5, 1957

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).

CASE FOR THE RESPONDENT.

RECORD.

INTRODUCTION.

1. The issue arising in this appeal is whether the High Court of Australia correctly decided that the provisions of the Factories and Shops (Long Service Leave) Act 1953 of the State of Victoria were not invalid by reason of Section 109 of the Constitution of the Commonwealth of Australia as being inconsistent with the Commonwealth Conciliation and Arbitration Act and an award (known as the Metal Trades Award 1952) made thereunder by a Conciliation Commissioner.

2. The power of the Parliament of Victoria to make the said Act is undoubted subject to the operation of the said Section 109 of the Constitution which provides as follows:—

"109. When a law of a State is inconsistent with a law of the "Commonwealth, the latter shall prevail, and the former shall, to "the extent of the inconsistency, be invalid."

3. The point arises out of the prosecution of the Appellant Company by the Respondent, an inspector of Factories and Shops, before the Metropolitan Industrial Court at Melbourne, Victoria, for a breach of the provisions of the said Factories and Shops (Long Service Leave) p. 1.

Act 1953. The Stipendiary Magistrate who constituted the Metropolitan Industrial Court under Legislation of the State of Victoria dismissed
p. 5, l. 31. the charge upon the ground that the Victorian Act was inconsistent with the Conciliation Commissioner's award and was *pro tanto* invalid by reason of Section 109. On appeal the High Court of Australia unanimously held that the provisions of the Victorian Act were not inconsistent with the Conciliation Commissioner's award and were
p. 33, l. 11. therefore not invalid. The High Court accordingly allowed the appeal, discharged the order of the Metropolitan Industrial Court and ordered that the information be remitted to the Metropolitan Industrial Court for re-hearing.

4. The test of what constitutes inconsistency for the purposes of Section 109 has been firmly established by a series of decisions of the High Court. A convenient statement appears in the following passage from the judgment of Fullager J. in *O'Sullivan v. Noarlunga Meat Limited*, 92 Commonwealth Law Reports at pages 591–2, a passage which was quoted in part by the Privy Council in that same case on appeal (*O'Sullivan v. Noarlunga Meat Limited* 1956 3 All E.R.177 at 182). It is as follows:—

"The test of inconsistency which is now generally applied was "laid down in *Clyde Engineering Co. Limited v. Cowburn* (1926) 37 "C.L.R. 466. It has been applied in a number of later cases: see "especially *H. V. McKay Pty. Limited v. Hunt* (1926) 38 C.L.R. 308; "*Hume v. Palmer* (1926) 38 C.L.R. 441; *Ex parte McLean* (1930) 43 "C.L.R. 472; *Colvin v. Bradley Bros. Pty. Limited* (1943) 68 C.L.R. "151 and *Wenn v. Attorney-General (Vict.)* (1948) 77 C.L.R. 84. "In *Clyde Engineering v. Cowburn*, Isaacs J. said: 'If . . . . a com- " 'petent legislature expressly or impliedly evinces its intention to " 'cover the whole field, that is a conclusive test of inconsistency " 'where another legislature assumes to enter to any extent upon the " 'same field.' (1926) 37 C.L.R. at p. 489. The test was analyzed " and fully stated by Dixon J. in *Ex parte McLean* (1930) 43 C.L.R. " 472, in a passage which is often cited. His Honour said: 'When " 'the Parliament of the Commonwealth and the Parliament of a " 'State each legislate upon the same subject and prescribe what the " 'rule of conduct shall be, they make laws which are inconsistent, " 'notwithstanding that the rule of conduct is identical which each " 'prescribes, and Section 109 applies. That this is so is settled, at " 'least when the sanctions they impose are diverse (*Hume v.* " '*Palmer* (1926) 38 C.L.R. 441). But the reason is that, by " 'prescribing the rule to be observed, the Federal statute shows an " 'intention to cover the subject matter and provide what the law " 'upon it shall be. If it appeared that the Federal law was " 'intended to be supplementary to or cumulative upon State law, " 'then no inconsistency would be exhibited in imposing the same " 'duties or in inflicting different penalties. The inconsistency does

" 'not lie in the mere coexistence of two laws which are susceptible
" 'of simultaneous obedience. It depends upon the intention of the
" 'paramount legislature to express by its enactment, completely,
" 'exhaustively, or exclusively, what shall be the law governing the
" 'particular conduct or matter to which its attention is directed.
" 'When a Federal statute discloses such an intention, it is incon-
" 'sistent with it for the law of a State to govern the same conduct
" 'or matter' (1930) 43 C.L.R. at p. 483."

That statement deals with what is sometimes called "indirect inconsistency" which arises because the Federal law demonstrates an intention that it shall "cover the field" in relation to some particular subject matter, so as to provide an exhaustive and exclusive regulation of that topic, with the result that any attempt by the State to enter the same field is inconsistent with the intention of the Federal legislature. Inconsistency, however, may arise in a more direct fashion without it being necessary for the Federal legislature to have intended to "cover the field". Such "direct inconsistency" may arise by reason of a State Act making a provision which is such that obedience to both State and Federal law is impossible, or such as to impair or interfere with the intended operation of the Federal legislation. An example of "indirect inconsistency" (not concerned with industrial legislation) may be found in the case of *Wenn v. Attorney-General (Victoria)* (1948) 77 C.L.R. 84) and of direct inconsistency (also not concerned with industrial legislation) in the case of *The King v. Brisbane Licensing Court, Ex parte Daniell* (1920) 28 C.L.R. 23).

5. Special problems, however, arise with regard to the operation of State law in relation to awards made under the Federal Conciliation and Arbitration Act. In such cases the nature of the Federal legislative power with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State is of particular importance. The Federal Parliament (unlike the State Parliaments) has no general legislative power over industrial matters or industrial relationships, and no power to make laws with respect to the terms and conditions of employment generally. The relevant Federal legislative power is that conferred by Section 51 (35) which provides as follows:—

"The Parliament shall, subject to this Constitution have power
"to make laws for the peace order and good government of the
"Commonwealth with respect to—
"(35) conciliation and arbitration for the prevention and
"settlement of industrial disputes extending beyond the limits
"of any one State."

