HIGH COURT OF AUSTRALIA.

THE QUEEN AGAINST

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION AND OTHERS; EX PARTE THE AMALGAMATED ENGINEERING UNION (AUSTRALIAN SECTION) AND OTHERS.

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THE QUEEN AGAINST

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION AND OTHERS; EX PARTE THE VEHICLE BUILDERS EMPLOYEES' FEDERATION OF AUSTRALIA AND OTHERS.

THE QUEEN AGAINST

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION AND OTHERS; EX PARTE THE NORTH AUSTRALIAN WORKERS' UNION AND ANOTHER.

Barwick C.J., McTiernan, Kitto, Taylor, Menzies and Windeyer JJ.

1967: SYDNEY, *Oct*. 10-13; *Dec*. 13.

118 CLR 219

Industrial Law (Cth) — Conciliation and Arbitration Commission — Power to award wage without prescribing basic wage — Alteration of basic wage — Conciliation and Arbitration Act 1904-1966 (Cth), s. 33.**The relevant parts of s. 33 of the Conciliation and Arbitration Act* 1904-1966 (Cth) *appear hereafter at pp. 238 and 239*

In setting a dispute as to wages to be paid, the Commonwealth Conciliation and Arbitration Commission is not bound so to prescribe a wage that it, or part of it, is identifiable as a "basic wage" as defined by s. 33 (1.) (*b*) of the *Conciliation and Arbitration Act* 1904-1966 (Cth).

Employees' organizations made an application to increase the basic wage and margins to be added thereto as prescribed by an award, whilst employers' organizations made a claim to vary the award by substituting a wage expressed as a single sum of money (a total wage) for each class of work to which the award referred. The President of the Commonwealth Conciliation and Arbitration Commission, being of opinion that the Commission constituted by a Commissioner was empowered to deal with the employers' claim, referred it, pursuant to s. 34 of the Act, to the Commission constituted by a Reference Bench. This Reference Bench deleted those clauses in the award relating to the basic wage and the margins, and inserted clauses prescribing a minimum wage and a total wage to be paid as wages for each class of work. The total wage for each class of work exceeded, by $1.00, the former wage (calculated by adding the prescribed basic wage and the prescribed margin) payable for that class of work, and the minimum wage exceeded the former basic wage by $4.75.

Held, by Barwick C.J., McTiernan, Taylor, Menzies and Windeyer JJ., Kitto J. dissenting that the award made by the Reference Bench did not constitute an alteration of the basic wage fixed by the previous award.

PROHIBITION AND MANDAMUS.

On 4th September 1967 the Amalgamated Engineering Union (Australian Section) and other employees' associations bound by an award made under the *Conciliation and Arbitration Act* 1904-1966 (Cth) known as the Metal Trades Award, 1952 were granted by Kitto J. in chambers orders nisi for (a) a writ of prohibition to restrain the Commonwealth Conciliation and Arbitration Commission, the Honourable Francis Heath Gallagher, and the Honourable John Cochrane Moore, Deputy Presidents of the Commission, Terence Cecil Winter, Esquire, a Commissioner of the Commission (the members of a Reference Bench of the Commission to which part of a certain dispute had been referred for settlement) and the Metal Trades Employers Association and other organizations of employers bound by that award from further proceeding upon the award made by that Bench on 5th June 1967 and for (b) a writ of mandamus directed to the Commonwealth Conciliation and Arbitration Commission, the Honourable Sir Richard Clarence Kirby, the President of the said Commission, the Honourable

Francis Heath Gallagher and the Honourable John Cochrane Moore, Deputy Presidents of the said Commission (the members of a Presidential Bench to which another part of the dispute had been referred for settlement) directing the hearing and determining the application of the employees' organizations for an increase of the basic wage prescribed in that award. Other respondents to the order nisi for mandamus included the Metal Trades Employers Association and other employers' organizations bound by the award.

On the same date the Vehicle Builders Employees Federation of Australia and other employees' organizations bound by the Vehicle Industry Award, 1953 were granted by his Honour an order nisi for a writ of prohibition to restrain the Commonwealth Conciliation and Arbitration Commission. James Edward Taylor, Esquire, the Senior Commissioner thereof, and the Motor Traders Association of New South Wales and other employers' organizations bound by that award from further proceeding with an award varying part of that award made by the Senior Commissioner on 21st June 1967.

On the same date the North Australian Workers' Union and the Amalgamated Engineering Union (Australian Section) being employees' organizations bound by the provisions of the Uranium Mining Industry (Northern Territory) Agreement, 1963, an industrial agreement certified pursuant to s. 31 of the Act, were granted by his Honour an order nisi for prohibition to restrain the Commonwealth Conciliation and Arbitration Commission, John Hereford Portus, Esquire, a Commissioner thereof, Territory Enterprises Pty. Limited, and United Uranium No-Liability, the latter two being employers bound by and parties to the agreement, from further proceeding on the notification of that Commissioner that he would consider whether variation should be made to the said agreement as a result of the decisions announced on 5th June 1967.

On 19th November 1965 employees' organizations registered under the Act made a claim to the Commission seeking a variation of the marginal rates prescribed by the Metal Trades Award, 1952. On 5th January 1966 employers' associations registered under the Act notified the Commission of an industrial dispute existing between those organizations and the employees' organizations mentioned above. An alternative claim made by the employers' organizations' claim giving rise to that dispute was that existing basic wage rates and marginal rates prescribed by the award be aggregated into total wage rates. These applications, together with

another application not referred to by the order nisi, comprised what is known as the *National Wage Cases,* 1966.

On 27th January 1966 the President of the Commission directed pursuant to s. 34 (3.) of the Act that the application for a variation of the marginal rates in the award be heard and determined by a Reference Bench of the Commission. On the same date the President expressed an opinion pursuant to s. 33 (4.) of the Act and gave a further direction pursuant to s. 34 (3.) of the Act in relation to the employers' total wage claim. This opinion was that those portions of the employers' total wage claim seeking an alteration of the basic wage must be dealt with, pursuant to s. 33, by the Commission in Presidential Session. The further direction was that those portions of the employers' total wage claim not seeking an alteration of the basic wage should be heard and determined by a Reference Bench of the Commission.

On 21st February 1966 the President nominated the Presidential and Reference Benches to determine these applications. On 8th July 1966 that Presidential Bench held that the employees' basic wage claims should be allowed by increasing the basic wage rates prescribed by $2 per week for adult males with proportional increases accruing to adult female employees, junior employees, and apprentices. On that date the Reference Bench directed a certain inquiry, made certain interim provision for the increase of certain wages, inserted a clause prescribing a minimum wage for adult males, and, on 22nd December 1966 awarded an interim increase in the marginal rates prescribed by the award.

On 16th January 1967 the employers' associations applied for further consideration of the part-heard employees' application for an increase in margins and the employers' total wage claim. On 10th February 1967 the employees' organizations filed an application to vary the award by increasing the basic wage prescribed. These applications for the increase in margins, the total wage claim, and the increase in the basic wage became known as the *National Wage Cases,* 1967.

On 22nd March 1967 the President announced the constitution of the Benches to hear the *National Wage Cases,* 1967. The Presidential Bench to determine the application for the increase in the basic wage was to be constituted by the President, Gallagher J., and Moore J., Deputy Presidents. The members of this Bench were made respondents to the order nisi for mandamus. The members of the Reference Bench to determine the other applications were Gallagher J. and Moore J., Deputy Presidents and Mr. Commissioner Winter. The members of this Bench were

made respondents to an order nisi for prohibition. A direction was given enabling the Commission to sit in joint session should it decide.

On 5th June 1967 the President announced, in the *National Wage Cases,* 1967 on behalf of the Commission, the elimination of the basic wages and margins and the introduction of total wages. Thereby the prescription of a basic wage contained in the Metal Trades Award, 1952 was deleted, a minimum wage provision was inserted, the prescription with respect to margins was deleted, and a new provision incorporated whereby the prescribed weekly wage rates were set out for each of the different classifications of work to which the award referred.

Applying this pronouncement in the *National Wage Cases,* 1967 the Commission constituted by either the Senior Commissioner or a Commissioner proceeded to vary existing awards made by the Commission to make those awards comply with the pronouncement. Some variations sought were initiated by employers' organizations and other were initiated by the Commission on its own motion.

By notice dated 6th June 1967 James Edward Taylor, the Senior Commissioner, who was assigned by the President to deal with industrial disputes relating to the group of industries covered by the provisions of the Vehicle Industry Award, 1953 made under the Act, gave notice that he intended to call before him the parties to that award to consider whether variation should be made as a result of that pronouncement. On 16th June 1967 certain employers' organizations bound by that award made application to the Commission that the award be varied to accord with that pronouncement. On 21st June 1967 the Senior Commissioner made an order varying the award accordingly, and in respect of this variation the Senior Commissioner was made a respondent to an order nisi for prohibition.

On 4th August 1967 John Hereford Portus, the Commissioner assigned to deal with industrial disputes relating to the Uranium Mining Industry (Northern Territory) Agreement, 1963, notified the parties to that agreement that following the pronouncement in the *National Wage Cases,* 1967, he would call before him the parties to that agreement to consider the question of whether any and if so what variation should be made to the agreement as a result of that pronouncement. The date of hearing specified in that notice was 13th September 1967. In respect of this notice the Commissioner was made a respondent to an order nisi for prohibition granted on 4th September 1967.

R. E. McGarvie Q.C. (with him *R. M. Northrop*), for the prosecutors. By s. 33 of the *Conciliation and Arbitration Act* 1904-1966 part of each wage prescribed by the awards and the industrial agreement was a basic wage, which may be altered only by the Commission in Presidential Session. To eliminate that basic wage is not an exercise of the power to alter it. A specific provision, by ss. 33 (1.) (*b*) and 32 of the Act, prescribing the method of exercising such power having been made, that method is the only way that the power may be exercised. [He referred to *R. v. Wallis* 1 , per Latham C.J. 2 .] Whatever wage be fixed, this prescribed method of its alteration requires first a determination of that part of it which is a basic wage. The provisions of the Act direct that there be an award in a form which selects a base and adds a margin, but it is not necessary that a rate of pay called the basic wage appear in it. Section 33 of the Act compels the Commission to prescribe wages by reference to a basic wage and a margin. [He referred to *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.* 3 .] The Presidential Bench is under a duty to declare a basic wage for the particular industry. The Reference Bench and the Commissioners subsequently sitting alone exceeded jurisdiction in purporting to excise the basic wage by substituting a total wage. Alternatively, the minimum wage prescribed on 8th July 1966 is a "basic wage" as defined. Alternatively, the substance of the award made was to increase, by $1.00, the then existing basic wage.

The respondent, the Commonwealth Conciliation and Arbitration Commission, and the respondent members thereof did not appear by counsel, but submitted to the order of the Court.

K. A. Aickin Q.C. (with him *J. G. Robinson*), for the respondent employers' organizations. Section 33 of the Act in particular, and the whole of the Act, must be construed, s. 33 being read with s. 60 (3.). These sections do not qualify the power to settle industrial disputes but constitute a prima facie division of functions between different members of the Commission. If s. 33 is to be construed to limit jurisdiction in the sense of limiting the power otherwise conferred upon the Commissioners, its provisions do not require that there be an identifiable basic wage, as defined, in every valid award. [He referred to *Reg. v. Blackburn; Ex parte Transport Workers' Union of Australia* 4 ; *R. v. Commonwealth Court of*

Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd. 5 ; *R. v. Wallis* 6 .]

R. M. Northrop, in reply.

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered:—

BARWICK C.J. The problem presented to the Court in these cases is no more than the proper construction of certain sections of the *Conciliation and Arbitration Act* 1904-1966 (Cth) (the Act). The claim of the prosecutors in each of the applications is that upon its proper construction the Act requires the Commonwealth Conciliation and Arbitration Commission (the Commission), in settling a dispute as to the amount of wages to be paid in an industrial employment, first to determine a sum which will form part of the wage to be prescribed in settlement of the dispute and which is a just and reasonable sum for an adult male to be paid, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed, and thereafter to fix an additional payment, commonly called a margin, to represent the particular work value of each classification of work in the particular industrial employment. The point at issue is in reality a narrow one, namely, whether or not the Act directs an exclusive method of determining the appropriate wage to be paid in industrial employment in the settlement of an industrial dispute. But to understand the argument which has been pressed upon the Court in support of the applications, it is necessary to make a brief excursion into some aspects of the history of the settlement of disputes as to industrial wages by the Court and the Commission operating under successive conciliation and arbitration statutes passed under and within the power given to the Parliament by s. 51 (xxxv.) of the Constitution. Before doing so, however, I ought to refer to the circumstances in which the applications come before the Court.

