

Industrial Arbitration Act.

1912-1952.

Western Australia.

Reprinted with Annotations to 31st March, 1955.

FOREWORD.

In the Foreword to the Reprint of this Act as approved for reprint on 5th October, 1950, the then Attorney General, the Hon. A. V. R. Abbott, M.L.A., stated:—

“The annotations to this Act have been made by Mr. F. T. P. Burt, LL.M. (W.A.), a practitioner of the Supreme Court of Western Australia. They are based on a thesis submitted by Mr. Burt in 1945 for the degree of Master of Laws in the University of Western Australia and have been prepared by him in association with the Editorial Committee of the University of Western Australia Annual Law Review. Mr. Burt's original monograph on this important subject was made possible by a Hackett Research Studentship which was awarded to him by the University in 1941 after he had taken the degree of LL.B. with first-class honours.”

The annotations so made have since been revised by Mr. Burt as at 31st March, 1955, and as so revised are incorporated with the Reprint of the Act as approved for reprint on the 5th July, 1956.

E. NULSEN,
Minister for Justice.

Perth, 5th July, 1956.

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LIST OF ABBREVIATIONS.

A.E.R.	All English Law Reports.
AR (NSW)	Arbitration Reports (NSW)
A.C.	Appeal Cases (English)
Bk of Awards	Book of Awards (New Zealand)
B.W.D.	Basic Wage Declaration.
B.T.A.R.	Building Trades Apprenticeship Regulations.
C.A.R.	Commonwealth Arbitration Reports.
C.L.R.	Commonwealth Law Reports.
Ch.	Chancery Reports (English).
E. & B.	Ellis & Blackburn (English).
G.L.R.	Gazette Law Report (New Zealand).
K.B.	King's Bench (English Reports).
N.Z.L.R.	New Zealand Law Reports.
Q.L.R.	Queensland Law Reports.
Q.W.N.	Queensland Weekly Notes.
Q.B.D.	Queen's Bench Division (English).
Q.A.B.W.	Quarterly Adjustment to Basic Wage.
S.A.I.R.	South Australian Industrial Reports.
W.A.A.R.	Western Australian Arbitration Reports.
W.A.I.G.	Western Australian Industrial Gazette.
W.A.L.R.	West Australian Law Reports.

"The New South Wales Act" refers to the New South Wales Industrial Arbitration Act, 1912 (No. 17 of 1912 and Amendments).

"The New Zealand Act" refers to the New Zealand Industrial Conciliation and Arbitration Act, 1925 (No. 24 of 1925).

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A NOTE ON THE CONSTITUTIONAL POSITION.

The Arbitration power within the Federal system is concurrent power, the Commonwealth having the specific grant and the States the residuary. It is therefore necessary to preface an examination of Western Australian Industrial Arbitration Law with a sketch of the Commonwealth's powers in the same field. The power which the Commonwealth may exercise with respect to Arbitration and Conciliation is contained in Section 51 placitum 35 of the Commonwealth of Australia Constitution Act (63 and 64 Vict. Cap 12.) which provides that "The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." This does not constitute a direct grant of judicial power. It is a grant of legislative power and it is not an absolute power but a limited one; thus it is necessary for the Commonwealth Court of Conciliation and Arbitration to look to the Act which gave it birth (the Commonwealth Conciliation and Arbitration Act 1904-1934) and not directly to the Constitution in order to establish its jurisdiction, and the provision on which the Court's jurisdiction is founded must be one which is within the power of the Commonwealth Parliament to enact.

An analysis of the Commonwealth Conciliation and Arbitration Act, read in conjunction with the Parliament's grant of power, would be necessary to fix the extent of the jurisdiction of the Commonwealth Court at any particular time. It is not intended to enter upon such an inquiry here. It will be assumed in this outline that the Commonwealth has used its legislative powers to the utmost, and only the limitations implicit in the Constitutional grant will be considered, so that in an incidental and indirect manner the field of activity left to the States may be marked out.

The power of the Commonwealth is in the first place restricted to "industrial disputes" the meaning of which must be regarded as having been settled by Isaacs and Rich JJ in the Municipalities Case (*Federated Municipal and Shire Council Employees v. Melbourne Corporation* (1919) 26 (C.L.R.) 508). They said there "the concept (i.e. of industrial disputes) may be thus formulated: Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation . . . It implies that 'Industry', to lead to an industrial dispute, is not merely industry in the abstract sense, as if it alone affected the result, but it must be acting and be considered in association with

its co-operator 'capital' and in some form, so that the result is in a sense the outcome of their combined efforts. It also implies that 'an industry', in the relevant sense, is not confined to a single enterprise, but means a class of operations in which all persons, employers and employees are engaged in the same field of industry—not necessarily of commerce—provided by the society in which they exist". (*The Bank Officials Association v. The Bank of Australasia and others* (1923) 33 C.L.R. 517 at page 536).

It is not necessary that the operations should be carried on for profit (*Federated Municipal and Shire Council Employees v. Melbourne Corporation* (1919) 26 C.L.R. 508) nor by manual labour but the co-operation must be industrial and this does not include all cases where the relationship of master and servant is found to exist (*The Federated State School Teachers Association of Australia v. The State of Victoria* 41 C.L.R. 569 per Knox, C.J., Gavan Duffy and Starke, JJ, at page 575).

An organisation of employees in an industry may have a dispute with employers in that industry even though some of the employers do not employ any of its members and all the employees or certain of the employers are satisfied with their conditions (*Burwood Cinema Limited v. The Australian Theatrical and Amusement Employees Association* (1924) 35 C.L.R. 528). As between the union and the employers served with the log the Court has jurisdiction to make an award binding on employers who do not employ members of the union as well as on those who do and as to the terms of the employment of all employees including non-unionists. (*The Metal Trade Employers' Association v. Amalgamated Engineering Union* (1935) 54 C.L.R. 387.)

A State may be a party to an industrial dispute and will be bound by the award (*Amalgamated Society of Engineers v. Adelaide Steamship Company Limited* (1920) 28 C.L.R. 129). The dispute must be a real dispute in fact and not an illusory, fictitious or "paper" dispute (*Caledonian Collieries Limited v. Australian Coal and Shale Employees Federation No. 2* (1930) 42 C.L.R. 558).

A sympathy strike does not constitute such a real and genuine dispute (*Metropolitan Coal Company v. Australia Coal Employees* 24 C.L.R. 85).

Threatened, impending or probable disputes are within the jurisdiction of the Court (*Merchant Service Guild v. Newcastle S.S. Co. Ltd.* (1913), 16 C.L.R. 591).

The Court has no jurisdiction over a dispute unless it is a dispute extending beyond the limits of any one State. It must be a "two State" dispute (*R. v. Australian Builders' Labourers' Federation* (1914), 18 C.L.R. 224).

For an industrial dispute to exist in each of the two States it must exist in each of the two States at the same time, and in each State it must be a genuine dispute (*Caledonian Collieries Limited v. Australian Coal Employees' Federation (No. 1)* (1930), 42 C.L.R. 527).

The Commonwealth may prevent and settle industrial disputes by conciliation and arbitration and these words are words of limitation. There is no power to reach the same end by other means and the Commonwealth has no general legislative power with regard to industrial matters. From this position it follows that the Court has no power to declare an award to be a common rule. (*The Australian Boot Trade Employees' Federation v. Whybrow and Company* (1911) 11 C.L.R. 311.)

Although the Court may by its award bind employers served with the log even if they employ no union labour and as to the conditions on which they employ non-union labour yet such an award will not confer rights upon such non-unionists. That is to say the award will only impose a duty upon such employers and a breach of such a duty would be an offence under the Commonwealth Act (Latham, C. J., in *Metal Trades Employers' Case* 54 C.L.R., 387 at page 406).

Although the Commonwealth Court can only impose duties and confer rights upon the parties to the dispute before it, it may by its award, control a party's relations with third persons who are not parties to the dispute nor before the Court.

The ambit of the Commonwealth's powers with respect to arbitration is fixed by the constitution. It is beyond the power of the Commonwealth Parliament in any way to extend these powers and it is beyond the power of the State Parliaments, by enacting inconsistent legislation or in any other way, to whittle the power away. Any State law or any award made by a State industrial authority or any industrial agreement made under the provisions of State industrial legislation will if inconsistent, and to the extent to which it is inconsistent, with a Commonwealth award validly made, be void and of no effect (Section 109 of the Constitution and also *Clyde Engineering Co. v. Cowburn* (1926) 37 C.L.R. 466 and also Section 30 of the Commonwealth Arbitration Act, 1904-1934).

What then is the test of inconsistency? It was held in *Whybrows case* ((1910) 10 C.L.R. 266) that there was no inconsistency if it were possible to obey the Federal authority without disobeying the State authority. This "obedience" test is not however appropriate for every case (*Knox C. J. and Gavan Duffy J., in Clyde Engineering Co. v. Cowburn*) (above). The test now applied is that outlined by Isaacs J. (1926 37 C.L.R. 466 at page 489) in *Clyde Engineering Company v. Cowburn*. He said there, "If a competent legislature expressly or impliedly evinces an intention to cover the whole field that is a *conclusive* test of inconsistency where another legislature assumes to enter to any extent upon the same field." (*H. V. McKay v. Hunt* (1926) 38 C.L.R. 308). This test was followed by the Court in *ex parte McLean* (1930 43 C.L.R. 472). Dixon, J., at page 483, says, "The inconsistency depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its intention is directed. When a Federal Statute discloses such an intention, it is inconsistent with it for a law of a State to govern the same conduct or matter." There can be no doubt but that the Commonwealth Parliament intended that an award of the Court

should cover the field. By section 51 of the Commonwealth Conciliation and Arbitration Act it is provided that any State award order or determination which is inconsistent with or *deals with* any matter dealt with by the Commonwealth Court shall to the extent of such inconsistency or in relation to the matters dealt with, be invalid. When there is no wholesale inconsistency in this sense it may be necessary to compare and contrast particular provisions. Even here the obedience test is no sure guide. If both legislative authorities are attempting to prescribe rules governing the same situation then such rules are inconsistent even if both authorities can be obeyed (Isaacs J. in Clyde Engineering case at page 490).

It would even appear that they are inconsistent for this purpose even if they are identical (per Dixon, J., in *ex parte McLean* 43 C.L.R. 472 at page 483).

The Commonwealth power is however always concurrent with that of the State. A Commonwealth law will only override a State law to the extent to which it is inconsistent therewith and no further. Thus as the Commonwealth Court has no power to make a common rule its award does not, as to persons not cited, render a State common rule inoperative or invalid (*Printing Industry Employees v. Brokensha & Shaw* (1935) 15 W.A.I.G. 189).

Quaere whether on a repeal of the Federal Law the superseded State law would revive (*Liquor Prohibition Appeal* case (1896) A.C. 348 and Wynes "*Legislative and Executive Powers in Australia*" (1936) at page 104).

State law, awards and agreements will of course only be ousted by inconsistent Commonwealth awards which are made within the jurisdiction of the Commonwealth Court. The Commonwealth Court's jurisdiction may fail because it cannot be supported in the terms of the Act, or it may be supported by the Act, and the Act itself be bad as being *ultra vires* the Commonwealth Parliament. In either case the resulting award will be a mere nullity and an inconsistent State award will not be affected.

This extremely cursory examination of the constitutional position has been made so that the reader may be aware of and bear in mind while studying State legislation, the arbitrary and unfunctional basis on which the Arbitration power is shared between the Commonwealth and the States. This situation must be taken as "given"; the State Act must be read subject to the constitutional position which prevents the State Court from regulating the industrial conditions in an industry already covered by a valid Commonwealth award.

THE W.A. ARBITRATION COURT'S ATTITUDE TO JUDICIAL PRECEDENT.

We are attempting, in all that follows, to analyse the case law surrounding the Western Australian Industrial Arbitration Act, 1912-1952 (No. 57 of 1912). We must therefore consider, as a preliminary, the attitude the Court itself has adopted to precedent.

As a general proposition it may be said that the Arbitration Court does not consider itself bound either by its own decisions nor by the decisions of other arbitration tribunals in other jurisdictions. In the *Timber Industry Disputes* ((1905) 4 W.A.A.R. 171 at page 188) Parker, J., after considering the provisions the Court in New Zealand had made when settling the conditions of work in the Timber Industry there said, "I cite the New Zealand case as an instance of the way in which this matter was settled in that colony. This Court is not bound by the decisions of the Court of Arbitration in New Zealand; in fact our statute expressly says that this Court is guided by equity and good conscience (see Section 69 post). Now equity and good conscience means the equity and good conscience of the three members of this Court and not the equity and good conscience of the members of the New Zealand Court, or the members of the Arbitration Court of any of the Australian States. This Court is not bound by the decisions of any Court or by the utterances of any previous President of this Court. We are a law unto ourselves and we are only controlled by the Supreme Court and the High Court of Australia (as to which see Section 64 post). Of course we always pay great respect to the utterances of any previous President or to the decisions of any of the Australian States; but if cases previously decided do not fall in with my views although I should always treat them with the greatest respect and follow them if possible, I should not feel myself bound by them; nor do I think the Act ever intended that the members of the Court should be bound by them." (See also *Tydell v. Commissioner of Railways* (1910) S.C. 9 W.A.A.R. 97 *prt.* *Burnside, J.*, at page 101 and *Fremantle Branch Engineers Union v. Millars* (1904) 3 W.A.A.R. 13.)

The working rule that the Court is not bound but would follow where possible has been adopted in practice by all subsequent Presidents with the exception of Rooth, J., who in the *Metropolitan Shop Assistants v. Foy & Gibson* ((1912) 11 W.A.A.R. 57) claimed an even freer hand. He said there, at page 61 that he "did not propose to allow himself to be influenced at all by the decisions which have been given in the New South Wales Courts." (See also *Burnside, J.*, in *Registrar v. Bunning Bros.* (1914) 13 W.A.A.R. 66 at page 70.)

When determining the Basic Wage, under Section 123 (post), the Court is of course not bound by any previous decisions of itself or any other Court (see *Dwyer, P.*, in 1942 Basic Wage Declaration

22 W.A.I.G. 134, see Section 123 post). The decision of an Industrial Magistrate is a decision of the Court of Arbitration (see Section 103 post) and the Court always reserves the right to reconsider it, especially in view of the fact that the right of appeal from an Industrial Magistrate is very limited and prior to Amendment (No. 42 of 1949) did not exist at all when the complaint was dismissed (see Dwyer, P., in *W.A. Cleaners and Caretakers' Union v. University of W.A.* (1940) 20 W.A.I.G. 213 and Section 108 post).

The President and the Deputy President will not consider a decision from which they dissent as being in any way binding upon them in subsequent cases. In the *Coastal Engineers v. Commissioner of Railways* ((1940) 19 W.A.I.G. 357) Wolff J. (Deputy President), who was dissenting from the decision of the other members of the Court said, "I have expressed these views so that if at any future date this matter should be again brought up for decision, this decision would not appear, so far as the President or the Deputy President are concerned, as a binding precedent on the Court."

The Court will however consider itself to be bound by its own previous decisions when the matter at issue is the interpretation of an award. When any such interpretation has been delivered by the Court it is thenceforth read into and forms part of the award. If either party is then not satisfied with the award as interpreted its proper remedy is to approach the Court and ask that the award be amended (*Coastal District Amalgamated Engineers v. Commissioner of Railways* (1943) 23 W.A.I.G. 186; *Engine Drivers' Award* (1949) 29 W.A.I.G. 605).

The Court will also consider itself bound by the decisions of the Full Court on all questions going to jurisdiction, see *Salvaris v. Hotel Club Caterers* (1953) 33 W.A.I.G. 219.

INDUSTRIAL ARBITRATION ACT, 1912-1952.

ARRANGEMENT.

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Approved for reprint.

WESTERN AUSTRALIA.

INDUSTRIAL ARBITRATION.

No. 57 of 1912.*

[As amended by No. 45 of 1920 (a), No. 50 of 1925 (b), No. 41 of 1930 (c), No. 6 of 1935 (d), No. 31 of 1935 (e), No. 26 of 1937 (f), No. 49 of 1941 (g), No. 46 of 1948 (h), No. 42 of 1949 (i), No. 20 of 1950 (j), No. 56 of 1950 (k) and No. 5 of 1952 (l) and reprinted pursuant to the Amendments Incorporation Act, 1938.]

(In this reprint the numbering of parts, sections, etc., as adopted in the reprint published in Vol. 5 of the Reprinted Acts of the Parliament of Western Australia (1952) is retained.)

AN ACT to amend and consolidate the law relating to the Prevention and Settlement of Industrial Disputes by Arbitration and Conciliation and for other relative purposes.

Long title
amended by
No. 5 of
1952, s. 2.

[Assented to 21st December, 1912.]

BE it enacted, by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the *Industrial Arbitration Act, 1912-1952*, and shall come into operation on a day to be fixed by proclamation.**

Short title.
No. 57 of
1912, s. 1§
No. 5 of
1952, s. 1 (3).

* This Act is affected by No. 38 of 1945.

(a) Assented to 24th December, 1920. (b) Assented to 31st December, 1925. (c) Assented to 24th December, 1930. (d) Assented to 5th October, 1935. (e) Assented to 6th January, 1936: Proclaimed to commence on 1st February, 1936 (see *Gazette* dated 31/1/36, p. 151). (f) Assented to 18th January, 1938. (g) Assented to 15th January, 1942. (h) Assented to 7th January, 1949. (i) Assented to 26th October, 1949. (j) Assented to 23rd November, 1950. (k) Assented to 18th December, 1950. (l) Assented to 11th September, 1952.

** Proclaimed to commence 1st January, 1913: See *Gazette* of 24th December, 1912.

§ Note.—Where the marginal notes in this reprint make reference to section numbers of the Act, No. 57 of 1912, the section numbers are those which are contained in the reprint of the Act contained in the Appendix to the Sessional Volume of the Statutes for the year 1935.

S.1. It is significant that the original Act (64 Vic. No. 20) was entitled the "Industrial Conciliation and Arbitration Act, 1900." This Act and also the Act that succeeded it (1 and 2 Ed. VII., No. 21) contained elaborate provisions

for conciliation. Both Acts were divided into two parts, namely, Conciliation and Arbitration, which were to be complementary to one another. The State was divided into "Industrial Districts" (section 26 of 64 Vic., No. 20) and for each Industrial District there was to be a Board of Conciliation. It was the function of these Boards to "expeditiously inquire into and investigate" (section 47) industrial disputes within its district, but it had no coercive power and could not make an award. All disputes were to be inquired into by a Board before they could be heard by the Court (section 52), and it was hoped that by this method an agreement would be reached without industrial peace being seriously disturbed.

The 1900 Act was a very short-lived and ineffective piece of legislation and was repealed and succeeded in 1902 by the Industrial Conciliation and Arbitration Act (1 and 2 Edw. VII., No. 21) in which the conciliation provisions were retained, not because they had in their short life proved themselves to be valuable but rather because they had not had time to reveal their futility. Mr. W. H. James, as he then was, supported their retention on the ground that they would lead to decentralisation along functional lines. It was thought at the time that the bulk of the work would be done by conciliation and that arbitration would only be resorted to in isolated and extreme cases. The Act had indeed been drafted on this assumption for without the mutual consent of the parties, all disputes were to be conciliated upon before they were arbitrated upon.

Mr. Holman, Minister for Labour in the Daglish Ministry, while bringing down a Bill for the abolition of conciliation boards in 1904 showed not only that in some cases this conciliation machinery was not producing the results expected from it but that in the majority of cases it was not functioning at all. (See McMillan, J., in *Millars v. Holman* (1906), 9 W.A.L.R. 125 at p. 136).

The Colonial Secretary complained in the same debate (*Hansard*, Vol. XXV. at p. 411) that "in every case the Conciliation Board has failed to give an opinion acceptable to the parties." Any finding of a Conciliation Board would always be swept aside so that finality could be obtained from the Arbitration Court.

This Bill was lost and no further attempt to abolish them was made until 1907. In that year the attack was taken up in the Council where the Hon. J. D. Connolly (Colonial Secretary) in moving the second reading (*Hansard* XXXI., p. 473) of an Arbitration Amendment Bill said that Conciliation Boards had fallen into disuse since 1904 and that the Government proposed to omit them entirely or to make them available to disputing parties only by mutual consent—a direct inversion of the original machinery.

Though this particular provision met with no opposition this Bill like its predecessor was lost and the conciliation provisions were allowed to remain as an atrophied limb of the Arbitration structure until 1912 when it was lopped off without any ceremony or fuss. The Act of that year was called the Industrial Arbitration Act, 1912.

The failure of the dual method of settling industrial disputes in this State has been dealt with at some length because this has not been the experience in all countries. The New Zealand Act still contains conciliation machinery distinct from and complementary to its arbitration machinery. (See sections 39 to 50 of the Industrial Conciliation and Arbitration Act, 1925 (N.Z.), No. 24 of 1935).

Conciliation in the West Australian Act has very limited functions. It is subordinate and auxiliary to arbitration proper. (See Parts IV.A, V. and VI. post.)

It will readily be seen that the word "arbitration" in its present context has quite a different meaning from that which it gathered unto itself in connection with mercantile contracts. The Arbitration Court is primarily concerned with the conditions on which industrial groups within the community will co-operate in the future. The mercantile arbitrator on the other hand has to determine the existing rights of individuals. Their functions are quite different. The function of the latter is judicial while the function of the former is for the most part legislative in effect and only when interpreting or enforcing awards can it be said to be judicial. (See *Burnside, J.*, in *re Kalgoorlie and Boulder Shop Assistants* (1920) 1 W.A.I.G. 52, also *Federated Sawmills v. James Moore* (1909) 8 C.L.R. 465 per *Isaacs, J.*, at p. 527.)

An award of the Court, however, is not equivalent in itself to a law of the State and the Court cannot be regarded as a subordinate legislature. "An award is not a law but merely the determination of a tribunal which when taken in conjunction with the Arbitration Act has the force of law." (See *Draper, J.*, in *White v. Amalgamated Society of Engineers*, 25 W.A.L.R. 88 at p. 95.)

An award made a common rule will over-ride the Factories and Shops Act. (See section 163 (1) of the Factories and Shops Act, 1920-1939, and *Sands & McDougall v. Bradshaw*, 27 W.A.L.R. 150) and in the absence of any provision similar to that contained in the Factories and Shops Act a State legislative enactment will over-ride the provisions contained in an award. (*Perth and Fremantle Operative Bakers v. H. Baker* (1925), 5 W.A.I.G. 205.)

Date fixed by proclamation was 1st January, 1913 (*Government Gazette*, 24th December, 1912.)

2. This Act is divided into Parts, as follows:—

PART I., ss. 4 to 7—PRELIMINARY.

PART II., ss. 8 to 36U—INDUSTRIAL UNIONS AND ASSOCIATIONS.

Division I., ss. 8 to 32—Industrial Unions.

Division II., ss. 33 to 36—Industrial Associations.

Division III., ss. 36A to 36N—Disputed Elections.

Division IV., ss. 36P to 36U—Jurisdiction to Order Submission of Matters to Secret Ballot.

PART III., ss. 37 to 43—INDUSTRIAL AGREEMENTS.

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Division I., ss. 44 to 60—Constitution of Court.

Division II., ss. 61 to 108—Jurisdiction and Procedure of Court.

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PART V., ss. 109 to 119—INDUSTRIAL BOARDS.

PART VI., ss. 120 to 122—CONCILIATION COMMITTEES.

PART VII., ss. 123 to 127—BASIC WAGE.

PART VIII., ss. 128 to 131—APPRENTICES.

PART IX., ss. 132 to 142A—OFFENCES.

PART X., ss. 143 to 165—GOVERNMENT OFFICERS.

PART XI., ss. 166 to 180—MISCELLANEOUS.

FIRST SCHEDULE—ACTS REPEALED.

SECOND SCHEDULE—NOTICES AND MATTERS FOR PUBLICATION IN THE WESTERN AUSTRALIAN INDUSTRIAL GAZETTE.

Act divided into Parts.
Inserted by No. 31 of 1935, s. 2 as s. 1A; amended by No. 5 of 1952, s. 3.

Formerly Part IXA.

Formerly Part X.

3. Part X. of this Act shall be read and administered and have effect as being separate and distinct from all the other parts of this Act, and, insofar as relates to matters to which Part X. applies and relates, none of the provisions contained in the other Parts of this Act shall apply or have

Part X to be read and administered as being separate and distinct from other Parts.

Inserted by No. 31 of 1925, s. 2, as s. 1B, renumbered s. 3 in 1943 reprint¹.

¹ i.e., the reprint of the Industrial Arbitration Act, 1912-1941, contained in the Reprinted Acts of the Parliament of W.A., Vol. 2 (1943).

any effect, save and except to the extent by which and the manner in which it is expressly provided in Part X. that the provisions contained in any of the other Parts of this Act shall be incorporated in Part X. and be applied and have effect in relation to matters to which Part X. applies and relates.

PART I.—PRELIMINARY.

Repeal.
No. 57 of
1912, s. 2.

4. The Acts mentioned in the schedule hereto are hereby repealed: Provided that with reference to those Acts the following provisions shall have effect:—

Savings.

- (a) All offices, appointments, regulations, rules, registers, records, certificates, awards, industrial agreements, orders, permits, instruments, and generally all acts of authority which originated under any enactment repealed by this Act and hereby re-enacted with or without modification and which are subsisting or in force on or immediately prior to the commencement of this Act shall, subject to this Act, enure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.
- (b) Every union or association registered under any such repealed Act and subsisting at or immediately prior to the commencement of this Act shall be deemed to be registered under this Act: Provided that the constitution and rules of any such union or association shall be amended so far (if at all) as may be necessary to bring them into compliance with this Act, and in case of default the registration may be cancelled by the President.

S.4. If the constitution or the rules of a union may be brought into compliance with the Act by an amendment in one of two alternative directions then it is for the union to decide in which of the two directions the alteration is to be made. (*Hannans and Boulder A.W.U. v. Registrar of Friendly Societies* (1903), 1 W.A.A.R. 199.)

- (c) All matters and proceedings commenced under any such repealed Act and pending or in progress at or immediately prior to the commencement of this Act may be continued completed and enforced under this Act.

5. The registration as an industrial union or an industrial association of any society or council or other body before the commencement of this Act shall be deemed to be and to have been as valid to all intents and purposes as it would have been if the definition of "Industry" and of "Worker" contained in this Act had been in the Act under which the registration was or purported to be made at the date of the registration.

Validation of the registration of certain bodies.
No. 57 of 1912, s. 3.

6. In this Act, if not inconsistent with the context,

Interpretation.

No. 57 of 1912, s. 4.

"award" means an award made under this Act;

Amended by

No. 50 of 1925, s. 4;
No. 5 of 1952, s. 4.

"Court" means the Court of Arbitration constituted under this Act;

S.6. "Award"—This word as now defined would not include an award made by the Western Australian Coal Industry Tribunal (see Mining Act Amendment Act, 1948 (No. 84 of 1948)).

"Employer"—Persons in the Fire Brigade (under the Fire Brigades Act) including the Superintendent are servants of the Board and not of the Superintendent. (Coastal Painters' Union v. J. M. Lapsley (1911), 10 W.A.A.R. 12.)

As to the position of "Government Officers" see Part X. post. The existence of a contract of service is a condition precedent to the jurisdiction of the Court. "In all matters coming within the jurisdiction of this Court there must be an employer on one side and a worker as defined by the Act on the other. An industrial dispute does not mean a dispute where the relationship of employer and worker does not exist" per Dwyer, P., in *Plasterers' Award* ((1929), 9 W.A.I.G. 313).

Thus a company cannot obtain an award before it has commenced operations. (*Peak Hill Goldfields Ltd. v. Peak Hill Miners' Union* (1906), 5 W.A.A.R. 31, per Burnside, J., at p. 32 following *ex parte* Brown (1906), 5 A.R. (N.S.W.) 71.)

If the relationship of employer and worker, once existing, is broken the jurisdiction of the Court is destroyed. (Burnside, J., in *Coastal Operative Pastrycooks' Union v. W. Berry* (1910), 9 W.A.A.R. 242 at p. 247. See also Burnside, J., in *Coastal Districts Timber Hewers v. Millars* (1906), 5 W.A.A.R. 93.)

It is not however, necessary that the actual parties to the contract of service should be in dispute. (In re *Coastal Districts Clerks' Union* (1914), 13 W.A.A.R. 39, per Burnside, J., at p. 43 and "Industrial disputes" post and section 63 post.)

The Court has only jurisdiction to regulate the conditions on which "workers" are employed. By its award it can only attach incidents to a contract of service, it has no control over an employer's relations with independent contractors. (Burnside, J., in *Gwalla Miners' Union v. Sons of Gwalla Ltd.* (1908), 7 W.A.A.R. 187 at p. 193.)

Whether a relationship is one of master and servant or employer and independent contractor depends upon the facts of each particular case. The fact that a person is cited in the award as an employer is not conclusive. (See *Metropolitan Laundry v. Home of Good Shepherd* (1925), 4 W.A.I.G. 174.)

As to the tests to be applied to ascertain the true relationship between the parties see "Worker" post.

"Employer" includes persons, firms, companies, and corporations employing one or more workers, also the Crown, and any Minister of the Crown, or body corporate acting on behalf of the State;

"Gazette" means the *Government Gazette* of Western Australia;

"Group of Industries" means any number of related industries within the meaning of section sixty-two;

Added by
No. 5 of
1952, s. 4 (b).

"industrial agreement" means an agreement made and filed in accordance with the provisions of Part III., and enforceable pursuant to the provisions of section one hundred, of this Act;

"Industrial Association" means an industrial association registered under this Act;

"Industrial Board" or "Board" means an industrial board appointed under Part V. of this Act;

"Industrial dispute" means a dispute in relation to industrial matters arising between an employer or industrial union or association of employers on the one part and an industrial union or association of workers on the other part, and includes any dispute arising out of an industrial agreement and any disagreement, howsoever originating, between an industrial union or association formed or existing for the protection of the interests of workers in any industry and an employer or industrial union or association of employers in relation to any industrial matter connected with any workers engaged in that industry or in any related industry;

The term also includes any dispute in relation to employment or industrial matters in an industry carried on by or under the control of the State, or by or under the control of any Minister of the Crown or body corporate on behalf of the State.

"Industrial Dispute"—Prior to 1925 it was held that the existence of an industrial dispute was a condition precedent to the jurisdiction of the Court (*ex parte Brown* (1906), 5 A.R. (N.S.W.), 71 H.C.), and that the dispute must exist at the time the case is begun and at the time it is called on for hearing (*Coastal Operative Pastrycooks v. W. Berry* (1910), 9 W.A.A.R. 242).