The nature and extent of the legislative power conferred by paragraph (35) have been the subject of a very long series of decisions in the High Court. Under the power, the Federal Parliament enacted the Conciliation and Arbitration Act 1904–1951 which set up a Common-

wealth Court of Conciliation and Arbitration and also provided for Conciliation Commissioners, conferring mutually exclusive jurisdictions upon the Court and the Commissioners. The extent of the powers which may validly be exercised under the Act has been defined as the result of much litigation over a period of nearly fifty years.

6. The true extent of these statutory powers depends upon the extent of the said legislative power of the Commonwealth as interpreted by the High Court in the series of decisions referred to. A law of the Commonwealth made under such power can only prescribe the rights and obligations of employers and employees to the extent to which it is a law with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The operation of such a law through awards is conditioned by the existence of an industrial dispute. An award can only be made for the purpose of preventing or settling such an industrial dispute and it can deal only with such matters as are in fact in dispute between the parties to the dispute. An award either of the Court or of a Conciliation Commissioner cannot prescribe terms and conditions of employment or deal with any industrial matter unless the matters dealt with are embraced within the ambit of the actual dispute which gives the Court or Commissioner the jurisdiction to make an award. An illustration of the application of this doctrine and a statement of it is to be found in the case of *The King v. Findlay, Ex parte Victorian Chamber of Manufacturers* (1950) 81 C.L.R. 537. An earlier illustration is contained in the case of *R. v. Commonwealth Board of Conciliation and Arbitration, Ex parte Whybrow & Co.* (1910) 11 C.L.R. 1 as dealt with at pp. 30–1, 46 and 61. The principle is discussed in the case of *Australian Insurance Staffs Federation v. Atlas Assurance Co. Limited* (1931) 45 C.L.R. 409 at pp. 421, 426-8, 432-5, 445-6. Thus if some subject matter is not within the ambit of a particular industrial dispute it is not intended by the Federal Parliament and could not validly be intended that either the Court or a Conciliation Commissioner should prescribe rights and duties for employer and employee in relation to such a matter.

7. In addition to these constitutional limitations, the Statute itself limits by definition the subject matters ("industrial matters") as to which there may be disputes resulting in awards, the subject matters which may be dealt with respectively by the tribunals it creates and the duration of awards when made.

8. The respective jurisdictions of the Court and Conciliation Commissioners are defined by the Act as follows:—

"13. (1) A Conciliation Commissioner shall not be empowered "to make an order or award—

"(a) altering the standard hours of work in an "industry;

"(b) altering the basic wage for adult males (that is "to say, that wage, or that part of a wage, which is just and

"reasonable for an adult male, without regard to any circum-
"stance pertaining to the work upon which, or the industry in
"which, he is employed) or the principles upon which it is
"computed;

"(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;

"(d) determining or altering the basic wage for adult
"females (that is to say, that wage, or that part of a wage, which
"is just and reasonable for an adult female, without regard to
"any circumstance pertaining to the work upon which, or the
"industry in which, she is employed) or the principles upon
"which it is computed.

"(2) The last preceding sub-section does 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."

"25. The Court may, for the purpose of preventing or settling
"an industrial dispute, make an order or award—

"(a) altering the standard hours of work in an industry;

"(b) altering the basic wage for adult males (that is to
"say, that wage, or that part of a wage, which is just and
"reasonable for an adult male, without regard to any circum-
"stance pertaining to the work upon which, or the industry in
"which, he is employed) or the principles upon which it is
"computed;

"(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;

"(d) determining or altering the basic wage for adult
"females (that is to say, that wage, or that part of a wage, which
"is just and reasonable for an adult female, without regard to
"any circumstance pertaining to the work upon which, or the
"industry in which, she is employed) or the principles upon
"which it is computed."

9. On the other hand, there are no constitutional limitations upon the legislative powers of the States with respect to industrial relations, affairs and matters except such as spring from territorial limits nor upon the operation of State law on these subjects except such as arise from Section 109 aforesaid.

10. In the present case the Appellant alleges inconsistency between the Victorian Act and the Federal award, and before looking at the relevant provisions, it is desirable first to note the way in which Section 109 of the Constitution operates when inconsistency is alleged

between State legislation and an award of the Conciliation and Arbitration Court or of a Conciliation Commissioner, in view of the fact that an award so made is not properly to be described as a "law of the Commonwealth". The matter is dealt with in the judgment under appeal by reference to accepted doctrine as explained in two citations which are made from *Ex parte McLean* (1930) 43 C.L.R. 472 as follows:—

"The basis of the application of Section 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 Section 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 a 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* (*supra*).

"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 analyzed 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 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) Section 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. (1930) 43 C.L.R. at pp. 484–485. The operation of Section 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 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 "Section 48(2) of the Act keeps the award in force and by reference "to the classes of persons bound by the award."

11. The inconsistency alleged in the present case is of both the indirect and the direct kinds mentioned above.

PROVISIONS OF THE METAL TRADES AWARD 1952.

12. The Metal Trades Award was, at the time of the passing of the State Act and thereafter, kept in force by the operation of Section 48(2) of the Conciliation and Arbitration Act. It deals with a wide variety of matters affecting industrial relations as between the employers and employees who are bound by the award in the various States of Australia (as to which see Clause (35) of the award). It deals with wages, by way of a basic wage (see Clause (2)) and of margins for employees of particular classifications (Clause (4)); with hours of work (Clause (11)), shift work and overtime; with the position of shop stewards and union officials; with time and wages books and piecework and with allowances for travelling and board; in particular it contains provisions dealing with pay for holidays and for Sunday work, payment of wages, contract of employment and paid sick leave and annual leave. It may be taken that all these various matters were the subject of dispute and the proper subject (in the circumstances) of a Commissioner's award.

13. The last mentioned matters are deal with in Clauses (15), (18), (19), (20) and (21) which are as follows:—

"Holidays and Sunday work.

"15. (a) Employees shall be entitled to the following public "holidays without loss of pay as regards employees on weekly "hiring:—New Year's Day, Foundation or Anniversary Day, Good "Friday, Easter Saturday, Easter Monday, King's Birthday, Eight "Hours' Day (or Labour Day), Anzac Day, Christmas Day and "Boxing Day or such other day as is generally observed in the "locality as a substitute for any of the said days respectively.

"By agreement between any employer and his employees other "days may be substituted for the said days or any of them as to such "employer's undertaking.

. . . . . .

"Exceptions:

"In South Australia, except at Whyalla, Commemoration Day "(the 28th day of December) shall be observed as a holiday under this "award instead of Boxing Day.