At the time of the events to which I am about to refer, there were current the following awards and industrial agreements upon which the Act operated:

An award known as the Metal Trades Award, 1952, to which the Metal Trades Employers Association, the Motor Traders Association of New South Wales, the Victorian Chamber of Manufactures and the Metal Industries Association of South Australia were

respondents: an award known as the Vehicle Industry Award, 1953, to which the Motor Traders Association of New South Wales, the South Australian Automobile Chamber of Commerce Incorporated, the Vehicle Manufacturers Association of Australia, the Victorian Automobile Chamber of Commerce, the Metal Trades Employers Association and the Victorian Chamber of Manufactures were respondents, and an industrial agreement certified by the Commission pursuant to s. 31 of the Act and known as the Uranium Mining Industry (Northern Territory) Agreement, 1963, to which the North Australian Workers' Union and the Amalgamated Engineering Union (Australian Section) on the one hand and Territory Enterprises Pty. Limited and United Uranium No-Liability on the other hand were parties.

In November 1965 the employee organizations, parties to the Metal Trades Award, applied to vary the award by increasing the amount of the basic wage there prescribed and also by increasing the margins prescribed in that award. In December 1965, no doubt in response to these applications, the organizations of employers bound by the Metal Trades Award served upon the various parties to that award a log of claims, seeking to alter the obligations of their employer members under the award in one of two alternative ways. The first alternative, in the log and in these reasons referred to as Part A, sought the deletion of the clauses of the award relating to the basic wage and the substitution of provisions for the payment of a wage expressed as a single sum for each class of work covered by the award. Such a provision has by now become known as a provision for a total wage, and the claim for its inclusion in the award will be referred to in these reasons as a claim for a total wage in contradistinction to a wage comprised of two separate elements, namely, the basic wage and a margin appropriate to the particular classification of work. The second alternative in the employers' log, there and in these reasons called Part B, claimed a provision requiring the payment of a basic wage increased by no more than a stated sum, the payment of the margins at the amount currently prescribed in the award increased by one per cent, and the payment of an additional sum equal to 0.5 per cent of the total of the increased basic wage and the increased margin.

These claims related to adult male employees. Other claims related to adult female employees and junior employees but I see no need to refer to these in any detail. Indeed, throughout these reasons, though claims were made in relation to adult female employees, I shall deal only with the claims in so far as they relate

to adult male employees. My reasons, however, will apply also to the case of the adult female employees.

Neither of these demands of the employers was acceded to by the employees' organizations, whereupon the resultant dispute was notified to the Commission.

In due course, the President of the Commission, at the instance of the employee organizations but with the concurrence of the employer organizations, directed that the application to vary the award by increasing the amount of the margins prescribed by it should be dealt with as provided by s. 34 of the Act, and in due course thereafter nominated the members of a Full Bench of the Commission to hear the application. That hearing proceeded and had not been completed at the time the present applications were heard by this Court.

At the same time as he gave the direction as to the hearing of the application to vary the margins, the President, at the instance of the employer organizations, directed that Part B of the employers' log be heard by the Commission in Presidential Session as well as the employee organizations' application for an increase in the basic wage; and that Part A of that log should be heard by a Full Bench of the Commission to which he referred that part of the log pursuant to s. 34 of the Act. In giving these directions, the President expressed himself as follows: "It is apparent this year as it was last year that those portions of the employers' claims which seek an alteration of the basic wage must, pursuant to s. 33 of the Act, be dealt with by the Commission in Presidential Session and I am of that opinion. However, if no direction was given by me the position would be that those portions of the employers' claims which did not seek an alteration of the basic wage would be dealt with by the Commissioner concerned, namely Mr. Commissioner Winter, and it is in respect of those portions of the claims which Mr. Robinson now, by his oral application, seeks to have referred by my direction to a Full Bench of the Commission constituted pursuant to s. 34 of the Act. The grounds of the said oral application for reference, were that those last portions of the dispute created by the employers' claims were of such importance that, in the public interest, they should be dealt with by a Full Bench. Mr. Hawke, on behalf of the Sheet Metal Working, Agricultural Implement and Stove Making Industrial Union of Australia, and the representatives of the other unions, conceded that those portions of the employers' claims were of such importance that they should be dealt with by a Full Bench of the Commission. ... I am of opinion that those portions of the

dispute in respect of which Mr. Robinson has made his oral application for reference are of such importance that, in the public interest, they should be dealt with as provided by s. 34 of the Act, namely, by the Commission constituted by not less than three members of the Commission nominated by the President, at least one of whom is a presidential member of the Commission and one is, where practicable, the Commissioner concerned and, having regard to the reasons for the application, I direct accordingly."

It was suggested, in argument, that the President, by the language in which he chose to express his opinion, had left open the question whether the Presidential Bench should entertain the whole or some part of the dispute arising out of Part A of the log, i.e. left for argument the question whether that part did seek an alteration of the basic wage. However, I am clearly of opinion that this was not so, and that the President's opinion effectively attracted the operation of s. 33 (3.) (*a*) so that Part B of the log only was within the competence of the Presidential Bench, and removed from controversy the question whether or not the Commission in Presidential Session, as distinct from the Commission otherwise constituted, should hear and determine so much of the dispute created by the non-acceptance of the employers' log of claims as related to the alternative claim to be found in Part A of the log. By referring the dispute created by the non-acceptance of Part A of the log to a Full Bench of the Commission pursuant to s. 34 of the Act, the President made it clear that in his opinion the settlement of that dispute was within the competence of the Full Bench to which he referred it. Thereafter the President nominated the presidential members of the Commission to hear the employee organizations' claims for a variation in the basic wage, and presidential members and a Commissioner to constitute a Full Bench of the Commission to which Part A of the employers' log was referred. Following upon these nominations by the President there was an unsuccessful challenge in this Court by the employers' organizations to the propriety of the course taken by the President in constituting the Presidential Bench and the Full Bench of the Commission to which other parts of the dispute were referred pursuant to s. 34 of the Act: see *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Metal Trades Employers' Association* 7 .

Thereafter the Presidential Bench nominated by the President to hear the claims to alter the basic wage, and the Full Bench nominated to hear the dispute arising out of Part A of the employers'

log—a Bench which was composed of three presidential members and a Commissioner—sat together to hear those various matters contemporaneously: see s. 44A of the Act. (One presidential member of the Full Bench retired from the hearing of the application due to ill health before the joint sitting commenced.)

I have no need to refer to any of the orders or proceedings which were made or had in these matters before their final disposal in 1967. On 5th June of that year, the President at the request of, and on behalf of, both the members of the Presidential Bench and of the Full Bench made a pronouncement of the reasons of the respective Benches for the making of orders and awards respectively to be made by each. Thereafter the Commission in Presidential Session dismissed the unions' application for an increase in the basic wage, and the Full Bench of the Commission made an award by which the clauses in the existing award relating to the basic wage and to margins were deleted and clauses inserted prescribing, amongst other things, a minimum wage for adult males and single money sums, "total wages", to be paid as wages for work done in the employment of the respondents to the award in the respective classifications of work. By comparing the monetary provisions of the former award with those of the new award, it can be calculated that the minimum wage prescribed in the new award is $4.75 more than the former basic wage. By a like comparison, the total wage prescribed in respect of each classification of work can be seen to be the sum of the amount of the appropriate former basic wage, the amount of the appropriate margin formerly prescribed and one dollar.

Following upon the pronouncement by the President, a Commissioner of his own motion brought the parties to the Vehicle Industry Award. 1953 before him, and after discussion and a conference made an award which followed in relation to the Vehicle Industry Award, 1953 the pattern set by the Commission in making the award varying the Metal Trades Award, that is to say, it removed the basic wage and margin provisions and substituted a provision for payment of a total wage and a provision for a minimum wage.

On 4th August 1967 a Commissioner, by writing, notified the parties bound by the Uranium Mining Industry (Northern Territory) Agreement, 1963 that he proposed to call the parties to it before him to consider the question whether any, and if so, what, variations should be made to the provisions of the said agreement as a result of the pronouncement by the President of the Commission.

On 4th September the Amalgamated Engineering Union and others obtained an order nisi for a writ of prohibition to restrain

the members of the Full Bench of the Commission, to which the dispute arising out of Part A of the employees' log had been referred for settlement, and the Metal Trades Employers' Association and other organizations of employers respondent to the Metal Trades Award, from further proceeding upon the award made by the Full Bench of the Commission on 5th June 1967; and also an order nisi for a writ of mandamus directed to the Presidential Bench of the Commission to hear and determine the application of the employees' organizations for an increase of the basic wage expressed in the Metal Trades Award.

On the same date the Vehicle Builders Employees' Federation of Australia and the other employee organizations party to the Vehicle Industry Award obtained an order nisi for a writ of prohibition to restrain the Senior Commissioner, the Motor Traders Association of New South Wales and other organizations of employers respondent to the Vehicle Industry Award from further proceeding on the said award made by the Senior Commissioner varying the Vehicle Industry Award.

Also, at the same time, the North Australian Workers' Union and the Amalgamated Engineering Union (Australian Section) obtained an order nisi for prohibition to restrain a Commissioner, Territory Enterprises Pty. Limited and United Uranium No-Liability from further proceeding, on the notification of the Commissioner that he would consider whether variations should be made to the said agreement as the result of the decisions of the Commission announced on 5th June 1967.

Thus there are four applications before the Court: three are for prohibition and one for mandamus. The applications for prohibition are designed to prevent the carrying out or the making of an award in which a dispute as to the amount of wages to be paid in an industry has been settled or it is feared will be settled by prescribing, ordering and awarding a single sum, a total wage, to be paid in respect of each classification of work to be covered by the award, together with a provision for a minimum wage payable irrespective of the classification of the work performed. The application for mandamus is to compel the Commission in Presidential Session to determine the basic wage as defined in s. 33 (1.) (*b*) of the Act in the case of the Metal Trades Award.

The submissions of the prosecutors common to the various applications may be expressed as follows:

First, that the Commission in Presidential Session is bound by the Act, in respect of every industrial dispute as to the wages to be paid in an industry at least where there is a dispute as to whether

or not the amount of the basic wage expressed in an award should be increased, to determine two components of the wage to be paid to each employee, of which one is an amount conforming to the definition of the basic wage in s. 33 (1.) (*b*): or, put another way, that the Commission, however constituted, cannot in the settlement of such an industrial dispute as to the wages to be paid in an industrial employment, prescribe or award a wage expressed in a single money sum, that is to say, cannot prescribe a total wage.

A consequential submission was that the Commission in Presidential Session must hear such a dispute or that aspect, of a larger dispute and in that hearing must determine as the whole or part of a wage to be prescribed, a sum which is just and reasonable for an adult male without regard to any circumstances pertaining to the work upon which or the industry in which he is employed.

In this connexion there were subsidiary submissions, namely, that an award which deletes entirely the clause providing for payment of the basic wage, is an award altering the basic wage, and that an award which orders the payment of a minimum wage is in reality an award prescribing a basic wage, though under a different name, and if the amount of the minimum wage differs from the amount currently prescribed in the award, constitutes an alteration of the basic wage. In either case such an award may only be made, so it is said, by the Commission in Presidential Session.

It is quite clear from the terms of s. 33 of the Act and its several predecessors since 1930 that it and they have been enacted in the light of a known practice of the Commission and of its forerunners of determining wages by adding an appropriate margin for skill, or the circumstances of the employment, to a basic figure. Since 1930, that figure, called the basic wage, could only be altered by a Bench composed of three members of the Court or Commission, as the case may be. But the principal question in this case is not whether the Bench which made the orders and awards sought to be prohibited was appropriately composed to alter the basic wage; though the resolution of that question, having regard to the provisions of s. 33 (3.) and (4.), might very well determine the fate of these applications. The principal question raised by the applicants is whether the Commission constituted in any manner is entitled to settle a dispute as to the wages to be paid in any industry where there is a claim to vary the basic wage by specifying, what is compendiously called, a total wage, without going through the steps of first determining a basic wage, and then adding thereto a margin appropriate to each particular classification of work. This question, the prosecutors have submitted, should be decided

negatively upon the true construction of the Act and, in particular, of s. 33 thereof.