By section 12 of 50 of 1925 the Court was given jurisdiction to "settle and determine" all "industrial matters" as well as industrial disputes. (See section 61 (b) (i) post.)

The use of the words "settle and determine" do not imply that there is a dispute nor even "disagreement" with respect to industrial matters. They may merely imply the existence of an industrial problem and "an industrial problem is not the same thing as an industrial dispute. Such a problem may or may not lead to an industrial dispute. A common concern about an existing problem does not of itself amount to a dispute. An uncommunicated desire that a problem should be solved does not amount to a dispute" per Latham, C.J., in *ex parte Kirsch* (60 C.L.R. 507 at p. 523).

An industrial problem would, however, be an industrial matter in respect of which the Court would have jurisdiction under section 61 (b) (i) post. (*Brown, P.* in the *Cardboard Box Makers' case* (1919), 2 S.A.I.R. 247.)

The dispute must be between employers and a union of workers and not between employers and employers nor between workers and workers. Such disputes are not "industrial disputes." (See *Parker, J.*, in *re Prieze* (1909), 8 W.A.A.R. 5 at p. 8.) The dispute is between the employer and the union and not between the employer and the workman, and there may be an industrial dispute within the meaning of the Act even if the parties to the contract of service are mutually satisfied. (See *Burnside, J.*, in *re Coastal Districts Clerks' Union* (1914), 13 W.A.A.R. 39 at p. 43.)

Nor is it necessary that a member of the complaining union should be employed by any party to the dispute or be personally concerned in the dispute. (See section 63 post.) (*Eastern Goldfields Amalgamated Tailors' Union v. New Zealand Woollen Company* (1907), 6 W.A.A.R. 24) is no longer a correct exposition of the law on this point. The doctrine enunciated in the *Eastern Goldfields Amalgamated Tailors' Union v. New Zealand Woollen Company* ((1907), 6 W.A.A.R. 24) in *Coastal Saddlers' Union v. Master Saddlers* (8 W.A.A.R. 12 (1909)), and in the *Barmains and Barmen's case* (10 W.A.A.R. 113 (1911)), to the effect that a union could not initiate a dispute, based as it was on the *non sequiter* of *Griffith, C.J.*, in *ex parte Brown* ((1906), 5 A.R. (N.S.W.) 71) ("industrial matters are matters relating to the terms and conditions of employment between employer and employee in an industry so that until the employer and employee differ as to the terms and conditions of employment there is no industrial dispute") can no longer be regarded as law. *Burnside, J.*, in *re Coastal Districts Clerks' Union* ((1914) 13 W.A.A.R. 39) at p. 43 puts the position correctly in the following words. "The employer may be employing non-unionists only, and the term of employment may be mutually satisfactory nevertheless the right of the union to interfere and invoke the assistance of the Court exists." It is however, obvious that the person sought to be made party to an industrial dispute as an employer be in fact a person actually employing one or more workers and should this matter be put in issue the onus is upon the union of workers to show that the person cited is an "employer" within the meaning of the Act and this must be proved by positive evidence. (*A.W.U. Westralian Branch v. Valli and others* (1948) 28 W.A.I.G. 719.)

A union cannot have a dispute with regard to the employment of persons who do not fall within the ambit of the union's constitution. (See *Coastal Operative Pastrycooks v. Master Pastrycooks* (1931) 11 W.A.I.G. 172.)

Demand and refusal is evidence of a dispute (*Coastal Slaughtermen's Union v. Forrest* (1903) 2 W.A.A.R. 13).

It was held by *Burnside, J.*, in the *Amalgamated Certificated Engine Drivers' Union v. William Thomas* ((1908) 7 W.A.A.R. 35 at p. 38) that a demand and refusal was essential to convert dissatisfaction into a dispute—he said there:—"Dissatisfaction without request or demand is not a dispute." In 1912 the Act was amended to make the conception of a dispute wider and it now includes "any disagreement howsoever originating." This is not to be construed to mean that the parties may approach the Court—alleging the existence of a dispute—at the first grumble. "If you have not got a request from the one side and a refusal either express or implied (it may be implied if the request is unanswered) you cannot have a dispute" per *Dwyer, P.*, in *Perth and Suburban Master Bakers v. W.A. Operative Bakers* ((1932) 13 W.A.I.G. 27).

As to an implied refusal see *Parker, J.*, in *Coastal Pastrycooks' Union v. Albany Bell* (1911) 10 W.A.A.R. 80. He said there "The other employers did not answer the letter and they must be held to have admitted that they had refused the demands."

An award terminates the dispute and though there may be a strike, lockout or dissatisfaction there cannot be a fresh dispute during the currency of an award over the subject matter dealt with by an award. (See *Dwyer, P.* in *Coal Miners' Union v. Amalgamated Collieries* (1939) 18 W.A.I.G. 421 at p. 422.) There may however, be a dispute after the term of the award has expired notwithstanding that the award is still in force by virtue of section 93 (1). (See section 93 (2) post.)

If there is an agreement there can be no dispute. "Agreement" and "Dispute" are terms which do not admit of co-existence. (See *Amalgamated Engine Drivers' Union v. Thomas* (1908) 7 W.A.A.R. 35, per *Burnside, J.*, at p. 36.) The fact that the parties have come together to negotiate does not prevent there being a dispute.

"Industrial matters" means all matters affecting or relating to the work, privileges, rights, and duties of employers or workers in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence; and, without limiting the general nature of the above definition, includes all matters relating to—

- (a) The wages, allowances, or remuneration of workers employed or usually employed or to be employed in any industry, or the prices paid or to be paid therein in respect of such employment;

"There is no objection once a genuine dispute exists, to the parties meeting together and endeavouring to arrange a common basis upon which that dispute may be settled, and as a safeguard, they may stipulate that everything arising out of the conference shall be on condition that whatever is agreed shall be incorporated in an award and thus keep the dispute alive until it reaches the Court. I have looked up the cases and they do not go as far as to say that once a genuine dispute exists, it ceases merely because the parties come together like sensible people to see what they can agree upon." *Per Burnside, J., in Coachbuilders Union v. Daniel White & Co. (1909) 8 W.A.A.R. 75 at p. 78.*

The suggestion thrown out here was acted upon in the *W.A. Typographical Union v. Sands & McDougall* ((1911) 10 W.A.A.R. 34) where an agreement on outstanding points was made on the express stipulation that it was only to be binding on the parties if confirmed by the Court and its terms incorporated into an award. A genuine agreement will prevent a dispute arising with respect to the same matter. In *re The Undertakers' Assistants* ((1924) 4 W.A.I.G. 56 at page 57) *Burnside, J., said:—*

An industrial dispute means a dispute defined by section 4 of the Act. Whatever be the subject matter of the dispute or however it may arise, a dispute involves a disagreement, a dissension, a difference of opinion of some kind with regard to the subject matter. If two parties have agreed upon a matter and have entered into a written agreement upon a matter, I find it very difficult to say there is any dispute between them.

The Court cannot make an award where a duly registered industrial agreement exists unless in the terms thereof. (*Hannans Miners' Union v. Great Boulder Co. and others* (1904) 3 W.A.A.R. 91, and in *re The Undertakers' Assistants* (1924) 4 W.A.I.G. 65.)

Jurisdiction cannot be conferred upon the Court by consent and therefore in so far as the Court's jurisdiction depends upon the existence of an industrial dispute the dispute must be genuine. The parties cannot do indirectly, by means of a "collusive dispute," that which they are unable to do directly. Facts may however, be admitted from which the Court can infer the existence of a dispute. (*See Fremantle Certificated Engine Drivers v. Fremantle Municipal Tramways* (1910) 9 W.A.A.R. 24.)

The Court will not (quære cannot, see section 69 (2) post and cases cited there) by its award deal with matters about which the parties are not in dispute. (*See W.A. Timber Industry Employees v. Millars* (1940) 19 W.A.I.G. 466.)

"Industrial matters"—The jurisdiction of the Court is confined to "industrial matters" and if the matter sought to be regulated is not an "industrial matter" then it is pro tanto beyond the jurisdiction of the Court. In *re Frieze* ((1909) 8 W.A.A.R. 5 at p. 8), *Parker, J.,* put the position thus:—

The employers here had asked the workers to meet them for the purpose of discussing the employers' desire of obtaining an alteration in the rate of wages and conditions of employment in the tailoring industry. The workers refused and the employers contend that this was sufficient evidence of a dispute—the dispute however, was merely whether they should meet or not; that is only a dispute. It is not a dispute upon an industrial matter.

- (b) The hours of employment, sex, age, qualification, or status of workers, and the mode, terms, and conditions of employment;

The above case can be distinguished from *Coastal Pastrycooks v. Albany Bell* ((1911) 10 W.A.A.R. 80) where a genuine dispute had been in existence before any question of a conference had arisen. (See also *Coastal Slaughtermen's Union v. Forrest* (1903) 2 W.A.A.R. 13 and in re *Canterbury Agricultural and Pastoral Labourers' Industrial Dispute* (1907) 9 G.L.R. (N.Z.) 653.)

"affecting or relating to work" means "affecting or relating to the doing of the work" and not "affecting or relating to the person who does the work in the course of the day or week or other period during which his employment continues, irrespective of the work itself." (See *Griffith, C. J.*, in *Australian Sugar Producers v. A.W.U.* 23 C.L.R. 58 at p. 68.)

"privileges, rights and duties of employers or workers in any industry" does not include matters outside the relationship of employer (master) and workman (servant). (*Magner v. Gohns* (1916) N.Z.L.R. 529.)

"Not involving questions which are or may be the subject of proceedings for an indictable offence." These words refer to cases where the employment itself is of an illegal nature and have no allusion to section 132 prohibiting strikes. (See *ex parte Brown* (1905) A.R. (N.S.W.) 294.)

(a) The word "remuneration" has been held to be particularly applicable to piecework—especially when read in conjunction with the words "mode terms and conditions of employment." (See *Carpenters' Union v. Builders and Contractors* (1903) 2 W.A.A.R. 30 and *Amalgamated Carpenters and Joiners v. Bunning* (1912) 11 W.A.A.R. 82 at p. 88 per Rooth, J.)

As to piecework see Part 7 post.

Re "allowance" see Part 7 post and *Australian Sugar Producers v. A.W.U.* (23 C.L.R. 58 per Griffith, C.J., at p. 68.)

(b) Hours—See Part 7 post.

Sex—An award made specifically to apply to men does not apply to women and the Court is unable to make an award regulating the employment of women on the application of a union whose constitution restricts membership to males. (*Coastal Operative Pastrycooks v. Master Pastrycooks* (1931) 11 W.A.I.G. 172.) The Court may settle the "mode terms and conditions of employment" of women but cannot prohibit their employment entirely (Rooth, J., in *Metropolitan Shop Assistants' Union v. Foy & Gibson Ltd.* (1912) 11 W.A.A.R. 57 at p. 58).

The Court would, however, regulate their performing of certain jobs or prohibit their doing them altogether if such work were injurious to health. (*Mental Hospital Award* (1929) 9 W.A.I.G. 123 W.A. *Barmen's Union v. Clowes* (1942) 22 W.A.I.G. 159 per Dwyer, P., at p. 160.)

Age—A person under 14 is not a "worker" and the Court has no jurisdiction in respect to him. (*Peak Hill Miners Union v. Peak Hill Gold Mines Co. Ltd.* (1904) 3 W.A.A.R. 110 at p. 113. *Mount Morgans Miners' Dispute* (1904) 3 W.A.A.R. 164 per Burnside, J., at p. 171.)

As to "Junior workers" and aged workers see section 123 (6) post.

Status of workers—This includes the power to grant preference to unionists. It for long remained doubtful whether this power existed. The original Bill, which was to become 64 Vic. No. 20 contained a clause giving the Court power to award preference. This clause was deleted and it was held as a consequence that the power did not exist. (*Painters and Paperhangers' Union v. Mitcher Bros.* (1903) 1 W.A.A.R. 125.)

The attitude of Parker, J., is more difficult to follow. In the *Coastal Journeymen Butchers v. Albert & Co.* ((1903) 2 W.A.A.R. 64.) he held that the power did not exist and that even if he had such a power he would not exercise it. In the *Nungarra Miners' Union v. Black Range Goldmining Co.* ((1905) 4 W.A.A.R. 58) he held, Burnside, J., dissenting, that preference would be granted if special circumstances could be shown; and the special circumstances were that—

- (a) The union would suffer without it and
- (b) the majority of workers were members of the union and,
- (c) the employer would not be prejudiced.

For the most part however, early dicta supports the contention that the Court had no jurisdiction to grant preference. (See *Coastal Carpenters' Dispute* (1905) 4 W.A.A.R. 139, *Perth Electric Tramways Employees' Union v. Perth Electric Tramways Ltd.*, (1910) 9 W.A.A.R. 58).

In the *Club Employees' Award* ((1926) 6 W.A.I.G. 9) *Davies, A. J.*, held that the law on this question had been settled by precedent of such long standing that they could not now be disturbed.

In 1934, however (*W.A. Meat Export Co. v. W.A. Meat Industry Employees* (1924) 14 W.A.I.G. 132) *Dwyer, P.*, was of the opinion that such a power existed and that it was founded on the definition of "industrial matters" and upon section 94 (b) which gave the Court power to make such orders

- (c) The employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
- (d) Any established custom or usage of any industry; either generally or in the particular locality affected;

as it may deem necessary for the peaceful conduct of industry. He had refused to grant preference in the past not because of lack of power but because of the lack of evidence. It is a power which the Court would only use sparingly and in a proper case. What is a proper case is a question for the Court to determine on the particular facts before it. In the case under discussion Dwyer, P., granted preference subject to the following conditions:—

- (a) There were to be members of union willing and able to do the work.
- (b) Entry to workers of good character and paying reasonable fee to be unrestricted.
- (c) If non-union member applies for membership within seven days of engagement no question of preference shall be deemed to have arisen unless his application is refused for good cause.

This privilege was to be forfeited if any "go slow" movement was organised or if the union, or any of its members, were convicted of an offence against the Act.

This opinion of Dwyer, P., was followed by Wolff, J. (Deputy President) in the Building Trades Award ((1939) 18 W.A.I.G. 526). He based his opinion on the definition of "industrial matters" and also on the authority given the Court in section 94 (1) (b) to exercise its jurisdiction for the sake of industrial peace. Section 4, subsections (b) and (c) he thought to be especially strong. "I think it is clear," he said, "that the term 'status of worker' includes a consideration of whether he is a member of some recognised body. Further it is well known that the employment of non-unionists is a fruitful source of argument and contention in industry and I take the view that the Court has power to exercise its jurisdiction to ensure the promotion of industrial peace by granting this right." (Taylor & Oaklev v. Edward (1900) 18 N.Z.L.R. 876 re Wool Store Employers (1917) Q.W.N. 41 followed: Mount Morgan Goldmining Co. Ltd. v. A.W.L. (1917) Q.W.N. 21)

In the Master Builders' case ((1939) 18 W.A.I.G. 615) the jurisdiction of the Arbitration Court to grant preference to unionists was challenged before the Full Court. Northmore, C. J., (at p. 616) said, "Preference to unionists is not specifically mentioned in the definition of the words 'industrial matters' but in my view the authority to grant such preference is to be found in the general words of the definition, viz.: 'all matters affecting or relating to the work, privilege, rights and duties of employers or workers in any industry,' when read with clause (h) and clause (b) of section 94 (1). It is notorious that a frequent source of dispute between employers and workers is on the question of employment of unionists and non-unionists. The provision in the award which is challenged as being in excess of the Court's jurisdiction would certainly eliminate that source of dispute and so tend to secure the peaceful carrying on of the industry and I think it was within the competence of the Court."

The Court in its award generally makes both the worker and the employer liable to a penalty for non-observance of the preference clause and in such a case it has been held that a union cannot enforce the provisions of the award as against an employer for failing to pay award rates to a non-unionist worker employed contrary to the award. (See W.A. Operative Plasters v. Evans (1940) 19 W.A.I.G. 537.)

Before employing non-union labour the employer should notify the union that labour of a specified kind is required and the union should inform him whether any labour of that kind is "ready and available." (See W.A. Operative Plasterers v. Evans above and also the Trolley Drayman's case (1904) 2 (C.L.R.) 509.) but see contra Amalgamated Carpenters v. Kwinana Construction Group (1953) 33 W.A.I.G. 396.

Preference will not be given for the mere asking. (W.A. Timber Industry Employees v. Millars (1940) 19 W.A.I.G. 466). Nor will it be granted to a union in respect to work which also lies within the competence of another union because the effect of such grant would be to restrict the constitution of the other union. (See A.W.U. (Pastoral Branch) v. Co-operative Bulk Handling (1940) 20 W.A.I.G. 462).

The Court often inserts in its awards a clause to the effect that employers are not to discriminate against non-unionists—a clause which is certainly within the jurisdiction of the Court. (See *Carpenters' Union v. Builders and Contractors* (1903) 2 W.A.A.R. 30, also see section 135 post.) Clauses providing for preference can be infinitely various. A common form is to provide that the worker must join the union within fourteen days as to which see *Amalaqamated Carpenters v. Kwinana Construction Group* (1953) 33 W.A.I.G. 396.

Preference to workers in a particular locality is not within the jurisdiction of the Court. (*Collie Coal Miners' Award Amendment* (1934) 14 W.A.I.G. 143).

The Court has no power to prohibit the employment of certain persons entirely (i.e., compulsory unionism). As Dwyer, P., pointed out in the *Trained Nurses' Award* (1935) 15 W.A.I.G. 236, "The question of placing in an award a provision to prohibit the employment of persons either generally or of a specific class is one which the Court has no power to make. There is a very wide distinction between giving preference to workers of a certain class or possessing a certain status . . . and a provision to prohibit the employment of persons." (See however, the remarks of Stout, C.J., in *Magner v. Gohns* (1916) N.Z.L.R. 529 at p. 547 (contra).)

"Conditions of employment"—Must be conditions which operate between the employer and the worker. (See in re *Drake* (1903) A.R. (N.S.W.) 239) and the words refer to matters antecedent to actual employment. "The phrase is, no doubt, susceptible," said Griffith, C.J., in *Australian Sugar Producers' Association Limited v. A.W.U.* (23 C.L.R. 58 at p. 67 (1916)) "in a different context, of covering all the conditions of actual employment, including hours of work, remuneration, accommodation, food and every other matter that can be relevant to carrying on an industry. If read in that sense, all the rest of the definition would be superfluous, and I cannot so read it." It does not include the question as to where the work is to be done (in re *Coultais* 7 W.A.L.R. 276 per Burnside, C.J.). Nor can it include payments to be made to a person who is not employed and so cannot extend to the payment of attendance money. *Dockworkers Award* (1951) 31 W.A.I.G. 238. The Court will not regulate the "mode" of employment and so relieve the owner of the responsibility for management unless questions of health are involved. (See *Mental Hospitals Award* (1929) 9 W.A.I.G. 129.)

It is suggested that the granting of long service leave would be a term of employment and an "industrial matter." See: *Bread Carters Award* (1950) 30 W.A.I.G. 66 per Jackson, J., at page 67 and cases cited there.

As to piecework see "remuneration." (See however, the remarks of Stout, C.J., in *Magner v. Gohns* (1916) N.Z.L.R. 529 at p. 547 (contra) p. 8 ante.)

(c) "dismissal or refusal to employ any person or class of persons therein." It was at one time held that these words did not give the Court power to reinstate even when read in conjunction with section 83. (See *Davies, A.J.*, in *Wiluna Gold Mines v. A.W.U.* (1938) 18 W.A.I.G. 66 following *Hotel Employees' case* (1903) A.R. (N.S.W.) 37.) It has however now been held that a claim by a union that a dismissed employee should be reinstated is a matter relating to the dismissal of that worker and in determining a dispute consequent on such dismissal the Court has power to make an order for reinstatement and such other incidental matters including payment of wages from the time of dismissal as the Court considers just and equitable. It would seem too that the Court will in certain circumstances exercise this power even when the worker's conduct was such as to justify the employer in dismissing him summarily. See: *Kwinana Construction Group v. Electrical Trades Union* (1954) 34 W.A.I.G. 51. It was held in the *Coastal Hotel Employees' Union v. Glowrey* (1904) 3 W.A.A.R. 31 that the Court had no jurisdiction to deal with the question of the employment of Asiatic labour, as "industrial matters" limited the Court to the regulation of classes of labour and gave no power with respect to nationalities. The proposition cannot be maintained in this absolute form, for although it is true to say that the Court is not normally concerned with nationalities yet should a definite preference be given to one of the parties and nationality be made the basis of the exercise of the discrimination, then the question of nationality becomes an "industrial matter" as being "a refusal to employ any person or class of person" in industry. Nationality will be made the basis of regulation in extreme cases only.

"The union asked that the portion of aliens to British subjects should be limited. This is opening up quite a fresh ground in industrial relations and it would require very strong evidence indicating serious interference with the rights of British subjects before the Court would insert in its award a provision whereby persons who have been admitted into this country, and thereby given permission to make a living would be deprived of such right or allowed to exercise it subject to restrictive conditions." Per Dwyer, P., in the *Bricklayers' Award* (1930) 10 W.A.I.G. 239 at p. 242).

(d) Custom—Custom and usage as used in this Act and in awards are synonymous; custom meaning what is generally understood by usage in the legal sense. (See *Draper, J.*, in *A.W.U. (Goldfields) v. Golden Horseshoe* (1922) 1 W.A.I.G. 83.) (See to the contrary the remarks of Dunphy, J., in *A.W.U. (Western Branch) v. Commissioner of Railways* 1947 (27 W.A.I.G. 751) in which he said, "There is obviously a difference between custom and usage, but actually the effect of custom or usage upon a question of interpretation is equal and identical.") Awards and agreements are presumed to be made on the basis of existing custom (usage). (See *Fremantle Bakers' Union v. Currie* (1910) 9 W.A.A.R. 55, *Perth Electric Tramways Employees'*

- (e) Any claim arising under an industrial agreement;
- (f) (i) The persons who may take or become apprentices;
- (ii) The number of apprentices that may be taken by any one employer;
- (iii) The mode of binding apprentices;
- (iv) The terms and conditions of apprenticeship;
- (v) The registration of apprentices;
- (vi) The examination of apprentices and the payment of examiners;
- (vii) The rights, duties, and liabilities of the parties to any agreement of apprenticeship;
- (viii) The assigning or turning over of apprentices;

Union v. Commissioner of Railways (1928) 7 W.A.I.G. 155, Halsbury Vol. 10, paragraph 785. *Brown v. Byrne* (1851) 3 E. and B. 703 per Coleridge, J.). The Court demands very strong evidence before it will make an award inconsistent with custom.

"Equal pay (i.e., for men and women) has grown practically into a custom in the industry. It is of course possible for this Court to vary this custom or to discharge it altogether, but custom is a thing that is very difficult to dispose of. It requires very strong evidence to displace it especially when it has been maintained so long." (Per Dwyer, J. in *Hollingwood v. W.A. Barmens and Barmaids' Union* (1926) 6 W.A.I.G. 340.)

A custom will continue to be binding on those engaged in an industry unless it is expressly dealt with in the award. (*Hotel Club, Caterers' Union v. Boans* (1920) 14 W.A.A.R. 766.)

"The effect of a proof of usage is simple," said Dunphy, J., in *A.W.U. (Western Branch) v. Commissioner of Railways* (1947) 27 W.A.I.G. 751. "The usage may be said to be written into the award in invisible ink but to be just as binding upon the award as if it were clearly imprinted in ordinary type in common with all the other printed provisions. The only way to alter such a usage is to have express terms put into the award which contradict it, vary it or cancel it."

It therefore follows that the fact that a matter is dealt with in an award in a certain manner is evidence, though slight, that before the award some other arrangement was customary. (See *Triton Goldmines v. Eastern Federated Engine Drivers' Union* (1941) 22 W.A.I.G. 63 per Dwyer, P.)

Though it is not necessary to expressly include a custom in an award yet it may be excluded and repealed by implication. An award is in the nature of a legal enactment and a custom cannot be set up against an Act of Parliament. (*A.W.U. (Goldfields) v. Lake View and Star* (1932) 12 W.A.I.G. 110. *Perth Amalgamated Tailors' Union v. Coultas* (1908) 7 W.A.A.R. 169. *W.A. Police Union v. Minister for Police* (1940) 21 W.A.I.G. 42 at p. 43.)

The custom must be the custom of the industry generally and not merely the practice of a particular employer—it must be generally recognised throughout a calling or locality (*Ivanhoe Gold Mine v. Wood* (1923) 37 W.A.L.E. 120.)

It must be (1) notorious, (2) certain, (3) reasonable and (4) must not offend against the intention of any legislative enactment or an award. (See Dwyer, P., in *A.W.U. (Goldfields) v. Lake View and Star* (1936) 16 W.A.I.G. 344.)

(f) Apprentices—This subsection was inserted in the Act by No. 47 of 1909 to overcome the lack of jurisdiction revealed in *re Frieze* ((1909) 8 W.A.A.R. 5. See also sections 128 to 131 post.) Apprenticeship is not defined in the Act. *Burnside, J.*, in the *Painters and Paperhangers' Award* ((1924) 4

- (ix) The dissolution of apprenticeships; and;
- (x) Any claim or dispute arising under any agreement of apprenticeship, or relating to an alleged breach of such agreement, notwithstanding that any party to any such agreement may have determined or have purported to determine the agreement;
- (g) The interpretation of any industrial agreement;
- (h) What is fair and right in relation to any industrial matter, having regard to the interests of the persons immediately concerned, and of the community as a whole.

“Industrial union” means an industrial union registered under this Act;

“Industry” includes—

- (a) Any business, trade, manufacture, handicraft, undertaking, or calling of employers on land or water;

W.A.I.G. 102 at page 103) defined it as “the relationship which arises out of a contract whereby one person, called the master or employer, becomes bound to teach another person who is called the apprentice, a profession or trade and the latter becomes bound to learn it and serve the master as an apprentice.”

(g) In interpreting an agreement the powers of the Court are not as wide as they are under section 90 (re Awards). The Court here is strictly limited to interpretation. (See Metropolitan Wool Scouring Union v. Swan Co. Ltd. (1933) 13 W.A.I.G. 90.)

An agreement will be interpreted on the principles applicable to contracts. The Court will endeavour to ascertain the intention of the parties (Evans v. Kalgoorlie Brewery (1914) 13 W.A.A.R. 76. Bond v. McKenzie (1929) A.R. (N.S.W.) 498, per Street, J.). As to interpretation of an award see section 90 post.

(h) In all matters that come before the Court the interest of the “community as a whole” must be considered. Although the basic wage is fixed upon the needs of the average worker, the Court will always consider the probable effect of the wage so fixed upon the community. (See 1941 Basic Wage Declaration 21 W.A.I.G. 100.)

The itemised matters in this definition are not exhaustive. Dockworkers (Roster System) Application (1949) 29 W.A.I.G. 629.

“Industry”—Under 64 Vic. No. 20 “industry” was defined as “any business, trade, manufacture, undertaking, calling or employment in which workers are employed.” This was interpreted to mean “that branch of art where labour is employed for the production of wealth and in which capital is employed” (per Burnside, J., in the Metropolitan Shop Assistants v. Foy & Gibson (1912) 11 W.A.A.R. 113 at p. 120.)

- (b) Any calling, service, employment, handicraft, or industrial occupation or vocation of workers, on land or water; and
- (c) A branch of an industry or a group of industries;

Cf. C. & A.
Oth., s. 4.
Added by
No. 5 of
1952, s. 4 (c).

"irregularity", in relation to an election for an office, includes a breach of the rules of an industrial union, and any act, omission or other means by which the full and free recording of votes by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;

*The Conciliation and Arbitration Act, 1904-1952, of the Commonwealth Parliament is referred to in the marginal notes to this reprint as C. & A., Cth.

The vocation of the worker did not mark out the industry. "The mere fact" said Burnside, J., in the *Metropolitan and South-West Engine Drivers' Union v. the Timber Corporation* ((1910) 9 W.A.A.R. 11) "that a man happens to drive an engine does not necessarily place him in the same calling as a man driving another engine." And it follows that shop assistants were not, because they were engaged in a similar form of occupation, all in one industry.

To overcome this position which prevented workers organised on a purely vocational basis from registering, the present definition was inserted by the 1912 Amending Act. The word "industry" has now two distinct meanings. It may mean the occupation of the employer or the occupation of the worker (see Burnside, J., in *re Coastal Districts Clerks Union* (1913) 12 W.A.A.R. at p. 26).

There is nothing in the Act to indicate that the meaning of the word was extended merely for the purpose of allowing the registration of craft unions. This, however, has been the result of judicial interpretation. "Industry" as appearing in sections 42 and 85 (post) has been held to mean "the common object sought to be attained by the combined efforts of the employer and the worker." It does not include the vocation of the worker for the purposes of these sections. (See *Amalgamated Engineers v. Parker & Son* (1926) 6 W.A.I.G. 377. *Coastal Painters' Union v. Withnell* (1913) 12 W.A.A.R. 107.)

Amalgamated Engineers v. Humphreys can no longer be considered good law ((1926) 6 W.A.I.G. 277).

For registration purposes however, the definition certainly includes the vocation of the worker, and thus it follows that the vocation of a salesman is an industry and it does not matter whether he is selling groceries or drapery. (See in *re Metropolitan Shop Assistants' Union* (1913) 12 W.A.A.R. 32.)

The definition is not exhaustive. It includes "A," "B" and "C" and anything else it would include apart from this definition (per Burnside, J., in *Metropolitan Laundry Union v. Salvation Army* (1925) 4 W.A.I.G. 174 at p. 176).

It is not necessary that the organisation should be carried on for profit. (*Trained Nurses' Association Award* (1935) 15 W.A.I.G. 236. *Hospital Employees' Union v. Home of Peace* (1924) 3 W.A.I.G. 166).

(c) "Group of Industries" means any number of related industries (section (6) which in turn mean industries which are branches of the same trade or are so connected that industrial matters relating to the one may affect the other (see section 82 (post)).

"Irregularity." This definition is the same as that introduced to the Commonwealth Act by the Conciliation and Arbitration Act No. 28 of 1949.

"Lock-out" includes any closing of a place of employment or any suspension of work or any refusal by an employer to continue to employ any number of his workers with a view to compel his workers or to aid another employer in compelling his workers to accept any terms or conditions of employment, or with a view to enforce compliance with the demands made by any employer on any workers;

"Minister" means the member of the Executive Council appointed by the Governor to administer this Act;

"office" in relation to an industrial union means—

- (a) the office of a member of the committee of management of the industrial union;

Cf. C. & A.
Oth., s. 4.
Added by
No. 5 of
1952, s. 4 (d).

