dismissed coming on for hearing before this Court at Melbourne on the 16th, 17th, 18th and 19th days of May 1955 pursuant

to special leave to appeal granted by this Court on the 10th day of March 1955 UPON READING the transcript record of the proceedings herein AND UPON HEARING Her Majesty's Solicitor-General in and for the State of Victoria and Mr. Aickin of Counsel on behalf of the Appellant and Mr. D. I. Menzies of Queen's Counsel and Mr. Aird of Counsel on behalf of the Respondent and Mr. Adam of Queen's Counsel and Mr. Menhennitt of Counsel intervening by leave on behalf of the Commonwealth of Australia THIS COURT DID ORDER on the said 19th day of May 1955 that the said Appeal should stand for judgment AND the 10 same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that the said Appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the said Order of the Stipendiary Magistrate constituting the Metropolitan Industrial Court of the State of Victoria be and the same is hereby discharged AND THIS COURT DOTH FURTHER ORDER that the said information be remitted to the said Metropolitan Industrial Court for re-hearing AND THIS COURT DOTH FURTHER ORDER that the costs of the former hearing be dealt with by the Stipendiary Magistrate disposing of the information AND THIS COURT DOTH ALSO ORDER that the 20 costs of the Appellant of this appeal be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Respondent to the Appellant.

In the High Court of Australia.

No. 8. Order of the High Court of Australia Allowing Appeal, 11th August 1955, *continued.*

By the Court.

(Sgd.) M. DOHERTY,
Deputy Registrar.

No. 9.

ORDER of Her Majesty in Council granting Special Leave to Appeal from the Order of the High Court of Australia.

In the Privy Council.

No. 9. Order of Her Majesty in Council granting Special Leave to Appeal from the Order of the High Court of Australia, 1st June 1956.

AT THE COURT AT BUCKINGHAM PALACE.

30 The 1st day of June 1956.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	MR. THORNEYCROFT
EARL OF MUNSTER	SIR MICHAEL ADEANE
MR. SECRETARY LENNOX-BOYD	MR. MOLSON

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 23rd day of April 1956 in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the 40 Seventh's Order in Council of the 18th day of October 1909 there

In the Privy Council.

No. 9. Order of Her Majesty in Council granting Special Leave to Appeal from the Order of the High Court of Australia, 1st June 1956, *continued.*

was referred unto this Committee a humble Petition of Charles Marshall Proprietary Limited in the matter of an Appeal from the High Court of Australia between the Petitioner and Gerald Alexander Collins Respondent setting forth (amongst other matters): that the questions upon which the Petitioner desires to obtain the decision of Your Majesty in Council is the validity of a Statute of the State of Victoria viz. :— The Factories and Shops (Long Service Leave) Act 1953 (thereinafter referred to as 'the State Act'): that the Petitioner was prosecuted in the Metropolitan Industrial Court at Melbourne upon the information of the Respondent an Inspector of Factories and Shops of the State of Victoria for an alleged offence against the State Act in not granting a dismissed employee one Kemp pay for a period of long service leave to which he was entitled under the State Act and pleading not guilty the Petitioner contended that the State Act was invalid by reason of its inconsistency with the Commonwealth Conciliation and Arbitration Act 1904–1952 and an Award made thereunder namely The Metal Trades Award which bound the Petitioner in relation to the said Kemp: that the case was the first of its kind and was treated as a test case between employers to whom the State Act if valid would apply and the State of Victoria upon the validity of the State Act: that the said Court on the 28th February 1955 dismissed the Information on the ground that the State Act was invalid by virtue of Section 109 of the Commonwealth Constitution: that the Respondent obtained special leave to appeal to the High Court of Australia and that Court on the 11th August 1955 in a reserved judgment decided that there was no inconsistency between the State Act and Commonwealth law and allowed the Appeal and set aside the Order of the Metropolitan Industrial Court and remitted the Information to that Court for re-hearing: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court of Australia dated the 11th August 1955 and for such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Australia dated the 11th day of August 1955 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs and upon condition that it shall be open to the Respondent to take the point that the Appeal is not competent upon the ground that the *inter se* question is raised:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon the payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

(L.S.) W. G. AGNEW.

No. 21 of 1956.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

CHARLES MARSHALL PROPRIETARY LIMITED . . . *Appellant (Respondent)*

AND

GERALD ALEXANDER COLLINS . . . . . . *Respondent (Appellant)*

RECORD OF PROCEEDINGS

PARK, NELSON & CO.,
11 ESSEX STREET,
STRAND,
LONDON, W.C.2,
Solicitors for the Appellant.

FRESHFIELDS,
1 BANK BUILDINGS,
PRINCES STREET,
LONDON, E.C.2,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1. WL6172-30539