"(b) Except as provided in sub-clause (i) of clause 12 of "this award an employee not engaged on continuous work shall be "paid at the rate of double time for work done on Sundays and "public holidays, such double time to continue until he is relieved "from duty.

"(c) An employee, other than a casual employee, not "engaged in continuous work who works on a Sunday or a public "holiday and (except for meal breaks) immediately thereafter con- "tinues such work shall on being relieved from duty be entitled to "be absent until he has had eight consecutive hours off duty, with- "out deduction of pay for ordinary time of duty occurring during "such absence.

"(d) Employees, other than on shift or engaged in main- "taining the continuity of electric light and power, required to work "on Sundays or public holidays shall be paid for a minimum of "three hours' work.

"(e) Where an employee is absent from his or her employ- "ment on the working day before or the working day after a public "holiday without reasonable excuse or without the consent of the "employer, the employee shall not be entitled to payment for such "holiday."

. . . . . .

"Payment of Wages.

"18. (a) Wages shall be paid weekly or fortnightly.

"(b) On the first pay day occurring during his employ- "ment, an employee shall be paid whatever wages are due to him "up to the completion of his work on the previous day: Provided "that this sub-clause shall not apply to employees of electric supply "undertakings nor to employers who make a practice of allowing "advances to employees approximating wages due.

"(c) Upon determination of the employment wages due "to an employee shall be paid to him on the day of such determina- "tion, or forwarded to him by post on the next working day.

"(d) An employee kept waiting for his wages on pay day "for more than a quarter of an hour after the usual time for ceasing "work shall be paid at overtime rates after that quarter-hour with "a minimum of a quarter of an hour.

"(e) On or prior to pay day, the employer shall state to "each employee in writing the amount of wages to which he is "entitled, the amount of deductions made therefrom, and the net "amount being paid to him.

"Contract of Employment.

"Weekly Employment.

"19. (a) Except as hereinafter provided employment shall be "by the week. An employee not specifically engaged as a casual "employee shall be deemed to be employed by the week.

"(b) Employment shall be terminated by a week's notice "on either side given at any time during the week or by the pay- "ment or forfeiture of a week's wages as the case may be. This "shall not affect the right of the employer to dismiss any employee "without notice for malingering, inefficiency, neglect of duty or "misconduct and in such cases the wages shall be paid up to the

"time of dismissal only or to deduct payment for any day the "employee cannot be usefully employed because of any strike or "through any breakdown in machinery or any stoppage of work by "any cause for which the employer cannot reasonably be held "responsible. Where an employee has given or been given notice "as aforesaid he shall continue in his employment until the date of "the expiration of such notice. Any employee who having given "or been given notice as aforesaid, without reasonable cause (proof "of which shall lie on him) absents himself from work during such "period, shall be deemed to have abandoned his employment and "shall not be entitled to payment for work done by him within that "period.

"Prohibition of Bans, Limitations or Restrictions.

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

(ii) An organization shall be deemed to commit a "new and separate breach of the above sub-clause on each and every "day in which it is directly or indirectly a party to such ban, "limitation or restriction.

"(c) (i) An employee (other than an employee who has "given or received notice in accordance with sub-clause (b) of this "clause) not attending for duty shall, except as provided by "clause 20 of this award, lose his pay for the actual time of such "non-attendance.

"(ii) Notwithstanding anything hereinbefore con- "tained any employer in the State of New South Wales who by "reason of the failure of shortage of electric power is unable to carry "on his undertaking during all the working hours of the day may "deduct from the wages of an employee payment for any part of a "day in excess of 20 minutes such employee cannot be usefully "employed. Provided that any employee who is required to attend "for work on any day but for whom for the reason above mentioned "no work is provided shall be entitled to two hours' pay and pro- "vided further that where any employee commences work he shall "be entitled to be provided with 4 hours' employment or failing "which be entitled to be paid as for 4 hours' work.

"Casual Employment.

"(d) A casual employee is one engaged and paid as such. "A casual employee for working ordinary time shall be paid per "hour one-fortieth of the weekly rate prescribed by this award for "the work which he or she performs, plus 10 per cent.

"Late Comers.

"(e) Notwithstanding anything elsewhere contained in "this award an employer may select and utilise for timekeeping

"purposes any fractional or decimal proportion of an hour (not "exceeding quarter of an hour) and may apply such proportion in "the calculation of the working time of employees who without "reasonable cause promptly communicated to the employer, report "for duty after their appointed starting time or cease duty before "their appointed finishing times.

"An employer who adopts a proportion for the aforesaid pur- "pose shall apply the same proportion for the calculation of "overtime."

"Sick Leave.

"20. (a) An employee on weekly hiring who is absent from "his work on account of personal illness, or on account of injury by "accident arising out of and in the course of his employment, shall "be entitled to leave of absence, without deduction of pay, subject "to the following conditions and limitations:—

"(i) He shall not be entitled to paid leave of absence "for any period in respect of which he is entitled to workers' "compensation.

"(ii) He shall within 24 hours of the commencement "of such absence inform the employer of his inability to attend "for duty, and, as far as practicable state the nature of the "injury or illness and the estimated duration of the absence.

"(iii) He shall prove to the satisfaction of his "employer (or in the event of dispute, of a Board of Reference) "that he was unable on account of such illness or injury to "attend for duty on the day or days for which sick leave is "claimed.

"(iv) He shall not be entitled in any year (whether in "the employ of one employer or of several) to leave in excess of "40 hours of working time.

"For the purpose of administering paragraph (iv) hereof an "employer may within one month of this award coming into opera- "tion or within two weeks of the employee entering his employment "require an employee to make a sworn declaration or other written "statement as to what paid leave of absence he has had from any "employer during the then current year; and upon such statement "the employer shall be entitled to rely and act.

"Single Day Absences.

"(b) In the case of an employee who claims to be allowed "paid sick leave in accordance with this clause for an absence of "one day only such employee if in the year he has already been "allowed paid sick leave on more than one occasion for one day "only, shall not be entitled to payment for the day claimed unless "he produces to the employer a certificate of a duly qualified "medical practitioner that in his, the medical practitioner's opinion "the employee was unable to attend for duty on account of personal

"illness or on account of injury by accident. Nothing in this sub-
"clause shall limit the employer's rights under paragraph (iii) of
"sub-clause (a) hereof.