"Lock-out"—A lock-out is the converse of a strike and what applies to one will apply to the other *mutatis mutandis*. A strike is the refusal by workers to continue to work unless they be given more wages or better conditions. A lock-out is the converse of a strike. The gravamen of both the lock-out and the strike is the intention to coerce the worker and the employer respectively. (See *Buchanan v. Registrar of Friendly Societies* (1904) 6 W.A.L.R. 108. *W.A. Supply Co. Ltd. v. Registrar of Friendly Societies* (1904) 6 W.A.L.R. 199. *Potosi Consolidated Ltd. v. Registrar of Friendly Societies* (1905) 4 W.A.A.R. 7.)

Thus, if the workers are dismissed absolutely and it is not the intention of the employer to bring pressure on them with the object of re-employing them at his own rate there is no lock-out and in the converse position no strike. But a combined cessation of work by employees in an industry, each of whom gives formal notice terminating his contract of service but who all desire to induce their employers to alter the conditions of employment in an industry is no less an offence (i.e., a strike) because no breach of contract is committed. (See *McKennon v. Fraser* 46 C.L.R. 343 per Evatt, J., at p. 376)

Quaere whether refusal to accept work and refusal to give work on terms laid down in an award constitutes a strike and lock-out respectively. Such conduct would if done with requisite intent be "doing something in the nature of a 'strike' or lock-out" (section 134). (See *McKennon v. Fraser* 46 C.L.R. per Evatt, J., at p. 375 and cases cited there.)

Refusal without reasonable excuse or cause to offer or accept work on the conditions laid down in an industrial agreement is an offence whether there be an intention to coerce or not. (See section 133 post.)

The characteristics of a lock-out are threefold—

- (1) It is a continuing offence involving previous existence and continued existence of the relationship of employer and worker.
- (2) There must be some act on the part of the employer which prevents the workman from continuing his employment and establishing his right to wages.
- (3) The act of the employer must relate to the terms and conditions of the employment. (See *Registrar of Friendly Societies v. E. A. Whittaker* (1914) 13 W.A.A.R. 59.)

As to mens rea see *Amalgamated Engineers v. Millars* (1907) 9 W.A.L.R. 207 and section 132 post.)

"Office" compare the definition of the same word in the Commonwealth Conciliation and Arbitration Act, 1904-1952, s. 4.

- (b) the office of president, vice president, secretary, assistant secretary or other executive office by whatever name called of the industrial union;
- (c) the office of a person holding, whether as trustee or otherwise, property of the industrial union, or property in which the industrial union has any beneficial interest; and
- (d) every office within the industrial union for the filling of which an election is conducted within the industrial union;

and includes

- (e) offices, by whatever name called, the whole or part of the functions of which are declared by the Court to be those of an office in the industrial union;

Added by
No. 5 of
1952, s. 4 (d).

“officer” means a person who carries out, or whose duty is or includes the carrying out of the whole or part of the functions of an office in an industrial union;

Added by
No. 5 of
1952, s. 4 (d).

“order” means an order made under this Act;

“Prescribed” means prescribed by regulations under this Act;

“President” means the President of the Court;

“Registrar” means the Registrar of Industrial Unions under this Act;

Substituted
No. 5 of
1952, s. 4 (e).

“strike” includes—

- (i) a cessation or limitation of work or a refusal to work by a worker acting in combination or under a common understanding with another worker or person; and

“Strike”—See lockout (above) and section 132 (post). Note the use of the word “includes” both here and in the definition of lock-out and contrast with the word “means” (see *Burnside, J., in Metropolitan Laundry Union v.*

- (ii) a refusal or neglect to offer for or accept employment in the industry in which he is usually employed by a person acting in combination or under a common understanding with another worker or person;

unless and until in any particular case the Court declares the particular cessation, limitation, refusal or neglect not to be a strike.

"Trade union" means a trade union registered under the Trade Unions Act, 1902;

"Worker" means any person of not less than fourteen years of age of either sex employed or usually employed by any employer to

Salvation Army (1925) 4 W.A.I.G. 174 at p. 176 and "Industry" above.) This definition was introduced by the Amendment Act of 1952 (No. 5 of 1952). Prior to this amendment it had been held by the Full Court that a stoppage of work in concert only amounted to a strike when the purpose of the stoppage was to enforce compliance with demands as to an industrial matter made by the workers so ceasing work on their employer or by other workers on their employer. (*Morrison & Colgan v. Bogue* (1951) 31 W.A.I.G. 695.) It should be noticed that the combination envisaged by this definition may be with a worker "or person." The definition is extraordinarily wide and bearing in mind that it is in effect a provision creating a penal offence somewhat peculiar in that the Court is given a dispensing power.

"Trade union"—Under the Trade Unions Act, 1902 (1 and 2 Edw. VII., No. 19) a trade union is defined as follows:—"Trade union" shall mean any combination, whether temporary or permanent, for regulating the relations between workmen and employers, or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

"Worker"—The essentials of this definition are well analysed by Burnside, J., in the *Metropolitan Laundry Union v. Salvation Army and others* ((1925) 4 W.A.I.G. 174). He said there at p. 175:—

In some instances words are indicated as including various things, for instance, "industry" includes "a," "b" and "c," but it does not say the word only includes that. It includes that and everything also it would include without that—but when we come to "worker" it prescribes a definition of that term an exact meaning for it. It includes nothing else. The essentials are his age—sex immaterial—skilled or unskilled tends to exclude work which does not require physical effort, otherwise it would include everybody because mental effort is skill after all. I take the words "to do skilled or unskilled work" to mean physical work. Finally the employment must be for hire or reward. I take reward to be synonymous with hire. It is not reward of a nature which the law does not recognise . . . I think this section imports no more than we understand ordinarily by master and servant.

(See also *W.A. Meat Industry Employees v. C. T. Collins* (1926) 6 W.A.I.G. 126.)

Burnside, J.'s restriction of the term "worker" to physical or manual work must, however, be rejected as being too narrow.

The word includes male and female, adult and junior (but over 14) and apprentice, the aged and infirm. To ascertain its meaning in a particular case one must examine the context in which it is used. (See *Operative Bakers v. Campbell & Sons* (1929) 9 W.A.I.G. 38 and also *Saunders & Stuart Pty. Ltd. v. Federated Boller-makers* (1929) 9 W.A.I.G. 147.)

do any skilled or unskilled work for hire or reward, and includes an apprentice; but shall not include any person engaged in domestic service, in a private home, provided that no home in which more than six boarders and/or lodgers are received for pay or reward shall be deemed to be a private home:

The term includes canvassers for industrial insurance whose services are remunerated wholly or partly by commission or percentage reward.

For the purposes of this paragraph, the word "canvassers" means persons wholly and solely employed in the writing of industrial insurance business, and/or in the collection of premiums at not longer intervals than one month in respect to such insurance, but does not include any person who directly or indirectly carries on or is concerned in the carrying on or conduct of any other business or occupation in conjunction or in association with that of industrial insurance;

Whether a person is a worker or not does not depend on whether the product of his labour is sold. There must, however, be reciprocal and enforceable obligations and duties between the alleged worker and his employer—the doing of the work must be a condition precedent to payment. Thus the inmates of religious institutions who do work from religious motives are not "workers" for in their case the nexus or link binding employer and employee is missing. They receive no wages or remuneration in the ordinary meaning of those terms and there is no legal obligation to pay them. There is no contract of service. (See *Metropolitan Laundry Union v. Salvation Army* (1925) 4 W.A.I.G. 174 and *Metropolitan Laundry Union v. Home of Good Shepherd* (1925) 4 W.A.I.G. 174. In re *Laundry Employees Award* (1919) A.R. (N.S.W.) 157 (F.C.) *Trained Nurses' Award* (1935) 15 W.A.I.G. 236.)

Should a religious institution employ a person on an ordinary contract of service they will of course be bound by the relevant award.

Whether the relationship between the parties is that of master and servant or that of employer and independent contractor is a question to be decided on the facts of each particular case. (See Dwyer, P., in the *Plasterers' Award* (1929) 9 W.A.I.G. 313.) The true test is to ascertain the "nature and extent of the control and direction which is actually exercised or which may be exercised when the occasion warrants" by the employer over the alleged worker. (See Dwyer, P., in *Federated Moulders' Union v. Hoskins* (1932) 12 W.A.I.G. 18; *W.A. Operative Plasterers v. Hawkins* (1933) 13 W.A.I.G. 168; *W.A. Operative Plasterers v. Davenport* (1940) 20 W.A.I.G. 529; *A.W.U. v. Cunderdin Co-operative Co.* (1936) 16 W.A.I.G. 180; *Thiel v. M.L.C.* (1919) 14 Q.J.P.R. 5) and *Coal Miners' Union v. Amalgamated Collieries* (1953) 33 W.A.I.G. 440.

The Court will look beyond the terms of the agreement to determine the real relationship between the parties. The use of legal terms in an agreement designed to make the relationship between the parties that of lessor and lessee is of no avail if from evidence dehors the contract it appears that the true relationship is that of master and servant.

The term does not include—

- (a) any person who is a "Government officer" within the meaning of that term as defined in and for the purposes of Part X of this Act; or
- (b) any officer within the meaning of that word in the Railways Classification Board Act, 1920-1945¹; or
- (c) any officer or person employed on the teaching staff of the Education Department under the Education Act, 1928-1943², or the regulations made under that Act.

Amended by
No. 31 of
1935, s. 4.

¹ Now Railways Classification Board Act, 1920-1950: See No. 4 of 1950, s. 2.

² Now Education Act, 1928-1955: See No. 44 of 1955, s. 1 (3).

Thus when A leases to B a taxi cab but keeps control over it and over the driver (the nominal lessee) the real relationship is that of master and servant. (See *W.A. Carters' Union v. T. G. Molloy* (1926) 6 W.A.I.G. 211.)

aliter however when there is no evidence of such control. (See *Amalgamated Road Transport Union v. Robinson* (1930) 10 W.A.I.G. 175.)

The existence of restrictive covenants in the "lease" may indicate that the true relationship between the parties is that of master and servant. (*Amalgamated Road Transport Union v. Herbert* (1939) 18 W.A.I.G. 454. *Brand v. Openshaw* (1930) 33 W.A.L.R. 1.)

The receipt of a commission on sales is not conclusive that the seller is an agent merely and the presumption of agency may be rebutted by evidence of control only compatible with the relationship of master and servant (*W.A. Goldfields Branch Caterers' Union v. Bell* (1923) 2 W.A.I.G. 68).

aliter again when no control. See in re *Australian Clerical Association* (1915) 14 W.A.A.R. 15 per Northmore, J., in re *Australian Clerical Association* (1922) 1 W.A.I.G. 77 per Draper, J., at p. 77.)

In the same way the use of the term "contractor" does not per se determine the real status of the person to whom it refers. The true status depends on the facts and they must substantiate the position by revealing a degree of independence which a servant does not possess. (*Hynam v. Demetrious Papagiorgis* (1937) 17 W.A.I.G. 206 and compare *Amalgamated Road Transport Union v. Herbert* (1939) 18 W.A.I.G. 454.)

The relationship is created by the contract of service and not by the award. (*Amalgamated Collieries Ltd. v. True* No. 1 per Latham, C.J., (1937) 17 W.A.I.G. 429.)

A "piecemaker" is a worker. (See page 78 post.)

The relationship of employer and worker may exist between A and B although the wages are being paid by a third party. (*Hotel Club Caterers' Union v. Karringup* (1936) 16 W.A.I.G. 102.) For the principles to be applied in determining whether a servant generally employed by A is, for the purposes of a particular job, the servant of B, see the recent case of *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board* (1942) 1 All. E.R. 491 and also *Federated Engine Drivers v. Minister for Works* (1940) 20 W.A.I.G. 530 especially the remarks of Lord Wright at p. 496.

"Canvassers for industrial insurance" were expressly included in the definition of "worker" by the 1925 amending Act. Previously to this it had been held that such persons were not workers but agents working on commission and over whom the insurance companies exercised no control as to the manner or the time of doing the work. (See *Australian Clerical Association* (1915) 14 W.A.A.R. 15 and (1922) 1 W.A.I.G. 77.)

The definition is hedged around with restrictions and is of very limited application. It only applies to persons employed "wholly and solely" in the writing of industrial insurance, and does not include persons who carry on this occupation in conjunction with other business.

Under the Railways Classification Board Act (No. 38 of 1920) an officer "means any person employed by the Commissioner (of Railways) at an annual rate or salary, or in receipt of a daily rate of pay as a temporary clerk." (Section 2.)

Penalties.
No. 57 of
1912, s. 5.

7. The mention of any penalty, pecuniary or other, at the foot of any section, subsection, or numbered paragraph of this Act means that any contravention of the section, subsection, or paragraph, as the case may be, whether by act or omission, shall be an offence against this Act, punishable on summary conviction or on conviction before the Court of Arbitration, by a penalty not exceeding the penalty indicated, or that any offence defined in the section, subsection, or paragraph, as the case may be, shall be punishable as aforesaid.

PART II.—INDUSTRIAL UNIONS AND ASSOCIATIONS.

Division I.—Industrial Unions.

8. (1) Any society consisting—

- (a) In the case of employers, of two or more persons who have in the aggregate throughout the six months next preceding the date of the application for registration employed on an average, taken per month, not less than fifteen workers, or
- (b) In the case of workers, of any number of workers not less than fifteen,

What
societies
may be
registered.
No. 57 of
1912, s. 6.
Amended by
No. 50 of
1925, s. 3.

S.7. See sections 101 (1), 103 and 104 post.

S.8. General.—The organisation of labour into unions is fundamental in this Act. "Workers" cannot approach the Court unless they are organised and registered. (See definition "Industrial Disputes" ante.)

Burnside, J., in *re Coastal Districts' Clerks Union* ((1914) 13 W.A.A.R. 39) put the position thus—

The legislature desiring that industrial peace should prevail considered there was more safety in a multitude of opinion than in the opinions of individuals and so authorised the aggregation of individuals into unions and entrusted the settlement of disputes to these persons subject where necessary to the intervention of the Court. It apparently approves the substitution of collective bargaining for individual bargaining and confers upon unions the exclusive privilege of approaching the Court.

"Industry" as used in this section includes the vocation of the worker. "The definition of the word industry," said Wolff, J., in the *Electrical Engineers' Case* ((1938) 18 W.A.I.G. 234 at p. 236) "in relation to the factors which determine the right to register is sufficient to cover the vocations of the worker as distinct from the combined activities of the employers and the employees." Its meaning cannot be read down here as it has been in sections 42 and 85 (post).

A society as such is not prior to registration a body corporate. It cannot sue or be sued in its own name. It enjoys however a certain status in that it can make an application for registration. In *re Australasian Society of Engineers* (1950) 30 W.A.I.G. 532. It is a "near corporation" per Lithwatt, J., in *National Union of General and Municipal Workers v. Gillian* (1946) K.E. 81 at page 87. See also *Bonsor v. Musicians' Union* (1954) 2 W.L.R. 687 and 70 L.Q.R. 322.

Applications for registration must be brought under one of three categories, that is to say—

(1) Membership is restricted to a specified industry (1), or (2) the proof necessary under (3) is available, or (3) the proof necessary under (4) (a) is available. (See Dwyer, P., in *re Australian Workers' Union application* (1940) 20 W.A.I.G. 514.)

associated for the purpose of protecting or furthering the interests of employers or workers in or in connection with any specified industry, or (in the case and subject to the conditions hereinafter set out) in or in connection with divers industries in the State, may, on passing the necessary resolution and rules, and otherwise complying with the requisitions of this Act, be registered as an industrial union under this Act.

(2) Any branch of a society or industrial union may be treated as a distinct society, and, with the approval of the Registrar, may, subject to this Act, be separately registered as an industrial union.

Branch may be treated as distinct society.

(3) If it is proved to the satisfaction of the President that, under the conditions existing in any locality defined in the application for registration, it is expedient that the limitation of the purposes of the society to a specified industry should not apply,

Although the Act permits registration of craft unions the basic principle is for registration on industrial lines. (See Dwyer, P., in re United Broom and Brushmakers' Union (1941) 21 W.A.I.G. 457.)

S.8. (1) This section should be construed as being mandatory. It confers an absolute right on workers (15) in a specified industry to register. The Act says the society *MAY* be lawfully registered and when an Act of Parliament confers upon a public officer authority to do some act for the benefit of the public, those words have a mandatory meaning, and they leave him no discretion provided the conditions laid down have been complied with. (See in re Eastern Goldfields Federated Engine Drivers' Union (1913) 12 W.A.A.R. 116 and in re Metropolitan Shop Assistants' Union (1913) 12 W.A.A.R. 32.)

A society falling under this subsection may be registered as of course and the President's fiat is not necessary as under subsections (3) and (4).

"Industry" here includes a group of industries and that includes related industries which are branches of the same trade. This subsection therefore authorises a society to be registered which consists of members associated for the purpose of protecting interests of workers in or in connection with any number of specified vocations which are branches of the same trade. (See Northmore, J., in Coastal Amalgamated Engineers' Union v. Dobbie (1915) 14 W.A.A.R. 18). The industry with respect to which the union seeks registration must be one which is actually being carried on in Western Australia at the time that the application for registration is made and if the word industry is being used as being the avocation of the worker then the calling must be one which is identifiable in the industrial life of the State. (The Australian Colliery Staff Association v. Amalgamated Engineering Union (1945) 25 W.A.I.G. 173.)

A society may establish a *prima facie* right to registration under this subsection and yet be prevented from registering by section 21 (post).

An application by workers in a specified industry will have precedence over an application by an existing union to extend its constitution by adding new workers and which would require a certificate from the President under subsection (3). (See Dwyer, P., in Wood Extract Workers' Union v. Amalgamated Engineers (1940) 20 W.A.I.G. 516.) There is no rule of law that when applications made by two unions with respect to the same industry are pending that the first in time must be registered. Under such circumstances the Registrar should deal with both claims on their merits and decide which of the two societies is the appropriate one to obtain registration. (Meat and Allied Trades' Federation v. W.A. Meat Trades' Association (1948) 28 W.A.I.G.)

S.8. (3) It has been held (see in re Eastern Goldfields Federated Engine Drivers' Union (1913) 12 W.A.A.R. 116) that this subsection is to a large extent mandatory and that a society has a *prima facie* right to be registered if peculiar conditions are proved. This case can no longer be taken on its face value unless the word "peculiar" is read to mean "exceptional." The Act lays great stress on the right of workers in any specified industry to be registered for that industry and to have their conditions of work

the society may be lawfully registered as an industrial union under this Act, notwithstanding that its members may be associated for the protection and furtherance of the interests of employers or workers (as the case may be) in connection with divers industries, and notwithstanding that such divers industries may not be a group of industries within the meaning of this Act.

regulated accordingly. It is only in exceptional instances that divers industries are grouped together. When for special reasons the registration of a union embracing divers industries is permitted, separate registration might at a later date be granted to any of its component parts forming definite separate industries. (*Amalgamated Millers and Mill Employees' Union (1943) 23 W.A.I.G. 59 at p. 60.*)

The application under this section should in the first place be made to the Registrar who should refer to the President for directions. (See in re *Goldfields Amalgamated Surface Workers' Union (1913) 12 W.A.A.R. 51.*)

The President, however, has no power to register; the Registrar alone is responsible for the actual registration. The proof required is merely to put the society seeking registration in the same position as if it were a society connected with a specified industry. It goes no further. The Registrar has still to see that the requirements of the Act are observed. (See in re *Electrical Trades Union (1927) 8 W.A.I.G. 103.*)

The "satisfaction" of the President is required as a first step before the Registrar can proceed to consider the rules and the circumstances which may guide his mind in registering the applicant (See in re *The Australian Workers' Union (1929) W.A.I.G. 241*) and this "satisfaction" must be continuing. (*Maritime Services Union (1953) 33 W.A.I.G. 632.*)

In considering an application under this section the President will always ascertain whether the industries sought to be embraced by the new union are already catered for. The policy of the Court has been to lean against an unnecessary multiplicity of industrial unions, and if the field is already covered by a registered union conducting itself in accordance with the principles of the Act the Court will not sanction the registration of a new body which would work in competition with it. Want of good faith on the part of the existing union, or difficulty of control and operation owing to a too extensive area of operation of a union may render the formation of a new body desirable, but these are special circumstances and must be shown before the Court will put an existing registered union in jeopardy. (See *Dwyer, P., in re Fremantle Tramway Employees (1940) 19 W.A.I.G. 517.*)

After the President has expressed his satisfaction—which is normally done by way of a certificate—it is competent for any industrial union formed and registered in the same industry to make such representation to the Registrar as it may deem advisable. It is still open to an objector under section 12 (post) to make representation to the Registrar that the expediency of allowing registration to apply to more than one industry does not exist and generally to argue its views. If this were not so, section 8 (3) and (4) would require serious amendment because no provision is made for giving other parties an opportunity of arguing their views. A review of the President's determination under this subsection might also be asked for. (See in re *Goldfields Amalgamated Surface Workers' Union (1913) 12 W.A.A.R. 51. Also A.W.U. (Goldfields) v. Coolgardie Federated Miners (1922) 1 W.A.I.G. 75 per Draper, J.,*)

Notwithstanding the granting of the certificate under this subsection a registered society may still object under section 21 (post) and it will thus be seen that in the case of a union which seeks to be registered in respect of divers industries the granting of a certificate under this section by no means ensures that union's registration (*Dwyer, J., in Amalgamated Millers and Mill Employees' Union of Workers, (1943) 23 W.A.I.G. 59.*)

The section applies to a trade union seeking registration under this Act as it does to any other society, otherwise the scheme of the Act could be undermined by securing registration under the Trade Union Act. (See section 16 (post).)

It is submitted that the correct application of this subsection requires that it be ascertained as a fact whether any one of the specified industries sought to be covered is already covered by a registered union. If the answer to this question is in the affirmative then, *prima facie*, the President will not be satisfied that the registration is expedient.

The Oxford English Dictionary meaning of "expedient" has been adopted. (See in re *Australian Workers' Union (1940) 20 W.A.I.G. 514.*)

This subsection and section 13 (2) shows that the Act contemplates the registration of a union for a specific locality but there is no reason why the "locality" should not be the whole State. (*Fibrous Plaster Workers Union 1949) 29 W.A.I.G. 654.*)

(4) (a) A society which consists of persons who are not all employers or workers in or in connection with one specified industry may apply for registration as an industrial union, and the Court (or if the Court is not sitting) the President may allow such society to be registered as an industrial union, or validate the registration or supposed registration prior to the commencement of this Act of such society as an "industrial union" if in other respects it is entitled to be so registered; provided it is proved to the satisfaction of such Court or President that the right of membership in such society is limited to persons whose interests in regard to industrial matters are in the main identical or of a kindred nature or whose vocations (as for example the vocations of clerks or engine-drivers) have characteristics in common, or whose interests are of like composite character.

(b) After the registration of any such union the members shall as such be deemed for the purposes of this Act to be workers or employers, as the case may be, in the same industry, and the vocations of the members shall, for all the purposes of this Act, be deemed to be one industry, and the provisions of this Act shall apply accordingly.

S.8. (4) The application under this subsection is normally made to the Court—under the preceding subsection it is made to the President. If the application sets out that the society consists of persons engaged in one specified industry this subsection has no application and such society must apply to the Registrar under section 8 (1). Before an order can be made under this subsection three things must be proved to exist—

(1) that the society consists of persons who are not all workers in one specified industry;

(2) that in other respects it is entitled to registration;

(3) that membership is limited to persons whose vocations have characteristics in common.

If these requirements are proved the Court cannot refuse its fiat. (See in re Eastern Goldfields Federated Engine Drivers' Union (1913) 12 W.A.A.R. 116.)

To be included in this subsection the persons seeking to be registered as a union must have some peculiar characteristics which will distinguish them from the remainder of mankind and establish a community of interest between themselves. (See Burnside, J. in re Coastal Districts Clerks' Union (1914) 13 W.A.A.R. 39.) "or whose interests are of a like composite character that I cannot interpret: I do not know what that means at all." Per Burnside, J. in Eastern Goldfields Federated Engine Drivers' Case ((1913) 12 W.A.A.R. 116).

"If in other respects": Burnside, J., in re Metropolitan Shop Assistants ((1913) 12 W.A.A.R. 32) construed these words to mean that the society consists of 15 persons—"that is the only other respect which is mentioned."

S.8. (4) (b) This subsection has the effect of creating an artificial industry. (See Burnside, J., in in re Coastal Districts United Clerks' Union (1913) 12 W.A.A.R. 25.)

(5) The Metropolitan Shop Assistants and Warehouse Employees' Industrial Union of Workers or any other society registered or purporting to be registered under the Industrial Conciliation and Arbitration Act, 1902, may apply to the Court or the President for an order validating its registration or supposed registration, and the Court or President may make such order as they or he may think just, notwithstanding that such society or union consists of persons who are not all employers or workers in or in connection with one specified industry.

Validating
the rules
of certain
unions.
Inserted by
No. 6 of
1935, s. 2.

(6) (a) Any society or industrial union registered or purporting to have been registered prior to the commencement of this section under the Industrial Conciliation and Arbitration Act, 1902, or under the Industrial Arbitration Act, 1912, and its amendments, may apply in the prescribed manner to the Court or to the President for an order validating its registration, including the registration of any rules or amendments to rules of the society or industrial union registered, or purporting to have been registered prior to such commencement, and the Court or the President may make such order as it or he may think just.

(b) Without limiting the general provisions of the preceding paragraph, any such validating order may be made notwithstanding that the society or industrial union in question may, according to such rules or amendments to rules, consist of persons who are not all employers or workers in or in connection with one specified industry, but in such case

S.8. (5) The scope of this section is infinitely wider than that of the preceding one. Any society registered under the Conciliation and Arbitration Act, 1902, may apply for a validating order which may be granted on such terms as the Court may think "just." The Court when exercising this discretion must be guided by some principle and that principle must be gathered from the basic principle underlying the Act itself, which is that the formation of unions of workers is encouraged and they alone are given the privilege of approaching the Court. This implies that the members of the union even if not "workers in or in connection with one specified industry" must have a community of interest in their several vocations to be registered under this section. (See Burnside, J., in re Coastal Districts Clerks' Union (1914) 13 W.A.A.R. 39.)

S.8. (6) (a) This subsection was introduced by section 2 of the 1935 Amending Act (No. 1) (No. 6 of 1935) to overcome the position revealed in the *Australasian Society of Engineers v. W.A. Wire Drawing Ltd.* ((1935) 15 W.A.I.G. 25.). In this case the Engineers' Union, by an alteration in its rules, amended its constitution so as to admit as members workers engaged in the wire drawing industry. Dwyer, P., held that this could not be done. "It seems to me," he said, "that when a society registered under the Act desires to alter its constitution for the purpose of protecting interests of industries other than those specified, it is in effect forming a new industrial union and for the purpose

the Court or the President may impose such terms and conditions as the Court may think just under the circumstances to safeguard the interests of any other society or industrial union.

(c) When the Court or the President makes any order validating the registration or any amendment of rules of any society or industrial union under this section every award, judgment, order or decision of the Court, and every act, matter or thing which may have been done in the faith of such registration or amendment being valid shall be validated as from the date thereof.

9. (1) Before any society makes application to be registered a resolution authorising the application must be passed by a majority of the members present in person at a general meeting of the society specially called for the purpose, of which seven days' previous notice specifying the time, place, and objects of such meeting shall have been given. Such notice shall be given by publication of an advertisement in a newspaper circulating in the district in which the office of the union is situate, and by posting a copy of the notice in a conspicuous place outside the said office.

Resolution and rules to be passed before application made for registration. No. 57 of 1912, s. 7, amended by No. 5 of 1952, s. 5.

(2) At such general meeting or at another general meeting called for the purpose, the society shall, by a vote of the majority of the members present in person, pass and approve rules for the purposes of this Act.

of doing so the requisitions laid down by the Act for the formation of an industrial union dealing with divers industries have to be observed." The union here had not followed the procedure laid down in section 8 (3) or (4) above and therefore the "amendment" was bad and furthermore doubt was cast upon the continued legality of its registration as an industrial union.

This section was therefore enacted so that unions who had compromised their positions in this way could obtain from the Court an order validating their registration and also the registration of their rules and any amendment thereof. In future any amendment to rules which may have the effect of altering the constitution of the union must be dealt with in the manner indicated in section 23 (4) post. As to the meaning of "constitution" see section 23 (5) post.

S.9. (1) There is no obligation to keep the notice referred to in this subsection continually posted. (Contrast section 48 of the Licensing Act, 1911.)

(2) Rules.—The rules of the union constitute the statutory written contract into which the members of the union enter. The assistance of the Court can only be invoked to enforce a contract, between a member and his union, made in compliance with the rules, and unless it can be shown that the disputed claim arises regularly in accordance with the rules the union cannot recover. The onus lies on the union, if the point be taken, to show that the rules have been observed. (See *McClintock v. McKennay*, 21 W.A.L.R. 58, per Burnside, J., at p. 63.)

Matters to
be provided
for in rules.

(a) Substi-
tuted No. 5
of 1952,
s. 5 (a).

(3) The rules shall specify the purposes for which the society is formed, and shall provide for—

- (a) The appointment to and removal from and powers and duties of office:
- (b) The manner of calling general or special meetings, the powers thereof, and the quorum and manner of voting thereat:
- (c) The mode in which industrial agreements and all deeds and instruments shall be made and executed on behalf of the society and in what manner the society shall be represented in proceedings before the Court:
- (d) The device, custody, and use of the seal:
- (e) The control of the property, and the investment of the funds of the society, and an annual or other shorter periodical audit of the accounts:
- (f) The inspection of the books and the register of members by every person having an interest in the funds:
- (g) A register of members, and for the mode in which and the terms and qualification on which persons shall become or cease to be members, provided that no member shall discontinue his membership without giving at least three months' previous written notice to the secretary, or paying a sum equal to three months' contributions in lieu of notice, nor until such member has paid all fees, fines, levies, or other dues payable by him under the rules to the end of the period covered by such notice, or has obtained a clearance card duly issued in accordance with the rules:

The union cannot by its rules usurp powers which are by the Act vested in the Court. (See Parker, J., in *Collië Miners' Union v. The Collië Proprietary Coalfields* (1905) 4 W.A.A.R. 21 at p. 42.)