The concept of a basic wage is one which, in the progress of industrial arbitration under the Acts of the Commonwealth Parliament, has suffered considerable development in the course of time. Early in the history of the Commonwealth system, the concept of a minimum wage to supply the basic needs of a man and his family was developed. It was conveniently referred to as a "needs" wage and it was in its conception a minimum wage; it persisted for many years. But in the course of time a new and, in relation to the mere fixation of a wage, a somewhat disparate consideration began to enter into the determination of the basic wage, as the minimum wage on a needs basis came to be called. That wage remained basic in the sense that it still in some degree related to the provision of the basic or minimal needs of the worker and his family; but it had also become basic in the sense that it provided the base of a wage structure for the employment covered by the award. The Court, and in due course the Commission, in its consideration of the figure at which to set the basic wage, came to regard the capacity of industry to pay, rather than the minimal requirements of the industrial worker, as the dominant consideration. In this way the worker was admitted to some part of the prosperity of industry in one element of which he was employed. For a period the amount of the basic wage was varied automatically by reference to a statistician's index reflecting the movement in price of a specified list of commodities and services. Also the basic wage expressed in the awards has, throughout, varied in amount as between the principal cities of the Commonwealth and in some instances as between various principal towns within a State: this no doubt on the footing that the cost of living varied in these different geographical situations.

At this point it is observable that the concept of a basic wage was somewhat mixed. The movement in price of the stated commodities was not really symptomatic of the prosperity of industry but rather related to the fluctuating cost of providing those requirements of food, accommodation and services which had been thought appropriate in relation to a "needs" wage. But the fluctuation in the price of these commodities was conceived, apparently, as an indication of the variation in the value of the money in terms of which the basic wage was expressed. These considerations remained as almost vestigial elements reflected in the determination of the appropriate amount at which to set the basic wage, even when the concept had developed to the point where the capacity of the

community as a whole to pay a proportion of its product to wage and salary earners became the dominant consideration. The terms in which the basic wage was sought to be defined in s. 33 inserted in the Act in 1956 by No. 44 of 1956, are indicative of the emergence and the dominance of this feature of the concept. The "needs" concept in the narrow sense was supplanted by the concept of the industrial wage and salary earner being justly entitled to live at a standard which was compatible with the current state of economic advance and prosperity in the community as a whole. And this in the broad is the concept of the basic wage as it was at the time of the decisions of the Commission which are challenged in these proceedings though it was still expressed in different amounts according to geographical locations. The definition of the basic wage in s. 33 was thus treated as covering the determination of what, in the circumstances of the community, and having regard to the state of its economy, ought in justice and reason to be paid to each and every adult male who worked in industry in the production of the national product without regard to what he did or where in the industrial field he did it.

Although the Commission was not, and indeed could not be, empowered to make a common rule for the payment of wages in industry, the basic wage which it thus determined from time to time in particular disputes came to be regarded in the community generally as a reference point for the determination of the wage to be paid in various circumstances of employment or as a base by reference to which to determine the amount of, and variations in, costs or charges. This became true, not merely of the system of wage regulation by the settlement of industrial disputes through the Commission, but also of systems of wage fixation by State tribunals. Further, private arrangements between employee and employer outside the terms of any award or of any industrial determination of wage levels were also influenced by it. Also it seems that it came to be regarded in the community as a minimum, as distinct from a basic, wage though in truth it was not. Few employees whose wages and conditions of work were prescribed by Commonwealth awards were covered as to wages only by that part of the award which ordered the payment of the basic wage. Although the awards have taken the form of ordering its payment, in fact it is not, except perhaps in isolated cases, a wage which as a separate sum is in the final analysis required to be paid. The awards bind only the named employers or organizations of which they are members and, in general, there is no classification of work under an award for which the basic wage is the resultant wage to be paid.

In other words, generally, though not universally, there is some margin above the basic wage for every classification of work performed in the industry. Also, apart from the minimum sums prescribed in awards, over-award payments by employers have long been the order of the day. It is quite clear that in any case the amount of the basic wage was not fixed by the Commission merely as a minimum wage. It was determined as a component of all wages covered by the award and its amount affected the marginal sums prescribed. This consideration appears to have been in the mind of the Commission in its recent decision, for in his pronouncement the President said: "The minimum wage will give better protection to those whose needs are greatest, namely, those whose take-home pay would otherwise be below the standard assessed by the Commission and will give the Commission more flexibility in assisting them because we will have more scope to give them special consideration." That is to say, a minimum wage can be fixed considering solely the position of the worker who for want of skill and circumstance can demand no more than the minimum. What is awarded for him will not form any element in the amount fixed for other workers, and it can be separately reviewed without any necessary consequence upon other wages.

The mechanism by which the Commission was able to determine the basic wage without making a common rule, and whilst acting in conformity with the provisions of the Act and particularly of s. 33, was the listing for hearing before itself in Presidential Session of a number of disputes involving claims to increase the basic wage or awards made in connexion with basic and widespread industries. Evidence and argument as to the state of the economy were then heard by the Commission thus composed and a determination reached as to what was the appropriate figure at which to set the basic wage, regarding it in the sense to which I have lastly referred. These hearings were known for a time as "the basic wage cases" and are latterly referred to as "the national wage cases". Thereafter, the disputes in which the Presidential Session had determined the basic wage would be further heard by a Commissioner who would himself make the final award determining the marginal sums to be added to the basic wage. Usually, but not universally, the award would take the form of a specific order, award or prescription that all the employees of the respondent employers (including the members of any registered organization of employers party to the dispute and respondent to the award) be paid the basic wage as specified in the award, and a further separate order, award or prescription that, in addition to that sum, the marginal

sums specified in a schedule of classifications of work be paid according to the classification of the work performed.

After the Commission in Presidential Session had determined the basic wage in the disputes which had thus been listed before it, each other dispute involving a claim to alter the basic wage in the appropriate award would be listed before the Commission in Presidential Session and the amount of the basic wage be fixed formally by the Commission in Presidential Session in each such dispute, each matter thereafter going to a Commissioner for the making of the complete award in the fashion I have already described.

This very brief description of the development of the concept of the basic wage and of the process by which it has been determined, will suffice for present purposes, though much might be written of it in another connexion as a very interesting part of the progressive discovery of the great width of the power given by s. 51 (xxxv.) and of the development of a characteristic Australian institution which, by this time, has come to be much more a piece of machinery for the distribution of the national product than merely a mechanism for determining the work value of work done in industry and for fixing of appropriate rewards, though of course the determination of a wage is the ultimate function performed by the Commission in connexion with a dispute as to wages.

The brief reference to its development shows that the concept of the basic wage has not been fixed. On the contrary, it has developed, and though it might seem to have reached its most expansive phase, there could be no certainty that it would not suffer further development. Not only were the principles upon which it has been determined not immutable, but the Act in s. 33 (1.) recognized that in practice they were not. Nor was there, of necessity, but one sum to express the basic wage, even in relation to one industry or employment: as I have indicated, basic wages were set for different cities and towns. These, it seems to me, are all considerations, as well as the precise language of s. 33 (1.) (*a*) relevant to the consideration of the question whether the Parliament has directed the continued use of a basic wage and a margin as a permanent feature of the system of settlement of industrial disputes set up by the Act.

It is now convenient to observe what the recent decision of the Commission really involves. There was a period, apparently, during which the predominance given by the Commission and the parties before it to the hearing of the basic wage, and the length

of time absorbed in the examination of the economy for that purpose, produced such a delay in the examination of claims for an increase of the margins that the determination of the amount of such payments lagged considerably: so that the amounts prescribed by awards remained less than those which ought to have been paid for the specific work done in the particular circumstances of the industry. However, on a former occasion, the Commission gave special attention to this question and some considerable adjustment was made in the amount of the margins. As well, over a period of time the relativities of the margins as between themselves had received a good deal of attention. As I have already mentioned the Commission is presently engaged upon an examination of the margins in point of work value and relativity in order to determine their appropriate level in current circumstances. Against this background, the Commission has apparently decided that there was room to move away from the practice of fixing a basic wage to which margins should be added as a means of resolving an industrial dispute as to the wages to be paid in industry. The practice of settling such a dispute as to wages by the determination of a single sum in respect of every classification has commended itself to the Commission.

In expressing the reasons of the two benches of the Commission for their respective decisions, the President in his pronouncement said: " ... We are creating new up-to-date fixation procedures and not changing principles of wage assessment. The Commission will be able to handle the annual review of the total wage flexibly. An increase could be awarded as a flat amount, ... as a flat percentage ... or in varying percentages ... or in other ways. ... In summary the adoption of the new procedures will enable the Commission to act flexibly, to ensure that economic gains are reflected in the whole wage each year, to give more reality to its award-making both in economic and work-value cases, and to give proper attention to the low-wage earner. It will simplify the procedural difficulties in economic cases, which would not be entirely overcome by the unions' agreement to simultaneous hearings of basic wage and margins cases. It will eliminate the present awkward necessity for different benches contemporaneously dealing with different parts of the wage; it should simplify the rapid and proper spread of economic decisions throughout awards and determinations under this Act and the *Public Service Arbitration Act*; and it should put those who give and receive over-award payments in a better position to deal with their problems."

The brief recital of the development of the concept of the basic wage as an integer in the prescription of the wage to be paid for work of a stated description performed in industry, will also serve to indicate how the periodic determination of the basic wage had become a feature of Australian national life and how, not unnaturally, it had come to be regarded as a desirable and a permanent feature. My quotation from the pronouncement by the President will serve to indicate both the nature of the change recently effected and some of the advantages claimed to result therefrom. Though it does not concern me in deciding what is purely a question of legal interpretation, I would doubt whether the change has the deep significance with which counsel for the prosecutors endeavoured to invest it. It would seem that by taking the present total of the basic wage with what is thought to be the currently appropriate increment and the appropriate margin, the Commission has established a new base expressed as a total figure for each classification of work: which total it contemplates varying in the future on economic grounds. No doubt this course assumes that that total reflects the current work value of each classification of work, and that the relativities of those classifications have been established. But in that connexion, the results of the hearing of the applications for increases of the margins will no doubt be used to vary the appropriate totals, where they do not adequately express the current work value or appropriate relativity.

But whatever the depth and significance of the change effected by the recent decisions of the Commission, it could not be said, in my opinion, and indeed I do not think that it was submitted, that such a claim as is to be found in Part A of the employers' log could not give rise to an industrial dispute within the purview of the Act. Nor, in my opinion, can it be said nor do I understand it to have been said, that an award such as has here been made in resolution of that dispute was either inappropriate to do so or beyond the confines of the dispute created by non-acceptance of that part of the log. What is said is that, however appropriate such an award could be as an exercise of the powers and duty given and imposed by s. 32 standing alone, it is in truth an award which is forbidden by s. 33 which, in this submission, is treated as controlling the generality of s. 32. The question therefore is whether the Act requires the continuance of this system or practice of fixing two amounts, the basic wage and a margin, in order to settle an industrial dispute by prescribing the wage to be paid, and prevents the adoption of any other method of settling a dispute as to wages by the prescription of a wage.

The basic power to settle disputes is given by the Act to the Commission in s. 32, namely, the power to determine industrial disputes where the parties to them are unable to agree. The prosecutors say that s. 33 (1.) circumscribes the generality of that power, and in relation to the prescription of wages "imposes limitations or qualifications upon the method" by which the Commission is to settle industrial disputes as to their amounts. It is said that the legislature has directed the indefinite continuance of the present system of a two-part wage prescription, although it is not submitted that the legislature has directed that the present concept of the basic wage is so to continue. This submission is grounded exclusively on s. 33. For completeness, I set out the relevant parts of the section:

> "33. (1.) The powers of the Commission to make an award, or to certify an agreement under section thirty-one of this Act—
>
> (*a*) ...
>
> (*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 circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed;
>
> (*c*) ...
>
> (*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.
>
> are exercisable by the Commission in Presidential Session and not otherwise.
>
> (2.) Subject to this Act, the powers of the Commission, other than power to make an award or certify any agreement referred to in the last preceding sub-section, are exercisable by a Commissioner and not otherwise.
>
> (3.) Where, in relation to a matter before the Commission in Presidential Session, the question whether the Commission in Presidential Session is empowered, having regard to the last two preceding sub-sections, to deal with that matter is raised—
>
> (*a*) if the opinion of the Commission in Presidential Session is that it is empowered to deal with that matter, then,

notwithstanding anything contained in this Act, the Commission in Presidential Session is empowered to deal with the matter; or

(*b*) if the opinion of the Commission in Presidential Session is that it is not empowered to deal with that matter, then, notwithstanding anything contained in this Act, the Commission constituted by a Commissioner is empowered to deal with the matter.