"Cumulative Sick Leave.

"(c) Sick leave shall accumulate from year to year so that
"any balance of the period specified in paragraph (iv) of sub-
"clause (a) hereof which has in any year not been allowed to an
"employee by an employer as paid sick leave may be claimed by the
"employee and subject to the conditions hereinbefore prescribed
"shall be allowed by that employer in a subsequent year without
"diminution of the sick leave prescribed in respect of that year.
"Provided that sick leave which accumulates pursuant to this sub-
"clause shall be available to the employee for a period of two years
"but for no longer from the end of the year in which it accrues.

"Attendance at Hospital, etc.

"(d) Notwithstanding anything contained in sub-clause (a)
"hereof an employee suffering injury through an accident arising
"out of and in the course of his employment (not being an injury in
"respect of which he is entitled to workers' compensation)
"necessitating his attendance during working hours on a doctor,
"chemist or trained nurse, or at a hospital, shall not suffer any
"deduction from his pay for the time (not exceeding four hours) so
"occupied on the day of the accident, and shall be reimbursed by
"the employer all expenses reasonably incurred in connection with
"such attendance."

"Annual Leave.

"Period of Leave.

"21. (a) A period of 14 consecutive days' leave shall be
"allowed annually to an employee after twelve months' continuous
"service (less the period of annual leave) as an employee on weekly
"hiring in any one or more of the occupations to which this award
"applies.

"Seven Day Shift Workers.

"(b) In addition to the leave hereinbefore prescribed
"seven day shift workers, that is shift workers who are rostered to
"work regularly on Sundays and holidays shall be allowed seven
"consecusive days' leave including non-working days.

"Where an employee with twelve months' continuous service
"is engaged for part of the twelve-monthly period as a seven days'
"shift worker, he shall be entitled to have the period of fourteen
"consecutive days' annual leave prescribed in sub-clause (a) hereof
"increased by half a day for each month he is continuously engaged
"as aforesaid.

"Annual Leave Exclusive of Public Holidays.

"(c) Subject to this sub-clause the annual leave prescribed
"by this clause shall be exclusive of any of the holidays prescribed

"by clause 15 of this award and if any such holiday falls within an "employee's period of annual leave and is observed on a day which "in the case of that employee would have been an ordinary working "day there shall be added to the period of annual leave time "equivalent to the ordinary time which the employee would have "worked if such day had not been a holiday.

"Where a holiday falls as aforesaid and the employee fails "without reasonable cause proof whereof shall be upon him to "attend for work at his ordinary starting time on the working day "immediately following the last day of the period of his annual "leave he shall not be entitled to be paid for any such holiday.

"Broken Leave.

"(d) The annual leave shall be given and taken in a con- "tinuous period or, if the employee and the employer so agree, in "two separate periods and not otherwise.

"Calculation of Continuous Service.

"(e) For the purposes of this clause service shall be "deemed to be continuous notwithstanding—

"(i) any interruption or determination of the employ- "ment by the employer if such interruption or determination "has been made merely with the intention of avoiding obliga- "tions hereunder in respect of leave of absence;

"(ii) any absence from work on account of personal "sickness or accident or on account of leave lawfully granted "by the employer; or

"(iii) any absence with reasonable cause proof "whereof shall be upon the employee.

"In cases of personal sickness or accident or absence with reason- "able cause the employee to become entitled to the benefit of this "sub-clause shall inform the employer, in writing if practicable, "within 24 hours of the commencement of such absence of his "inability to attend for duty and as far as practicable the nature of "the illness, injury or cause and the estimated duration of his "absence. A notification given by an employee pursuant to "clause 20 of this award shall be accepted as a notification under "this sub-clause.

"Any absence from work by reason of any cause not being a "cause specified in this sub-clause shall not be deemed to break the "continuity of service for the purposes of this clause unless the "employer during the absence or within 14 days of the termination "of the absence notifies the employee in writing that such absence "will be regarded as having broken the continuity of service.

"In cases of individual absenteeism such notice shall be given in "writing to the employee concerned, but in cases of concerted or "collective absenteeism notice may be given to employees by the "posting up of a notification in the plant, in the manner in which

"general notifications to employees are usually made in that plant "and by posting to each union whose members have participated in "such concerted or collective absenteeism a copy of it not later than "the day it is posted up in the plant.

"A notice to an individual employee may be given by delivering "it to him personally or by posting it to his last recorded address, "in which case it shall be deemed to have reached him in due course "of post.

"In calculating the period of twelve months' continuous "service any such absence as aforesaid shall not, except to the "extent of not more than 14 days in a twelve-monthly period in the "case of sickness or accident, be taken into account in calculating "the period of twelve months' continuous service.

"Calculation of Service.

"(f) Service before the date of this award shall be taken "into consideration for the purpose of calculating annual leave but "an employee shall not be entitled to leave or payment in lieu "thereof for any period in respect of which leave or a payment in "lieu thereof has been allowed. The period of annual leave to be "allowed under this sub-clause shall be calculated to the nearest "day any broken part of a day in the result not exceeding half a day "to be disregarded.

"Where the employer is a successor or assignee or transmittee "of a business if an employee was in the employment of the "employer's predecessor at the time when he became such successor "or assignee or transmittee the employee in respect of the period "during which he was in the service of the predecessor shall for the "purpose of this clause be deemed to be in the service of the "employer.

"Calculation of Month.

"(g) For the purpose of this clause a month shall be "reckoned as commencing with the beginning of the first day of the "employment or period of employment in question and as ending "at the beginning of the day which in the latest month in question "has the same date number as that which the commencing day had "in its month and if there be no such day in such subsequent month "shall be reckoned as ending at the end of such subsequent month.

"Leave to be taken.

"(h) The annual leave provided for by this clause shall "be allowed and shall be taken and except as provided by sub-"clause 5(l) and (m) hereof payment shall not be made or accepted "in lieu of annual leave.

"Time of Taking Leave.

"(i) Annual leave shall be given at a time fixed by the "employer within a period not exceeding six months from the date "when the right to annual leave accrued and after not less than "two weeks' notice to the employee.

"Leave Allowed Before Due Date.

"(j) An employer may allow annual leave to an "employee before the right thereto has accrued due but where "leave is taken in such a case a further period of annual leave shall "not commence to accrue until after the expiration of the twelve "months in respect of which annual leave had been taken before "it accrued.