The rules of the union will be considered when determining whether it is a society to which workers "can conveniently belong." (See section 21 (post) and in re *Australasian Society of Engineers* (1905) 4 W.A.A.R., 150 per Parker, J.)

"present in person" prohibits, for this purpose, voting by proxy. An injunction will be granted to prevent the breach of union rules. (See *Schoe v. W.A. Branch of the Printing Union*, 25 W.A.L.R. 141.)

(3) (a) A union or society seeking registration may formulate a rule excluding from office a member of the communist party. Such a rule would be registered. *Railway Employees Union* (1948) 28 W.A.I.G. 982.

- (h) The purging of the register by striking off members in arrears of dues for such period as is prescribed by the rules not exceeding twelve months; but without freeing such persons from arrears due:
- (i) The conduct of the business of the society at some convenient and specified address to be called the registered office of the society:
- (j) Any prescribed matter:
- (k) The amendment, repeal, or alteration of the rules, subject to the foregoing requisites of this section.

(4) Such rules shall expressly provide that—

- (a) No person shall be a member who is not a worker or employer, as the case may be (except in the capacity of an honorary member); and that

(3) (g) This subsection confers no rights of discharge on members but it imposes a duty on the union to make provisions for, inter alia, the mode in which and the terms on which persons shall become and cease to be members of the union. (See *Osborne v. Greymouth Wharf Labourers* (1911) 30 N.Z.L.R. 634 and compare section 6 (c) (8) of New Zealand Industrial Arbitration Act, 1925.) The object of the subsection is not only to protect the members but also to preserve the union during a possibly critical period in the way of Court proceedings or otherwise. (Per Dwyer, J., in *Printing Employees' Union v. Brennan* (F.C.) 18 W.A.I.G. 242.)

(3) (h) This provision is mandatory and must be observed by all unions. A member who is in arrears for twelve months ceases to be a member of the union even if his name is not struck from the register. (See *Craig, I.M.*, in *W.A. Operative Plasterers v. Evans* (1940) 19 W.A.I.G. 537.) Thus fees recoverable are limited to the amount that falls due within the twelve month period, or within such shorter period as may be fixed by the rules. (*Trobe v. Perth Amalgamated Tailors* 9 W.A.L.R. 66 and *Wellington Plasterers' Union v. Murray* (1935) 31 M.C.R. 3.)

(3) (j) "Prescribed" means prescribed by the rules. (See section 6 ante.)

(3) (k) This subsection is limited to the amendment, repeal and alteration of "domestic" rules and has no application to an extension of the union's constitution. (*W.A. Plumbers' Union v. Amalgamated Engineering Union* (1934) 14 W.A.I.G. 284.) If it is desired to alter union rules with respect to—

- (a) the qualification of persons for membership;
- (b) the objects of the union; or

(c) the area over which the union is authorised to operate the procedure laid down in section 23 (4) must be followed. If the workers proposed to be added are not in the same industry the President's fiat under section 8 (3) will have to be obtained and the Registrar may require, in the case of extension of area, to make inquiries under section 21 (*Wood Extract Workers' Union v. Amalgamated Engineering Union* (1940) 20 W.A.I.G. 516.)

(4) (a) Employers cannot be members of a workers' union and workers cannot be members of an employers' union. Should the members of a workers' union become employers that would be a ground for the deregistration of the union (*Burnside, J.*, in *re Metropolitan Master Plasterers' Union* (1914) 13 W.A.A.R. 143). A person does not cease to be a member of a union simply because he ceases to be a "worker". (*Building Trades Award* (1954) 34 W.A.I.G. 456).

- (b) No part of the funds or property of the industrial union shall be paid or applied for or in connection with or to aid or assist any person engaged in any strike or lock-out in this State; and that
- (c) All industrial disputes in which the industrial union or any of its members may be concerned shall, unless settled by mutual consent, be referred for settlement pursuant to this Act.

Subsec. (4a)
added by
No. 5 of
1952, s. 5 (b).
Cf. C. & A.
Cth., s.
70A (1).

(4a) Rules relating to elections for office—

- (a) shall provide that the election shall be by secret ballot; and
- (b) shall make provision for—
 - (i) absent voting;
 - (ii) the manner in which persons may become candidates for election;
 - (iii) the appointment, conduct and duties of returning officers;
 - (iv) the conduct of the ballot;
 - (v) the appointment, conduct and duties of scrutineers to represent the candidates at the ballot; and
 - (vi) the declaration of the result of the ballot,

and those rules shall be such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

Cf. C. & A.
Cth., s. 70A
(2).
Subsec. (4b)
added by
No. 5 of
1952, s. 5 (b).

(4b) Without prejudice to the operation of subsections (4f) and (4g) of this section, the rules of a society applying for registration, or of an industrial union, relating to elections for office may provide for compulsory voting.

(4) (b) The right to strike given under No. 64 Vic. 19 was surrendered in return for the benefits given under this Act. "This subsection embodies one of the most important principles laid down in the Act and without it it is difficult to see how the Act could be administered." *Per Dwyer, P.*, in *Registrar v. W.A. Printing Employees' Union* ((1928) 8 W.A.I.G. 105 at p. 106. See also the *Mining Awards* (1934) 14 W.A.I.G. 223). The prohibition is limited to a strike or lockout "in this State." (See section 132 (post).)

(4c) A society which is registered as an industrial union on the coming into operation of the Industrial Arbitration Act Amendment Act, 1952, is allowed a period of three months after that date, or such longer period as the Registrar determines, within which to bring its rules into conformity with the requirements of subsection (4a) of this section.

Cf. C. & A. Cth., s. 70A (3). Subsec. (4c) added by No. 5 of 1952, s. 5 (b).

(4d) If the rules of an industrial union to which subsection (4c) of this section applies do not, at the expiration of the period allowed by that subsection, in the opinion of the Registrar, conform with the requirements of subsection (4a) of this section, the Registrar may, after inviting the industrial union to consult with him on the matter, determine such alterations of the rules as will, in his opinion, bring them into conformity with those requirements.

Cf. C. & A. Cth., s. 70A (4). Subsec. (4d) added by No. 5 of 1952, s. 5 (b).

(4e) The Registrar shall register the alterations so determined by him, and thereupon the rules shall be deemed to be altered accordingly.

Cf. C. & A. Cth., s. 70A (5). Subsec. (4e) added by No. 5 of 1952, s. 5 (b).

(4f) The Court may, upon its own motion or upon application made under this section, disallow any rule of an industrial union which, in the opinion of the Court—

Cf. C. & A. Cth., s. 80 (1). Subsec. (4f) added by No. 5 of 1952, s. 5 (b).

- (a) is contrary to law, or to an award, order or industrial agreement;
- (b) is tyrannical or oppressive;
- (c) prevents or hinders members of the industrial union from observing the law or the provisions of an award, order or industrial agreement; or
- (d) imposes unreasonable conditions upon the membership of a member or upon an applicant for membership,

and a rule so disallowed shall be void.

(4g) A member of an industrial union may apply to the Court for the disallowance of a rule of the industrial union on any of the grounds specified in subsection (4f) of this section.

Cf. C. & A. Cth., s. 80 (2). Subsec. (4g) added by No. 5 of 1952, s. 5 (b).

(4h) The Court may, in its discretion, instead of disallowing the rule, direct the industrial union concerned to alter that rule, within a specified time, so

Cf. C. & A. Cth., s. 80 (3). Subsec. (4h) added by No. 5 of 1952, s. 5 (b).

as to bring it into conformity with the requirements of this Act and, if, at the expiration of that time, the rule has not been so altered, the Court may then disallow the rule and the rule shall be void.

Cf. C. & A.
Cth., s. 81
(1).
Subsec. (4i)
added by
No. 5 of
1952, s. 5 (b).

(4i) (a) The Court may, upon complaint by a member of an industrial union and after giving persons against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an industrial union by persons under obligation to perform or observe those rules.

(b) A person who fails to comply with directions so given commits an offence.
Penalty: Twenty-five pounds.

(5) The said rules or any amendment thereof may contain such other provisions not inconsistent with this Act or otherwise contrary to law as a majority of the members of the society or union present in person at any general meeting thereof may approve.

Amalgam-
ation of
unions.
No. 57 of
1912, s. 8.

10. (1) Any two or more industrial unions consisting of employers or workers engaged in the same industry or in related industries may apply to the Registrar for registration as one union.

(5) A union in its rules is entitled, in addition to providing all that the Act says they must provide, to put in all other conditions or requirements which they may lawfully do, without infringing the Arbitration Act or the general law. Unions may thus provide for the moral or intellectual advancement of their members. (See *Taylor v. Government Water Supply Employees* (1936) 16 W.A.I.G. 106, per Dwyer, P.)

The insertion of political objects is legal though of doubtful wisdom. Their inclusion would have a direct bearing on the question of "convenience" (section 21) and may well cause the Registrar to refuse to exercise the discretion vested in him by that section, in which case political minorities would obtain registration as independent industrial unions, with the result that the usefulness, and even the existence, of the old union would be seriously jeopardised. (See Dwyer, P., in *Jarvis v. W.A. Timber Workers' Union* (1933) 13 W.A.I.G. 275.) As to the bearing of "political objects" on the question of preference to unionists, see also in re Insurance Staffs Federation ((1927) A.R. (N.S.W.) 45).

S.10. Compare section 34 of Queensland Act.

The word "amalgamation," though it appears in the marginal note, does not appear in the operative words of the section. Something more than a mechanical admixture of unions is, however, contemplated. The section provides for two or more unions to be registered as one union and then talks of the "proposed new union" (subsection (5)). The original unions must approve of the new rules, and on registration of the proposed new union the registration of every union affected shall be deemed to be cancelled (subsection (5) (1)). In all respects an application under this section is to be dealt with as if it were an application for the creation of a new union. The rules and the constitution for the new union have to be subjected to the same scrutiny and consideration by the Registrar and may be open to the same objections and objection to registration of the new body may be made on the same grounds as if a union

(2) The application shall be under the respective seals of the unions concerned, and shall be signed by their respective chairmen and secretaries.

(3) The applications shall be accompanied by—

(a) A list of the members and officers and the trustees (if any) of the proposed new union;

(b) Two copies of the rules of such proposed union, such rules being in accordance with section nine of this Act; and

(c) A copy of a resolution authorising the application and approving of the rules on behalf of each union concerned, passed by a vote of the majority of the members present in person at a general meeting of such union.

(4) Every application hereunder shall be deemed to be an application by a society for registration under this Act, and the succeeding provisions of this Act shall (so far as applicable) apply thereto, and in respect thereof accordingly.

(5) On the proposed new union being registered as an industrial union under this Act—

(i) The registration of every union affected shall be deemed to have been cancelled under subsection one of section twenty-nine;

(ii) All the property, rights, duties, and obligations whatever vested in or imposed on the unions affected shall become vested in or imposed on the new union.

hitherto unknown to the Act had made application to the Registrar for registration. When a new union is created under this section its rules and constitution have no relation to the rules and constitutions of the unions which have "amalgamated" but are determined entirely by the rules lodged in connection with the new registration. (See *Amalgamated Engineers' Union v. Electrical Trades Union* (1935) 15 W.A.I.G. 327.)

The word "industry" in this section has been interpreted to mean the vocation of the worker. In *re Perth & Suburban and Fremantle Bakers' Union* (1913) 12 W.A.A.R. 72 the President upheld the Registrar's decision in which he refused to register as a new industrial union an "amalgamation" of a bakers and, inter alia, a bread carters' union on the ground that the 1912 Act, which had made the calling of the worker an "industry." (See section 6 ante) had thereby deprived a bread carter of whatever claim he might have had to belong to the baking industry and had relegated him to the realm of the horse-driving industry.

Mode of
application.
No. 57 of
1912, s. 9.

11. An application for registration shall be made to the Registrar by one or more of the officers of the society in the prescribed form, accompanied by—

- (a) A list of the members and officers and the trustees (if any) of the society with their addresses;
- (b) Two copies of the rules of the society; and
- (c) A copy of the resolution authorising the application.

Registration
of society.
No. 57 of
1912, s. 10,
amended by
No. 5 of
1952, s. 6.

12. (1) On being satisfied that the society is qualified to register and that the requisitions of this Act have been complied with, the Registrar shall, subject as hereinafter provided, register the society as an industrial union, and shall issue a certificate of registration, which (except in proceedings for the cancellation of registration) shall, until cancelled, be conclusive evidence of the registration and that such requisitions have been duly complied with.

(2) The Registrar shall at the same time register the rules and also the address of the registered office:

Provided that the Registrar shall, at least fourteen days before the registration as an industrial union of any society or body formed in connection with any industry or industries, give the prescribed notice of his intention to effect such registration to every industrial union formed and registered in connection with the same industry, or any one or more of

S.11. "prescribed form." (See regulations made under this Act, forms 1 to 8 and Regulations 1 to 4.)

S.12. In the matter of refusal to register the Registrar has a discretionary and quasi judicial authority vested in him, and he is left to consider not whether a rule is distinctly contrary to some express provisions of the Act, but whether it is consonant with the objects of the Act. (See *Ohinemuri Mines Batteries Employers' Union v. Registrar of Industrial Unions* (1917) N.Z.L.R. 829 and compare section 6 of the New Zealand Act.)

In applications other than those under section 29 (i.e., for cancellation of registration) the certificate of registration stands as conclusive evidence of the fact of registration and of compliance with the prescribed conditions. (See *Parker, J., in Coastal Amalgamated Engineers v. Metropolitan Iron-masters' Union* (1911) 10 W.A.A.R. 158 at p. 167) and in all such applications the certificate will be conclusive evidence that the society is one which is entitled to be registered under the Act. The High Court case of the *Federated Engine Drivers v. B.H.P.* (12 C.L.R. 398) is no authority for the proposition that proceedings anterior to the granting of the Certificate of Registration might be investigated with a view to ascertaining whether a society has been properly registered. The Court in this case actually decided that an association which was incapable of being registered from the beginning could not, if it did get on the register, by the mere production of the Registrar's Certificate, be held to have satisfied the requirements of the Act. The authority for this statement of the law was certain dicta appearing in *re National Debenture* ((1891) 2 Ch. 505. See *Federated Engine Drivers v. B.H.P.* 12 C.L.R. 398, per Griffith, C.J., at p. 413 and *O'Connor, J.*, at p. 441) and it is very doubtful if this proposition, although it had the support of *Burnside, J.* (See in *re The Coastal Districts United Clerks* (1914) 13 W.A.A.R. 39 at p. 43 and the *Metropolitan Shop Assistants' Union v. Foy & Gibsons Ltd.* (1912) 11 W.A.A.R. 57) would be followed here in the face of the decision of the Privy Council in *Moosa Goolam*

the same industries, and any industrial union receiving any such notice may make such representations to the Registrar as it deems advisable in relation to the proposed registration of such society or body.

(3) Where an industrial union has been registered in connection with an industry, and that registration has been cancelled by the President, whether before or after the coming into operation of the Industrial Arbitration Act Amendment Act, 1952, an industrial union or a trade union or a society shall not be registered in connection with that industry without the Court's consent.

Subsec. (3)
added by
No. 5 of
1952, s. 6.

13. (1) Every society registered as an individual union shall, upon and during registration, become and be, for the purposes of this Act, a body corporate by the registered name, having perpetual succession

Incorporation
of
society.
No. 57 of
1912, s. 11.

Ariff v. Ebrahim Goolam Ariff (28 T.L.R. 505) where the older decisions in Peel's case ((1867) 2 Ch. App. 674) and in Oakes v. Turquand ((1867) L.R. 2 H.L. 325) to the effect that the certificate prevents all recurrence to prior matters essential to registration, were followed in preference to the "mere dicta" in in re National Debentures (above). (See Lord MacNaughton in Moosa, etc. (above) at p. 506. See also the remarks of Dwyer, P., in in re Electrical Trades Union (1935) 15 W.A.I.G. 327 at p. 329.) It has been held that the certificate is conclusive evidence that the members of an industrial union of workers are "workers" within the meaning of the Act (except of course on an application under section 29). (See Parker, C.J., in Metropolitan Musicians' Union v. West's Pictures Ltd. 10 W.A.A.R. 47 at p. 51.)

The certificate is sufficient to protect a society as constituted by the trades it was intended to cater for at the date of registration, and when the certificate was issued, but it cannot be called in aid of extensions to the constitution of the union resulting from an alteration of the union's rules for such action would have the effect of creating a new union. (Australasian Society of Engineers v. W.A. Wire Drawing Ltd. (1935) 15 W.A.I.G. 25 per Dwyer, P., at p. 26.)

(2) "rules" see section 9 (3) ante.

It is still competent for a registered union, after the President has declared that in the case of a society applying for registration the limitation to a specified industry should not apply, to make representation to the Registrar under this subsection that the expediency of allowing that registration to apply to more than one industry does not exist and generally to argue its views. (See in re Goldfields Amalgamated Surface Workers' Union (1913) 12 W.A.A.R. 51.)

"Prescribed notice," see form 20. The Act is silent as to the procedure to be followed by the Registrar on receipt of the objections. The regulations (19) provide that he is to give seven days' notice to the society applying for registration and to the objectors and then shall proceed "to hear and determine the same." It is the Registrar who is considering the objections and the proceedings have not parties in the technical sense of the term. It is the Registrar who is to summon witnesses and he is given power to do so by the regulations (Regulation 19); no penalty is provided for non-appearance. (See in re Blacksmiths' Industrial Union (1936) 16 W.A.I.G. 35.)

This subsection does not prevent the Registrar, in the exercise of his discretion under section 21, from considering the past industrial conduct of the applicant Society such Society being in fact a deregistered union. See in re Amalgamated Engineering Union (1953) 33 W.A.I.G. 117.

S.12 (3). The word industry here can be read in the plural so as to mean industries. (Maritime Services Union (1954) 34 W.A.I.G. 459.)

S.13. Compare section 7 of New Zealand Act.

Unions under this Act are registered and incorporated. Under the Trade Union Act they may be registered but not incorporated; they may, however, be sued in their registered name and if not registered may be reached by a representative action. (See Taff Vale case (1901) A.C. 426. See section 15 post.)

and a common seal: Provided that subject to this Act a union may at any time, with the consent of the Court, change its name.

Registered
name.

(2) There shall be inserted in the registered name of every industrial union the words "union of employers" or "union of workers," according as such union is a union of employers or workers, and also the locality in which the majority of its members reside or exercise their calling, as thus: "The Goldfields Plumbers' Industrial Union of Employers"; "The Perth Tailors' Industrial Union of Workers."

Effect of
registration.
No. 57 of
1912, s. 12.

14. Upon and after registration the industrial union, and members thereof for the time being, shall be subject to the jurisdiction of the Court, and to all the provisions of this Act; and all such members shall be bound by the rules of the industrial union during the continuance of their membership: Provided that nothing herein contained shall render a shareholder of an incorporated company liable for any further amount hereunder than that for which he is liable as a shareholder of such company.

Powers and
liabilities
of industrial
unions.
No. 57 of
1912, s. 13.

15. (1) An industrial union may sue and be sued and may purchase, take on lease, hold, sell, lease, mortgage, exchange, and otherwise own, possess, and deal with any real or personal property.

(2) "Locality" in this subsection has not the same connotation as in section 21 (post). (See *Amalgamated Engineers' Union v. Electrical Trades Union* (1935) 15 W.A.I.G. 325.)

S.14. Compare section 12 of The New Zealand Act.

The rules of the union constitute the written statutory contract into which the members enter and they are bound by the contract as defined by the rules. (See *Burnside, J., in McClintock v. McKennay* (1919) 21 W.A.L.R. 58 at p. 63.)

S.15. Trade unions and like associations were not in themselves criminal at common law, but they were for the most part regarded as associations in restraint of trade and although agreements whereby they sought to give effect to their restrictive aims were unenforceable, yet their capacity to contract exists independently of registration under this Act or under the Trade Unions Act, 1902-1924, and unlike a company a union may be sued after registration for contracts entered before registration. (See *McPherson v. Hilberg* (1912) 14 W.A.L.R. 48.)

This section deals with the union's contractual relations with the outside world, as to the position with regard to "internal contracts." See section 175 post and *Burnside, J., in McClintock v. McKennay* ((1919) 21 W.A.L.R. 58 at p. 63). Being a body corporate (section 13) it does not, as do trade unions registered under the Trade Unions Act only, require trustees in whom its property may be vested, but may hold it in its own name. An industrial union incorporated under this Act is liable for the wrongful acts done by its agents acting as such. (See *Gould v. Wellington Waterside Workers* (1924) N.Z.L.R. 1025 and compare section 19 of the New Zealand Act; and see the remarks of *Burnside, J., in Cardiff Coal Mining Co. v. Colliie Coal Miners* (1907) 6 W.A.A.R. 59.)

An industrial union, being a body corporate, its instruments should be under seal.

(2) Any industrial union shall subject to this Act, be liable to all the penal provisions of this Act to the same extent, so far as may be, as an individual.

(3) The service of any process, notice, or document of any kind on an industrial union may be effected by delivering the same to the chairman or secretary of such union, or by leaving the same at its registered office (not being a branch office), or by posting the same to such registered office in a duly registered letter addressed to the secretary of such union.

16. (1) A trade union, consisting of not less than fifteen persons, formed in connection with any specified industry or industries, may be registered under this Act as if it were a society complying with the conditions of section eight.

Registration
under the
Act of trade
unions.
No. 57 of
1912, s. 14.

(2) Such union when registered shall bear the name which it bears as a trade union with the insertion of the additional words provided in section thirteen hereof.

(3) It shall not be necessary for the union to pass and approve a complete set of rules for the purposes of this Act, but the union may in lieu thereof pass and approve such additional rules and modifications of existing rules as may be necessary to bring the rules of the union into conformity with the requisitions of this Act, and the said rules with and subject to any such additions and modifications shall constitute the rules of the industrial union.

S.16. The object of this section appears to have been to ensure that craft unions are not over-run by industrial unions. (See Dwyer, P., in *re United Broom and Brush Manufacturers' Union* (1941) 21 W.A.I.G. 457.) The section has received a very restricted interpretation and as it stands does not give to a trade union seeking registration any very great advantage over other bodies. Section 8 (ante) imposes certain conditions from which a trade union is exempt, i.e., the passing of resolutions at the times and in the manner prescribed by the Act. A trade union, however, must still in an appropriate case supply the proof required by section 8 (3) and (4), for these sections apply to trade unions seeking registration as they do to any other society. Were this not so it would be possible, by obtaining registration in the first place as a trade union, to render nugatory the whole spirit of the Act as regards registration. Thus the fact that a body is registered as a trade union in New South Wales and so falls within subsection (4) does not mean that it can claim to be registered under this Act automatically. (See Dwyer, P., in *re Australian Workers' Union* (1929) 9 W.A.I.G. 241.)

The Registrar may still exercise his discretion under section 21 and refuse to register a trade union, if in the same locality there exists an industrial union to which the members can conveniently belong. (See *in re Electrical Trades Union* (1927) 8 W.A.I.G. 103.)

(4) For the purposes of this section "trade union" includes a branch of a trade union and also a branch of any society in the nature of a trade union duly registered under the law of any part of the King's Dominions outside the State.

Special provisions as to registering societies of employers. No. 57 of 1912, s. 15.

17. With respect to the registration of societies of employers the following special provisions shall apply—

- (1) Where a co-partnership firm is a member of the society, each individual partner residing in the State shall be deemed to be a member, and the name of each such partner (as well as that of the firm) shall be set out in the list of members accordingly, as thus: "Watson, Brown, and Company, of Perth, boot manufacturers; the firm consisting of four partners, of whom the following reside in Western Australia, that is to say, John Watson, of Perth, and Charles Brown, of Fremantle";
- (2) except where its memorandum, articles or rules expressly forbid the same, any company, incorporated under any Act, or being a foreign company within the meaning of the Companies Act, 1893¹, may be registered as an industrial union of employers, as if it were a society complying with the conditions of section eight, and in such case the provisions of sections eight, nine, and eleven hereof shall be deemed to be sufficiently complied with if the application for registration is made under the seal of the company, and pursuant to a resolution of the board of directors, and is accompanied by—

(a) a copy of such resolution;

¹ See Act No. 36 of 1943.

S.17. Compare section 9 of New Zealand Act.
 "as if it were a society complying with section 8." Compare section 16 and cases cited there.

A company cannot become "registered as an industrial union" if the memorandum or articles expressly forbid it (subsection 2) but it may "become a member of any society proposed to be registered as an industrial union" notwithstanding anything to the contrary in the memorandum or articles. (See section 19 (post).) The principle of limited liability is not affected by this Act. (See section 14 (ante).)

- (b) satisfactory evidence of the registration or incorporation of the company;
 - (c) two copies of the memorandum and articles of association or rules of the company;
 - (d) a list containing the names of the directors, and of the manager or other principal executive officer of the company in Western Australia;
 - (e) the address of the registered office of the company in Western Australia;
- (3) in so far as the memorandum, articles, or rules of any company are repugnant to this Act, they shall, on the registration of the company as an industrial union of employers, be construed as applying exclusively to the company and not to the industrial union;
- (4) it shall not be necessary in the case of an incorporated company to insert in the name thereof when registered as an industrial union the additional words set out in section thirteen.

18. Subject to any provision to the contrary the provisions of this Act relating to the registration of a society and to the effect of such registration and of a certificate thereof apply in respect of a trade union, company, council, or other body authorised to be registered under this Act.

Provisions relating to society to apply to trade union and company.
No. 57 of 1912, s. 16.

19. Notwithstanding anything to the contrary contained in the memorandum or articles of association or rules of any company, such company may, with the consent of its manager or other principal executive officer in Western Australia, become a member of any society proposed to be registered as

Company authorised to join society or industrial union, or to enter into industrial agreement.
No. 57 of 1912, s. 17.

On registration the body would assume a double identity—as a company and as an industrial union. See subsection (3). It is not necessary for employers as it is for workers to become registered under the Act. See "Industrial disputes." Section 6 (ante).

S.19. Compare section 17 (2) ante.

an industrial union of employers or of an industrial union of employers or a party to any industrial agreement.

Unions not to be registered under similar names.
No. 57 of 1912, s. 18.

20. An industrial union shall not be registered under a name identical with that by which any other industrial union has been registered or so nearly resembling such name as to be likely to deceive or mislead the members or the public.

Power to refuse registration in certain cases.
No. 57 of 1912, s. 19.

21. The Registrar may refuse to register any society, trade union, or company as an industrial union if in the same locality there exists an industrial union to which the members or the bulk of the members of such society, trade union, or company can conveniently belong.

S.20. Compare section 24 of the Companies Act, 1893, and section 10 of New Zealand Act. This section is inserted for the protection of registered industrial unions. The Registrar's discretion will not be interfered with. (See Rex v. Registrar of Companies (1912) 3 K.B. 23.)

S.21. This section has become more difficult to interpret since the enlargement of the meaning of the word "industry." See section 6 (ante). Under 1 and 2 Edward VII., No. 19, societies could only be registered in a specified industry and to such a provision this section was a fitting corollary. Under this Act there may be embraced in one society workers in almost every calling in life (8) (4) (ante) and if this section be given full effect to it is difficult to conceive any state of circumstances in which some union would not be found somewhere to which members of the proposed society could conveniently belong. (See Eastern Goldfields Federated Engine Drivers' Union (1913) 12 W.A.A.R. 16, per Burnside, J.)

In exercising his discretion—which is a discretion to refuse (see Egg Marketing Board Employees Union (1955) 35 W.A.I.G. 94, and Hospital Salaried Officers' Association of W.A. (1955) 35 W.A.I.G. 94)—under this section the Registrar must have regard to a principle which, although no longer expressly declared in the Act, nevertheless continued to manifest itself in provisions of this kind—namely, the Act attempts to prevent the growth of a multiplicity of unions. (See Wolff, J., in Amalgamated Engineering Union v. Australasian Society of Engineers (1939) 18 W.A.I.G. 419, and also Dwyer, P., in Fremantle Tramway Employees' Union (1940) 19 W.A.I.G. 517; Arms Explosives and Munition Workers' Union v. Bollermakers' Society (1945) 25 W.A.I.G. 176; Fremantle Tramway Employees' Union v. Amalgamated Road Transport Union (1946) 26 W.A.I.G. 416.) And such discretion should be exercised in such a way that on the one hand the workers' right to protection from employers is not denied them, and on the other hand so that complicity and confusion by an unnecessary multiplicity of proceedings and parties is not created. (See Heewitson, P., in re the Metropolitan Abattoirs (1929) 10 S.A.I.R. 100, 112.)

A finding that the members of the applicant Society can conveniently belong to a registered Union does not prevent the Registrar, in the exercise of his discretion, from registering. The discretion to register may well be exercised when the registered Union is one covering divers industries. Electrical Trades Union (1950) 30 W.A.I.G. 274.

In the Blacksmiths' Union v. Coachbuilders' Union (1930) (10 W.A.I.G. 294) Dwyer, P., without attempting to limit the meaning of "conveniently belong," gave certain instances of inconvenience which reveal the diverse nature of the circumstances which the Registrar may have to consider. He said that it may be inconvenient for one set of persons to combine in an association with another in analogous or similar callings or even in the same calling if, owing to the distance one is separated from the other, it is difficult for the interest of either to receive adequate consideration, or if their interests are diverse, or again in the case of two societies, it may be inconvenient if the rules of one body are such as to make it difficult for the members or the majority of the members of the other body to co-operate for industrial purposes. And again we may have inconvenience if in a composite association some of its members have their interests neglected or sacrificed by the ruling body. The rules of the registered society may disclose features which make it inconvenient for workers to belong to it. (See Jarvis v. W.A. Timber Workers (1933) 13 W.A.I.G. 275, see also section 9 (5) ante

22. (1) Any society, trade union, or company which thinks itself aggrieved by any decision of the Registrar in refusing to register it as an industrial union, or in registering any other industrial union, may within three months from the date of the decision appeal against the decision to the President.

(2) The President may on such appeal make any order which he thinks just, and such order shall be duly observed and carried into effect by the Registrar:

Appeal from Registrar to President.
No. 57 of 1912, s. 20.

(political objects). If the rules are difficult to ascertain that may be a ground for membership being "inconvenient." (See in re Australasian Society of Engineers (1905) 4 W.A.A.R. 150.)

The members of an association applying for registration under the Act cannot "conveniently belong" to an organisation already registered if membership of that organisation would interfere with the proper performance of their duties. Per Dethridge, C.J., in Commonwealth Storemen and Packers' Union v. Commonwealth Naval Storehousemen's Association. 1928 27 C.A.R. 56.