(4.) Where, in relation to a matter before the Commission constituted by a Commissioner, the question whether the Commission so constituted is empowered, having regard to sub-sections (1.) and (2.) of this section, to deal with that matter is raised, the Commissioner shall refer the question to the President and—

(*a*) if the opinion of the President is that the Commission constituted by a Commissioner is so empowered, then, notwithstanding anything contained in this Act, the Commission so constituted is empowered to deal with the matter; or

(*b*) if the opinion of the President is that the Commission constituted by a Commissioner is not so empowered, then, notwithstanding anything contained in this Act, the Commission in Presidential Session is empowered to deal with the matter."

As I have said, sub-s. (1.) of this section is clearly drawn against the background of the long-standing practice of the Commission in relation to the prescription of a basic wage and margins: and possibly also in the expectation that that practice will continue. It can also be said that, having that expectation, the Parliament has directed that the variation of the basic wage upon economic grounds should not be prescribed or awarded by a Commissioner sitting alone, but only by a Bench of not less than three presidential members of the Commission. But none or all of these circumstances in themselves, in my opinion, warrants or warrant the construction for which the prosecutors contend unless the words of the statute are themselves capable of bearing that construction and unless, if so construed, the Parliament would have constitutional power so to enact.

Sub-section (1.) (*b*) in terms deals only with the *alteration* of the basic wage. It is noticeable that sub-s. (1.) (*d*) speaks of "determining" as well as of altering the basic wage for adult females. But in my opinion, nothing turns in these cases upon the difference in the language used. Nor do I need to found myself on any emphasis

of the word "alteration", though much could possibly be made of it. The direction, limited to the alteration of the basic wage, in my opinion, falls far short of a direction to maintain the basic wage or a system of wage prescription which includes the determination of the basic wage as an integer of the wage actually to be awarded or ordered to be paid. But I would rather place my decision upon the real nature of s. 33 in relation to s. 32.

In my opinion, so far from being an attempt to limit or qualify the power and the duty to settle industrial disputes given and imposed by s. 32, s. 33 is plainly concerned only with procedural matters. It is concerned with how the Commission shall compose itself for the settlement of disputes. In my opinion, it is not concerned in any sense to direct the Commission as to how it shall settle the dispute. Any doubt that might otherwise have lingered in that connexion upon a reading of s. 33 (1.) and (2.) alone, is, in my opinion, completely removed by sub-ss. (3.) and (4.). Whether or not the Commission constituted in one way rather than another is to be determined by the President or by a Presidential Session as the case may be. Those sub-sections are so expressed as to make the opinions for which they provide definitive of the authority of the Commission as particularly constituted to determine the matter before it.

As a result, quite apart from the operation of s. 60 of the Act, where the President or the Presidential Session has expressed his or its opinion, no challenge to the competence of the Commission however constituted could succeed based solely upon the provisions of s. 33 (1.) or (2.). The legislature has indicated by a directive how the Commission should be constituted to perform the particular task, but has left to the President or the Presidential Session according to the circumstances, the definitive decision as to whether its directions are being carried out.

It was submitted that to rescind the clauses of an award which require the payment of the basic wage of a stated amount is to alter the basic wage so provided within the intendment of s. 33 (1.) (*b*). I am unable to accept this contention. Section 33 (1.) (*b*), in my opinion, only says that the amount of the basic wage or the principles of its computation as embodied or reflected in the award may not be altered except by the Commission constituted in a particular way. To rescind the clauses of the award relating to the basic wage does not, in my opinion, offend this direction. And, of course, as I have said, the President's opinion that a Commissioner may determine that part of an industrial dispute which seeks the removal

of these clauses in an award would place beyond challenge the Commissioner's award rescinding them.

Thus, in my opinion, from the very nature of s. 33 as a whole, no basis exists for regarding it as a limitation upon the powers of the Commission to settle industrial disputes.

I should deal briefly with two other submissions which were made. First, it was said that the minimum wage awarded and prescribed by the Commission was in truth a basic wage as defined. In my opinion, this view is not acceptable even if it be granted that the Commission in making its award was moved only by economic considerations. That it is possible by arithmetical processes to infer how the Commission arrived at the amount of the wage does not, in my opinion, detract from the conclusion that the Commission did, as it purported to do, abandon the notion of a two-part wage and determined to settle the dispute by the award of a single sum or total wage. The minimum wage is radically different from a basic wage. I have already indicated the difference, and have no need to repeat what I have said. Secondly, what was, in reality, an alternative submission, was put by counsel for the applicants as a reason for acceptance of the construction of the Act for which he contended.

It was said that the determination of a basic wage as defined in s. 33 (1.) (*b*) is in any case an indispensable and necessary step in the prescription of a wage, that is to say that, whether or not required so to do by statute, a tribunal fixing any wage must first adopt a basic wage (presumably according to some, but not necessarily according to any particular concept so long as it was conformable to the definition) and then proceed to add some differential. The notion is that, of their very nature, all wages are related to the concept of a sum payable to all workers in common justice without regard to what they do or where they do it.

But, in my opinion, there is no single necessary process which must be followed by an arbitrator in arriving at the sum of money he will award in settlement of a dispute as to the proper rate of wages to be paid for work done in industry. In particular, I am clearly of opinion that that proper amount cannot only be reached by first determining an amount which is unrelated to work or to industry, and thereafter to add to it some other amount in order to compute or determine what is the proper sum of wages to be paid; or, to make the matter more pointed in relation to the present argument. I am clearly of opinion that to determine a basic wage with margins is not the only way in which to prescribe a wage in settlement of a dispute as to the wages to be paid. Indeed, for my

part, though followed by long practice, this method is of its nature a rather unusual way in which to approach the question of what is a proper wage even if economic considerations are considered relevant to the matter.

If, as I think, the system or practice of determining the basic wage and a margin for each classification of work is not the only method of settling a dispute as to wages, could the Parliament have chosen it as one of the possible methods of such settlement and have directed the Commission to adopt it to the exclusion of all others in exercising its powers and performing its duties under s. 32?

The constitutional power in this area is to make laws with respect to the settlement of industrial disputes extending beyond the limits of one State by a specific means, namely, by conciliation and arbitration. The Parliament is unable itself to legislate the level of wages to be paid. Nor has it power to direct the arbitrator as to the level of wages he shall prescribe in the settlement of a dispute as to wages. The constitutional power requires that settlement of the dispute be left to the arbitrator. His award will be valid if it remains within the ambit of the dispute, and its terms are relevant to that dispute and to its settlement, the dispute, of course, itself falling within the constitutional limitation.

Therefore, in my opinion, the Parliament could not have seized upon one method of determining a wage in settlement of a dispute as to wages and have directed the Commission to follow that method and none other. To have done so would, in my opinion, have transcended the constitutional power.

However, it seems to me that it would be within the power of the Parliament to provide that, if the arbitrator decided to employ such a method of arriving at the wages to be prescribed in settlement of the dispute, it should follow a given procedure or, to be more precise in relation to the present arguments, should compose itself in a particular manner. And this, as I have said, is what s. 33 purports to do; and all it purports to do.

It was not suggested in argument that there was any section other than s. 33 from which a duty in the Commission to settle a dispute as to wages by first determining a basic wage and then adding to it a margin, could be derived. In my opinion, no such duty can be extracted from s. 33 and, if there be no such duty, it seems to me that not only must the application for mandamus fail, but by the same token, so must the several applications for prohibition.

Being of this opinion, it is unnecessary for me to rely upon s. 60 or to point out the inappropriateness of directing a writ of

prohibition to a Commissioner who has not made an award, having regard to the presence in the Act of s. 33 (3.) and (4.).

In my opinion, all the applications should be dismissed.

MCTIERNAN J. As regards the orders nisi for prohibition, the argument centred on the order of the Reference Bench of 5th June 1967 which is in terms a variation of the Metal Trades Award, 1952. This argument was advanced as being applicable to each of the other orders nisi for prohibition. It was submitted for the unions that the order of 5th June 1967 works an alteration of the basic wage which is the foundation of the wage structure of the award. If this is correct, then subject to the argument for the employers on the force of an opinion of the Commission in Presidential Session under s. 33 (3.) (*b*), the order involves an infringement of s. 33 (1.).

What the order purports to do is to determine the industrial disputes to which it refers, to the extent of its intended operation. One of those disputes was solely about the amount of the margins in the award. This dispute having been referred pursuant to s. 34 (3.) from the Commissioner to the Reference Bench which made the order in question, they had power under s. 34 (4.) to hear and determine such matter. The other dispute involved two matters. One was whether the existing wage structure of the award, which consisted of a basic wage plus a margin should be maintained. The second matter was a dispute formulated on the basis that such a structure would continue. The Commission in Presidential Session dealt with the latter matter together with a separate dispute raised by the unions as to the sufficiency of the amount of the basic wage which was the foundation of the wage structure. To return to the former matter involving the continuance of the existing wage structure, it was as to this matter that the Commission in Presidential Session gave their opinion that a Commissioner was empowered to deal with it. This matter was referred to the Reference Bench pursuant to s. 34 (3.). The power of this Bench to hear and determine it rested on s. 34 (4.). The order under consideration relates to both matters referred to the Reference Bench. What the order does is this. It deletes from the award all basic wages and margins, and in lieu fixes a total wage for each employee. The basic wage eliminated from the award was an amount expressed to be the basic wage estimated by the Commission in accordance with the formula enacted in s. 33 (1.) of the Act. The total wage includes the sum of the amount of the basic wage and the margin previously paid to an employee under the award. The amount is paid as a valuation of his work. Neither the entire

wage nor part of it is estimated in accordance with the formula mentioned above. It is not severable into basic wage and margin. A condition of the award as varied, chosen from the award as it was beforehand, is that no wage must be less than a prescribed minimum. This wage is a different entity from the basic wage without the addition of a margin. I am of opinion that the order in question does not alter any amount which was expressed in the award to be a basic wage. Indeed, it operates according to its terms. The order increases the original rate of the minimum wage by $1; it also increases the sum of the amounts which were formerly basic wage and margin by $1. It is not possible to regard the sum of these amounts as the basic wage and the addition as a margin. In the case of *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.* 8 the Court observed: "The term `basic wage' is sometimes used as if it were equivalent to `minimum wage' or `living wage'. When an industrial tribunal determines that the basic wage shall be an amount which is prescribed because it is a living wage, and also that no lower amount shall be paid by way of wages, the basic wage, the living wage and the minimum wage are all identical in amount. But the meaning of the terms is nevertheless not the same. The basic wage is a wage which is basic in that it forms the basis or foundation of a wage structure. Where there is an applicable award and a wage is prescribed for a male adult unskilled labourer to which additions are made to remunerate skill or otherwise to differentiate between workers, that wage is the basic wage as determined by that award" 9 .

I agree that the opinion of the Commission in Presidential Session is definitive of the issue whether they were empowered to determine the part of the dispute concerning the wage structure of the award. The result of the opinion was, by reason of the words of s. 33 (3.) (*b*), that the Commission constituted by a Commissioner was empowered to deal with this matter. The fact that an opinion for which s. 33 (3.) provides has in fact been given, is the criterion by which, if a question arises under this sub-section, to determine who are empowered to exercise the powers contained in sub-ss. (1.) or (2.) of s. 33; is it the members of the Commission in Presidential Session or a Commissioner. The opinion is effectual in this respect unless it was not genuine. An opinion authorized by s. 33 (3.) does not touch a constitutional question. The division of powers under s. 33 (1.) does not arise from constitutional necessity. It depends upon questions merely of policy. Subject to an opinion duly given

under par. (*a*) or (*b*) of s. 33 (3.), the division of powers goes to jurisdiction: it is not merely procedure.

I am of opinion that a dispute as to whether the basic wage be paid as a wage or utilized as the foundation of a wage structure, is an industrial dispute—it is a dispute as to an industrial matter. In my opinion such a dispute may be settled by the Commonwealth Conciliation and Arbitration Commission in accordance with the *Conciliation and Arbitration Act*.