"Where leave has been granted to an employee pursuant to this "sub-clause before the right thereto has accrued due and the "employee subsequently leaves or is discharged from the service of "the employer before completing the twelve months' continuous "service in respect of which the leave was granted the employer "may for each one complete month of the qualifying period of "twelve months not served by the employee deduct from whatever "remuneration is payable upon the termination of the employment "one-twelfth of the amount of wage paid on account of the annual "leave, which amount shall not include any sums paid for any of "the holidays prescribed by clause 15 of this award.

"Payment for Period of Leave.

"(k) Each employee before going on leave shall be paid "two weeks' wages except a shift worker or an employee taking his "leave pursuant to sub-clause (d) of this clause either of whom shall "be paid the amount of wage he would have received in respect of "the ordinary time which he would have worked had he not been on "leave during the relevant period. For the purposes of this sub-"clause and sub-clause (l) hereof wages shall be at the rate "prescribed by clauses 2, 2A, 3, 4, 6 and 7 of this award for the "occupation in which the employee was ordinarily employed imme-"diately prior to the commencement of his leave or the termination "of his employment, as the case may be. Payment in the case of "employees employed on piece or bonus work or any other system "of payment by result shall be at time rates.

"Proportionate Leave on Dismissal.

"(l) If after one month's continuous service in any quali-"fying twelve-monthly period an employee lawfully leaves his "employment or his employment is terminated by the employer "through no fault of the employee the employee shall be paid at his "ordinary rate of wage for $6\frac{2}{3}$ hours at the same rate in respect of "each completed month of continuous service, the service being "service in respect of which leave has not been granted hereunder.

"Annual Close Down.

"(m) Where an employer closes down his plant, or a "section or sections thereof, for the purposes of allowing annual "leave to all or the bulk of the employees in the plant, or section or "sections concerned, the following provisions shall apply—

"(i) He may by giving not less than one month's "notice of his intention so to do stand off for the duration of the

"close down all employees in the plant or section or sections "concerned, and allow to those who are not then qualified for "two full weeks' leave paid leave on a proportionate basis of "one-sixth of a week's leave for each completed month of "continuous service.

"(ii) An employee who has then qualified for two full "weeks' leave, and has also completed a further month or more "of continuous service shall be allowed his leave, and shall "subject to sub-clause (f) hereof also be paid one-sixth of a "week's wages in respect of each completed month of continuous "service performed since the close of his last twelve-monthly "qualifying period.

"(iii) The next twelve-monthly qualifying period for "each employee affected by such close down shall commence "from the day on which the plant or section or sections con- "cerned is reopened for work. Provided that all time during "which an employee is stood off without pay for the purposes "of this sub-clause shall be deemed to be time of service in the "next twelve-monthly qualifying period.

"(iv) If in the first year of his service with an "employer an employee is allowed proportionate annual leave "under paragraph (i) hereof, and subsequently within such "year lawfully leaves his employment or his employment is "terminated by the employer through no fault of the employee, "he shall be entitled to the benefit of sub-clause (l) of this clause "subject to adjustment for any proportionate leave which he "may have been allowed as aforesaid.

"Exceptions.

"(n) This clause shall not apply to any employer in "respect of any employee to whom pursuant to an award or agree- "ment—Commonwealth or State—he is required to allow annual "leave to an extent equal to or greater than that prescribed herein."

14. It will be noted that the Award does not purport to deal with long service leave as a subject matter. Section 51 of the Conciliation and Arbitration Act provides as follows:—

"51. When a State law . . . . . 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, be invalid."

It is submitted that this is meant to be an explicit statement of legislative intention as to the extent of the exclusion of State law where awards under the Act are concerned, similar to the explicit statement of intention considered in *Wenn v. Attorney-General* (1948) 77 C.L.R. 84. It is then submitted that upon the proper construction of the section, it is only when an award contains provisions with which a State law is "inconsistent" in the sense of being "contrary", or actually deals with

a matter which the State law deals with, that the award is to prevail and the State law is to be *pro tanto* invalidated. This involves a different and narrower meaning being given to the words "inconsistent" and "inconsistency" in Section 51 from that attributed to the same words in Section 109 of the Constitution, but such meaning is necessary if any operation is to be allowed to the alternative words in Section 51.

PROVISIONS OF THE FACTORIES AND SHOPS (LONG SERVICE LEAVE) ACT 1953.

15. The general scheme of the Victorian Factories and Shops (Long Service Leave) Act 1953 is to prescribe conditions of entitlement for long service leave for workers who have been in "continuous employment" (as defined) with the same employer for the prescribed period and to impose upon employers an obligation to grant such leave or make a payment in respect thereof according to the circumstances. The employers and workers concerned, would, upon territorial considerations, be such as had some connection with Victoria. One provision provides for thirteen weeks' leave after twenty years' "continuous employment", with provision for further leave of three-and-a-quarter weeks for each succeeding five year period of continuous employment. There are also provisions for entitlement to leave for workers whose employment is terminated where they have been in "continuous employment" for more than ten years but less than twenty years and the employment has been terminated by the employer otherwise than for serious and wilful misconduct or by the worker on account of illness incapacity or necessity. There is also provision for payment to the legal personal representative of deceased employees who though entitled to long service leave die without taking it. The particular provisions are as follows:—

"2. (1) In this Act unless inconsistent with the context or "subject-matter—

" 'Employer' means any person employing any worker and "includes the Crown.

" '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 his personal representative) of the entitlement "concerned; and where the worker is provided with board or "lodging by his employer includes the cash value of that "board or lodging.

" 'Worker' means any person employed by any employer "to do any work for hire or reward and includes an apprentice "and any other person whose contract of employment requires "him to learn or to be taught any occupation.

"(2) For the purposes of the definition of 'ordinary pay' in "the last preceding sub-section—

"(a) where no ordinary time rate of pay is fixed for a "worker's work under the terms of his employment the

"ordinary time rate of pay shall be deemed to be the average "weekly rate earned by him during the period of twelve months "immediately prior to the date of the accrual to the worker (or "his personal representative) of the entitlement concerned;

"(b) where no normal weekly number of hours is "fixed for a worker under the terms of his employment the "normal weekly number of hours of work shall be deemed to "be the average weekly number of hours worked by him during "the period of twelve months aforesaid;

"(c) the cash value of any board or lodging provided "for a worker shall be deemed to be its cash value as fixed by "or under the terms of the worker's employment or, if it is not "so fixed, shall be computed at the rate of Twenty shillings a "week for board and Ten shillings a week for lodging:

"Provided that the value of any board or lodging or the "amount of any payment in respect of board or lodging shall "not be included in any case where the board or lodging is "provided or the payment is made not as part of his ordinary "pay but because the work done by the worker is in such a "locality as to necessitate his sleeping elsewhere than at his "genuine place of residence or because of any other special "circumstances."