The action of the union in improperly expelling and fining certain of their members may make it "decidedly inconvenient" for such persons to remain members of the union. (See Newspaper Workers' case (1932) 12 W.A.I.G. 280.) Seemingly it may be inconvenient to belong to a union which has obtained registration but which in fact makes no or no sufficient efforts to secure industrial benefits for its members (A.W.U. Timber Cutting (1946) 26 W.A.I.G. 207 at p. 208, per Dunphy, P.).

The dicta of Parker, J., in Carpenters' Union v. Registrar of Friendly Societies ((1903) 1 W.A.A.R. 192) to the effect that convenience is limited to physical convenience can no longer be considered law. The authorities bearing on "convenience" are collected in the Professional Accountants' Officers Case (1949) 29 W.A.I.G. 239.

The circumstances may be such as to make it preferable that workers working in a particular industry should be organised industrially on an industry basis rather than on a vocational basis. (Australian Collieries Staff Association (1955) 35 W.A.I.G. 88).

"Locality" in this section has not the same meaning as in section 13 (2) ante. It appears to be incapable of precise definition. (See Goldfields Miners' Union v. Registrar (1903) 2 W.A.A.R. 99) but as it is no longer necessary for a resolution passed at a special meeting of the union to precede a reference of a dispute to the Court (compare section 97 of 57 of 1912 with section 107 post) the basis for a restrictive interpretation of "locality" no longer exists. (See in re application of Bakers' Union (1913) 12 W.A.A.R. 72.)

It has been held in South Australia (see Women Teachers' Guild Registration Case (1941) 16 S.A.I.R. 31 at p. 40) that although "locality" signifies a particular place within a larger area and in this case must mean a particular area within the State, (see also Burnside, J., at p. 75 in re application of Bakers' Union case above) yet "locality" must be read as "locality or localities." (See section 26 of Interpretation Act 1 to 30 of 1918) and that the localities may be numerous enough to be State wide. (See Parker, J., in Yundamindera Miners' Union v. Registrar of Friendly Societies 1919-1921 W.A.L.R. (Industrial cases) 3.) "If in the same locality there exists an industrial union" means if there exists in the locality a registered industrial union FOR THAT PARTICULAR LOCALITY and in South Australia (Women's Teachers' case above) it has been held that a society can be said to "exist" at any place where its influence is present and active, in other words, at any place where the "industry" with which it is connected is followed by workers who are eligible to join it.

The expression "in the same locality" must be construed in a broad and common sense manner and so to mean in the same general locality and not in the exact area as defined in the objecting union's constitution. In re Australasian Society of Engineers (1950) 30 W.A.I.G. 532.

This section must be construed to mean that IN FUTURE the Registrar shall not register two unions in the same locality but any union registered under the 1900 Act, which had no section against multiplicity, could bring itself under this Act whatever multiplicity it might cause. (See section 116 of 1 and 2 Edw. VII., No. 21 and sections 4 (b) and 8 (6) ante also Hannans and Boulder A.W.U. v. Registrar of Friendly Societies (1903) 1 W.A.A.R. 199.)

S.22. Compare the proviso to this section with section 66 (d) of the South Australian Industrial Code, 1920-1937. The decision of the Registrar will not be interfered with unless it can be shown that a grave injustice would be done or that the principles on which the decision has been based have been inadequately considered or where irrelevant matter has been the basis of the decision. (See in re Electrical Trades Union (1927) 8 W.A.I.G. 103 and the Blacksmiths' Society Registration case (1923) 6 S.A.I.R. 123, per Brown, F., at p. 126.) As to onus see section 21 ante. Distance and diversity of interest are not exhaustive tests of inconvenience. (See section 21 (ante).)

Provided that if the Registrar has refused registration under the last preceding section it shall lie on the society, trade union, or company to satisfy the President that, owing to distance, diversity of interest, or other substantial reason it will be more convenient for the members to belong to an industrial union separately registered than to join any existing industrial union.

Amendment
of rules.
No. 57 of
1912, s. 21.

23. (1) Copies of all additions to or amendments or rescissions of the rules of an industrial union shall, after being verified by the secretary or some other officer of the industrial union, be sent to the Registrar, who shall register the same upon being satisfied that the same are not in conflict with this Act. No such addition, amendment, or rescission shall be valid until registered:

Inserted by
No. 6 of
1935, s. 3.

Provided that the Registrar shall not register any addition, amendment, or rescission of any rules which has or may have the effect of altering the constitution of a union.

(2) A printed copy of the rules (certified as in subsection three) for the time being of the industrial union shall be delivered by the secretary to any person applying for the same on payment of a sum not exceeding one shilling.

(3) In all proceedings affecting the industrial union, *prima facie* evidence of the rules and their validity may be given by the production of what

The mere existence of diversity of interests as between members of the applicant union and those of an already registered association may not of itself be enough to allow the former to be registered separately. It may be that however diverse the interests of the different sections of an organisation may be, the rules will be found to permit and not to impede or deny their advocacy. (See *Women Teachers' case* (1941) 16 S.A.I.R. 31, per Kelly, P., p. 46. See also his remarks at p. 44.)

A statement of number of matters (not to be regarded as exhaustive) relevant to the exercise of the discretion by this section vested in the President are to be found in *re Australasian Society of Engineers* (1950) 30 W.A.I.G. 532 at page 533.

S.23. As to amendment see section 9 (k) ante, and as to rules generally, see section 9 ante.

In the proviso to subsection (1) and in subsections (4) and (5) the Act now recognises the distinction between rules which are purely domestic and those which determine the constitution of the union. As to "constitution" see subsection (5). This distinction was made in the cases before it was made in the Act. (See *W.A. Plumbers' Union v. Amalgamated Engineers' Union* (1934) 14 W.A.I.G. 284, and *The Amalgamated Engineers' Union v. Lake View & Star* (1935) 15 W.A.I.G. 103 and also in *Australian Society of Engineers v. W.A. Wire Drawing Ltd.* (1935) 15 W.A.I.G. 25. (See sections 8, 8 (a) and 9 (k) and notes thereon.)

purports to be a copy thereof, certified as a true copy under the seal of the union and the hand of the secretary or any other prescribed officer.

(4) When any industrial union desires to make any addition, amendment, or rescission of rules which has or may have the effect of altering the constitution of a union, it shall make application in the prescribed manner to the Registrar for that purpose, and the Registrar shall refer the matter to the President.

Provisions
for amend-
ment of
constitution
of industrial
union.
Inserted by
No. 6 of
1935, s. 3.

The provisions of subsection (1) of section nine of this Act shall apply to any application under this section as if the terms "application to be registered" and "application" therein mentioned were construed as an application under this section.

Before proceeding to deal with such application, the President shall require notice to be served on any industrial union which in his opinion would be affected or likely to be affected by the granting of such application.

(5) In this section the term "constitution" means—

- (a) the qualification of persons for membership of the union;
- (b) the objects of the union;
- (c) the area over which the union is authorised to operate.

24. (1) In addition to its registered office, an industrial union may have a branch office in any locality in which any of its members reside or exercise their calling.

Registered
office and
branch
office of
industrial
union.
No. 57 of
1912, s. 22.

An application to alter the "constitution" is in essence an application to create a new union, and the application having been referred by the Registrar to the President, the latter will deal with it and apply the provisions of section 8 to it, as if it were an application to register a new union. (See in re Fremantle Tramway Employees' Union (1940), 19 W.A.I.G. 517, per Dwyer, P.)

The application cannot be dealt with entirely on the basis that it is an application by a society for registration. The applicant here is a presently registered union and one can and should have regard to the industrial coverage which it has, prior to the amendment, in fact enjoyed. See *Australasian Society of Engineers* (1952) 32 W.A.I.G. 549.

A union may under subsection (4) seek approval to a constitutional amendment prior to such amendment being the subject of a resolution of a general meeting. See in re *Australian Workers Union* (1953) 33 W.A.I.G. 446.

"prescribed manner" (4). See regulation 2 and Form 2 in regulations made under the Industrial Arbitration Act Amendment Act, 1935 (*Government Gazette*, 8th November, 1935).

S.24. An industrial union does not exist in a particular locality merely because it has a branch office in that locality. (See *Parker, J., in Yundamindera Miners' Union v. Registrar of Friendly Societies* (1903), 2 W.A.A.R. 54. See section 21 ante.)

(2) Upon application by the industrial union, under its seal and the hand of its chairman or secretary, specifying the address of the branch office, the Registrar shall register the same.

(3) The address of the registered office and of each registered branch office may be changed from time to time in the prescribed manner.

(4) Every such change shall be forthwith notified to the Registrar by the secretary of the union, and shall thereupon be registered.

25. (1) An industrial union shall keep the following records—

- (a) a register of its members showing the name and postal address of each member;
- (b) a list of the names, postal addresses and occupations of the persons holding offices in the industrial union;
- (c) an account, in proper form, of the receipts, payments, funds and effects of the industrial union; and
- (d) such other records as are prescribed.

Penalty: Five pounds for each week of default.

(2) An industrial union shall, within three months after the date upon which it became registered or after the coming into operation of the Industrial Arbitration Act Amendment Act, 1952, whichever is the later, or within such longer time as the Registrar allows, file with the Registrar a copy of the register of its members as at the quarter day next preceding the date on which the copy is filed.

Penalty: Five pounds for each week of default.

(3) An industrial union which has filed with the Registrar a copy of the register of its members shall, during the month next following each quarter day, commencing with the quarter day next following the date on which the copy register was filed, file with the Registrar a statement giving, in respect of

Records to be kept and filed by industrial union.
Cf. C. & A. Cth., s. 91 (1).

No. 57 of 1912, s. 23, renumbered as s. 25, repealed and re-enacted by No. 5 of 1952, s. 7.

Cf. C. & A. Cth., s. 91 (2).

Cf. C. & A. Cth., s. 91 (3).

the period of three months ending on that quarter day, particulars of the alterations made in the register of its members.

Penalty: Two pounds for each week of default.

(4) An industrial union shall file with the Registrar once in each year, at such time as is prescribed a copy of the records required to be kept under paragraphs (b), (c) and (d) of subsection (1) of this section, certified by statutory declaration by the Secretary or other prescribed officer of the industrial union to be a correct statement of the information contained therein.

*Cf. C. & A.
Oth., s. 91
(4).*

Penalty: Five pounds for each week of default.

(5) An industrial union shall file with the Registrar in such manner and within such time as is prescribed notification of changes in the holding of offices.

Penalty: Five pounds for each week of default.

(6) An industrial union shall, at all times during which a person is a member of the industrial union, keep a record or butt of the latest union ticket issued to him, showing his name and usual postal address.

*Cf. C. & A.
Oth., s. 91
(5).*

Penalty: Ten pounds.

(7) The Court may at any time order such rectifications of the register of members of an industrial union, and of the copy of the register kept by the Registrar, as it considers necessary.

*Cf. C. & A.
Oth., s. 91
(6).*

(8) All documents filed with the Registrar under this section shall be made available for inspection at the office of the Registrar as prescribed.

*Cf. C. & A.
Oth., s. 91
(7).*

(9) The register of members of an industrial union shall be made available by the industrial union for inspection by such persons as are authorised by the Registrar at such times as are appointed by him, at the office of the industrial union.

*Cf. C. & A.
Oth., s. 91
(8).*

Penalty: Ten pounds.

Cf. C. & A.
Cth., s. 91
(10).

(10) The regulations may make provision with respect to the manner in which records are to be kept for the purposes of this section, and the records shall be deemed not to be duly kept unless they are kept in accordance with the regulations.

Cf. C. & A.
Cth., s. 91
(11).

(11) In this section—

“quarter day” means the last day of the month of March, June, September or December;

“union ticket” includes a receipt or other document acknowledging or certifying that a person is a member or has renewed his membership of the industrial union or has paid any dues or other moneys payable in respect of his membership of the industrial union or the renewal of his membership.

Exemptions
from cer-
tain require-
ments.

Cf. C. & A.
Cth., s. 91A
(1).

No. 57 of
1912, s. 24,
renumbered
as s. 26,
repealed and
re-enacted
by No. 5 of
1952, s. 8.

26. (1) Where the Registrar is satisfied—

that the register of members of an industrial union is maintained in such a form and manner that it would, for the purposes of the conduct of a ballot or election in pursuance of this Act, provide in a convenient form accurate particulars of the membership of the industrial union,

he may issue to the industrial union a certificate exempting the industrial union from the application of the provisions of subsections (2), (3) and (6) of section twenty-five of this Act.

Cf. C. & A.
Cth., s. 91A
(2).

(2) While a certificate under subsection (1) of this section is in force, if the certificate exempts the industrial union, the provisions of subsections (2), (3) and (6) of section twenty-five of this Act do not apply to the industrial union.

(3) Where—

(a) it appears to the Registrar that the register of members of an industrial union to which a certificate under this section has been issued is no longer maintained in such form and manner as to justify the continuance in force of the certificate; or

- (b) the industrial union refuses or fails to give to the Registrar information or facilities required by him for the purpose of deciding whether the exemption should be continued,

he may cancel the certificate and if he does so shall give notice in writing of the cancellation to the industrial union.

(4) Where a certificate is so cancelled, the industrial union shall, within one month after the first quarter day, as defined by section twenty-five of this Act, next following the cancellation of the certificate, or within such longer time as the Registrar allows, file with the Registrar a copy, as at that quarter day, of its register of members.

Cf. C. & A.
Cth., s. 91A
(4).

Penalty: Five pounds for each week of default.

(5) A certificate of the Registrar that a specified person was at a specified time a member or officer of a specified industrial union shall, in all courts and proceedings, be prima facie evidence that the facts are as stated.

Certificate
as to
membership
of industrial
union.
Cf. C. & A.
Cth., s. 93.

27. It shall be the duty of the Registrar to supply to Parliament, within thirty days after its meeting in each year, a return showing the number of members in each industrial union registered under the Act.

Return for
Parliament.
No. 57 of
1912, s. 25.

28. The secretary of every industrial union shall, once in every year, cause the accounts of the union to be properly audited by a duly qualified public accountant, and shall, within one calendar month after the completion of the yearly audit of the accounts of the union, deliver to the Registrar a duly audited balance sheet of the assets and liabilities of the union, made up to the date of closing the accounts, and also a duly audited statement of the receipts and expenditure of the union during the year, the subject of such audit.

Industrial
unions to
send yearly
balance
sheet to
Registrar.
No. 57 of
1912, s. 26.
No. 49 of
1941, s. 2.

Penalty: Ten pounds.

Procedure
for cancella-
tion of
registration.
No. 57 of
1912, s. 27,
renumbered
as s. 29 and
amended by
No. 5 of
1952, s. 9.

29. (1) An industrial union may apply to the Registrar in the prescribed manner for a cancellation of the registration thereof, and thereupon the Registrar, if satisfied that the cancellation is desired by a majority of the members of such union, and after giving six weeks' notice of his intention so to do, may by notice in the *Gazette* cancel such registration.

(2) If it appears to the President on the application in the prescribed manner of any industrial union or person interested, or of the Registrar—

- (a) that an industrial union has been registered erroneously or by mistake; or
- (b) that the rules of an industrial union are not in conformity with the requisitions of this Act or have not *bona fide* been observed; or
- (c) that the rules of an industrial union or their administration do not or does not provide reasonable facilities for the admission of new members or impose or imposes unreasonable conditions upon the continuance of their membership or are or is in any way oppressive; or

S.29. The registration of every union affected by an "amalgamation" shall, on the registration of the new union, be deemed to be cancelled. (See section 10 (5) ante.)

The Act makes no provision whereby an industrial union may challenge the registration of an industrial association or *vice versa*. (See Amalgamated Certificated Engine Drivers v. Amalgamated Certificated Engine Drivers' Association (1910), 9 W.A.A.R. 143.)

(1) "prescribed manner" see regulations 29-30 and Forms 26 and 27.

(2) See regulations 31 to 33 and Forms 28 and 29.

"persons interested": Burnside, J., in *Bell v. W.A. Timber Workers* ((1928) 8 W.A.I.G. 428) held that this expression included all workers in the industry; he said there—

I think, if a union has been registered, that any worker in the industry, although not a member of the union, may be said to be a "person interested" When a union is registered, the individual right of the worker to barter for his own terms of employment ceases and he becomes a person most interested.

It also includes employers who are bound by the union's award.

If employers who would be bound by the award are not "persons interested," it is difficult to see who would be. (Per Dwyer, P., in *Copley's Bank v. S.W. Vineyard Employees' Union*. (1935) 15 W.A.I.G. 111.)

In the *Metropolitan Coal Co. of Sydney v. Australian Coal Employees* (24 C.L.R. 85), Higgins, J., said that the word ought to be given a liberal construction, but not so as to include a common informer or intermeddler. (Also the *Acting Public Service Commissioner v. Australian Commonwealth Post and Telegraphs* (1917) 11 C.A.R. 960.)

(a) See in re *Australian Actors' Union* ((1912) 6 C.A.R. 89.)

(c) Note the effect of such restrictive conditions on the entry of new members on the question of preference to unionists.

See section 6 (ante) "Industrial matters" as to the power of a union to exclude persons from holding executive positions and also from being members (see *Wignall v. Amalgamated Society of Railway Employees* (1948) 28 W.A.I.G.).

- (d) that the proper authority of an industrial union wilfully neglects to provide for the levying and collection of subscriptions, fees, or penalties from members of the union; or
 - (e) that the accounts of an industrial union have not been duly audited or that the accounts of the union or of the auditor do not disclose the true financial position of the union; or
 - (f) that an industrial union has wilfully neglected to obey an order of the Court, the President, or the Conciliation Commissioner; or
 - (g) that the number of members in the union is below the number which a society would be required to have before it could be registered as such a union under this Act; or
 - (h) that for any other reason the registration of an industrial union ought to be cancelled,
- the President may order the registration of the union to be cancelled, and thereupon it shall be cancelled accordingly.

(b) The President will cancel registration if the union resorts to a strike, or allows its members to so resort, instead of referring the dispute to the Court, for the union is thereby breaking or acquiescing in the breach of that very essential rule. (See section 9 (4) (c) which is a condition precedent to the registration of any society.) (See *Registrar v. Amalgamated Road Transport Union* (1936) 16 W.A.I.G. 349.) The order for cancellation may, in an appropriate case, be stayed for a certain period to allow the union to discipline its members. (See *A.W.U. Westralian Branch v. Coolgardie Miners' Union* (1946) 26 W.A.I.G. 417.)

(h) The discretion vested in the President by this subsection is a wide one uncontrolled by any limitation except that it should be based upon reasons which appear to him to be good and in the exercise of his discretion he is bound only to follow the rules of reason and justice within the limits and for the objects intended by the legislature, the limits being those in which an honest man competent to exercise the duties of his office ought to confine himself. (See *in re Boulder Amalgamated Engine Drivers' Union* (1910) 9 W.A.A.R. 129.)

And in the later case of *Bell v. W.A. Timber Workers' Union* ((1928) 8 W.A.I.G. 426 at p. 429) Burnside, J., said:—"It was suggested that 'for any other reason' be read *eiusdem generis*. I think it would be more in accordance with the intention of the legislature if the President's power to cancel the registration of the union is only limited to those reasons which the President thinks sufficient to justify cancellation. He is the person that is the final determiner as to the reasons upon which registration ought to be cancelled."

The President under this section is entitled to consider the conduct of the Union over a period of years—and bad conduct generally is apt to have a cumulative effect. In *re Coastal Dock Workers* (1952) 32 W.A.I.G. 101.

The power to deregister will only be used in extreme cases and when no other remedy appears to be available. "It (deregistration) is one of the severest punishments to mete out to a union, it renders it difficult, if not impossible to look after and police an award and the members once a union is deregistered cannot approach the Court for an award or an amendment of an award, they are without guide in the industrial field, they wander and get lost." (Per Dwyer, P. in *Taylor v. Government Water Supply Employees' Union* (1936) 16 W.A.I.G. 106. See also in *re Australian Coal Federation* (1917) 11 C.A.R. 984.)

Effect of
cancellation.
No. 57 of
1912, s. 28.

30. A cancellation shall, as from the making thereof, dissolve the incorporation of the industrial union, in so far as this Act is concerned, and any representatives of the union in any industrial association shall cease to be members of such association, but the cancellation shall not affect the prior status of the union or the status of any such association or relieve the union, or any member thereof, from the obligation of any industrial agreement, or any award or order of the Court, nor from any penalty or liability incurred prior to such cancellation.

No cancellation
during
pendency of
proceedings.
No. 57 of
1912, s. 29.

31. [*Repealed by Act No. 5 of 1952, s. 10.*]

Conditional
order for
cancellation.
No. 57 of
1912, s. 30.

32. On making any order for cancellation the President may direct that the order shall be suspended for a period fixed by him and that if a requisition specified in the direction be complied with by the union to the satisfaction of the President within that period, then the order shall be annulled, but that if the requisition be not so complied with then the order shall have effect as from the making thereof; and every such direction of the President shall have effect according to its tenor.

S.30. Compare section 22 (b) of New Zealand Act, 1925.

Cancellation of registration does not affect the liability of a union for abetting a strike prior to such cancellation. (See *Gohns v. Auckland Builders' Union* (1912) 14 G.L.R. 570.)

It is difficult to see how an action for the enforcement of an award commenced after cancellation could be maintained against a society which had lost its corporate existence. (See *Hikurangi Coal Miners' case* (1911) 12 Bk. of Awards 295.)

"In so far as this Act is concerned." The union may still be incorporated under the Companies Act, 1893. See section 17 (ante).

[S.31. A reference may be said to be pendent when the Court has cognizance of the industrial dispute by the filing of an application in the Court and a pendency subsists until the application then filed is finally disposed of either by an award being made or by the application being struck out. A reference will while pending prevent any resignation of members and will also be fatal to any application for cancellation of registration and this will be so whether the reference be a genuine one or otherwise. If the reference is not genuine and is allowed to remain on the Court's list for an ulterior object then the proper remedy is to make application to have the reference struck out. The Court is not prevented from dealing with an application for cancellation of registration which is made before the reference although it is brought on for hearing after the reference. (See *Wigmores Ltd. v. Amalgamated Road Transport Union* (1945) 25 W.A.I.G. 175.)

This section covers individual resignations from membership as well as resignations of large proportions or whole branches. (See *Printing Industry Employees' Union v. Brennans (F.C.)* (1938) 18 W.A.I.G. 242. See section 9 (3) (g) ante.)]

S.32. For an example of an order for cancellation suspended in this way see *Registrar v. Amalgamated Road Transport Union* ((1936) 16 W.A.I.G. 349 and in re *Boilermakers* (1932) 32 W.A.I.G. 102).

Division II.—Industrial Associations.

33. Any council or other body, however designated, representing not less than two industrial unions of either employers or workers in any specified industry, may be registered under this Act as if such council or body were a society complying with the conditions of section eight.

Industrial associations may be registered. No. 57 of 1912, s. 31.

Provided that every such council or other body shall in lieu of being registered as an industrial union be registered as and designated an industrial association, and the word "association" shall be substituted for the word "union" wherever necessary accordingly.

34. All the provisions of this Act relating to industrial unions, their officers, trustees, and members, shall, *mutatis mutandis*, extend and apply to a registered industrial association, its officers, trustees, and members respectively, and such provisions shall be read and construed accordingly in so far as the same are applicable, and the special reference to industrial associations in any section shall not render other sections inapplicable: Provided that no industrial association shall be entitled to recommend the appointment of a member of the Court.

Provisions affecting unions applicable. No. 57 of 1912, s. 32.

35. (1) In lieu of making provision with respect to the matters mentioned in paragraphs f, g, and h of section nine, provisions shall be made in the rules of any council or other body applying for registration as an industrial association with respect to—

Matters to be dealt with in rules of associations. No. 57 of 1912, s. 33.

- (i) a register of industrial unions represented on the association and of the members of the association respectively representing such unions, and the mode in which and the terms and qualifications on which such unions shall be entitled to be or shall cease

S.33. The industrial association is an entirely separate and distinct body from an industrial union. The association represents unions collectively and the unions represent workers or employers collectively, and the Legislature contemplated that each body would operate in a distinct sphere of action—the association dealing with matters which affect the interests of the unions collectively whilst the unions are confined to matters which affect the workers or the employers individually. (See in re Amalgamated Certificated Engine Drivers' Union (1910) 9 W.A.A.R. 143.)

S.34. As to appointment of members of the Court, see section 47 post.

to be so represented, but so that no union shall discontinue its representation unless and until it has given at least three months' previous written notice to the association of its intention so to do;

- (ii) the expulsion from representation on the council or body of unions in arrears of dues for any specified period not longer than twelve months, but without freeing such union or its representatives from arrears due;
- (iii) the purging of the register;
- (iv) the inspection of the books and the register of members by any person authorised in that behalf by an industrial union represented on the council or body.

(2) Regulations may be made prescribing other matters in respect of which industrial associations shall have rules and providing that industrial associations need not have rules regarding any specified matter which has been prescribed in the case of industrial unions.

Ground for
cancellation
of registra-
tion.
No. 57 of
1912, s. 34.

36. It shall be an additional ground for the cancellation of the registration of an industrial association that the rules thereof or their administration do not provide reasonable facilities for the admission to representation on the association of new unions or impose or imposes unreasonable conditions upon the continuance of their membership or are or is in any way oppressive.

[Div. III.
added by
No. 5 of
1952, s. 11.]

Division III.—Disputed Elections.

Applications
for inquiries
respecting
elections.
Cf. C. & A.
Oth., Part
IV., Div. 3,
ss. 94A-96N.
S. 36A added
by No. 5 of
1952, s. 11.

36A. (1) Where a member of an industrial union, or a person who, within the preceding period of two months, has been a member of an industrial union, claims that there has been an irregularity in or in

S.36. Compare section 29 (c) ante.

36A. The application under this section is one which must be lodged with to be dealt with by the Registrar. See *The King v. The Commonwealth Court of Conciliation and Arbitration* (1950) 81 C.L.R. 229.

connection with an election for an office in the industrial union, he may lodge an application for an inquiry by the Court into the matter.

(2) An application under this section shall—

- (a) be in writing in accordance with the prescribed form;
- (b) be lodged with the Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations;
- (c) specify the election in respect of which the application is made and the irregularity which is claimed to have occurred, and state the facts relied on in support of the application; and
- (d) be accompanied by a statutory declaration by the applicant declaring that the facts stated in the application are, to the best of the applicant's knowledge and belief, true.

36B. (1) Where an application under section thirty-six A of this Act is lodged with the Registrar, he shall—

Action by Registrar.
Cf. C. & A. Oth., s. 96B.
S. 36B added by No. 5 of 1952, s. 11.

(a) if he is satisfied—

- (i) that there are reasonable grounds for an inquiry into the question whether there has been an irregularity in or in connection with the election, which may have affected or may affect the result of the election; and
- (ii) that the circumstances of the matter justify an inquiry by the Court under this Division,

grant the application and refer the matter to the Court; or

- (b) if he is not so satisfied, refuse the application and inform the applicant accordingly and may impose costs against the applicant if the application is considered to be frivolous or vexatious.

(2) The Registrar may exercise his powers under subsection (1) of this section upon the basis of the matters stated in the application, but he may nevertheless take into account any relevant information coming to his knowledge.

(3) At any time after the lodging with the Registrar of an application for an inquiry in connection with an election, the Court may authorise the Registrar, by himself or by a person acting on his behalf, to—

- (a) inspect ballot papers, envelopes, lists and other documents which have been used in connection with or are relevant to the election;
- (b) for the purpose of the inspection, enter, with such assistance as he considers necessary, premises which he believes were used or occupied by the industrial union, and in which he believes the ballot papers, envelopes, lists or documents to be;
- (c) require a person to deliver to him, in accordance with the requirement, the ballot papers, envelopes, lists and other documents in the possession or under the control of that person;
- (d) take possession of the ballot papers, envelopes, lists and other documents; and
- (e) retain the ballot papers, envelopes, lists or other documents delivered to him, or of which he has taken possession, until the completion of the proceedings arising out of the application or until such earlier time as the Court orders.

(4) Before authorising action under subsection (3) of this section, the Court shall, if of opinion that, having regard to all the circumstances, a person should be given an opportunity of objecting to the proposed action, give the opportunity to that person.

(5) A person who—

- (a) refuses or fails to comply with a requirement under this section; or

- (b) obstructs or hinders the Registrar or any other person in the exercise of his powers under this section,

commits an offence against this Act.

Penalty: Fifty pounds or imprisonment for six months.

(6) An act or decision of the Registrar under this section shall be subject to appeal to the Court within the time and in the manner prescribed, and the Court may hear and determine the appeal.

36C. (1) Upon the reference of a matter to the Court under section thirty-six B of this Act, the inquiry shall be deemed to have been instituted in the Court.

Jurisdiction of Court.
Cf. C. & A. Cth., s. 96C.
S. 36C added by No. 5 of 1952, s. 11.

(2) An act or decision of the Court under this Division shall be final and conclusive and shall not be questioned in the Supreme Court or any other Court.

Cf. s. 64 post.

(3) The provisions of subsection (2) of this section do not derogate from those of section sixty-four of this Act.

36D. Where an inquiry has been instituted, the Court shall fix a time and place for conducting the inquiry, and may give such directions as the Court thinks necessary to ensure that persons who are or may be justly entitled to appear or be represented at the inquiry are notified of the time and place so fixed.

Directions as to hearing.
Cf. C. & A. Cth., s. 96D.
S. 36D added by No. 5 of 1952, s. 11.

36E. (1) At any time after an inquiry in connection with an election has been instituted, the Court may, if it thinks fit, make one or more of the following orders—

Interim orders.
Cf. C. & A. Cth., s. 96E.
S. 36E added by No. 5 of 1952, s. 11.

- (a) an order that no further steps shall be taken in the conduct of the election or in carrying into effect the result of the election;

- (b) an order that a person who has assumed an office, or has continued to act in an office, or claims to occupy an office, being an office to which the inquiry relates shall not act in that office;
- (c) an order that a person who holds, or who last held before the election, an office to which the inquiry relates may act or continue to act in that office;
- (d) where it considers that an order under paragraph (c) of this subsection would not be practicable or would be prejudicial to the efficient conduct of the affairs of the industrial union or would be inappropriate having regard to the nature of the inquiry,

an order

that a member of the industrial union or another person specified in the order may act in an office to which the inquiry relates; provided that in the event of a suitable member being available the Court shall give preference to such member;

- (e) an order incidental or supplementary to an order under this subsection; and
- (f) an order varying or discharging an order under this subsection.