In the view which I take, none of the orders nisi for prohibition could be made absolute.

I am of opinion that the members of the Commission in Presidential Session properly exercised their powers under the Act in making the order dismissing the application for an award increasing the basic wage prescribed for employees covered by the Metal Trades Award, 1952. The order nisi for mandamus should in my opinion be dismissed.

KITTO J. The general power of the Commonwealth Conciliation and Arbitration Commission under the *Conciliation and Arbitration Act* 1904-1965 (Cth) to settle inter-State industrial disputes by arbitration is by s. 33 divided into two classes of powers and made exercisable, as to one class of powers, by the Commission in Presidential Session only (that is to say by the Commission constituted by at least three presidential members having the security of tenure, protection and immunity of judges); and as to the other class by a Commissioner (who is an officer not having those advantages) or, upon a reference by him or a direction by the President, by the Commission constituted by three members of the Commission (commonly called a Reference Bench) of whom at least one is a presidential member and one is, where practicable, the Commissioner concerned.

The powers in the first class are described in the four paragraphs of sub-s. (1.), and include the power to make an award (or to certify an agreement having the same effect as an award) altering the basic wage for adult males or the principles upon which it is computed, and the power to make an award (or certify such an agreement) determining or altering the basic wage for adult females or the principles upon which it is computed. The basic wage for adult males (and, separately, for adult females) is defined in the section as that wage, or part of a wage, which is just and reasonable for an adult male (or adult female), without regard to any circumstance pertaining to the work upon which, or the industry in which, he (or she) is employed. The expression "which is just and reasonable"

obviously refers to that which is prescribed by the Commission as being just and reasonable. The only other powers in the first class relate to standard hours of work and long-service leave, with which we are not here concerned. All powers of the Commission other than those mentioned fall into the second class, exercisable by a Commissioner or Reference Bench (sub-s. (2.)).

The rigidity of this dichotomy of powers is tempered by provisions in sub-ss. (3.) and (4.). In relation to a matter before the Commission in Presidential Session, the opinion of that body is made decisive as to whether the matter is within its powers or the powers of a Commissioner, and in relation to a matter before the Commission constituted by a Commissioner, the opinion of the President is made decisive.

The first two of the matters now before us relate to the Metal Trades Award, 1952, as varied from time to time. Until the making of the orders which are the subject of these proceedings, this award, like many if not all others, dealt with the subject of wages by prescribing first a "basic wage", as defined by s. 33 (1.), (varying in amount as between specified places in Australia) for all adult employees in the industry, and secondly an additional amount called a margin, which was separately fixed for each of a large number of classifications into which the award divided the employees. Moreover there was a provision, inserted in 1966, prescribing a minimum wage below which no adult male employee should be paid. The unions which are the prosecutors in these proceedings, and the employers' organizations which are respondents, were all bound by that award.

In November 1965 the unions applied to the Commission for a variation of the award with respect to the margins, and in January 1966 the employers' organizations notified the Commission of a dispute arising out of two alternative demands which they had made upon the unions; namely, (A) that existing basic wage rates and marginal rates be aggregated into total wage rates, to which should be added one and one-half per cent of the total rates; and (B) that existing basic wage rates should be increased by three shillings, marginal rates by one per cent, and the resulting figure by one-half per cent thereof. This dispute and the unions application with respect to margins were partly dealt with in 1966, the basic wage being increased by the Commission in Presidential Session, and the margins being increased and the minimum wage provision being inserted by a Reference Bench; but both matters came on for further consideration in 1967. By this time the unions had made an application for a variation of the award by increasing

the basic wage, and all three matters were argued together before a joint session of the Commission. Separate decisions, however, were given, as they had to be, by the Presidential Session and the Reference Bench respectively. The Commission in Presidential Session dismissed the unions' application for an increase of the basic wage. The Reference Bench settled the dispute arising out of the employers' claim for a total wage by deleting, from the award, the clauses which respectively prescribed a basic wage and margins, and putting in their place a prescription of a total wage for each classification of employees, arriving at such total wage by two steps: first, by doing what formerly had been left to be done as an exercise in the application of the award provisions to individual employees, namely, adding together the former basic wage and the margin appropriate to the classification, and, secondly, by adding $1 per week to the total. An addition of $1 was likewise made to the minimum weekly wage for adult males.

The Commission in joint session announced, at the time of these decisions, a general policy of eliminating from all awards the provisions for a basic wage and margins, and of introducing in their place provisions for total wages to be arrived at in the manner above stated. In conformity with this policy a Commissioner, sitting alone, has made an order for a variation of the Vehicle Industry Award, 1953; and another Commissioner, also sitting alone, is proposing to make a similar variation of the Uranium Mining Industry (Northern Territory) Agreement, 1963, that being a certified agreement which has the effect of an award.

In the present proceedings the unions challenge the power of a Commissioner or a Reference Bench, in view of s. 33, to make the total wage provisions. They accordingly seek: (1) prohibition to the Reference Bench prohibiting it from proceeding further on its order for variation of the Metal Trades Award; (2) mandamus to the Commission in Presidential Session to hear and determine the unions' application for an increase of the basic wage; (3) prohibition against the Commissioner who has purported to substitute total wage provisions for basic wage and margins provisions in the Vehicle Industry Award; and (4) prohibition against the Commissioner who proposes to do the same in respect of the Uranium Mining Industry (Northern Territory) Award.

So far as appears, only one relevant opinion of the Commission in Presidential Session has been given under s. 33 (3.), and only two relevant opinions of the President under s. 33 (4.). The President's opinions, which were given on 27th January 1966, were, first, that

those portions of the employers total wage claim seeking an alteration of the basic wage must be dealt with by the Commission in Presidential Session; and, secondly, that those portions not seeking such an alteration should be heard and determined by a Reference Bench. The opinion of the Commission in Presidential Session was given in July 1966 and was that that arm of the Commission was not empowered to deal with Part (A) of the employers' claim. For reasons that will appear, I do not think that any of these opinions related to the question whether the Reference Bench was empowered, if it should first add the pre-existing basic wage to each of the pre-existing margins, then to add to each total thus obtained, a lump sum arrived at without regard to any circumstance pertaining to the relevant work or the relevant industry.

If the only question were whether an award departing from Part (A) of the employers' demand by adding to the aggregate of basic wage and margins $1 instead of one and one-half per cent was within the power of the Commission generally in dealing with the dispute, the answer of course would be that it was, because such an award is an appropriate means of settling such a dispute. Moreover, if the new award had stopped at aggregating the basic wage and each classification's margin, it would not have been an award altering that part of the wage (of each classification) which fell within the definition of "the basic wage", for the definition applies to any such part whether or not it be segregated in the award. The basic wage ingredient in the total wage would have satisfied the definition as completely as ever it did. Again, if the award had accorded with the employers' claim, adding one and one-half per cent to the aggregate amounts of basic wage and margins, it might have been thought that the addition, though made on general economic grounds only, was in its nature so tied to the aggregate amounts that no part of it could be separately identified as an addition to the basic wage component of those aggregate amounts. The opinions given by the President and the Presidential Session, it must be remembered, related to that claim. But what the Reference Bench did, in fact, was to make an addition of an amount having no inherent relation to the total to which it was added or to either of the components of the total; and the announced reasons for the adoption of this course showed beyond question that the addition had been arrived at as being just and reasonable for an adult male (or female) without regard to any circumstances pertaining to the work upon which, or the industry in which, he (or she) was employed. The only circumstances taken into account at all were circumstances of a general character.

They were described as predominantly economic, and as including the questions of adjustment for price movements, of price stability, of productivity movements, and of economic capacity to pay—all in relation to the economy of the country generally and not of the particular industry. The necessary result, as it seems to me, was that the part of the total wage which thereafter answered the statutory definition of "the basic wage" was larger than that which formerly answered it, and consequently that the new award was in fact an award altering "the basic wage". It is true that the announced reasons treated the decision as a decision against adding to the basic wage on the one hand and in favour of expressing the increase in a total wage on the other; but its effect nevertheless was to increase that part of the total wage which s. 33 (1.) requires us to recognize as the basic wage. It is quite impossible, in view of the definition, to treat the identification of "the basic wage" as depending in any degree whatever upon the presence or absence of the label "basic wage" in an award. There seems to me to be only one valid way in which to test whether a new award is one "altering the basic wage", and that is to ask three simple questions: (1) Did any part of a wage, prescribed in respect of a person or classification by an award which was in force up to the commencement of the new award answer the statutory description of "the basic wage"? (2) Does any part of a wage so prescribed by the new award answer that description? (3) If yes to (1) and (2) is there any difference in amount between those parts?

I do not say that in every wage fixation there will necessarily be a component which can be identified as falling within the definition of "the basic wage". In the case of the Metal Trades Award the Reference Bench might conceivably have chosen to start afresh by fixing total wages at amounts not made up of separately identified components of which one or more fitted the definition of "basic wage". The practical difficulties in the way of doing this might have been great, perhaps insuperable, but if they were overcome the correct view, I am prepared to assume, would be that, even though the newly awarded wage for each classification had been arrived at partly by regarding circumstances not pertaining to the work of the classification or of the relevant industry, no alteration had been made to any pre-existing "basic wage". But the decision which is now challenged was not of that kind. Nor was the decision of the Commissioner in the *Vehicle Industry Case*. Nor will the decision of the Commissioner be in the *Uranium Mining Industry Case*, if he proceeds as he at present intends.

The truth, as it seems to me, is that the Reference Bench has purported to do the very thing which s. 33 is enacted to prevent. The declared intention of the Bench was that the $1 addition should flow generally throughout federal awards. If the Reference Bench had power to make an addition of this nature, it has power by a similar procedure to make a subtraction which, though made from the total wage, is of such a character that in truth it reduces that part of the wage which answers the description of "the basic wage". Moreover, if the Reference Bench has these powers, so has a single Commissioner. The result, whether the action be taken by a Reference Bench or a Commissioner, is that employers and employees in the particular industry and in industry generally will be denied the degree of protection which s. 33 (1.) is designed to afford. Indeed the announcement made for the joint session of the Commission claims as one of the advantages of the course which has been taken that "it will eliminate the present awkward necessity for different benches contemporaneously dealing with different parts of the wage". Whether that is desirable or undesirable is not for me to say; but in so far as it involves, as in my opinion it does in the cases now before us, that the part of a wage which fulfils the statutory description of the basic wage may be increased or reduced by a Bench not consisting of three or more presidential members of the Commission, it is, in my opinion, contrary to the Act.

The decision of this Court in *Australian Workers' Union v. Commonwealth Railways Commissioner*
10 shows that an award may be one which alters the basic wage even though it is made in substitution for a pre-existing award (or, as necessarily follows, a part of a pre-existing award) which it brings to an end; and it shows also that the question whether the new award does or does not alter the basic wage is a question of fact, depending upon the actual effect which the award has in relation to a wage or part of a wage, prescribed by the pre-existing award, which has the character of a basic wage according to the definition that is adopted. The decision was given at a time when the Act contained no definition of "basic wage", so that the Court had to work out for itself what the expression was intended to mean. Under an Act which provides a quite precise definition of its own, the question in my opinion is, even more clearly than in that case, not one of form—not one of words or labels, and not one the answer to which can be affected by the adoption of a procedure of first aggregating the part of the pre-existing wage which fits the definition with other parts and

then making an addition to the resulting total—but a question as to the actual truth of the matter, namely whether, in view of the circumstances to which the Commission has had regard in fixing the relevant parts of the pre-existing wage and of the new wage respectively, a greater part of the total wage than formerly is within the definition of "the basic wage".

I ought, perhaps, to refer to the fact that all three of the claims with respect to the Metal Trades Award were heard by the Commission in joint session pursuant to s. 44 of the Act, and that what was done by the Presidential Session and the Reference Bench respectively, was done with the assent of all who constituted the joint session. They consisted of (1) three presidential members who had been nominated by the President to hear and determine both the unions' claim for an increase in the basic wage, and "those portions of the employers' total wage claim seeking alteration of basic wage", and (2) two presidential members and a Commissioner, they having been nominated by the President to hear and determine the unions' claim for marginal increases and "those portions of the employers' total wage claim not seeking alteration of basic wage". It seems clear enough that the employers' alternative claim (B) was regarded as seeking alteration of the basic wage by three shillings, while alternative claim (A) and so much of (B) as related to marginal rates and the addition of one and one-half per cent to the resultant figure, were regarded as not seeking alteration of the basic wage.