"7. (1) Subject to this Act every worker shall be entitled to "long service leave on ordinary pay in respect of continuous "employment with one and the same employer.

"(2) The amount of such entitlement shall be—

"(a) on the completion by a worker of twenty years' "continuous employment with his employer—thirteen weeks' "long service leave and thereafter an additional three and a "quarter weeks' long service leave on the completion of each "additional five years of continuous employment with such "employer;

"(b) in addition, in the case of a worker who has com- "pleted more than twenty years' continuous employment with "his employer and whose employment is terminated—

"(i) by the employer for any cause other than "serious and wilful misconduct; or

"(ii) by the worker on account of illness "incapacity or domestic or any other pressing necessity "where such illness incapacity or necessity is of such nature "as to justify such termination—

"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 under paragraph (a) of this "sub-section;

"(c) in the case of a worker who has completed at "least ten but less than twenty years of continuous employment "with his employer and whose employment is terminated—

"(i) by the employer for any cause other than "serious and wilful misconduct; or

"(ii) by the worker on account of illness "incapacity or domestic or any other pressing necessity "where such illness incapacity or necessity is of such nature "as to justify such termination—

"such amount of long service leave as equals one-eightieth of "the period of his continuous employment."

"9. (1) When a worker becomes entitled to long service "leave under this Act such leave shall be granted by the employer "as soon as practicable (but save as otherwise expressly provided "in this section not before the thirty-first day of December One "thousand nine hundred and fifty-four) having regard to the needs "of his establishment; but subject to this Act—

"(a) the taking of such leave may be postponed to "such date as is mutually agreed or in default of agreement as "the Industrial Appeals Court having regard to the problems "involved directs but no such direction shall require such long "service leave to commence before the expiry of six months "from the date of such direction;

"(b) the taking of such leave may (if the entitlement "has accrued) be advanced to such date before the thirty-first "day of December One thousand nine hundred and fifty-four as "is mutually agreed;

"(c) in no case shall any entitlement to long service "leave be lost or in any way affected by the foregoing provisions "of this sub-section or by failure or refusal of the employer to "grant the leave.

"(2) 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.

"(3) The employer and worker may agree that any accrued "entitlement of long service leave will be taken in two periods; but "save as aforesaid long service leave shall be taken in one period.

"(4) 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; in which case payment shall, if "the worker in writing so requires, be made by cheque posted to "a specified address; 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 accordingly.

"(5) Any long service leave shall be inclusive of any trade "or public holiday occurring during the period when the leave is "taken, but shall not be inclusive of any annual leave occurring "during such period."

"17. (1) Every person who—
"(a) . . . . . .
"(b) . . . . . .
"(c) . . . . . .
"(d) contravenes or fails to comply in any respect "with any provision of this Act—
"shall be guilty of an offence against the Principal Act and liable "to a penalty of not more than One hundred pounds."

16. The proceedings in the present case arose in relation to a worker whose employment had been terminated after he had completed more than ten but less than twenty years of continuous employment, the employment being terminated in circumstances falling within Section 7 (2) (c), and the information which came before the Metropolitan Industrial Court was in respect of a failure "to grant to "the said worker the amount of ordinary pay in respect of the long "service leave to which he was entitled" in contravention of the Act. The particular provisions the validity of which were in issue were therefore Section 7 (2) (c) and Section 9 (2) and Section 17 (1) (d) in relation to the latter provision. p. 1, l. 28.

INDIRECT OR GENERAL INCONSISTENCY.

17. The Respondent contends that there is no indirect or general inconsistency. Although the Appellant contended that the nature of the award was such as to disclose an intention to regulate the entire field of industrial regulations between the employers and employees neither the Act nor any award under it could constitutionally be intended to prescribe exhaustively the whole of the relations between the employers and employees upon whom it is binding. The intention could not go beyond prescribing for settlement of matters in dispute. There is no evidence as to the nature or extent of the dispute which was before the Conciliation Commissioner and which he settled by the making of this award, although it can no doubt be properly presumed that the award was validly made and therefore that all the matters with which the award does in fact deal were within the ambit of the dispute. There is, however, no basis upon which any further inference

could be made and in particular no basis for inferring that the dispute in fact embraced matters not dealt with in the award.

18. Moreover under the Conciliation and Arbitration Act itself, by the definition of "industrial dispute" in Section 4, disputes are confined to disputes as to "industrial matters", the Commissioner's powers are limited and there are certain subject matters with which the Commissioner has no statutory power to deal and long service leave is one of them. An illustration of the way in which disputes have been held to be confined to "industrial matters" is to be found in the case of *The King v. Kelly, Ex parte State of Victoria* (1950) 81 C.L.R. 64. To express the matter by reference to the metaphor of covering the field, the Respondent contends that a Conciliation Commissioner cannot have intended or be deemed to have intended nor could the Act have intended him to occupy by his award a field which he is forbidden by the Act to enter. Further since the Constitution itself does not permit an award under the Conciliation and Arbitration Act, whether made by the Court or a Commissioner, to provide for matters, even though they be industrial matters, which are outside the ambit of the actual dispute, the award could not have been intended or be deemed to have been intended nor could the Act have intended it to deal with the whole of the rights and duties as between employer and employee, but only with such particular industrial matters as were specifically within the ambit of the dispute.