(2) Where the Court orders that a person may act, or continue to act, in an office, that person shall, while the order remains in force, be deemed, for all purposes, to hold the office.

(3) An order under this section shall continue in force, unless expressed to operate for a shorter period or unless sooner discharged, until the completion of proceedings in the Court in connection with the election and of all matters ordered, otherwise than under this section, by the Court in those proceedings.

36F. (1) The Court shall allow to appear or be represented at an inquiry, persons who apply to the Court for leave to appear or be represented, being persons who appear to the Court to be justly entitled to be heard, and the Court may order any other person so to appear or be represented.

Procedure
at hearing.
Of. C. & A.
Cth., s. 96F.
S. 36F added
by No. 5 of
1952, s. 11.

(2) The persons appearing or represented, or ordered to appear or be represented, at an inquiry shall be deemed to be parties to the proceedings.

(3) The Attorney General may, at any stage of an inquiry intervene by counsel, solicitor or agent on behalf of the State.

(4) Notwithstanding the provisions of subsection (4) of section sixty-seven of this Act, legal practitioners may be allowed by the Court to represent parties to and be heard at proceedings under this Division.

(5) The provisions of section sixty-nine of this Act apply in relation to proceedings under this Division.

36G. (1) At an inquiry the Court shall inquire into and determine the question whether irregularity has occurred in, or in connection with, the election, and such further questions concerning the conduct and results of the election as the Court thinks necessary.

Functions
and powers
of Court.
Of. C. & A.
Cth., s. 96G.
S. 36G added
by No. 5 of
1952, s. 11.

(2) In the course of conducting an inquiry the Court may make such orders, including an order for the recounting of votes, as the Court thinks necessary for the purposes of the inquiry.

(3) If the Court finds that an irregularity has occurred, the Court may, in its discretion, but subject to subsection (4) of this section make one or more of the following orders—

- (a) an order declaring the election, or any steps taken in or in connection with the election, to be void;

- (b) an order declaring a person purporting to have been elected not to have been elected, and declaring another person to have been elected;
 - (c) an order directing a new election to be held, or any step in or in connection with the election, including the submission of nominations, to be taken again, in accordance, subject to an order, if any, under paragraph (d) of this subsection, with the rules of the industrial union or with those rules as varied or added to in such manner as the Court thinks necessary to rectify procedural defects in those rules which appear to the Court to exist;
 - (d) an order directing the taking of such safeguards as the Court thinks necessary against irregularities in, or in connection with,
 - (i) a new election if so ordered;
 - (ii) a step if so ordered to be taken again; or
 - (iii) uncompleted steps in the election,and, for the purposes of the order, an order appointing and authorising a person to act as a returning officer in conjunction with the returning officer, if any, acting under the rules of the industrial union in connection with the election, and to exercise such powers as the Court directs; and
 - (e) an order incidental or supplementary to an order under this section.
- (4) The Court shall not
- declare an election, or a step taken in or in connection with an election, to be void, or declare that a person was not elected,
- unless the Court is of opinion that,
- having regard to the irregularity found, and any circumstances giving rise to a likelihood that similar irregularities may have occurred or may occur,

the result of the election may have been affected, or may be affected by irregularities.

36H. (1) The Court may make such orders as it thinks necessary for the effectual exercise of its powers and functions and the enforcement of its orders under this Division.

Enforcement of orders.
Of. C. & A.
Cth., s. 96H.
S. 36H added
by No. 5 of
1952, s. 11.

(2) A person who refuses or fails to comply with an order of the Court under this Division or hinders or obstructs the carrying out of any such order commits an offence against this Act.

Penalty: Fifty pounds or imprisonment for six months.

(3) The provisions of this section do not derogate from the other provisions of this Act relating to contempt.

36J. (1) Where the Court declares void the election of a person who has, since the election, purported to act in the office to which he purported to have been elected, acts done by him while so purporting to act and which could validly have been done by him if he had been duly elected are, subject to this section, valid and effectual for all purposes.

Validation of certain acts, etc.
Of. C. & A.
Cth., s. 96J.
S. 36J added
by No. 5 of
1952, s. 11.

(2) The Court may, if it considers it desirable so to do, declare an act so done to have been void, and thereupon that act is, for all purposes to be deemed not to have been validly done.

(3) Where an election is held, or a step in or in connection with an election is taken, in pursuance of an order of the Court, that election or step shall not be invalidated by reason only of a departure from the rules of the industrial union involved in compliance with the order of the Court.

36K. (1) Where upon an inquiry the Court finds that an irregularity has occurred, the Attorney General may, if he considers the circumstances to justify him in so doing, authorise payment by the State to the person who applied for the inquiry of

Costs.
Of. C. & A.
Cth., s. 96K.
S. 36K added
by No. 5 of
1952, s. 11.

the whole or a part of his costs and expenses, including expenses of witnesses and fees of legal practitioners who are allowed to appear.

(2) Where, upon an inquiry, the Court does not find that an irregularity has occurred, but certifies that the person who applied for the inquiry acted reasonably in so applying, the Attorney General may authorise payment by the State to that person of the whole or a part of his costs and expenses, including expenses of witnesses and fees of legal practitioners who are allowed to appear.

(3) Where the Attorney General is satisfied that, having regard to the findings of the Court upon an inquiry, it is not just that a person, not being the person who applied for the inquiry, should be required to bear, or to bear in full, any expenses, including expenses of witnesses and fees of legal practitioners who are allowed to appear, incurred by him in connection with the inquiry, the Attorney General may authorise payment by the State of the whole or a part of those expenses.

(4) Where the Court orders—

- (a) a new election to be held;
- (b) a step in or in connection with an election to be taken again; or
- (c) safeguards, not provided for in the rules of the industrial union to be taken in or in connection with an uncompleted step in an election,

the Attorney General may,

if he is satisfied that the nature of the irregularity found by the Court to have occurred is such that it would be unreasonable for the industrial union to be required to bear, or to bear in full, the expenses involved in compliance with the order of the Court,

authorise payment by the State

of the whole or part of those expenses.

(5) (a) The Court may make an order as to the costs and expenses, including expenses of witnesses and fees of legal practitioners who are allowed to appear, of proceedings before the Court in or in connection with an inquiry.

(b) The provisions of the preceding subsections of this section do not affect those of this subsection.

(6) Authorisation by the Attorney General under this section of payment, is sufficient for appropriation of the payment from the Public Account.

36L. Notwithstanding anything contained in the rules of an industrial union, an industrial union and its officers able to do so, shall take such steps as are necessary to ensure that ballot papers, envelopes, lists and other documents used in connection with, or relevant to, an election for an office are preserved and kept at the registered office of the industrial union for a period of one year after the completion of the election.

Ballot papers, etc., to be preserved.
Cf. C. & A. Cth., s. 96L.
S. 36L added by No. 5 of 1952, s. 11.

Penalty: Fifty pounds or imprisonment for six months.

36M. (1) An industrial union may, in writing, request the Registrar that an election for an office in the industrial union be conducted under this section with a view to ensuring that no irregularity occurs in or in connection with the election.

Registrar to conduct elections upon request.
Cf. C. & A. Cth., s. 96M.
S. 36M added by No. 5 of 1952, s. 11.

(2) For the purposes of subsection (1) of this section, a request by an industrial union may be made—

(a) by or on behalf of the committee of management of the industrial union; or

(b) by a number, ascertained as prescribed, of the members of the industrial union.

(3) The regulations may make provision with respect to the times at which requests may be made under this section.

(4) Where a request is made or purports to be made under this section, the Registrar shall, after making such inquiries, if any, as he considers necessary, decide whether or not the request has been duly made.

(5) Where the Registrar decides that a request has been duly made under this section, he shall inform the industrial union accordingly, and may conduct the election, direct other officers of the Court to conduct the election, or may make arrangements with the Chief Electoral Officer holding that office under the Electoral Act, 1907-1951¹, for the conduct of the election by an officer holding office under that Act.

(6) Notwithstanding anything contained in the rules of the industrial union, the person conducting the election may take such action and give such directions as he considers necessary in order to ensure that no irregularities occur in or in connection with the election or to remedy procedural defects which appear to him to exist in those rules.

(7) A person who—

(a) refuses or fails to comply with a direction given under subsection (6) of this section; or

(b) obstructs or hinders—

(i) the person conducting an election under this section in the conduct of the election or the taking of any action under subsection (6) of this section; or

(ii) any other person in the carrying out of a direction under subsection (6) of this section;

commits an offence against this Act.

Penalty: Fifty pounds or imprisonment for six months.

¹ Now Electoral Act, 1907-1953: See No. 34 of 1953, s. 1 (3).

(8) The provisions of this Division relating to inquiries do not apply in relation to an election conducted under this section.

(9) An election conducted under this section is not invalid by reason only of an irregularity in the request in pursuance of which the election was conducted or by reason of a breach of the rules of the industrial union involved in anything done or omitted, or in compliance with a direction given, under this section.

(10) The expenses of an election conducted under this section, but not including the salary of an officer of the State performing a duty in relation to the election, shall be borne by the industrial union concerned.

(11) In proceedings
in connection with anything done or proposed to be done by reason of a request made or purporting to be made under this section in relation to an industrial union,
the copy of the register
of members of that industrial union filed with the Registrar,
as varied
in accordance with statements, if any, filed under section twenty-five of this Act before the date upon which the request was made,
is prima facie evidence that the persons shown in that copy register, as so varied, as the members of the industrial union, were, at the date on which the request was made, the members of the industrial union.

36N. (1) A person who, without lawful authority or excuse, in or in connection with an election for an office

(a) personates another person to secure a ballot paper to which the personator is not entitled, or personates another person for the purpose of voting;

Offences in connection with elections. Cf. C. & A. Cth., s. 96N. S. 36N added by No. 5 of 1952, s. 11.

- (b) destroys, defaces, alters, takes or otherwise interferes with a nomination paper, ballot paper or envelope;
 - (c) puts or delivers a ballot paper or other paper—
 - (i) into a ballot box or other ballot receptacle;
 - (ii) into the post; or
 - (iii) to a person receiving ballot papers for the purposes of the election;
 - (d) records a vote which he is not entitled to record;
 - (e) records more than one vote;
 - (f) forges or alters, knowing it to be forged, a nomination paper, ballot paper or envelope;
 - (g) supplies a ballot paper;
 - (h) obtains, or has in his possession, a ballot paper; or
 - (i) destroys, takes, opens or otherwise interferes with a ballot box,
- commits an offence against this Act.

(2) A person who, in or in connection with an election for an office,

- (a) threatens, offers or suggests violence, injury, punishment, damage, loss, disadvantage, or any form of intimidation for or on account of, or to induce—
 - (i) candidature or withdrawal of candidature;
 - (ii) a vote or an omission to vote;
 - (iii) support or opposition to a candidate; or
 - (iv) a promise of a vote, or an omission to vote, or of support for, or of opposition to a candidate; or

- (b) uses, causes, inflicts or procures violence, punishment, damage, loss, disadvantage, or any form of intimidation for or on account of any such candidature, withdrawal, vote, omission, support or opposition,

commits an offence against this Act.

(3) Penalty for an offence mentioned in this section: Fifty pounds or imprisonment for six months.

Division IV.—Jurisdiction to Order Submission of Matters to Secret Ballot.

[Div. IV.
added by
No. 5 of
1952, s. 11.]

36P. Where the Court thinks that the views of the members, or of a section or class of the members, of an industrial union or where registration of an industrial union has been cancelled, that the views of the persons or a section or class of the persons who were at the time of the cancellation members of the union upon a matter ought to be ascertained, the Court may order that that matter be submitted to a vote of those members, or of the members of that section or class, taken by secret ballot, with or without provision for absent voting, in accordance with directions given by the Court.

Court may
order secret
ballot.
Cf. C. & A.
Cth., s.
72 (b).
S. 36P added
by No. 5 of
1953, s. 11.

36Q. (1) The Court may make such orders as it thinks necessary for the effectual exercise of its powers and functions and the enforcement of its orders under this Division.

Enforce-
ment of
orders.
S. 36Q added
by No. 5 of
1952, s. 11.

(2) A person who refuses or fails to comply with an order of the Court under this Division or hinders or obstructs the carrying out of any such order commits an offence against this Act.

Penalty: Fifty pounds or imprisonment for six months.

36R. The Court may order that such steps shall be taken as are necessary to ensure that ballot papers, envelopes, lists and other documents used in connection with, or relevant to, a ballot ordered

Ballot
papers, etc.,
to be
preserved.
S. 36R added
by No. 3 of
1952, s. 11.

under section thirty-six P of this Act are preserved and kept at such place and for such period after the completion of the ballot, as the Court thinks fit.

Persons
having the
conduct of
ballots.
S. 36S added
by No. 5 of
1952, s. 11.

36S. (1) The Court may direct the Registrar to conduct the ballot or may direct other officers of the Court to do so, or direct the Registrar to make arrangements with the Chief Electoral Officer holding that office under the Electoral Act, 1907-1951¹, for the conduct of the ballot by an officer holding office under that Act.

Powers of
persons
having the
conduct of
ballots.

(2) Notwithstanding anything contained in the rules of the industrial union, the person conducting the ballot may take such action and give such directions as he considers necessary in order to ensure that no irregularities occur in or in connection with the ballot or to remedy procedural defects in those rules which appear to him to exist.

Disobedience
and
obstruction.

(3) A person who—

- (a) refuses or fails to comply with a direction given under subsection (2) of this section; or
- (b) obstructs or hinders—
 - (i) the person conducting the ballot or the taking of any action under subsection (2) of this section; or
 - (ii) any other person in the carrying out of a direction under subsection (2) of this section;

commits and offence against this Act.

Penalty: Fifty pounds or imprisonment for six months.

Validity of
ballots.

(4) A ballot conducted under this Division is not invalid by reason only of a breach of the rules of the industrial union, involved in anything done or omitted, or in compliance with a direction given, under this Division.

¹ Now Electoral Act, 1907-1953: See No. 34 of 1953 s. 1 (3).

- (5) (a) The expenses of a ballot conducted under this Division, but not including the salary of an officer of the State performing a duty in relation to the ballot, shall be borne by the industrial union concerned, unless in exercise of the authority conferred upon him by paragraph (b) of this subsection the Attorney General authorises payment of the expenses by the State. Expenses of ballots.
- (b) Where the Attorney General considers the circumstances justify him in doing so, he may authorise payment of all or part of those expenses by the State.
- (c) Authorisation by the Attorney General under this section of payment, is sufficient for appropriation of the payment from the Public Account.

(6) Where an order is made for taking a ballot under section thirty-six P of this section, the copy of the register of members of the industrial union concerned, filed with the Registrar, as varied in accordance with statements, if any, filed under section twenty-five of this Act before the date appointed by the order for taking the ballot, is prima facie evidence that the persons shown in that copy register, as so varied, as the members of the industrial union, were, at the date so appointed, members of the industrial union.

36T. (1) A person who, without lawful authority or excuse, in or in connection with a ballot under this Division

Offences in connection with ballots.
S. 36T added by No. 5 of 1952, s. 11.

- (a) personates another person to secure a ballot paper to which the personator is not entitled, or personates another person for the purpose of voting;
- (b) destroys, defaces, alters, takes or otherwise interferes with a ballot paper or envelope;
- (c) puts or delivers a ballot paper or other paper—
- (i) into a ballot box or other ballot receptacle;

- (ii) into the post; or
 - (iii) to a person receiving ballot papers for the purposes of the ballot;
 - (d) records a vote which he is not entitled to record;
 - (e) records more than one vote;
 - (f) forges or alters, knowing it to be forged, a ballot paper or envelope;
 - (g) supplies a ballot paper;
 - (h) obtains or has in his possession, a ballot paper; or
 - (i) destroys, takes, opens or otherwise interferes with a ballot box,
- commits an offence against this Act.

(2) A person who in or in connection with a ballot under this Division

- (a) threatens, offers, or suggests violence, injury, punishment, damage, loss, disadvantage, or any form of intimidation for or on account of, or to induce—
 - (i) a vote or omission to vote;
 - (ii) support or opposition to a view on the matter, the views of the members on which are to be ascertained by the ballot;
 - (iii) promise of a vote, or an omission to vote, or of support for, or of opposition to such a view; or
- (b) uses, causes, inflicts or procures violence, punishment, damage, loss, disadvantage, or any form of intimidation, for or on account of any such vote, omission, support or opposition,

commits an offence against this Act.

(3) Penalty for an offence mentioned in this section: Fifty pounds or imprisonment for six months.

36U. The provisions of sections thirty-six Q to thirty-six T both inclusive of this Act do not derogate from the generality of the power conferred upon the Court by section thirty-six P of this Act to direct how the secret ballot is to be taken.

Saving of the powers conferred by s. 36P. S. 36U added by No. 5 of 1952, s. 11.

PART III.—INDUSTRIAL AGREEMENTS.

37. (1) Any industrial union or association of workers or employers may make an agreement in writing for the prevention or settlement of an industrial dispute or relating to any industrial matter. Every such agreement shall be made between an industrial union or association of workers, of the one part, and an industrial union or association of employers or some specified employer or employers, of the other part.

Industrial agreements may be made. No. 57 of 1912, s. 35.

(2) Every industrial agreement shall be for a term to be specified therein, not exceeding three years from the date of the making thereof and shall commence as follows: "This agreement, made in pursuance of 'The Industrial Arbitration Act, 1912,' this day of Between ," and then the matters agreed upon shall be set out.

Term and form of agreement.

[See No. 5 of 1952, s. 1 (3).]

(3) An agreement shall be limited in its effect to the particular locality therein specified.

(4) The date of the making of the agreement shall be the date on which it is first executed by any party thereto; and such date, and the names of all the original parties thereto, shall be truly stated therein.

Date of agreement.

S.37. Compare section 28 of the New Zealand Act.

The Court is in no way concerned with the making of industrial agreements and will assume no responsibility for their contents. (See in re Kalgoorlie and Boulder Shop Assistants (1920) 1 W.A.I.G. 52. And Hotel, Club, Caterers' Union v. Spurge, F. C. (1929), 9 W.A.I.G. 248.)

(1) Unlike an employer, an individual worker cannot be a party to an industrial agreement.

(2) The term of three years must be computed from the date of the making of the agreement, and not from some future date. (See in re Gisborne Waterside Workers (1912), 14 G.L.R. 711.)

(3) The fact that no locality is specified is fatal to an application under section 42 (post) to make the agreement a common rule. (See in re Agricultural Implements Agreement (1914), 13 W.A.A.R. 92.)

(4) In order to make any breach of an agreement punishable by fine, it is essential that the agreement shall truly state the date on which it is made. (See Inspector of Awards v. Wellington Slaughtermen's Union (1907), 9 G.L.R. 412.)

Agreement
to continue
in force for
parties not
retired.

(5) Notwithstanding the expiry of the term of an industrial agreement, it shall, subject to any award of the Court, continue in force in respect of all parties thereto, except those who retire therefrom.

Mode of
retirement.

(6) At any time after, or not more than thirty days before, the expiry of an industrial agreement any party thereto may file in the office of the Clerk of the Court a notice in the prescribed form signifying his intention to retire therefrom at the expiration of thirty days from the date of such filing, and such party shall on the expiration of that period cease to be a party to the agreement.

Duplicate
to be filed.
No. 57 of
1912, s. 36,
renumbered
as s. 35,
amended by
No. 5 of 1952,
s. 12.

38. (1) A duplicate original of every industrial agreement shall, within sixty days after the making thereof, be filed in the office of the Clerk of the Court.

(2) Every document purporting to be a copy of an industrial agreement shall (notwithstanding that no notice to produce the original has been given) be admissible in evidence in proof of the contents of the original, provided such copy be certified as a correct copy under the seal of the Court and the hand of the Clerk of the Court, and the production of such copy shall be *prima facie* evidence that the original agreement was duly executed in accordance with this Act in manner indicated in the copy, and that a duplicate has been duly filed as provided in this section.

Parties to
agreement
may be
added.
No. 57 of
1912, s. 37.

39. Whilst the industrial agreement is in force any industrial union or industrial association or employer may (with the consent of the original

(5), (6) At the expiration of the term of the agreement, the parties may retire, but see section 42 (post).

S.38. It has been held in New Zealand that an industrial agreement which has not been filed cannot be enforced. (*Inspector of Awards v. Wellington Slaughtermen* (1907), 9 G.L.R. 412 and *Pukemiro Collieries Ltd. v. Pukemiro Miners' Union* (1928), N.Z.L.R. 385, and compare section 28 (5) of New Zealand Act and section 40 (1) (post), especially words "duly filed.")

Such an agreement, although unenforceable as an industrial agreement under this Act, may constitute an enforceable contract between the parties thereto. (See *Beattie v. Duncan* (1922), N.Z.L.R. 1220.)

(2) A certified copy is *prima facie* evidence only, and is open to rebuttal. (See in re *Kalgoorlie and Boulder Shop Assistants* (1920), 1 W.A.I.G. 52.)

S.39. The agreement may "continue in force" after the expiration of the term. (See section 37 (5) ante.)

"with the consent of the original parties," this was inserted to prevent an employer concurring in an agreement with the object of preventing the union of workers securing better conditions by arbitration.

"prescribed form": See regulation 37 and Form 32.

parties to the agreement or their respective representatives) become party thereto by filing in the office wherein such agreement is filed a notice in the prescribed form, signifying concurrence with such agreement.

40. (1) Every industrial agreement duly filed shall except to the extent mentioned in subsection (2)¹ of section thirty or in section ninety-eight A of this Act be binding on the parties who execute the same or concur therein, and also on every member for the time being of any industrial union or industrial association which is party thereto, and also on every industrial union and every member for the time being of any industrial union which is for the time being represented on any such association.

On whom agreement binding.
No. 57 of 1912, s. 38, renumbered as s. 40, amended by No. 5 of 1952, s. 13 (a).

(2) The agreement shall except to the extent mentioned in subsection (2)¹ of section thirty or in section ninety-eight A of this Act also extend to and bind every worker who is at any time whilst it is in force employed by any employer on whom the agreement is binding.

(3) Industrial agreements shall be enforceable in manner provided by section one hundred of this Act, and not otherwise.

Enforcement of agreements.

¹ Subsec. (2) of s. 30 as proposed in clause 9 of the 1952 amending Bill was defeated in Committee in the Assembly: See Hansard Vol. 131 (1952) p. 377.

S.40. "duly filed": See section 38 (1) ante and New Zealand cases cited there, and also Federated Glass Founders Case ((1913) 7 C.A.R. 43).

"for the time being" refers to the time at which the action for enforcement is brought. If a member of an association, bound by an agreement, retires from that association, he thereby ceases to be bound by the terms of the agreement. Those who are bound are the members of the association (or union) for the time being, which means that if at any time you desire to ascertain whether a particular person is bound by the agreement you must find out whether he is at that time a member of the association. If so, he is bound. If he is not a member, he is not bound. Thus new members of an association or union, who become members after the date of the agreement, become bound by that agreement and remain bound so long as they are members. If the contrary construction were correct (i.e., that "the time being" referred to the time of the making of the agreement) it would mean that neither the masters nor the men who become members of their respective unions after the date of the agreement would be bound and we would find a union of workers consisting of a number who are bound and a number that are not, and the same position would exist in an association of masters. (See W.A. Amalgamated Butchers' Union v. Anderson (1918), 14 W.A.A.R. 753, per Northmore, J. See also Dethridge, J., in H. V. McKay v. W.A. Arbitration Court, 28 C.A.R. 333 at p. 338.)

Agreements may be varied, renewed or cancelled. No. 57 of 1912, s. 39.

41. Every industrial agreement, made under this Act or the Acts hereby repealed, may be varied, renewed, or cancelled by any subsequent industrial agreement made by and between all the parties thereto, but so that no party shall be deprived of the benefit thereof by any subsequent industrial agreement to which he is not a party: Provided, however, that no industrial agreement with respect to which any powers conferred by the next succeeding section have been exercised shall be varied or cancelled without the leave of the Court.

Industrial agreement may be declared a common rule. No. 57 of 1912, s. 40, renumbered as s. 42, amended by No. 5 of 1952, s. 13 (b).

42. The Court may declare that any industrial agreement shall have the effect of an award, and be a common rule of any industry or industries to which it relates, and the agreement shall thereupon, except to the extent mentioned in subsection (2)¹ of section thirty or in section ninety-eight A of this Act; and subject as hereinafter provided, become

¹ See footnote 1 to s. 40 (1) ante.

Every individual member of a union is bound by the terms of an industrial agreement entered into by his union, and it would be an illegal act for such person to re-open the industrial dispute settled by agreement. (See *Hannans and Boulder Mining Employees' Union v. Great Boulder* (1904), 3 W.A.A.R. 91.)

It has been held that a purchaser, who enters the industry by buying a business from an employer who is bound by an industrial agreement, will also be bound by the agreement although he is not a party thereto. (See *Collie Coal Mines Ltd. v. Collie Miners' Union* (1910), 9 W.A.A.R. 136.)

(2) As *Burnside, J.*, pointed out in *Eastern Goldfields Butchers' Union v. Black* ((1913) 12 W.A.A.R. 14) the effect of this subsection is that a man may be bound by an agreement of which he has never heard.

(3) This subsection is restrictive and the manner of enforcement is strictly limited to that provided by section 100. (See *W.A. Typographical Union v. Daily News* (1922) 1 W.A.I.G. 80.) Section 100 when read in conjunction with section 99 (2) (3) (4) and (5) gives the Court power to impose a penalty but no power to order specific performance. See section 100 (post).

S.41. An industrial agreement can only be varied, renewed or cancelled by a subsequent industrial agreement made by and between all the parties thereto and in no other way. In the absence of any such agreement the Court has no power to vary or cancel the agreement. (See *Painters and Paperhangers' Union v. Metcher Bros.* (1903) 1 W.A.A.R. 125. In re *Kalgoorlie and Boulder Shop Assistants* (1920) 1 W.A.I.G. 52 and *Collie Federated Engine Drivers v. Collie Power Company* (1943) 23 W.A.I.G. 185.) If however, a matter subsequently arises which is not in any way dealt with by the agreement and is completely outside the agreement then it is open to either party to apply for an award restricted to that matter, such an award to be in force concurrently with and to be read together with the agreement (*Collie Federated Engine Drivers v. Collie Power Company* (1943) 23 W.A.I.G. 185, per *Dwyer, P.*).

There is a distinct implication contained in the proviso that an agreement which has been made a common rule can be varied or cancelled with the leave of the Court. (See section 42 post and *Metropolitan Wine and Spirit Employees v. Milne & Co.* (1937) 17 W.A.I.G. 304.)

S.42. The object of making an agreement a common rule is twofold—

(1) from the employers' point of view it prevents unfair competition from employers not covered by an award or parties to an agreement, and

binding on all employers and workers, whether members of an industrial union or association or not, engaged at any time during its currency in any such industry within the locality specified in the agreement:

Provided that before acting under this section the Court shall give all parties likely in its opinion to be affected, notice by advertisement or otherwise of its intention to extend the operation of such agreement, and shall hear any parties desiring to be heard in opposition thereto.

(2) from the workers' point of view it prevents other workers from undermining "the standard." (See *Hospital Employees' Union v. Perth Public Hospital* (1931) 11 W.A.I.G. 175.)

When made a common rule the parties cease to be acting under their agreement and are acting under compulsion. (See *Hotel Club Caterers' Union v. Spurge* (F.C.) (1929) 9 W.A.I.G. 248.) "The Court may declare." The power conferred on the Court is a discretionary one though the principles on which the discretion is to be exercised have not been revealed by the legislature. (See *Burnside, J., in re Kalgoorlie and Boulder Shop Assistants* (1920) 1 W.A.I.G. 52) Such discretion will only be exercised on the application of a party to the agreement.

Although the industrial agreement in no way represents the opinion of the Court, the Court should, before it declares it to be a common rule, be satisfied that the terms of the agreement are fair and equitable as regards the majority of the interest that are likely to be affected by the extension. It should also see that the agreement has been properly executed in accordance with the provisions of the Act, and that it is binding on the persons it purports to bind. (See *Burnside, J., in re Kalgoorlie and Boulder Shop Assistants* (1920) 1 W.A.I.G. 52.) The Court will require to be satisfied in the first place that all the requirements of the regulations—such as advertising—have been observed and in addition to this and without attempting to be exhaustive, the Court will require evidence as to the following matters:—

- (a) the locality to which the agreement relates;
- (b) the number of employers in the industry covered by the agreement;
- (c) the number of the employees in the industry covered by the agreement;
- (d) whether the agreement represents a majority of employees and/or employers;
- (e) whether the agreement contains any clauses which are beyond the jurisdiction of the Court to make or whether it contains clauses not capable of general application;
- (f) why it is desired to have the agreement made a common rule in preference to presenting a claim for an award in the normal way (*Coastal Dock, Rivers and Harbour Works Union v. Millars and Bunnings Shipbuilders* (1945) 25 W.A.I.G. 136).

Also that it is not in conflict with an extant award. (See *Electrical Trades Union v. Flemming* (1937) 17 W.A.I.G. 427.) The Court cannot make an agreement a common rule without at the same time assuming some responsibility for its contents. By making the agreement a common rule the Court thereby gives it "the stamp and character" of an award and all persons engaged in the industry included or covered by the agreement are bound. "When it is considered," said Dwyer, P., in *Hotel Club Caterers' Union v. J. J. Elliott* (1927) 7 W.A.I.G. 245) "what evidence is needed in awards and the care with which they are scrutinised one is struck with the necessity for the care and attention that should be given in making any agreement a common rule and thus giving it the stamp and character of an award. When an agreement has been registered in the Court *prima facie* it is such as would be reasonable to apply to others exercising the trade, calling or vocation of the parties mentioned and so ensure equal competition between the employers and equal conditions for the workers. In the ordinary course unless some very important principle is at stake or some apparent error has been made in an agreement an agreement will be given the effect of a common rule by the Court. If an objection is taken an opportunity is given to the objectors to be represented before the Court; and once the

Variation of agreement to conform with common rule. No. 57 of 1912, s. 41; inserted as s. 40a.; amended by No. 50 of 1925, s. 4.

43. The Court may order that any industrial agreement may be varied so far as it is inconsistent with an award or other industrial agreement in operation as a common rule, and such agreement shall be deemed to be amended or varied as the case may be and take effect accordingly.

objection is raised (not frivolous) to the making of an agreement a common rule, then the Court immediately has to consider the circumstances surrounding the making of that agreement and what that agreement contains."