The Presidential Session before which the matter came in July 1966, clearly enough was of opinion that alternative claim (A) did not seek alteration of the basic wage; but that claim was not before it for decision, and therefore the opinion it purported to express under sub-s. (3.) of s. 33 did not have the effect in relation to (A) for which that sub-section provides. Neither was that claim before the Presidential Session which sat in joint session with the Reference Bench in 1967, so that no opinion that might be implied from the assent of the presidential members to the course taken by the Reference Bench could have effect under s. 33 (3.). In any case no such opinion appears to have been in fact implied, for an opinion under that sub-section is required by reg. 23 to be recorded in writing, signed by a member of the Commission and kept by the Registrar, and there is nothing to suggest that this requirement was observed. Presumably all who formed the joint session took it for granted without examination that, accepting the President's declared opinion that, the addition of a percentage of total figures reached by adding the pre-existing basic wage to each pre-existing

margin would not be an alteration of the basic wage, neither would the addition of a lump sum to those total figures, even though the amount of the addition were arrived at as being just and reasonable without regard to any circumstances of the work or the industry.

From the foregoing it will be seen that I do not uphold the unions' contention that as a matter of meaning, as distinguished from any question of practical result, s. 33 limits the powers of the Commission by requiring that an award prescribing a wage shall specify separately a part of the wage which answers the description of a basic wage. If, for example, for a particular kind of work a wage be fixed by a single assessment of the amount which the community can afford for that kind of work, there is nothing express or implied in s. 33 to prevent an award from being made accordingly; and if such an award were made, it would be alterable by a Commissioner or by a Reference Bench in exercise of the power conferred by sub-s. (2.). The alteration would be outside both the words and the evident reason of sub-s. (1.) But it is quite a different question whether, in respect of employees covered by existing awards and industrial agreements which fix a basic wage and margins separately, it is practicable, in the absence of amending legislation, to make "total wage" determinations granting increases which are considered just and reasonable without regard to circumstances pertaining to the work upon which, or the industry in which, the employees are employed, and yet to leave "the basic wage" (as defined) unaltered.

The opinions I have expressed, if correct, would entitle the unions to succeed in their present applications for prohibition were it not that by s. 60 (3.) it is provided that an award shall not be called in question in any way on the ground that it was made by the Commission constituted otherwise than as provided by the Act. If given full literal effect, this provision would reduce sub-ss. (1.) and (2.) of s. 33 to the level of merely directory provisions which might be ignored without legal consequence. Sub-sections (3.) and (4.) strongly suggest the contrary intention, though it will be observed that there is no provision resembling either of these sub-sections in relation to a question of power arising before a Reference Bench. It could not be sound to construe s. 60 (3.) as an attempt, necessarily ineffectual as it would be, to deprive this Court of the jurisdiction given by s. 75 (v.) of the Constitution. The problem, therefore, is to reconcile s. 60 (3.) with s. 33. In other contexts a problem of this general kind is solved by construing the privative provision as having a validating operation where, but only where, three conditions are fulfilled, namely that the purported exercise

is a bona fide attempt to exercise the power, it relates to the subject matter of the legislation, and it is reasonably capable of being referred to the power (i.e. does not on its face go beyond the power): *R. v. Hickman; Ex parte Fox and Clinton* 11 ; *R. v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* 12 . A similar solution is, I think, sound in the present context, and the three conditions are in each case satisfied. In the *Metal Trades Case*, the Reference Bench obviously made its award in good faith and upon a matter within the scope of the legislation, and the fact, as I believe it to be, that the result was to alter "the basic wage" did not appear on the face of the order that was made. On the contrary, that fact is discoverable only by means of an analysis made possible by resort to two other sources of information, namely the earlier award and the announcement of reasons by the joint session of the Commission. In the case of the Vehicle Industry Award the condition of bona fides might well have been unsatisfied if the question of the Commissioner's power had been raised before him in other circumstances and he had deliberately failed to refer the question to the President; but the course of events was such that he had every reason to believe, and obviously did believe, that he was empowered to make the award. In the case of the Uranium Mining Industry (Northern Territory) Agreement the question of power has been raised and no award has yet been made; but while it is true that according to the views I have expressed the question should be referred to the President, and the correct opinion for him to give would be that the matter is one not for a Commissioner but for a Presidential Session, it must be kept clearly in mind that the Act makes the President's opinion the criterion of power, and it would be wrong to prohibit the Commissioner from proceeding while the possibility remains that he may obtain from the President an opinion favourable to his power and operating, by virtue of s. 33 (4.). to give validity to what he does. An intervention by this Court could not be justified, unless of course it were by way of mandamus to refer the question to the President, in the event of a refusal by the Commissioner to do so.

It seems to me that the unions' application for mandamus to the Presidential Session in the *Metal Trades Case* is in any event misconceived. The dismissal of the claim to increase the basic wage was not a refusal to perform the duty of proceeding with the settlement of the relevant industrial dispute. It resulted from a decision by the Commission that the settlement of that dispute would be

better served for the future by fixing total wages for each classification. That was a decision in performance, not in refusal, of the duty to proceed with the Commission's function; and the fact that the Presidential Session intended the Reference Bench to fix total wages so as to include an increase (as I regard it) of the basic wage element does not, even if the views I have expressed be correct, invalidate the refusal of the Presidential Session itself to increase the basic wage.

In my opinion, the orders nisi should be discharged.

TAYLOR J. These matters come before us as the result of an order, or award, made by the Conciliation and Arbitration Commission in what is known as the *National Wage Case* (1967). In that case competing applications were made by the employers and employees' organizations. The latter organization sought, inter alia, an increase in the basic wage, and the former, inter alia, the prescription of "total wages" not based on the concept of a basic wage and not calculated by reference to that concept and additionally prescribed margins. In the result, the claim of the employers' organization, which had been pressed on other occasions, was acceded to and the application of the employees' organizations was dismissed. In the first and second matters the prosecutors seek prohibition in respect of the order by which the application of the employers' organization was granted and mandamus in respect of their application for an increase in the basic wage. In the third matter the prosecutors seek to prohibit a Conciliation Commissioner from further proceeding upon an award varying the Vehicle Industry Award in conformity with the decision of the Commission in the *National Wage Case* and, in the fourth, the prosecutors seek to prohibit a Commissioner from proceeding to vary the Uranium Mining Industry (Northern Territory) Agreement in conformity with the aforesaid decision of the Commission. The critical question, as I see it, which arises in each of the cases—and indeed, in my view, the only question of substance—is whether, when making an award prescribing rates of wages the Commission is bound by law to prescribe them by reference to two constituent elements, viz. (1) a "basic wage" and (2) appropriate margins to be paid additionally for different classifications of employment.

Ever since the entry of the Commonwealth into the industrial field of conciliation and arbitration it has generally, though not invariably, been the practice of the Commission and its predecessor to prescribe rates of wages by reference to a basic wage, and to prescribe additional marginal payments for different classifications

of employment. But the concept of the basic wage appears to have changed somewhat during this period. First of all, it seems to have denoted the "minimum" or "basic" wage sufficient to maintain an average employee and his family in a reasonable state of comfort. It was, in effect, at this stage a "needs" basic wage and, later, it was understood to mean a reasonable living wage. In later years a more liberal concept has developed and it seems now to denote the highest minimum wage for an unskilled worker which the state of the nation's economy can afford. Having regard to the content of the relevant legislative head of power there is not and, of course, there could not be, legislation requiring the payment of a specific sum of money as a "minimum" or "basic" wage. Nor would it be competent for the Commission to make a common rule so to provide. But in practice uniformity in the basic wage in industries in which conditions of employment are regulated by federal awards has, in general, been achieved, first of all, through the medium of what have been called basic wage inquiries conducted at intervals between 1930 and 1964. The history of these inquiries is briefly set out in the Commonwealth Year Book 1966 at pp. 364 to 367. Then after the conclusion of each basic wage inquiry the Commission has adopted the basic wage as declared as a basic element in individual awards fixing rates of wages. Since 1964 the place of the basic wage inquiries has been taken by what are called the *National Wage Cases* each of which has involved the reconsideration of the basic wage as between the parties to an award. The relevant inquiry has been as to what wage, or part of a wage which, to use the words of s. 33 of the *Conciliation and Arbitration Act* "is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed". I observe that, whilst it may be accepted that the prescription of such a basic wage together with marginal payments for different classifications represents one method by which rates of wages may be fixed, the ascertainment of what wage is just and reasonable for an adult, without regard to any circumstance pertaining to the work upon which or the industry in which such persons are employed, is by no means a necessary or indispensable step when a tribunal comes to decide what the minimum rates of wages shall be in an industry where the employees are engaged in work of various classifications. Nor can it be said that, when rates of wages are fixed without regard to this concept of the basic wage, the lowest rate prescribed for an unskilled worker in the industry must be taken to be, in the sense in which the expression has been used, the "basic wage". It may be a wage considered to be just *having*

regard to the circumstances pertaining to the work upon which or the industry in which the worker is employed though no doubt, in fixing the rates of wages, the economic value of money would, among other things, be a material factor.

The problem in the cases is, of course, one of power, and the prosecutors point to s. 33 (1.) (*b*) of the Act as a provision which precludes the Commission from pursuing the course upon which it has now decided to embark. But before referring to this section it should be pointed out that the functions of the Commission are performed in part by the Commission in Presidential Session and partly by Conciliation Commissioners. In substance there has always been a division of functions between the Commissioners and other arms of the Commission, and, additionally, there have, for a long time, existed provisions withdrawing from the Commissioners certain powers of the Commission. It may be noticed that s. 18A (4.) of the Act, as amended in 1920, provided that:

> "Notwithstanding anything contained in this Act, the Court shall not have jurisdiction to make an award—
>
> (*a*) increasing the standard hours of work in any industry; or
>
> (*b*) reducing the standard hours of work in any industry to less than forty-eight hours per week, or, where the standard hours of work in any industry are less than forty-eight hours per week, reducing the standard hours of work in that industry,
>
> unless the question is heard by the President and not less than two Deputy Presidents, and the increase or reduction, as the case may be, is approved by a majority of the members of the Court by whom the question is heard."

The first reference in the Act to the "basic wage" appeared in 1926 when s. 18B (1.) of the Act as it then stood provided that:

> "The Attorney-General on behalf of the Commonwealth may, by giving to the Registrar a notice in writing of his intention so to do, intervene in the public interest in any proceeding before the Court in which the question of standard hours of work in any industry or of the basic wage is in dispute, in relation to either of those questions."

Then, in 1930, sub-s. (4.) of s. 18A as it then stood provided that:

> "Notwithstanding anything contained in this Act, the Court shall not have jurisdiction—
>
> (i) either to make an award—
>
> (*a*) altering the standard hours of work in any industry; or
>
> (*b*) altering the basic wage or the principles on which it is computed, or

(ii) to vary or give an interpretation of an award where the variation or interpretation would result in any such alteration,

unless the question is heard by the Chief Judge and not less than two other Judges, and the alteration, variation or interpretation, as the case may be, is approved by a majority of the members of the Court by whom the question is heard."

These two provisions were the earliest legislative recognition of the practice of the tribunal in fixing wages partly by reference to a basic wage and, there being no power to invest the tribunal with authority to make a common rule, the latter provision was inserted in the interests of uniformity. I do not mention intervening amendments which have been made but in 1949 an amendment was made which for the first time introduced the definition of "basic wage" now contained in s. 33 (1.). That section is now in the following form:

"(1.) The powers of the Commission to make an award, or to certify an agreement under section thirty-one of this Act—

(*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 circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed;

(*c*) making provision for or in relation to, or altering a provision for or in relation to, long service leave with pay; or

(*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,

are exercisable by the Commission in Presidential Session and not otherwise."