19. An examination of the list of matters dealt with in the Metal Trades Award shows that some aspects of the legal relationship and the rights and duties of the employer and employee are not covered by the award. For example, it does not prescribe an obligation to attend for duty but only consequences in relation to pay for non-attendance in specified circumstances. No award either is designed to or can operate in a legal vacuum. It operates upon and not in lieu of a contract of employment (*Mallinson v. Scottish Australian Co.* (1920) 28 C.L.R. 66 at 73; *Tasmanian Steamers Pty. Limited v. Lang* (1938) 60 C.L.R. 111 at 124–5). This award like all others must operate in a setting and against a background of Common law and of other State and Federal law as it may be from time to time and such law may affect the rights and duties of the employer and employee in relation to each other, as well as the rights and duties of both employers and employees. Two matters which are in the Respondent's submission plainly of an industrial character and affect the industrial relationship between employer and employee but which are not provided for by this award, are Workers' Compensation and what may be described as "Industrial Safety" generally, although Clause 22 (4) does purport to provide that employers shall comply with all "relevant requirements of State Acts "and regulations relating to guarding of machinery and the installation "and maintenance of dust-extracting appliances", except as to the State of New South Wales. Other matters of the same character might be

State laws providing for superannuation or marriage endowment for employees.

20. The award, it is true, does deal with paid holidays, paid annual leave and paid sick leave, but the Respondent contends that long service leave as dealt with by the State Act is an entirely separate and distinct subject matter from annual or sick leave with pay or paid holidays. The fact that they are separate and distinct subject matters is recognised by the Federal legislature itself in the Conciliation and Arbitration Act. It would be contrary to established doctrine to regard an award of long service leave with pay as permissible in a dispute as to annual leave with pay or paid holidays. Such distinctions were recognized in *The Queen v. Hamilton Knight, Ex parte The Commonwealth Steamship Owners Association* 86 C.L.R. 283 at pages 301, 303, 314, 325–6. The same distinction appears in the Victorian Act itself. The Factories and Shops Acts contain other provisions dealing with annual leave, and moreover the State Act dealing with long service leave itself recognizes the existence of leave of a different character, i.e. annual leave. The award, therefore, cannot be regarded as dealing exhaustively with the subject of "leave" and as embracing the subject of long service leave.

21. The award also deals with the payment of wages under the award but it does not follow that the State Act dealing with the payment during long service leave of "ordinary pay" as defined in that Act, encroaches upon a field occupied by the award. It has been held by the Judicial Committee that a provincial law providing for the imposition of and the recovery of a tax upon wages of employees in the province was not invalidated on the basis of the Parliament of the Dominion of Canada having occupied the field of taxation on incomes (*Forbes v. A.G. of Manitoba* 1937 A.C. 260). In *Tasmanian Steamers Pty. Limited v. Lang* (1938) 60 C.L.R. 111, the High Court held similar State wage taxing legislation not to be inconsistent with an award of the Commonwealth Court of Conciliation and Arbitration dealing with the payment of wages.

22. Certain features of the State Act require also to be observed in this connection.

Firstly, although the entitlement, to which the Act refers, for long service leave with pay is expressed as "continuous employment with "one and the same employer", when an examination is made, having regard to Section 3, of what constitutes continuous employment, it is found that it is deemed continuous notwithstanding periods when the worker is on leave, or is absent on account of illness or injury, and periods when the employment has been interrupted or ended, or the worker dismissed and re-employed or stood down. Furthermore, for the purpose of computing the length of the employment certain of these interruptions are embraced and not others. Moreover sub-section (3) of Section 3 shows that in some cases it is employment with a business rather than with the one and the same employer that will contribute to

the entitlement. The "continuous employment with one and the "same employer" referred to in the State Act is therefore a very special conception.

Secondly, the "leave" to which the State Act grants entitlement embraces any trade or public holiday occurring during the period during some of which there would be no obligation of any kind to be on duty and in this respect such "leave" is a special conception.

Thirdly, although the State Act imposes an obligation to pay "the ordinary pay of a worker" for the period of leave, that is a term defined in Section 2 in such a manner that it will not necessarily be equal to the amount payable under the award in the case where a worker is bound by the award. The award rate is a minimum rate. The "ordinary pay" is that actually fixed under the terms of the employment. It is calculated upon the rate of pay as at the time of the accrual to the worker of the entitlement concerned and would therefore be unaffected by subsequent variations of the award rate. In the case where there is no actual time rate fixed under the terms of employment it is calculated upon an average rate during a period of twelve months preceding the accrual of entitlement, and where there are no normal weekly number of hours fixed under the terms of employment upon the average number of weekly hours of work during a period of twelve months. It also takes in the cash value of board or lodging provided as fixed by the terms of employment or if not fixed a specified rate in lieu thereof. The "ordinary pay" referred to in the State Act is thus a very special conception.

23. The Commonwealth Conciliation and Arbitration Act contains no definitions relating to "long service leave with pay".

24. It is therefore submitted that in this respect there is a material difference between the conceptions with which the Commonwealth Act and the State Act are respectively concerned.

25. The Appellant's argument with regard to indirect or general inconsistency is also put upon the ground that even though the Conciliation Commissioner had no power under the Federal Act to award long service leave, the Metal Trades Award was nonetheless made upon the basis that there was no long service leave and that for State law to provide for long service leave disturbs or interferes with the settlement of the dispute effected under the Federal Act. This argument, however, assumes that a Conciliation Commissioner may preclude the provision of a matter for which he may not make provision himself because it is either outside the ambit of the dispute or relates to a non-industrial matter or is outside the statutory power conferred on the Commissioner. It is submitted that this assumption is incorrect. A Conciliation Commissioner (or the Court itself) is no doubt conscious on making an award that it would operate in a given legal situation in which the rights and duties of employer and employee are regulated by State or Federal law, both in regard to their relation to each other and in regard to

matters which may effect the real value of wages awarded to employees or the burden imposed upon employers. A Conciliation Commissioner or the Court would no doubt be conscious of and make an award in the light of the fact that State law provided a system of Workers' Compensation, but if that matter were outside the ambit of the dispute the award could not be made to operate so as to prevent the State legislature from amending the Workers' Compensation law on the ground that any alterations in the "legal background" of the award was inconsistent within the meaning of Section 109. Similar considerations apply with respect to State law or administrative action providing for concessional fares on State Railways or Tramways for workers or for the fixing of rents or of prices for goods and services at specified levels. Likewise with regard to the position of employers, since amongst the matters which Conciliation Commissioners make take into account would be the capacity of the employers to pay wages at a particular level and the factors which would affect the capacity to pay would be such matters as State Taxation, forming part of outgoings, e.g. State Land Tax or State Payroll Tax. It would not follow from the fact that the Conciliation Commissioner took the burden of such taxes into account in determining what wages were proper to be paid in the settlement of the dispute as to wages that a State law increasing the level of such taxation would, so far as it applied to employers bound by the award, be inconsistent with the award and therefore inoperative. A variant of this argument of the Appellant is that the Commissioner makes his award upon the assumption that if provision for long service leave with pay is made it will be made only by the Commonwealth Court of Conciliation and Arbitration. But there can be no such assumption since a dispute about long service leave with pay is a condition precedent to the exercise of the Court's power. It is not a condition precedent to the provision of long service leave by or under a State law. The fact that an award may have been made upon some assumed basis of fact or of law in relation to matters not directly in dispute, does not produce the result that some new State regulation of those matters of fact or of law produces inconsistency with the award. The Commonwealth legislation provides for a power to set aside an award or any of its terms or to vary any of the terms of an award, if for any reason the Commissioner considers it desirable to do so.