"shall have the effect of an award . . . during its currency." Prior to the case of *Spurge v. Hotel Club Caterers' Union* ((1929) 32 W.A.L.R. 17) the words "during its currency" were understood to mean during the currency of the original agreement, so that when the term of the agreement had expired the parties reverted to the position that they were in before the declaration of the common rule. The agreement became an ordinary agreement once more from which the parties could retire under section 38 (5) and (6). This was the procedure which was followed by *Spurge*, the defendant in the above case; he had entered into an industrial agreement dated the 2nd June, 1925, and expressed to come into force and be operative for a term of three years from that date. On the 29th July, 1925, the agreement was made a common rule. On 9th July, 1928, *Spurge* filed a notice of his intention to retire. The Full Court (McMillan, C. J., Northmore, J., and Draper, J.) held that an agreement made a common rule could not be retired from. A common rule was to "have the effect of an award" and that being so it was subject to sections 92 and 93 (post), and the provision in that latter section, to the effect that after the expiration of the period specified in an award for its operation, the award shall continue in force until a new award is made, applies to an agreement made a common rule under this section. It was not necessary for this decision, nor did the Full Court decide—as suggested by Dwyer, P., in *Electrical Trades Union v. Thomsons Ltd.* ((1939) 19 W.A.I.G. 505 at p. 506) that an agreement declared to be a common rule should "be deemed TO BE an award." If the terms of the agreement in this case had been contained in an award the reciprocal rights and duties of the parties would have continued after 2nd June, 1928, and it would seem to follow that reciprocal rights and obligations under an agreement, which is to have the effect of an award, must continue for the same period. By the same reasoning if a party to an award has not the right to retire therefrom, a party to an agreement with the like effect, has no right to retire either.

The next case on this point was *McPhail v. Peake* (35 W.A.L.R. 65). In this case the union, party to an agreement which had been made a common rule, was deregistered, and it was held by the Full Court that there can be no industrial agreement with only one party and that therefore the industrial agreement and the common rule, ceased to exist when the industrial union was deregistered. Although the common rule was to have the effect of an award it remained dependent on the continued existence of the agreement because an agreement which had ceased to exist cannot be said to be current. Dwyer, J., said that as the agreement was to be a common rule and have the effect of an award only "during its currency" it was first of all necessary to ascertain the meaning of these words. At p. 67 (35 W.A.L.R. 65 and 67) he said, "I think it is impossible to doubt that the express term mentioned in the award or agreement was the period of its currency," the position with regard to awards has been altered but agreements have been left to remain in force during their currency. The term here had expired and the parties on each side no longer existed and it could not be said that the agreement was "current," and if not current the common rule erected on it must fall. This equation of "currency of the agreement" with the "express term of the agreement" is a hark back to the law as it was before *Spurge v. Hotel Club* 32 W.A.L.R. 17 and was not adopted by Northmore, C.J., or Draper, J., who based their judgment solely on the ground that one of the parties had ceased to exist. This case cannot be taken to overrule *Spurge's* case although Dwyer, J., certainly did not follow it and Dwyer, P., does not favour it. (See *Electrical Trades Union v. Thomsons Ltd.* (1939) 19 W.A.I.G. 505 at p. 506.) Nor can it, in view of the fact that section 30 was ignored, be taken as authority for the proposition it expressly purports to decide. It has been held to be no authority for the proposition that an agreement which has been made a common rule can be determined by one of the parties retiring from it (under section 37 (5) and (6) and leaving it unilateral. (See *Electrical Trades Union v. Thomsons Ltd.* ((1939) 19 W.A.I.G. 505 at p. 506.) *Spurge's* case does not imply that an agreement made a common rule can never be cancelled for it does not impinge upon the power conferred by implication in the proviso to section 41. The provision that a common rule agreement shall not be varied or cancelled without leave of the Court definitely implies that such variation or cancellation may be affected with such leave. *Metro-politan Wine and Spirit Employees v. Milne & Co.* (1937) 17 W.A.I.G. 304,

Electrical Trades Union v. Thomson (1939) 19 W.A.I.G. 505. Amalgamated Engineers Union v. Millars (1939) 18 W.A.I.G. 611. Hospital Employees v. Perth Public Hospital (1931) 11 W.A.I.G. 175 (contra).

"Engaged . . . in any such industry." These words have been the subject of much judicial interpretation. In the *Coastal Painters' Union v. Withnell* ((1913) 12 W.A.A.R. 107), W employed a man to do odd jobs which included painting and paid him at a rate which was less than the rate laid down in the Painters' Award. It was held that W was not bound by the award as he was not engaged in the painting industry. The industry, it was held, must be the employer's industry, and one in which the employer was engaged for profit. The word industry was not used here to mean the vocation of the worker.

This case was followed by the *Coastal Painters' Union v. W.A. Turf Club* ((1915), 14 W.A.A.R. 740). In this case the club was repairing its grounds and employed painters, paying them less than the award rate. Northmore, J., held that the word "industry" as used in this section meant the trade, business or manufacture carried on by the employer, and that, therefore, an employer engaged in the painting industry meant an employer whose business or trade is that of a painter. The lay members of the Court (Daglish and Somerville) held that the club was bound—the former distinguishing this case from *Withnell's* case on the ground that the race club were maintaining a building used in connection with its business. The effect of this decision was that an award became binding on an employer who, in the course of his business, engaged any worker who exercised the trade covered by the award. Thus a master butcher who employed a plumber to patch his business premises would be said to be engaged in the plumbing industry and be bound by the plumbers' award. (See *Northmore, J., in Amalgamated Society of Engineers v. Sandover* (1916), 14 W.A.A.R. 744. Also *W.A. Carters' Union v. St. John's Ambulance* (1926) 6 W.A.I.G. 134, and *Printing Employees' Union v. Felton, Grimwade & Bickford* (1924), 4 W.A.I.G. 181. *Coastal District Engineers v. W.A. Airways* (1923), 5 W.A.I.G. 88, *Amalgamated Engineers v. Humphrey* (1927), 6 W.A.I.G. 277.)

These cases were overruled by the Full Court in the now leading case of the *Amalgamated Engineers v. Parker & Son* ((1926), 6 W.A.I.G. 377). Burnside, J., said there—

The word "industry" is used in many ways in the Act. The object of the Legislature was to enable agreements to be so made as to ensure that the interests of persons mutually engaged should be protected or given furtherance to THE COMMON OBJECT WHICH IT IS SOUGHT TO ATTAIN BY THE COMBINED EFFORTS OF THE EMPLOYER AND WORKER INDICATES THE INDUSTRY IN WHICH THEY ARE ENGAGED. If that object be the making of bricks, then that industry is brickmaking, and that is the industry to which the agreement relates. Unless that common object be the determining factor, then it is impossible to define the industry to which the agreement relates.

This decision reversed the tendency noticeable in the decisions to construe the word "industry," as used in this section, as the vocation of the worker. The test to be applied in every case is to ascertain the interests of the persons MUTUALLY engaged in the industry, and in every case the parties to the agreement have to be looked to to ascertain what are the mutual interests of these parties. Looked at from the other side, from the side of procedure, it is now necessary for any union of workers to find, as parties to be bound by the agreement, such persons, companies or firms as are typical of the various industries which they desire to include within the ambit of the common rule. (See *Amalgamated Road Transport Union v. Fletcher* (1927), 7 W.A.I.G. 156, and for examples of the application of this principle see *Hotel Club Caterers' Union v. Weiss* (1929) 9 W.A.I.G. 163 and 248; *Hotel Club Caterers' Union v. Y.M.C.A.* (1929), 9 W.A.I.G. 351; *W.A. Branch Australasian Meat Employees v. Elder Smith* (1930), 10 W.A.I.G. 174; *Metro-politan Shop Assistants v. Westralian Auto Service* (1930), 10 W.A.I.G. 174; *Amalgamated Road Transport v. Keough* (1931), 11 W.A.I.G. 263; *Amalgamated Road Transport v. Adams* (1937), 17 W.A.I.G. 326; *W.A. Clothing Union v. Ball* (1941), 21 W.A.I.G. 160; *United Furniture Trades Union v. Norman* (1941), 21 W.A.I.G. 286.)

It is not essential that the business should be identical in all respects with the business carried on by the representative employers, but it should be substantially of the same type. (See *Amalgamated Road Transport v. Keough* (1931), 11 W.A.I.G. 263.)

If the process carried on by a worker is provided for by two awards, he will be bound by that award which is more appropriate to the undertaking of his employer. (See *W.A. Branch of the Australasian Meat Industry Employees v. Elder Smith & Co.* (1930), 10 W.A.I.G. 174.)

"Locality": The Court has now power to exclude any person or institution from the operation of an agreement which has been made a common rule. The only way in which this could be done would be to mark out the "locality" in such a way as to exclude the area where the operations of the body desired to be excluded are carried on. (See *Trained Nurses' Association Award* (1935), 15 W.A.I.G. 236.) If no locality is specified in the agreement, it cannot be made a common rule. (See in re *Agricultural Implements Agreement* (1914), 13 W.A.A.R. 92.)

PART IV.—THE COURT OF ARBITRATION.

Division I.—Constitution of Court.

Court of
Arbitration.
No. 57 of
1912, s. 42.

44. There shall be one Court of Arbitration for the whole State with the jurisdiction and authority conferred by this Act.

The Court shall be a Court of Record, and have a Seal, which shall be judicially noticed in all Courts of Justice, and for all purposes.

Members
of Court.
No. 57 of
1912, s. 43.
Amended by
No. 50 of
1925, s. 5*

45. The Court shall consist of three members appointed by the Governor. One member shall be appointed on the recommendation of the industrial unions of employers and one on the recommendation of the industrial unions of workers, as provided by section forty-seven, and the third member shall be a person qualified to be appointed a Judge of the Supreme Court, appointed as hereinafter provided by the Governor to act in that behalf. Such third member shall be the President of the Court. The other members shall be called ordinary members.

Provision
in case of
illness or
absence of
member.
No. 57 of
1912, s. 44.
(Amended
by No. 45 of
1920, s. 2,
and No. 50
of 1925, s. 6.)
Renumbered
as s. 46 and
amended by
No. 5 of
1952, s. 14.

46. In the case of the illness or absence of the President at any time, the Governor shall nominate a person qualified as aforesaid to act as President during such illness or absence; and may from time to time appoint a Judge as deputy President of the Court, and in that capacity to exercise the powers and functions of the President. And in case of the absence of a member of the Court other than the President, by reason of illness or other cause, the Governor may appoint such other person as he may think fit to fill his place during such absence. Provided that a person so appointed may continue to fill that place until he has completed all inquiries commenced before him.

* The amendment of this section has effect from 7th April, 1925. See No. 50 of 1925, s. 5, subsec. (2).

S.45. "by the Governor": See section 23 of Interpretation Act (No. 30 of 1918).

Industrial associations are not entitled to recommend the appointment of a member of the Court. See proviso to section 34 ante.

Qualifications of a Supreme Court Judge are set out in section 8 of the Supreme Court Act (No. 36 of 1935). He must be either—

- (a) a practitioner as defined by the Legal Practitioners Act, 1893, of not less than eight years' standing and practice, or
- (b) a practising barrister of the English Bar, or of the High Court of Australia, of not less than eight years' standing.

47. Each industrial union may, within one month after being requested so to do by the Registrar, recommend to the Governor in the prescribed manner the name of one person, and from such names the Governor shall select two members, one from the persons recommended by the industrial unions of employers, and one from the persons recommended by the industrial unions of workers.

Appointment of members on recommendation.
No. 57 of 1912, s. 45.

48. If either division of industrial unions fails or neglects to make a recommendation within the aforesaid period, the Governor may thereafter appoint a person to be a member of the Court; and such member shall be deemed to be appointed on the recommendation of the said division of industrial unions.

Procedure in default of recommendation.
No. 57 of 1912, s. 46.

49. Forthwith after a full Court has been appointed, the names of the members shall be notified in the *Gazette*, and such notification shall be final and conclusive for all purposes.

Notification of appointments.
No. 57 of 1912, s. 47.

50. (1) The tenure of office of the President shall be the same as in the case of a Judge of the Supreme Court; and he shall be entitled to all rights and privileges of a Judge, including pension:

Tenure of office.
No. 57 of 1912, s. 48.
No. 50 of 1925, s. 7.

Provided that a President shall not continue in office after he shall have attained the age of seventy years.

(2) Each ordinary member of the Court shall be appointed for a period of five years and until the appointment of his successor.

Amended by No. 46 of 1948.*

(3) Each ordinary member of the Court shall be eligible for re-appointment.

(4) In the event of the period of office of the ordinary members of the Court expiring during the period of any investigation on which the Court has entered, the Governor may continue them in office for such time as may be necessary to enable them to take part in the completion of the matter.

* The amendment of this subsection, assented to 7th January, 1949, provided that it should apply only to future appointments under the said section.

Salaries.
No. 57 of
1912, s. 49,
amended by
No. 50 of
1925, s. 8.

51. The President shall receive a salary equal to that of a Judge of the Supreme Court, and each ordinary member of the Court shall receive such salary (not being less than £600 per annum) as shall be fixed from time to time by the Governor, and all such salaries shall be paid out of the Consolidated Revenue Fund.

Appropriation.
No. 57 of
1912, s. 50.

52. This Act shall be deemed a permanent appropriation of the salaries of the members of the Court.

Existing
Court and
members
continued.
No. 57 of
1912, s. 51.

53. With respect to the court constituted under the Industrial Conciliation and Arbitration Act, 1902, the following provisions shall apply—

- (a) It shall be deemed to be the Court under this Act.
- (b) The President and the other members thereof shall be deemed to have been appointed as President and ordinary members respectively under this Act, and the terms of office of such ordinary members shall be calculated from the seventh day of July, nineteen hundred and eleven.

Resignation
of member.
No. 57 of
1912, s. 52.

54. Any member of the Court may resign his office by writing under his hand addressed to the Governor, and thereupon the office shall become vacant.

Disqualifi-
cations for
membership.
No. 57 of
1912, s. 53.

55. Any person who—

- (a) is an alien; or
- (b) is an undischarged bankrupt; or
- (c) is of unsound mind,

shall be incapable of being appointed a member of the Court.

Power of
removal by
Governor.
No. 57 of
1912, s. 54.
Amended by
No. 50 of
1925, s. 8.

56. The Governor may remove any member of the Court from office who—

- (a) Becomes subject to any of the disabilities mentioned in the last preceding section; or

- (b) Accepts, whether by assignment, composition, or otherwise, any such relief as is afforded by law to bankrupt or insolvent debtors; or
- (c) Is proved to be guilty of inciting any industrial union or any worker or employer to commit any breach of an industrial agreement or award; or
- (d) Is absent without reasonable cause from three consecutive sittings of the Court;

and every vacancy thereby caused shall be deemed to be a casual vacancy.

57. The Governor may also remove from office the President or any ordinary member on an address from both Houses of Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity.

Removal on address of Parliament.
No. 57 of 1912, s. 55.

58. (1) Every casual vacancy in the office of an ordinary member of the Court shall be supplied in the same way as an original appointment was made, and the foregoing provisions shall, *mutatis mutandis*, be applied accordingly.

Mode of filling casual vacancies.
No. 57 of 1912, s. 56.

(2) Every person appointed to fill a casual vacancy hereunder shall hold office only for the residue of the term of his predecessor.

59. Before entering upon their offices the members of the Court shall make oath before a Judge of the Supreme Court that they will faithfully and impartially perform the duties of their respective offices, and that they will not, except in the discharge of their duties, disclose to any person any evidence or other matter brought before the Court.

Oath of office and secrecy.
No. 57 of 1912, s. 57.
Amended by No. 50 of 1925, s. 11.

60. (1) The Governor may appoint such Clerk and other officers of the Court as he thinks necessary. Such Clerk and officers shall hold office during pleasure, and receive such salary or other remuneration as the Governor thinks fit.

Clerk and officers of Court may be appointed.
No. 57 of 1912, s. 58.

S.57. The tenure of the President is otherwise during good behaviour. (See section 50 (1) ante and section 9 (1) of the Supreme Court Act (No. 36 of 1935).)

(2) The duties of the Clerk of the Court, and of all other officers thereof, shall be as prescribed and also as directed by the Court or President.

Division II.—Jurisdiction and Procedure of Court.

Jurisdiction.
No. 57 of
1912, s. 59,
inserted by
No. 50 of
1925, s. 12,
renumbered
as s. 61 and
amended by
No. 5 of
1952 s. 15.

61. The Court shall have jurisdiction—

- (a) on its own motion to deal with and determine all industrial matters, and to prevent, settle, and determine all industrial disputes, pursuant to this Act, irrespective of whether the parties to any dispute are registered industrial unions or not, if the dispute has caused a cessation of work:

Provided that where there is a registered industrial union of workers connected with the calling to which the industrial matter or dispute relates, such industrial union shall be a party to the proceedings, and the award shall be made and issued with reference to such union;

S.61. General.—The Court is a statutory Court and its jurisdiction is limited by the statute which created it. It cannot by any legal process give itself jurisdiction over any matter which the Legislature has not authorised it to deal with, and thus any attempt to deal with matters which are not "industrial matters" is *pro tanto* beyond the jurisdiction of the Court. (See in re Frieze (1909), 8 W.A.A.R. 5, per Parker, J., at p. 8.)

If the Court's jurisdiction is challenged the Court must inquire into the facts to ascertain whether the challenge can be substantiated. If the matter is *prima facie* within the jurisdiction of the Court and is not challenged then the Court need make no inquiries. (See Burnside J., in Metropolitan Shop Assistants' Union v. Foy & Gibson Ltd. (1912) 11 W.A.A.R. 113 at p. 119.) Jurisdiction cannot be established by consent but the parties may admit the existence of facts from which the Court can infer that jurisdiction exists. (See Burnside J., in Fremantle Certificated Engine Drivers v. Fremantle Municipal Tramways (1910) 9 W.A.A.R. 24 at p. 27.)

As to control exercised by the Supreme Court over the Arbitration Court in the matter of jurisdiction, see section 108 (post) and the Master Builders' case (1938) 18 W.A.I.G. 615). The State Court has no jurisdiction over matters which are within the competence of the Commonwealth and which have been dealt with by that Court. (See the Constitutional Position (ante).)

(a) This subsection deals with the jurisdiction which the Court may exercise on its own motion. Firstly the Court is given power on its own motion to deal with and determine "all industrial matters." An expression which must be read down to mean "all industrial matters other than industrial matters in the coal industry." See: Mining Act Amendment Act, 1948. This is wider than a jurisdiction which is limited merely to the settling of disputes, and would include a power to determine industrial problems which fall short of being industrial disputes. As to the distinction between a "problem" and a "dispute" see Latham, C.J., in ex parte Kirsch (60 C.L.R. 507 at p. 523). The remarks of Brown, P., in the Cardboard Box Makers' case (1919) 2 S.A.I.R. 247) when considering a grant of jurisdiction to the South Australian Court in similar terms (see sections 9 and 13 of South Australian Arbitration Act, 1912) may be applied to this section. He said there, at p. 250, "I limit myself to the remark that, while there can be no dispute save as to an industrial matter, the definition of 'industrial matter' is not limited in terms to subjects as to which there has been a threatened impending or probable dispute. If we take the plain language of the Act, the apparent intention of the legislature was to give the Court jurisdiction, not only over industrial disputes, but over industrial matters, even where there has been no dispute—threatened impending or probable."

Secondly, the Court may of its own motion settle and prevent disputes, irrespective of whether the parties thereto are registered or not, if the dispute has caused a cessation of work. It is difficult to see how a dispute which has already caused a cessation of work can be prevented. It would

(b) to settle and determine—

- (i) all industrial matters and disputes referred to it by any party or parties under this Act;
 - (ii) all industrial matters and disputes as to which the President has held a conference under section one hundred and seventy-one, and so far as no agreement has been reached, and which the President has referred to the Court; and
 - (iii) all industrial matters and disputes as to which a conference has been held under section one hundred and seventy-two and so far as no agreement has been reached, and which the commissioners have referred to the Court.
- (c) to determine and declare in a particular case that a cessation or limitation of work, or refusal to work, or a refusal or neglect to offer for or accept employment, does not constitute a strike;
- (d) from time to time to make declarations for the purposes of paragraph (e) of the definition of "office".

Para. (c)
added by
No. 5 of
1952, s. 15.

Para. (d)
added by
No. 5 of
1952, s. 15.

appear to be more a question of cure. Quære whether "if the dispute has caused a cessation of work" qualifies the whole of this grant with respect to disputes or merely the power of the Court to settle disputes in which unregistered societies are implicated.

(b) This subsection deals with the Court's jurisdiction over matters which have been referred to it. The Court's jurisdiction is not limited to disputes but extends to "all industrial matters." (See (a) above.) In this respect the State Court's jurisdiction is far wider than that of the Commonwealth Court. It would appear that this Act does, while the Commonwealth Act does not, permit the parties to say to the Court, "Here is an industrial problem. We are not in dispute about it, but we ask you to find a solution and put the solution into an award." (Per Latham, C.J., in *ex parte Kirsh* (60 C.L.R. 507 at p. 423).)

Cases, such as the *Coastal Operative Pastrycooks v. W. Berry* ((1910) 9 W.A.A.R. 242) which decided that the existence of a dispute was a condition precedent to the jurisdiction of the Court, were decided before the words "all industrial matters" were included in this section. (See section 12 of the Industrial Arbitration Amendment Act, 1925 (No. 50 of 1925) and it is submitted that the dictum of Mr. President Dwyer in *A.W.U. (Goldfields Branch) v. Goldfields Firewood Supply Limited* ((1944) 24 W.A.I.G. 185) namely that "in order that the Court may act there must be a dispute in the first place" is not good law. But see *Hotel Club Caterers Award* (1949) 29 W.A.I.G. 593.

It should be noted that the Court has also, with leave of the President a jurisdiction to review any decision given by the Coal Industry Tribunal. See section 323 of the Mining Act, 1904-1948. This section provides not for an appeal to the Court but for a review by way of a rehearing.

For the principles upon which the President will grant leave to review see *Amalgamated Collieries of W.A. Ltd. v. Coal Miners Union* (1952) 32 W.A.I.G. 334.

The Court is also a Court of Appeal from the decisions of the Western Australian Coal Industry Tribunal constituted under the Mining Act Amendment Act of 1948.

Para. (e)
added by
No. 5 of
No. 52, s. 15.

- (e) to exercise powers conferred by any other section of this Act but not expressly mentioned in this section.

Industrial
disputes
in related
industries.
No. 57 of
1912, s. 60.

62. (1) An industrial dispute may relate either to any industry in which the party by whom the dispute is referred for settlement to the Court as hereinafter provided is engaged, concerned, or interested, or to any industry or industries related thereto.

(2) An industry or industries shall be deemed to be related to another where both or all are branches of the same trade (as, for example, bricklaying, masonry, carpentering and painting are branches of the building trade), or are so connected that industrial matters relating to the one may affect the other.

Jurisdiction
not affected
by fact that
no member
of union is
concerned
in dispute.
No. 57 of
1912, s. 61.

63. When an industrial union of workers is party to an industrial dispute, the jurisdiction of the Court to deal with the dispute shall not be affected by reason merely that no member of the union is employed by any party to the dispute or is personally concerned in the dispute.

S.63. Prior to the insertion of this section in 1912 (see section 60 of No. 57 of 1912) it was held that an industrial dispute could only exist between persons who were in actual contractual (master and servant) relationship with one another and that a union could not refer to the Court a dispute between an employer and workmen, none of whom were members of the union. The classic enunciation of this doctrine is to be found in *ex parte Brown* ((1906) 5 A.R. (N.S.W.) 71) per Griffiths, C.J., at p. 76. He said there:—

But if the union has nothing to do with the particular employees who are parties to the dispute, what interest, in the legal sense, has it in the dispute? How can it be said that it as plaintiff has any legal interest in the matter? . . . I think the union was not entitled to create an industrial dispute between an employer and employee
WITH WHOM THEY HAVE NO CONNECTION.

For application of the same doctrine to this Act, see *Eastern Goldfields Amalgamated Tailors* (1907) 6 W.A.A.R. 24; *Coastal Saddlers' Union v. Master Saddlers* (1909), 8 W.A.A.R. 12; *Barmaids and Barmen's Case* (1911), 10 W.A.A.R. 112; the *Timber Hewers Case*, 22 W.A.L.R. 22.

Under this section the fact that the employer is employing workmen in an industry over which the union has jurisdiction is sufficient to give that union an "interest" in the conditions on which these workers are being employed. The nexus between the union and the employer is the industry itself. The constitution of the union must, however, be wide enough to embrace the persons as to whose conditions the dispute exists. (See *Coastal Operative Pastrycooks v. Master Pastrycooks* (1931), 11 W.A.I.G. 172.)

But it is not necessary that the dispute should exist between persons who stand in the relationship of master and servant to each other. "The employer may," said Burnside, J., in *re Coastal Districts Clerks Union* ((1914), 13 W.A.A.R. 39, at p. 43), "be employing NON-UNIONISTS ONLY, and the terms of the employment MAY BE MUTUALLY SATISFACTORY; nevertheless the right of the union to interfere and invoke the assistance of the Court exists." (Compare section 107 of the New Zealand Act and see *Cromwell Colliery Co.'s Case* (1906), 25 N.Z.L.R. 986).

64. The Court shall have jurisdiction to determine whether any matter referred to it is an industrial dispute, and any finding by the Court that a matter referred to it is or is not an industrial dispute shall be final and conclusive, and shall not be questioned in the Supreme or any other Court.

Decision that matter is an industrial dispute conclusive. No. 57 of 1912, s. 62.

65. (1) At any time after an industrial dispute has been referred into the Court by any party, or when in the course of a hearing, investigation, or inquiry into any industrial dispute (including any compulsory conference), the Court or the President, as the case may be, shall make all such suggestions and do all such things as appear to be right and proper for dealing with the cause or bringing about the settlement of the dispute by amicable agreement.

Conciliation. No. 57 of 1912, s. 63; No. 50 of 1925, s. 13. No. 51 of 1941, s. 3.

(2) If an agreement is arrived at a memorandum of its terms shall be made in writing and certified by the President, and such memorandum shall be filed in the office of the Clerk of the Court, and unless otherwise ordered and subject as may be directed by the Court shall have the same effect as and be deemed to be an award of the Court:

S.64. The object of this section was to make absolute the provision in section 108 to the effect that, except in so far as the proviso to that section applied, the decisions of the Court of Arbitration should be unimpeachable. "If the Court of Arbitration mistake the intention of the Legislature it is for the Legislature to intervene and express its intention more clearly, or take away the immunity of the Court of Arbitration from appeal so far as awards are concerned, prohibition will not lie to the Arbitration Court at all." (Per Northmore, J., in *re the Master Builders* (1938), 18 W.A.I.G. 615) Dwyer J., in the same case, at page 616 said that if the existence of an industrial dispute depends on findings of fact, prohibition will not be granted, "and if it depends on an interpretation of the words of the Statute it cannot be granted unless the claim and the refusal must OF NECESSITY be regarded in every way foreign to and quite lacking in all elements of an industrial dispute, and the action of the Arbitration Court in dealing with it as being an arbitrary and unwarranted usurpation of authority in a matter in which it has no concern."

McMillan, C.J., in *Faulding & Co. v. Coastal Districts Clerks' Union* (1936), 16 W.A.I.R. 32) held that the word "finding" meant a finding of fact, and that if there was any evidence before the Court of Arbitration to support such a finding the Supreme Court had no power to decide as to its sufficiency, but a finding that an industrial dispute was in existence, if there were no EVIDENCE to support it, may be reviewed by the Supreme Court. (See section 108 post.)

S.65. (1) See subsection 1 (ante) re conciliation.

As to a compulsory conference, see section 171 post.

(2) Although the agreement subject to the operation of this section is not only to "have the same effect" as an award, but is also "to be deemed to be an award" (contrast the position under section 42 above), and is therefore subject to the provisions of section 92 (post), yet the power to vary contained in that section will not be exercised by the Court lightly. The terms of an agreement, entered into under this section, have only been settled after much discussion between the parties, they in all probability represent much in the way of compromise, and they will not be departed from except under exceptional circumstances. (See *Amalgamated Road Transport Union v. Australian Glass Manufacturers* (1940), 20 W.A.I.G. 483; *The Civil Service Association v. The Public Service Commissioner* (1948), 28 W.A.I.G.)

Provided that before any such memorandum of the terms of agreement is certified, all industrial unions that in the opinion of the President may be affected thereby shall be notified, and shall be afforded the opportunity of being heard.

Reference of
dispute to
Court.

No. 57 of
1912, s. 64.

No. 50 of
1925, s. 14.

66. (1) An industrial dispute may, subject to this Act, be referred to the Court in the prescribed manner by a commissioner or the party or parties or a majority of the parties on the one side or the other.

(2) Should any question arise as to whether all or a majority of such parties on one side or the other have agreed to such reference, the question shall be settled by the President upon summons under section seventy-five.

Representa-
tion of
parties
before
Court.

No. 57 of
1912, s. 65,
renumbered
as s. 67,
amended by
No. 5 of
1952, s. 16.

67. (1) Any employer, being a party to a reference or any other matter, may appear in person, or by his agent duly appointed in writing for that purpose.

(2) An industrial union or industrial association being a party to a reference or any other matter, may appear by its chairman or secretary, or by any person appointed in writing by the chairman, or in such other manner as the rules prescribe.

(3) Except as hereinafter provided, every party appearing by a representative shall be bound by the acts of such representative.

No. 50 of
1925, s. 15;
No. 5 of
1952, s. 16.

(4) (a) Except where this Act provides otherwise no legal practitioner, whether of this State or any other State, whether on the Rolls or not, or solicitor's clerk, shall be allowed to appear or be heard before

S.66. As to Commissioners, see section 172 post.

A dispute cannot be referred into Court by an agent, but only by a party or by a Commissioner. The agent has no authority or standing until the dispute is before the Court. (See section 67. Also see *Perth and Suburban Master Bakers v. W.A. Operative Bakers* (1932), 13 W.A.I.G. 27, per Dwyer, P., at page 28.)

S.67. (3) This subsection is declaratory of the common law. The actions of an agent cannot be repudiated. If the agent is not to the satisfaction of the union, that is a matter between the union and the agent. (See *Australian Saddlery Employees v. Hugo Fischer* (1912), 11 W.A.A.R. 180, per Burnside, J., at page 182. Compare section 79 of N.Z. Act.)

(4) Legal practitioners are excluded in an effort to avoid technicalities. (See section 69 post.)

"Or in any other State." (See *Coastal Paperhangers v. Metcher Bros.* (1902), 1 W.A.A.R. 84.)