The first thing that may be said about this section is that, like its predecessors, it recognizes the existing practice employed by the Commission in fixing rates of wages and, clearly enough, in the interests of uniformity, it reserved to the Commission in Presidential Session exclusive authority to make awards which had the effect of altering the basic wage in an industry. But it is not a provision

which confers, or was intended to confer, authority on the Commission; a general authority to determine disputes by the making of awards is already conferred by s. 32. This is acknowledged by the opening words of s. 33 (1.) which, together with sub-s. (2.), then proceeds to distribute the powers and functions of the Commission in a mutually exclusive fashion between the Commission in Presidential Session and the various Commissioners, which expression includes also a presidential member of the Commission dealing with a particular dispute (s. 22). But does s. 33 do more than this? The prosecutors assert that it does and that it also regulates the manner in which the Commission is to proceed in fixing rates of wages. That is to say that, in effect, it provides that the so-called basic wage shall constitute a basic element in every award fixing rates of wages. But the section certainly does not expressly so provide and I can see no basis for any such implication. No such implication is necessary in order that the section should have an effective operation, and it seems to me that to make such an implication would be foreign to the object and purpose of the provision. It merely recognizes existing practice and is intended to achieve as much uniformity as possible in the application of that practice. But that is not all. Sub-sections (3.) and (4.) of s. 33 contain provisions intended to deal with situations where doubts have arisen as to whether an award which is necessary for the determination of a particular dispute is one which is comprehended by sub-s. (1.) or by sub-s. (2.). Sub-sections (3.) and (4.) are as follows:

> "(3.) Where, in relation to a matter before the Commission in Presidential Session, the question whether the Commission in Presidential Session is empowered, having regard to the last two preceding sub-sections, to deal with that matter is raised—
>
> (*a*) if the opinion of the Commission in Presidential Session is that it is empowered to deal with that matter, then, notwithstanding anything contained in this Act, the Commission in Presidential Session is empowered to deal with the matter; or
>
> (*b*) if the opinion of the Commission in Presidential Session is that it is not empowered to deal with that matter, then, notwithstanding anything contained in this Act, the Commission constituted by a Commissioner is empowered to deal with the matter."
>
> "(4.) Where, in relation to a matter before the Commission constituted by a Commissioner, the question whether the

> Commission so constituted is empowered, having regard to sub-sections (1.) and (2.) of this section, to deal with that matter is raised, the Commissioner shall refer the question to the President and—
>
> (*a*) if the opinion of the President is that the Commission constituted by a Commissioner is so empowered, then, notwithstanding anything contained in this Act, the Commission so constituted is empowered to deal with the matter; or
>
> (*b*) if the opinion of the President is that the Commission constituted by a Commissioner is not so empowered, then, notwithstanding anything contained in this Act, the Commission in Presidential Session is empowered to deal with the matter."

These provisions seem to me to emphasize what has already been said. A perusal of them shows that sub-ss. (1.) and (2.) are not finally determinative of the line of demarcation between the functions exercisable by the Commission in Presidential Session on the one hand and those which are exercisable by the Commissioners on the other. In cases where the question of authority is raised in matters before the Commission in Presidential Session, it is the opinion of that arm of the Commission which finally determines the question whether the Commission, as so constituted, is authorized to determine the matter and, in cases where doubt arises in matters before a Commissioner the question of authority, if raised, must be referred to the President and his opinion finally determines the matter. Finally by s. 60 (3.) it is provided that an award shall not be called in question in any way on the ground that it was made by the Commission constituted otherwise than as provided by the Act. So that if in any matter before the Commission in Presidential Session or before a Commissioner the question be not raised, an award made in the determination of a dispute is not open subsequently to attack (cf. the observations in *R. v. Hickman; Ex parte Fox and Clinton* 13). These provisions make it clear that s. 33, as a whole, is not a section which confers jurisdiction to make awards in the settlement of disputes; it is a section which does no more than provide for the allocation of functions between different arms of the Commission. For these reasons I am of the opinion that s. 33 (1.) does not impose upon the Commission any obligation or duty to fix a "basic wage" or to prescribe rates of wages by reference to that concept.

Other alternative objections were taken by the prosecutors in the first and second matters on the ground that the prescription of a "total" wage, and the consequent elimination of the basic wage from the award under consideration, constituted an alteration of the basic wage within the meaning of s. 33 (1.), and upon the ground that the total wage prescribed for an unskilled worker was, in substance, a new and different basic wage. Upon either ground it was asserted that the making of the new award was a matter for the Commission in Presidential Session. But the dispute originally came before a Commissioner, and the question of authority having been raised, it was referred to the President for his opinion. His opinion was that the settlement of this aspect of the dispute was within the authority of the Commissioner and, application having been made that a direction should be given pursuant to s. 34 that it should, in the public interest, be dealt with by a Full Bench of the Commission, the President directed accordingly. In my view this is sufficient to dispose of the objection that the Commission's award was made without authority. Further if, as I think it is, the award is valid the prosecutors' claim for mandamus to hear and determine their application for an increase in the basic wage must also be dismissed.

A like objection is taken by the prosecutors in the third matter which is concerned with a variation of the Vehicle Industry Award, 1953. This variation operated to prescribe a "total" wage, and it was made by a Commissioner without the question of his authority being raised. In these circumstances it is clear that the provisions of s. 60 (3.) preclude the prosecutors from asserting that it was made without authority.

In the fourth matter, as already appears, prohibition is sought to prohibit a Commissioner from further proceeding to consider whether he will make a like variation to the Uranium Mining Industry (Northern Territory) Agreement, 1963. But if the question of his authority to make such a variation is raised beforehand he will be bound to refer the question to the President whose opinion will conclude the question. Prohibition at this stage would preclude the Commissioner from referring the question to the President and, in my view, it is clear it should be refused. To grant prohibition at this stage would be to prevent the operation of a legislative provision (s. 33 (4.)) which, together with other provisions of the Act, is expressly designed to operate in the demarcation of the powers and authorities of each arm of the Commission.

For these reasons each of the orders nisi should be discharged.

MENZIES J. I have had the advantage of reading the reasons for judgment of Taylor J. with which I agree. I can therefore dispense with any recital of the proceedings in respect of which orders nisi have been granted. There are however four legal questions of importance arising out of the matters before us upon which I would say something.

The first is whether the Act requires the Commission, in making awards fixing wages in an industry, to identify the wage, or, some part of the wage, fixed as a "basic wage", i.e., that which is fixed as "just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed" (s. 33 (1.) (*b*)). The second is whether a part of any wage fixed by the Commission, however the wage may be described in the award, is nevertheless identifiable at any particular time as the "basic wage" in the statutory sense above stated. The third is whether the basic wage fixed by the award of 19th July 1966 varying the Metal Trades Award, 1952 was altered by the award of 5th June 1967 made by the non-Presidential Commission comprising Gallagher and Moore JJ. and Commissioner Winter. The fourth is whether the effect of s. 33 (3.) and (4.) and s. 60 (3.) is to commit to the Commission in Presidential Session, or to the President of the Commission, as the case may be, the responsibility for finally determining any question which is raised about the power of the Commission in Presidential Session or by a Commissioner to deal with the matter within the jurisdiction of the Commission.

The submission that a basic wage must always be determined when a wage is being fixed by the Commission rested upon those provisions in s. 33 (1.) which commit to the Commission in Presidential Session the power of the Commission to make an award altering the basic wage. This provision impliedly requires, so it was argued, the making of every award fixing wages in terms which would enable the Commission in Presidential Session to make an award altering it in the exercise of this power. To read s. 33 (1.) as requiring this is, in my opinion, to take more from the sub-section than it contains. It must be read with s. 33 (3.) and (4.) and s. 60 (3.). Reading these provisions as a whole they have, I think, a like character to that attributed by this Court to s. 13 of the *Conciliation and Arbitration Act* 1904-1951 in *Reg. v. Blackburn; Ex parte Transport Workers Union of Australia* 14 , viz. provisions in which the criterion of power to exercise jurisdiction is not the true meaning and application of s. 33 (1.) (*b*) but rather, in the

event of any question being raised before the Commission in Presidential Session or before a Commissioner is the opinion of the Commission in Presidential Session (s. 33 (3.)) or the President of the Commission (s. 33 (4.)) as the case may be. This being the character of s. 33, it is hardly to be supposed that it has hidden within it a far-reaching restriction upon the overall powers of the Commission to fix wages in the settlement of a dispute in an industry. Furthermore the natural meaning of the language used in s. 33 (1.) (*c*) does no more than stipulate that where there is a dispute in an industry which relates to the alteration of the basic wage for that industry that dispute, or, that element of the dispute, if more is involved, is to be determined by the Commission in Presidential Session. If an award determining an industrial dispute and fixing wages in an industry contains no provision determining a basic wage, there cannot be a dispute subsequently about the alteration of the basic wage in that industry, and s. 33 (1.) would have no operation if, and when, a dispute arises about the variation of the wages fixed by that award. I have found no justification for deciding that every award of wages must be so framed, that when it comes to be altered, either the whole or a part must be altered by the Commission in Presidential Session.

Passing now to the second question the submission that there is in every award, however framed, a basic wage element, was also based upon the definition of basic wage in s. 33 (1.) (*b*), viz. "that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed". It was argued that any wage fixed be it $50 or $500 a week, and even if it has been fixed in any industry where there are no unskilled or needy employees, will, by a process of analysis on the basis of this definition and of current economic conditions, yield a basic wage which would be the same for all industries. This I cannot accept. I am satisfied that when s. 33 (1.) commits to the Commission in Presidential Session the task of altering the basic wage in any industry, the reference is to what, by the terms of an existing award, is identified, either expressly or impliedly, as a basic wage. If the award of a total wage could at any time and despite its terms be divided by such a process of analysis into two parts (1) a basic wage element and (2) the remainder of the wage, it seems to me that in such a case the basic wage element would vary automatically as the cost of living varied and there would never be any occasion for changing the basic wage by an award; the basic wage element of such a total wage would be, as it were, always

up to date. I have no doubt that what is referred to in s. 33 (1.) (*b*) is the variation of a basic wage identified in an existing award as a wage or part of a wage having that character.

It was, however, further argued that the award made by the Commission (Gallagher and Moore JJ. and Commissioner Winter) by variation dated 5th June 1967—No. B. 2201—altered the previously existing basic wage. The contention that it did so was put in two ways. First, that cl. 3—fixing a minimum wage—is an identifiable basic wage which differs from the previously existing basic wage and could therefore in conformity with s. 33 (1.) (*b*) be made only by the Commission in Presidential Session. It does not appear, however, either expressly, or, by necessary implication, that the "minimum wage" was something fixed by the Commission as the wage or part of the wage "just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed". The Commission, indeed, expressly denied that character to the minimum wage which it fixed, and it is not easy to see why a minimum wage calculated by adding $1 to the minimum wage fixed by the Commission on 8th July 1966 as part of an award which itself fixed a different and lower basic wage eo nomine, should now be stamped by this Court with the character of a basic wage fixed by the Commission on 5th June 1967. There is, in my opinion, nothing to warrant such a conclusion. Secondly, it was claimed that it can be seen that the addition of $1 per week to all existing award wages of adults amounted to an alteration to the basic wage. Previously existing award wages had consisted of two elements, a basic wage and a margin. An application for an increase in the basic wage element was dismissed by the Commission in Presidential Session at the same time as the non-Presidential Commission eliminated basic wages and margins and introduced total wages fixed, as I have said, at existing award wages plus $1 weekly. For the prosecutor it was contended that despite the purported elimination of the basic wage, what was done amounted to an altering of the existing basic wage by increasing it by $1 a week, and that this was done by the Commission otherwise than in Presidential Session and therefore in a manner contrary to s. 33. Although I am satisfied that the reasons given for increasing by $1 a week all award wages and the existing minimum wage do show that the increase was made without regard to any circumstance pertaining to the work upon which, or the undertaking in which, an adult male was employed, I am not able to regard the award that was made as fixing a new basic wage at

a figure $1 per week higher than the previously existing basic wage. It is to be observed that it is not the character of the increase that was made that is decisive; what has to be determined is the character of that which was increased, and in my opinion this was not the existing basic wage but the existing award wages as totals. Notwithstanding that the existing award wages had been determined by adding margins to a basic wage, what was increased was not one element in that total wage but the total wage itself. In my opinion therefore the award of 5th June made by the Commission otherwise than in Presidential Session did not alter the basic wage. I should perhaps add that the deletion from the award of the basic wage and margins provisions did not of itself constitute an amendment of the basic wage. It is upon the total effect of what was done that attention must be concentrated in determining whether a new basic wage resulted from the determination of the Commission. I have not been convinced that the Commission did unwittingly the very thing which it set out not to do and the very thing which the Commission in Presidential Session positively refused to do, viz. to alter the basic wage.