DIRECT OR PARTICULAR INCONSISTENCY.

26. The Appellant also attacks the State legislation on the ground that certain provisions show direct or particular inconsistency with the provisions of the Federal award.

27. It will be apparent from an examination of Sections 7 and 8 of the State Act that it deals with three situations—

(1) Where the employment is continuing and no circumstance of termination by act of the parties or death of the worker is involved;

(2) Where the employment is terminated by the act of either party;

(3) Where the worker dies.

28. The first such instance of direct inconsistency relied upon relates to the second of these situations. It is said that Section 7 (2) (c) and Section 9 (4) of the Act are inconsistent with Clause 19 of the award in that the Act provides for a continuation of the employment and the relationship of employer and employee and of the obligation to pay in accordance with the award, whereas the award itself provides that an employee may be dismissed upon a week's notice and that that is the end of the relationship, subject only to payment for that week of employment and of any amount due in respect of accrued annual leave. On behalf of the Respondent, it is submitted that Section 9 does not and does not purport to continue the employment or continue the relationship of employer and employee after it is terminated. Section 9 (2) and Section 7 (c) operate only when the employment is in fact terminated and the cessation of the employment and the relationship of employer and employee is a condition precedent to their operation. Section 9 (2) deliberately uses the expression "shall be deemed to have commenced "to take his leave" in recognition of the fact that he is no longer an employee and that he is not in truth or in fact on leave. For the purposes of the section he is deemed to have commenced to take his leave, but that is in order that the workers entitlement to be paid under sub-section (2) and the employer's obligation to pay under sub-section (4) may operate in the case of a worker who has terminated his employment. Sub-section (4) is expressed in quite general terms and is directed primarily to the case of an employee who has by reason of "continuous employment" (and not by termination of employment) become entitled to leave, and in order to make the language of the section apply at all in the case of an employee who is no longer employed, sub-section (2) provides that for the purposes of the Act he shall be deemed to have commenced to take his leave and there is thereby provided a measure in point of time for the payment which the Act requires shall be made to him.

29. The payment under the State Act is not a payment of "wages" or "pay" in the sense in which those terms are used in the award. In the award those terms are used in respect of remuneration for work actually done in the period in respect of which the payment is made. The payment which the State Act directs shall be made to an ex-employee is not a payment of wages or pay as such, but is a statutory payment of a special character directed to be made, not in respect of work being done, but in respect of the entitlement there referred to.

30. Another instance of direct inconsistency upon which reliance is placed by the Appellant is that the award proceeds upon the principle of "no work no pay", and that Section 9 (4) of the Act which imposes the obligation to pay "ordinary pay" within the meaning of the Act to

a worker on long service leave is inconsistent with Clause 19 (c) of the award which provides that an employee not attending for duty shall lose his pay for the actual time of non-attendance. This argument wrongly assumes that "ordinary pay" under the State Act is the same in its nature as "wages" or "pay" under the award. The Act does not require the employer to continue to the employee the "wages" in respect of a period of non-attendance, but does require that there shall be paid to him an amount measured by his "ordinary pay" which is in turn arrived at not in respect either of attendance or non-attendance to his duties as employee during a particular period, but in respect of his entitlement as prescribed by the Act. The right to "ordinary pay" in respect of any particular week of long service leave does not depend upon effluxion of time in that particular week, but is complete and indefeasible upon the expiration of the period of "continuous employment". Although one of the methods and times of payment permitted under the Act is at weekly intervals during the period of leave, that is merely a method of payment by instalments of a liability already accrued. It is because long service leave and payment during the period of long service leave are an entirely different subject matter from anything that is dealt with in the award that no inconsistency arises from a requirement that the payments prescribed by the State Act shall be made in respect of the period of long service leave, in circumstances in which under the award itself no payment of wages would be due from the employer to the employee. A further point of inconsistency relied upon is that by virtue of Section 9 (5) the employment is said to be continuous during the period of long service leave for the purpose of earning annual leave. But it is submitted that that provision will not bear the construction contended for. The right to annual leave must be found elsewhere.

31. The Respondent therefore submits that the decision of the High Court was correct and should be affirmed for the following p. 33, l. 11.

REASONS.

1. The field which the Federal Act is intended to occupy does not embrace any industrial matter which is not within the ambit of a dispute and there is no evidence or any permissible inference that either the whole of the industrial relations between employer and employee or the matter of long service leave with pay was within the ambit of the dispute in which the award was made.
2. The Federal Act is not intended to operate so as to render invalid a State law except to the extent that it makes a provision contrary to an award or deals with a matter dealt with in an award.

3. Long service leave with pay is a different industrial matter and subject of dispute from annual leave with pay and sick leave with pay and the award of the Conciliation Commissioner neither could nor did deal with long service leave with pay nor did it occupy or could have been intended to occupy a field which embraced long service leave with pay.
4. The provisions of the State Act are such that they do not come into collision with or interfere with or disturb any of the provisions of the settlement made in the Commissioner's award and in particular with the provisions in the award as to the duration or termination of the employment, the payment of wages for services rendered or annual leave with pay.
5. In particular the provisions of the State Act in respect of which contravention was alleged in this case, that is to say Section 9 (2) dealing with the case where the employment of a worker is terminated before he takes any long service leave to which he is entitled, do not come into collision with or interfere with or disturb any of the provisions of the award.
6. The reasons given by the members of the High Court for their decision that no inconsistency existed are correct.

GREGORY GOWANS.

K. A. AICKIN.

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).

CASE FOR THE RESPONDENT.

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