Finally if, contrary to my opinion, this Court were to determine that the minimum wage—or any other sum—had on 5th June 1967 been fixed by the Commission as a new basic wage and one different from that previously existing, the new basic wage, so identified, was nevertheless fixed by an award of the Commission which cannot be called into question. What I have to say about this follows from my earlier analysis of s. 33 (1.) in the light of s. 33 (3.) and (4.) and s. 60 (3.), and I can state my conclusion shortly. It is that the Act treats the question of the constitution of the Commission to hear and determine any particular matter before it as a question for internal determination either by the Commission in Presidential Session (s. 33 (3.)), or by the President of the Commission (s. 33 (4.)), in the event of any question about the constitution of the Commission being raised. If no such question is raised, or, if the question having been raised, the matter is heard by the Commission in Presidential Session or by a Commissioner in accordance with the opinion of the Commission in Presidential Session (s. 33 (3.)) or by the President (s. 33 (4.)), then there is full compliance with the Act. In any event, an award made by the Commission in a bona fide attempt to exercise its powers in the manner provided by the Act cannot be called into question on the ground that it was made by the Commission constituted otherwise than provided by the Act (s. 60 (3.)). It follows therefore that if, contrary to my opinion, the award made by the Commission

(Gallagher and Moore JJ. and Commissioner Winter) on 5th June 1967 did effect an alteration of the basic wage by the Commission otherwise than in Presidential Session, this affords no ground for interference by this Court. The President did, I consider, form the opinion that the variation of the Metal Trades Award sought by the employers—other than an alternative and express claim for a variation of the basic wage—was not a matter with which the Commission in Presidential Session was empowered to deal. This appears from the direction of the President given on 27th January 1966. That variation sought therefore became a matter to be dealt with in the first place by a Commissioner, and subsequently by the Commission (Gallagher and Moore JJ. and Commissioner Winter) which heard and determined it in accordance with the direction of the President given under s. 34 of the Act. Furthermore, in any event, the Commission having acted as it did in a matter committed to it and in a bona fide attempt to exercise its powers in accordance with the Act, the award which it made is protected by s. 60 (3.) from attack, on the ground that the Commission was nevertheless irregularly constituted.

Accordingly I agree that each order nisi should be discharged.

WINDEYER J. In the article, "Basic Wage", in the *Australian Encyclopaedia*, vol. 1, p. 445, Mr. A. G. L. Shaw, now Professor Shaw of Monash University, wrote:

> "The idea of the basic wage is now firmly rooted in the Australian economic structure. It must be emphasized that this is the standard for unskilled labour; all courts award `margins', or `loadings', for skill, overtime, week-end work, danger, and dirt. But the wage is now, especially when taken in conjunction with contemporary social services, substantially above the minimum requisite for basic needs. The courts have increasingly recognized this as they changed gradually the basis of its fixation from living standards to the prosperity of the country, but it remains the basis of all wage-determinations, and to this extent still justifies its name."

That was written over ten years ago. The basic wage has now had a place in Australian thought and language for sixty years. It used to get its meaning, from the *Harvester Judgment [Ex parte Mckay]* of Higgins J., as a sum sufficient to satisfy "the normal needs of the average employee regarded as a human being living in a civilized community" 15 . In the course of time the satisfaction of needs as the measure has been superseded by a consideration of the state of

the national economy, to the intent that the wage earner shall participate in prosperity and productivity. In the result, it seems to me to have become impossible to define or describe the basic wage today in any more precise way than by saying that it is such sum as is declared by an industrial tribunal of competent jurisdiction to be the basic wage. This is so whether the declaration be by the Commonwealth tribunal or by a State tribunal establishing a basic wage for a State or part of a State. In saying that no more precise meaning than that I have expressed can be given to the term "basic wage", I have had several things in mind. The first is that the principles by which the basic wage has been determined from time to time have not been constant. This was recognized by this Court in the *Ozone Theatres Case* 16 . Comparisons of the basic wage at different periods are thus not of direct value for economic history or statistical purposes, because the wage at different times has reflected different ideas. At one time it was needs and the cost of living; later on the productivity and capacity of industry. And, on top of these general factors, arbitrary and empirical adjustments have been made by "loadings", such as "prosperity loadings". These have been made as the result of policy considerations rather than by the arithmetical application of settled principles of valuation.

My second reason for saying that the idea of the basic wage is now incapable of precise formulation is that it has long since ceased to be, in a real sense, a minimum wage for all unskilled workers in industry. From what we were told in the course of the argument, there are now few workers on the basic wage; that is so at all events in industries governed by Commonwealth awards. Most employees, we were told, get considerably more than the basic wage whatever work they do. And thirdly, it seems unreal to suppose that the rates for different classifications prescribed by the awards of wage-fixing tribunals are always ascertained by adding "margins for skill" to the basic wage. The salaries prescribed for men and women having high professional qualifications, such as the professional engineers whose salaries are regulated by an award of the Commonwealth tribunal, are surely not in reality prescribed by making an addition to the basic wage.

Nevertheless I assume that in arriving at the remuneration to be prescribed for men and women in the lower paid grades of any industry, any tribunal or arbitrator must proceed from some base. In fixing either a new basic wage or new margins regard must, I would suppose, be had at the outset to the existing basic

wage and the existing margins in that industry. That means the ultimate wage structure is likely to be built upon a past basic wage, although the foundation has become overlaid.

The only statutory description, or definition, of the Commonwealth basic wage is in s. 33 (1.) (*b*) of the *Conciliation and Arbitration Act* 1904-1966. The basic wage for adult males is there said to be "that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed". There is a similar description of the basic wage for adult females. This abstract expression is obviously not susceptible of transformation into concrete monetary terms by a process of calculation or analysis. Indeed I do not find it easy to conceive of a just and reasonable wage for a man regardless of where he works and what he does unless it be related to needs in the *Harvester* sense. The different amounts prescribed for some localities in Australia seemed to me to contradict the abstract and general meaning which counsel for the prosecutors sought to put upon the statutory expression. These variations are apparently traditional, but are now a vestigial survival from a period when the basic wage directly reflected the cost of living in different localities. I find difficulty in the way in which Mr. McGarvie expressed the idea. But I do not doubt that in this country, which has inherited the fundamental doctrines and spirit of the common law, a tribunal which has the power to decide facts or to make rules must always be capable of determining what is a just and reasonable amount to be paid in any given circumstance.

However imprecise the idea of a basic wage may be, and however misleading the phrase itself now is—the idea has for long been meaningful for Australians and the phrase is a familiar part of the Australian vocabulary. The basic wage affects many things apart from wage-fixing. Variations in the basic wage are made the meter for the adjustment of prices and charges under commercial contracts or in contracts of service not governed by awards. Provisions in deeds and wills for the payment of annuities of variable amounts are, I believe, sometimes regulated by the basic wage in force from time to time. State industrial tribunals have accepted from the Commonwealth the idea of the basic wage. State basic wages have generally been, in the past, more or less closely related to the Commonwealth basic wage, which has thus had an influence beyond those industries governed directly by the Commonwealth awards. In words of strength and eloquence the Industrial Commission of New South Wales has recently in its judgment in the matter of

the *Agricultural Employees (State) and other Awards* expressed that tribunal's view of the social significance of the concept of the basic wage. Their Honours said among other things, and they gave illustrations supporting their statement, that "although legally it relates only to awards, its moral influence controls a substantial amount of work outside awards." And in the law of New South Wales, and for all that I know elsewhere, the State basic wage enters into many matters far removed from the relationship of employer and employee. It is a measure or criterion in provisions contained in sixteen Acts, which may be found set out in the First Schedule to the *Industrial Arbitration (Amendment) Act*, 1964 (N.S.W.). In this way, by the interrelation of the Commonwealth basic wage and the State basic wage or "Sydney basic wage", Commonwealth basic wage determinations have, in the past, indirectly affected a variety of matters arising under State law including the attachment of debts, the recovery of leased premises, workers' compensation payments, and cases in which a person is entitled to have the services of the Public Solicitor.

When in s. 33 (1.) of the Act the Parliament referred to "altering the basic wage", it contemplated that the Commission would continue to follow the practices of the past, that there would be a basic wage. And further that in some way—and presumably in recent times by the medium of what have come to be known as the *National Wage Cases*—the Commission would from time to time alter and declare the basic wage. On that assumption, and remembering the far-reaching effects of the Commonwealth basic wage and the need for it to be uniform in all Commonwealth awards, the policy of s. 33 (1.) is obvious. The Act was passed in the knowledge that in the past the basic wage had been altered from time to time, and so too had the principles on which it was computed.

The Act certainly assumes that the Commission would or might continue the practice of declaring a basic wage as part of the process of award-making. But does the Act command this? That it seems to me is the fundamental question. I do not think it is an easy question. I have, however, come to the conclusion that the Act does not command this. And that for that reason, if for no other, this Court cannot command it. I shall not analyse the provisions of the Act as I agree generally in what has been said about them by other members of the Court who reject the arguments of the prosecutors. I would make only two or three further observations. First, I do not think it is right to say that in every prescription of a wage there will always be an identifiable element, the basic wage, on top of which the prescribed wage was built.

Unless there be a sum in fact described as the basic wage, a prescribed wage under an award is simply, it seems to me, the amount to be paid for work done of the kind described. The wage is then, using the phrase which has been adopted, a total wage. To search for some sum within a total wage which can be described as that part of it which it would be just and reasonable to pay that worker regardless of the nature of his work and the industry in which he is employed must, I think, be futile. It might have been possible to do this when the basic wage was determined by needs. But the principles upon which the basic wage is computed are not immutable. The Act itself refers to them being altered.

Secondly—and most importantly—I think that it would be beyond the power of the Commonwealth Parliament to insist that the Commission must determine and declare a basic wage. The Commission exercises a far-reaching authority over the national economy. But the Parliament has no power under the Constitution to direct that it go about its task of settling industrial disputes by fixing wages according to some particular principle or formula. It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration. If the Act commanded that the Commission fix wages by reference to a basic wage it would. I consider, be invalid. But the Act is not invalid if it be read as assuming that it may do so and enacting that, if it does, matters relating to the basic wage must be determined in a Presidential Session.

I am not able to accept the proposition that what the Commission has done by its decision to adopt a total wage was altering the basic wage. The statutory words "altering the basic wage" seem to me to refer to the procedures by which, in the past, the basic wage has periodically been expressly altered, sometimes by automatic quarterly adjustments, sometimes as a result of inquiries or in the course of making some governing award such as the Metal Trades Award. What has recently been done was not in that sense altering the basic wage: it was abandoning the concept of the basic wage as an element in wage fixation. No longer is there to be a basic wage as the expressed foundation of, or as a separate component in, wages prescribed by Commonwealth awards. The consequences of the decision could be far reaching. It was not apparent to me that in the long run employees would suffer from it. But it is not for us to say whether the fears for the future which the unions, the prosecutors, express are justified. It is not within the province of this Court to consider the merits and policy of the decision of the Commission. If it is doing, or proposing to

do, something unlawful, this Court must, interfere. Otherwise it must not. The Commission has a law-making function. Its performance requires a consideration of economic conditions and the evaluation of evidence put before it by disputants. In performing its function the Commission cannot be tied by law to past practices and precedents, however valuable these may be or be thought to be.

I have come to the conclusion that the order nisi should be discharged in each case.

Orders nisi discharged with costs.

Solicitors for the prosecutors, *Maurice Blackburn & Co.*

Solicitors for the respondent employers' organizations, *Moule, Hamilton & Derham*.

M. G. M.

1 (1949) 78 C.L.R. 529

2 (1949) 78 C.L.R., at p. 541

3 (1949) 78 C.L.R. 389

4 (1952) 86 C.L.R. 75

5 (1949) 78 C.L.R. 389

6 (1949) 78 C.L.R. 529

7 (1966) 114 C.L.R. 648

8 (1949) 78 C.L.R. 389

9 (1949) 78 C.L.R., at p. 402

10 (1933) 49 C.L.R. 589

11 (1945) 70 C.L.R. 598, at pp. 614, 615

12 (1951) 82 C.L.R. 208, at p. 249

13 (1945) 70 C.L.R. 598, at pp. 616, 617

14 (1952) 86 C.L.R. 75, at pp. 93, 94

15 (1907) 2 C.A.R. 1, at p. 3

16 (1949) 78 C.L.R. 389, at pp. 402-407