"whether on the rolls or not." (See *Sawmillers Dispute* (1906), 5 W.A.A.R. 72.)

the Court or any industrial board, conciliation committee, or commissioners appointed under this Act in any capacity whatsoever, or to attend the Court or any industrial board, conciliation committee, or commissioners appointed under this Act to advise the representative of any party before the Court, or any industrial board, conciliation committee, or commissioners appointed under this Act, unless all the parties to the reference or other matter expressly consent thereto:

(b) When the Court is sitting for the trial of any offence, counsel or solicitor shall be entitled to appear and be heard before the Court on behalf of the prosecution or of the defence with all the powers of a counsel or solicitor appearing on the trial of an offence in a court of summary jurisdiction.

(c) Where a question of law is raised or argued or is likely, in the opinion of the Court to be raised or argued, in proceedings before it, the Court may allow legal practitioners to appear and be heard.

Para. (c)
added by
No. 5 of
1952, s.
16 (c).

68. The Crown may, where, in the opinion of the Minister, a State industry is or is likely to be affected by the award, order, decision, or determination of

Intervention
of Crown.
No. 57 of
1912, s. 66.
No. 50 of
1925, s. 16.

It has on numerous occasions been held, although nowhere reported, that legal practitioners have a right as such to appear before the President.

"In any capacity whatsoever." (See *Millars v. Yarloop Timber Union* (1902), 1 W.A.A.R. 30; *Millars v. Yarloop Timber Union* (1905), 4 W.A.A.R. 118; re *Nicholson* (1905), 4 W.A.A.R. 171; re *Nicholson* (1906), 5 W.A.A.R. 1; re *Nicholson* (1906), 5 C.L.R. 47; *Sawmillers' Dispute* (1906), 5 W.A.A.R. 73; *Metropolitan and South-West Engine Drivers' Union v. Timber Corporation* (1910), 9 W.A.A.R. 11; *Amalgamated Timber Workers v. Millars*, 12 W.A.A.R. 157.

"to advise the representative of any party before the Court." (See *Carpenters' Union v. Coombe Wood & Co.* (1902), 1 W.A.A.R. 13; *S.W. District Bookbinders' Union v. E. S. Wigg & Co.* (1908), 7 W.A.A.R. 7; *Coastal Pastrycooks' Union v. Albany Bell* (1911), 10 W.A.A.R. 80, at page 82; *Millars v. Yarloop* (1902), 1 W.A.A.R. 30.)

Proviso to subsection (4).—An application for the enforcement of an award is an application charging the defendant named with an offence within the meaning of this proviso and therefore both the complainant and the defendant have the right to be represented before the Court by counsel or solicitor. (See *Hotel Club Caterers' Union v. Fanourios* (1913), 12 W.A.A.R. 63.) And the right to representation is the same, whether the case is dealt with by the Court under section 101 or by an Industrial Magistrate under section 103. The fact that during the conduct of the proceedings before the Industrial Magistrate the latter may, prior to the amending Act (No. 42 of 1948), have found it necessary to refer a "question for interpretation" to the Court did not alter the nature of the action, which remained one for the trial of an offence. The reference changed the personnel of the Court, but the proceedings themselves were one and indivisible. (See *Amalgamated Engineers' Union v. Commissioner of Railways* (1940), 19 W.A.I.G. 502, per *Dwyer, P.*, at page 503.)

The Court is not able to order costs for the services of any "counsel, solicitor, or agent." (See section 71 (ii) post.) The Court encourages the use of legal practitioners for the settlement of purely legal matters (in re *Commissioner of Railways* (1927), 6 W.A.I.G. 229.)

S.68. (*Federated Clerks Union v. Commissioners of the Harbour Trust* (1945), 25 W.A.I.G. 51.)

the Court, intervene in any proceeding before the Court, and make such representations as may be thought necessary in order to safeguard the public interest.

Court to
decide
according
to equity
and good
conscience.
No. 57 of
1912, s. 67.

69. (1) In the hearing and determination of every industrial dispute the Court or President shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its or his mind on the matter in such a way as it or he thinks just.

S.69. (1) "equity, good conscience." Burnside, J., in *The Metropolitan Shop Assistants' Union v. Foy & Gibson Ltd.* ((1912) 11 W.A.A.R. 113) doubted if these words were capable of definite meaning. He understood them to mean that the Court and the President were to act on their common sense. If they have any meaning, it is entirely subjective. "That good conscience is my good conscience," per Parker, J., in *Perth and Fremantle Bread Carters' Union* (1903 2 W.A.A.R. 71).

"and shall not be bound by any rules of evidence." The confusion that would arise, and at times did arise, from the disregard of the rules of evidence was referred to by Burnside, J., on many occasions. In the *Bunbury Engine Drivers' Union v. Millars* ((1910) 9 W.A.A.R. 219, at p. 223) he said—

What we get here in the matter of examination and cross-examination is a complete travesty. The examination in chief generally consists in the examiner giving the whole of the evidence and the witness answering "yes" or "no." The suggestion comes from the examiner. The cross-examination consists of a weary repetition of the examination in chief from back to front, and the re-examination has as much to do with what went before as the flowers which grow in the spring. . . . It is a most pronounced and unmitigated farce in my opinion.

And in *re W.A. Amalgamated Railway Employees' Union* (1905), 4 W.A.A.R. 154, at page 158—

There is no rule, no order and no principle whereby the procedure of that Court (i.e., the Arbitration Court) is regulated.

To avoid such confusion the Court has always discouraged the admission of evidence which is not "legal evidence."

Although the Court is not bound by rules of evidence, it will, for the sake of convenience, follow them in most cases. In the *Coastal District Timber Hewers' Union v. Millars* ((1906) 5 W.A.A.R. 93, at page 95), Burnside, J., said—

The Legislature did not mean the Court to accept the loosest form of evidence, but intended it to abide by the rules of evidence as nearly as possible, but not to the absolute technical rules of evidence. When you put forward a statement which is capable of being proved by the best evidence, I am inclined to think that we ought to get that best evidence. When this case is finished, I will insist on the rules of evidence and the proper practice as to examination and cross-examination of witnesses being followed.

Generally the best evidence should be produced, and although inferior evidence may be admitted (Parker, J., admitted hearsay in the *Timber Industry Dispute*) ((1905) 4 W.A.A.R. 171) it will not carry much weight. See Parker, J., in *Coastal Journeymen Butchers v. Albert & Co.* (1903) 2 W.A.A.R. 4 and *Coastal Timber Hewers' Union v. Millars* (above) per Burnside J., at p. 95 re admission of Hansard.)

The section does not, of course, affect the WEIGHT which the Court will attach to any particular piece of evidence. When considering the facts placed before the Court to establish the Court's jurisdiction prudence demands that regard should be paid to legal evidence only, for should the Court's jurisdiction be challenged in a higher court such court will only consider legal evidence. It would, therefore, be useless for the Arbitration Court to go outside the rules of legal evidence to establish its jurisdiction. (See *Metropolitan Shop Assistants' Union v. Foy & Gibson Ltd.* (1912) 11 W.A.A.R. 113, per Burnside, J., at p. 119. See also *Federated Engine Drivers v. B.H.P.* (1911) 12 C.L.R. 398 and *Country Retailers' case* (1937) 14 S.A.I.R. 38.)

(2) In granting relief or redress under this Act the Court shall not be restricted to the specific claims made or to the subject matter of the claim.

70. (1) The sittings of the Court shall be held at such time and place as may be from time to time fixed by the President, and sittings may be fixed either for a particular case or generally for all cases then before the Court and ripe for hearing, and it shall be the duty of the Clerk of the Court to give to each member of the Court, and also to all parties

Sittings of Court.
No. 57 of 1912, s. 68, (Amended by No. 50 of 1925, s. 17), re-numbered as s. 70 and amended by No. 5 of 1952, s. 17.

This distinction is of limited importance today in view of the limitation imposed upon the Supreme Court's power to grant prohibition. (See sections 64 and 108 and cases cited there.)

"Inform its mind . . . in such way as it thinks fit." The Court will not "chase" evidence and may refuse to make an award if sufficient evidence has not been placed before it. (See *Eastern Goldfields Butchers' Union v. G. Allen* (1908) 7 W.A.A.R. 155.) If evidence is presented by the applicant only, the Court will not make independent inquiries to ascertain whether that evidence is correct, but will make an award in the terms of the application. (See *Amalgamated Timber Workers v. Millars* (1913) 12 W.A.A.R. 157 at p. 168.) Burnside, J., in *Gwalla Miners' Union v. Sons of Gwalla Ltd.* at p. 193 refused to conjecture what the evidence might have been had the application been opposed; he said in that case, "I find it utterly impossible . . . to imagine what the evidence would be if it came before us." (1908) 7 W.A.A.R. 187.) The Court will take judicial notice of its own awards which have the effect of law. (See *Hotel, Club Caterers' Union v. Fanourios* (1913) 12 W.A.A.R. 63.)

When the Court is sitting for the trial of an offence the law of evidence should be administered strictly. (See *McMillan, C.J.*, in *Amalgamated Society of Engineers v. Hill* (1926) 6 W.A.I.G. 124. This subsection has no application to complaints before Industrial Magistrates or to application for enforcement before the Court. *Salvaris v. Hotel, Club Caterers' Union* (1953) 33 W.A.I.G. 219. Notice to inspect documents should always be given. (See *Perth and Fremantle Plumbers' Union v. Master Plumbers* (1903) 1 W.A.A.R. 160, and *Norseman Miners' Union v. Princess Royal Gold Mine* (1903) 3 W.A.A.R. 122.)

As to attitude of the New Zealand Court to a similar section 82 (j) in their Act. See *Seed v. Somerville* ((1904) 7 G.L.R. 199).

(2) In the *Amalgamated Engineers v. Forwood Down* ((1939) 19 W.A.I.G. 210) Dwyer, P., following the High Court decision of *ex parte Kirsch* (60 C.L.R. 507) and the case law generally surrounding section 38b of the Commonwealth Conciliation and Arbitration Act, overruled the dictum of Wolff, J., in the *Iron Trades Award* ((1938) 18 W.A.I.G. 344) and held that this subsection did not enable the Court to make an award extending to matters outside the ambit of the dispute. "It is a fundamental principle of arbitration," he said, at p. 211, "that in a dispute as to wages an award cannot be made which would give the worker a lesser amount of wages than the employer has definitely offered to give him in the issues before the Court." (See also *W.A. Timber Employees v. Millars* (1940) 19 W.A.I.G. 468. *A.W.U. (Goldfields Branch) v. Goldfields Firewood Supply Limited* (1944) 24 W.A.I.G. 185 and *Engine Drivers Award* (1950) 30 W.A.I.G. 505.)

The position taken up by Dwyer P., may be briefly put in the words of Rich, J., in *ex parte Kirsch* (60 C.L.R. 507 at p. 526)—"the log crystallises and makes definite the claims of the union."

It would appear doubtful whether Dwyer, P., was justified in applying the case law surrounding section 38b. of the Commonwealth Act to the interpretation of this subsection. The language in both cases is similar, but a close examination of the cases leads to the conclusion that section 38b has been read down and received a restrictive interpretation in an effort to keep it within the powers of the Commonwealth Parliament under section 51 (35) of the Constitution. The Commonwealth Court has only power with respect to "Industrial disputes" and this is an absolute limitation which Parliament cannot remove. The Courts have always been conscious of this limitation of legislative power and have construed section 38b in a way which prevents it from being held to be ultra vires. In the *Merchant Service Guild v. Commonwealth Steamships* (30 C.A.R. 593) Dethridge, C.J., at p. 595 said:—

In my opinion this Court has NO CONSTITUTIONAL POWER to adjudicate upon matters as to which no demand has been made by a party and this section (38B) SHOULD BE CONSTRUED ACCORDINGLY.

See also *Merchant Service Guild* (1950) 30 W.A.I.G. 404.

concerned, at least seven clear days' notice of the time and place of each sitting other than an adjourned sitting except where the Court is of opinion that urgency requires shorter notice, in which case the notice to be given shall be that fixed by the Court.

(2) The Court may be adjourned from time to time and from place to place—

- (a) by the President at any sitting thereof, or if the President is absent from such sitting, then by any other member present; or
- (b) if no member is present at the time fixed for the sitting by the Clerk of the Court; or
- (c) by the President at any time before the time fixed for the sitting.

(3) All industrial matters and disputes referred to the Court shall be listed and heard in the order in which the issues are settled, unless for a sufficient reason the Court shall otherwise direct.

71. The Court shall have power in any dispute or other matter before it—

- (i) to dismiss the dispute or other matter at any stage of the proceedings where it thinks the dispute or matter trivial;

Powers of Court.
No. 57 of 1912, s. 69; (amended by No. 49 of 1941, s. 4), renumbered as s. 71 and amended by No. 5 of 1952, s. 18.

Latham, C.J., in *ex parte Kirsch* (1938) 60 C.L.R. 507 (referred to in *W.A. Timber Employees v. Millars* (1940) 19 W.A.I.G. 466) approached the section in the same way. At p. 524 he said—

The Court cannot make an award dealing with a matter which is not in dispute The Court is not a general supervisor of industry. By reason of the character of the LEGISLATIVE power conferred on the Commonwealth Parliament by section 51-xxxv the functions of the Court are limited to dealing with certain industrial disputes. If there is no dispute as to a particular subject matter, the Court cannot deal with the subject matter.

The State Parliaments are subject to no such limitations and there appears to be no reason why, in this jurisdiction, the clear words of the section should receive a similar restrictive interpretation. It should also be noted in this connection that the jurisdiction of this Court is not restricted to industrial disputes—it also has jurisdiction over all "industrial matters." (See section 61 (*ante*).)

It has now been held the Court's jurisdiction to settle an industrial dispute is not limited to making an award within the outer limits of the dispute itself. See: *Merchant Service Guild* (1951), 31 W.A.I.G. 404.

The present state of the cases in this State reveal that while the Court may settle a dispute by adopting an expedient not suggested by the parties, it cannot regulate a matter which was not at issue in the dispute. It must always be decided whether a particular provision proposed to be included in an award may be regarded as fairly incidental to the settlement of a dispute as to a particular matter, or whether it is a provision relating to an entirely different matter which is not in dispute. (See Latham, C.J., in *ex parte Kirsch*, 60 C.L.R. 507, at page 525.)

S.71. (ii) The expenses incidental to the resolution of the governing body of the union and also of the advertisement which the Statute (section 107 post) requires to precede a reference of a dispute to the Court, can be

- (ii) to order any party to the dispute or other matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that except as provided in section thirty-six K of this Act no costs shall be allowed for the services of any counsel, solicitor, or agent;
- (iii) to proceed to hear and determine any dispute or other matter in the absence of any party thereto who has been summoned or served with notice to appear therein;
- (iv) to sit in any place for the hearing and determination of the dispute or other matter;
- (v) to conduct its proceedings or any part thereof in private;
- (vi) to refer to any person any dispute or matter before it or any question arising in any such dispute or matter for investigation and report and to accept or act on the report of or evidence taken by any such person or any part of such report or evidence; and to refer to experts the interpretation of awards in technical trades;
- (vii) to direct parties to be joined or struck out;
- (viii) to correct, amend, or waive any error, defect, or irregularity whether in substance or in form;

recovered under this section, which gives the Court power to order the payment of expenses as well as the payment of costs. (See *Tailors' Union v. Coultas & Son* (1908), 7 W.A.A.R. 169.)

In enforcement cases the practice of the courts of law will be followed and costs will be awarded to the successful party unless some special circumstances are present which would make it advisable to depart from that rule. (See *Parker, C.J.*, in *Amalgamated Millers Employees' Union v. Padbury* (1911), 10 W.A.A.R. 22.)

In applications for awards and for interpretations, it is not the practice of the Court to award costs to the successful party, and costs will not be awarded in enforcement cases where this procedure is used as an indirect way of obtaining an interpretation. (See *Draper, J.*, in *A.W.U. (Goldfields) v. Golden Horseshoe* (1922), 1 W.A.I.G. 83.)

As to solicitors, see section 67 (4) ante.

As to costs in chamber applications, see section 76 post.

(vi) The Court will use this power when the interpretation of an award depends upon the meaning of technical trade terms. (*The Boot Trade of Western Australia Industrial Union of Workers v. The Comfort Wear Slipper Co.* (1943), 23 W.A.I.G. 185, at page 186.). The power will also be used when the Court under Section 90 is interpreting an award made by some other Tribunal such as a Conciliation Commission or Industrial Board. In re *Furniture Trades* (1951) 31 W.A.I.G. 539.

(vii) The Court has no power under this section to add a new party to an award. (See *A.W.U. v. Goldfields Firewood Supply Co.* (1942), 22 W.A.I.G. 61.)

- (ix) to extend any time fixed by this Act or by any regulation under this Act or by any order of the Court or of the President or any other member thereof;
- (x) to direct that two experts (one nominated by the party or the majority of the parties on one side and the other by the party or the majority of the parties on the other) shall sit with the Court as assessors on the hearing of any dispute or other matter to aid the members of the Court with their counsel;
- (xi) to make such orders as may be just with respect to the issues to be submitted to the Court, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing;
- (xii) to enter upon any manufactory, building, workshop, factory, mine, mine-workings, ship or vessel, shed, place, or premises of any kind whatsoever, wherein or in respect of which any industry is or is reputed to be carried on, or any work is being or has been done or commenced, or any matter or thing is taking or has taken place, which is made the subject of a reference to the Court;
- (xiii) to inspect and view any work, material, machinery, appliance, article, matter, or thing whatsoever being in such manufactory, building, workshop, factory, mine, mine-workings, ship or vessel, shed, place, or premises as aforesaid;

(x) Assessors are not members of the Court and are called in an advisory capacity only. They should not be called as witnesses. (See *Coastal Operative Bootmakers v. W.A. Metropolitan Boot Manufacturers* (1903), 2 W.A.A.R. 115.)

(xi) The Court may, under this subsection, make an order giving the union representative power to inspect plant, equipment and buildings. (See *Sugar Refining Employees v. Colonial Sugar Refinery* (1935), 16 W.A.I.G. 342.)

(xiv) to interrogate any person who may be in or upon any such manufactory, building, workshop, factory, mine, mine-workings, ship or vessel, shed, place or premises as aforesaid in respect of or in relation to any matter or thing hereinbefore mentioned;

No. 49 of
1941, s. 4.

(xv) to consolidate or divide references and all or any matters before the Court;

(xvi) generally to give all such directions and do all such things as it deems necessary or expedient in the premises.

No. 49 of
1941, s. 4.

72. The power mentioned in paragraph x of the last preceding section shall be exercised by the Court if so required by any party to the dispute or other matter, and any power mentioned under paragraph xii, xiii, or xiv of the last preceding section may, if the Court so directs in any case, be exercised by any member or officer of the Court or by any expert appointed to act as assessor.

Exercise of
certain
powers.
No. 57 of
1912, s. 70.

73. The Court may, at any time before the determination of an industrial dispute of which it has cognisance, allow the amendment, on such terms as it thinks fit, of the plaint or of any subsequent proceeding.

Power of
amendment.
No. 57 of
1912, s. 71;
No. 50 of
1925, s. 18.

74. (1) Where it appears to the Court that a question has arisen as to the right of workers in specified callings to do certain work in an industry to the exclusion of the workers in other callings, the Court may, on application made by any industrial union of workers or industrial union of employers,

Demarcation
of callings.
No. 57 of
1912, s. 72;
No. 50 of
1925, s. 19.

S.72. The use of the word "shall" implies that the exercise of the power is mandatory, the use of the word "may" that it is permissive. (See section 32 of Interpretation Act (No. 56 of 1918).)

S.73. The power to amend the issues or the plaint may be exercised by an Industrial Board, although such power is not specifically mentioned in section 118 (post). (See *Amalgamated Engineers v. Forwood Down* (1939), 19 W.A.I.G. 210.)

It was at one time held that the Court could not amend the plaint so as to include matters which were outside the scope of the original dispute for such amendment would result in a dispute being brought before the Court "otherwise than pursuant to a resolution of the governing body" of the union. (See section 107 (1) post) and without having been advertised as required by section 107 (2). (See *W.A. Timber Industry Employees v. Millars* (1940), 19 W.A.I.G. 466.) This decision has not been followed. It has since been held that the Court can in a proper case permit an amendment extending a claim beyond that approved by resolution of the governing body of the union. See: *Merchant Service Guild* (1951), 31 W.A.I.G. 404.

S.74. The section does not permit an individual employer to make application to the Court for the appointment of a special Board (hereinafter called a Demarcation Board), but he may be represented on such Board when once it is formed.

constitute a Special Board to determine such question. Such board shall consist of a chairman and such number of other members as the Court may fix, and—

- (a) if in the opinion of the Court employers are interested in the question, one half of such other members shall be representatives of employers, and the other half shall be representatives of the industrial unions of workers engaged in the said callings;
- (b) such of the callings as the Court considers to be directly interested in the question shall be represented on the board by an equal number of representatives of employers (if in the opinion of the Court employers are interested in the question) and representatives of the industrial unions of workers concerned.

(2) The chairman and other members of any such board shall be appointed by the Court, but the Court in making such appointments shall give effect to nominations made in the prescribed manner by the parties concerned.

The section deals only with the right of workers in specified callings to do work to the exclusion of the workers in other callings. It has no application to a dispute between workers in the same calling but belonging to different unions. (See *Amalgamated Road Transport Workers' Union v. W.A. Lime & Stone* (1927), 7 W.A.I.G. 160) and *Engine Drivers v. Government Water Supply Employees* (1953) 33 W.A.I.G. 639.

Nor where the question is one arising wholly between employers and workers. (See in re *Sydney Coal Lumpers* (1930), A.R. (N.S.W.) 320 and compare section 16/6 of N.S.W. Industrial Arbitration Act, 1912.)

The question which must arise is whether the workers in specified callings have the right to do the work to the exclusion of other workers in other callings. (See *Dwyer, P.*, in *W.A. Shop Assistants v. A.W.U.* (1940), 20 W.A.I.G. 523.) Practice and customs are important factors in the determination of such disputes. *Boilermakers v. Coach Builders* (1948) 28 W.A.I.G. 729.

The power to grant a Demarcation Board is discretionary. (See in re *Operative Plumbers Society* (1915) A.R. (N.S.W.) 153, per Heydon, J.) The section has no application to an unregistered union. Such a body has no right to representation, and if one side is not interested, the Board could not be appointed because the other side would not be represented. (See *Operative Bricklayers' Union v. Operative Stonemasons* (1931), 11 W.A.I.G. 109.)

(a) It is difficult to conceive of a "demarcation" dispute in which the employers would not be "interested," and whenever they are so interested it is mandatory on the Court to give them representation equal to that of the contending unions combined. It can be seen that this would, in effect, give the employer the power to select, and it is not likely, under such circumstances, that this machinery would be made use of by the workers unions. The procedure that has been adopted in cases where the interests of the employers is only incidental is for the employers to sit on the Board to see that the matter is placed fairly before it and then to abstain from voting. (See *Amalgamated Engineers v. Australian Loco. Drivers, etc. Union* (1937), 17 W.A.I.G. 185, and *Amalgamated Transport Workers' Union v. W.A. Lime & Stone* (1927), 7 W.A.I.G. 160.)

(3) The determination shall be adopted by the Court for the purposes of any award or order made by the Court.

75. The President, on the application of any party to an industrial dispute or other matter of which the Court has cognisance, may, on summons returnable before the President sitting in Chambers, make in relation to the dispute or other matter any order which he thinks just as to any interlocutory proceeding to be taken before the hearing, the costs of such proceedings, the issues to be submitted to the Court, the persons and unions or associations to be served with notice of proceedings, particulars of the claim of the parties, admissions, discovery, interrogatories, inspection or production of documents or of any property, examination of witnesses, and the place, time, and mode of hearing: Provided that no order of the President shall prejudice the exercise of any power by the Court.

President may exercise certain powers in Chambers. No. 57 of 1912, s. 73.

76. As regards all proceedings before him the President may make such order as to costs as he shall deem just.

Power of President to award costs. No. 57 of 1912, s. 74.

77. With respect to evidence in proceedings before the Court the following provisions shall apply:—

Evidence. No. 57 of 1912, s. 75 (amended by No. 50 of 1925, s. 20.), renumbered as s. 77, amended by No. 5 of 1952, s. 19.

- (1) On the application of any party, the Clerk of the Court shall issue a summons in the prescribed form to any person to appear and give evidence before the Court; such summons may require such person to produce before the Court any books, papers, or other documents in his possession, or under his control, in any way relating to the proceedings.

(3) "Practically this means that the determination arrived at by a Board within its jurisdiction, that is to say, within the limits submitted to the Board, shall be final and shall be accepted by the Court," per Dwyer, P., in re *Federated Boilermakers v. Commissioner of Railways* ((1929) 9 W.A.I.G. 229). In this respect Demarcation Boards differ both from Industrial Boards and Boards of Reference. In the latter case the question of appeal was left over and has been provided for in the regulations (a), while in the former case the Act (b) provided for an appeal to the Arbitration Court by way of rehearing.

S.75. See also section 102 (2) post and regulation 60 and 61.

Procedure: By Chamber Summons, see Form 41.

S.77. (1) "prescribed form" see regulation 101 and form 84.

(2) Every person who is summoned and duly attends as a witness shall be entitled to receive from the party at whose instance he was summoned an allowance for expenses according to the prescribed scale.

(3) Any person duly served with such summons, and to whom at the same time payment or tender has been made of his reasonable expenses according to the aforesaid scale, who fails to attend or to duly produce any book, paper, or document as required shall be guilty of an offence and be liable to a penalty not exceeding Twenty pounds, or to imprisonment for any term not exceeding one month.

Provision
for obtaining
evidence at
a distance.

(4) The Court may, whenever it shall appear just or convenient so to do, make any order for the examination upon oath or otherwise before the Court or any officer of the Court, or any other person, and at any place of any witness or person, and may empower any party to give the deposition of such witness or person in evidence on such terms, if any, as the Court may direct.

(5) The Court may take evidence on oath or affirmation, and for that purpose any member or the Clerk of the Court may administer an oath or affirmation.

Disclosure
of trade
secrets.

(6) No evidence relating to any trade secret, or to the profits or financial position of any witness or party, shall be disclosed except to the Court, or published without the consent of the person entitled to the trade secret or non-disclosure.

(2) "prescribed scale" is the Supreme Court scale for the time being. See regulation 119.

(3) Persons subpoenaed as witnesses are not liable to the penalty for non-attendance unless expenses are tendered or paid. (See *Yarloop Timberworkers' Union v. Millars* (1903) 2 W.A.A.R. 105.)

(6) This subsection and subsection (8), not only protects certain information from being made public but also protects it from being inspected by the other party. It follows that such evidence cannot be subjected to cross-examination, and the Court is unable to obtain the assistance of experts when considering secret evidence of a technical nature (i.e., balance sheets). The Court will place little reliance on such untested evidence. (See *Burnside, J., in Amalgamated Timberworkers v. Millars* (1913) 12 W.A.A.R. 157, and also *Dwyer, P., in W.A. Shop Assistants v. Dalgety & Co.* (1931) 11 W.A.I.G. 331.)

Penalty: One hundred pounds or three months' imprisonment with or without hard labour.

(7) All such evidence as is mentioned in the last preceding paragraph shall, if the witness or party so requests, be taken in private.

(8) All books, papers, and other documents produced in evidence before the Court may be inspected by the Court and also by such of the parties as the Court allows, but the information obtained therefrom shall not be made public without the permission of the Court, and such parts of the documents as in the opinion of the Court do not relate to the matter at issue may be sealed up. Provided that such books, papers, and documents relating to any trade secret or to the profits or financial position of any witness or party shall not, without his consent, be inspected by any party.

Contents of books not to be disclosed.

Penalty: One hundred pounds or three months' imprisonment with or without hard labour.

(9) The provisions of the preceding subsections of this section apply *mutatis mutandis* in respect of proceedings before the President.

Subsec. (9) added by No. 5 of 1952, s. 19 (b).

78. The presence of the President and at least one other member shall be necessary to constitute a sitting of the Court.

Quorum. No. 57 of 1912, s. 76.

79. The decision of a majority of the members present at the sitting or if the members present are equally divided in opinion then the decision of the President shall be the decision of the Court. The

Decision to be of majority of Court. No. 57 of 1912, s. 77.

S.79. If the lay members come to one decision that decision would overrule the opinion of the President, but if all members are equally divided, that must mean, in a properly constituted court, that all members hold different opinions and in this case the opinion of the President is to prevail. Should the lay members overrule the President in any particular case the precedent thereby created will not be regarded as binding on the President in subsequent cases. "I have expressed these views," said Wolff, J., while delivering a dissenting judgment in the *Coastal Engineers v. Commissioner of Railways* ((1940) 19 W.A.I.G. 357) "so that if at any future date this matter should be again brought up for discussion, this decision would not appear, so far as the President or the Deputy President are concerned to be a binding precedent on the Court."

decision of the Court on the settlement of an industrial dispute shall be drawn up in the form of minutes, which minutes shall be open to the inspection of the representatives of the parties concerned. An appointment shall be made by the Court for the purpose of allowing the representatives of the parties to speak to matters contained in such minutes. As the outcome of such appointment and discussion during same, it shall be open to the Court in its absolute discretion to vary, or amend, the terms of such minutes before the same are actually issued as an award of the Court.

President
to deliver
decision.
No. 57 of
1912, s. 78.

80. The decision of the Court shall in every case be signed by the President, and may be delivered by him or by any other member of the Court or by the Clerk.

When award
to be made.
No. 57 of
1912, s. 79.

81. An industrial award of the Court shall be made within one month after the Court began to sit for the hearing of the reference, or within such extended time as in special circumstances the Court thinks fit. Every award, as far as practicable, shall be pronounced and delivered at the place where the hearing of the dispute or the principal part of the hearing of the dispute took place.

Award to
be signed,
sealed and
deposited
in office.
No. 57 of
1912, s. 80.

82. The award shall have the seal of the Court attached thereto, and shall be deposited in the office of the Clerk of the Court, and be open to inspection without charge during office hours by all persons interested therein.

Minutes: The object of drawing up the decision of the Court in the form of minutes is to give the representatives of the parties an opportunity to point out any of the provisions of the award which may have been inserted inadvertently or by mistake and which, if allowed to remain would be inconsistent or unworkable or would in some way render the award less perfect than the Court intended it to be. The parties should therefore, when speaking to the minutes, confine their attention to alterations which will have the effect of making the award more workable rather than to alter its substance. (See Burnside, J., in the Printing Trades Award (1925) 4 W.A.I.G. 150 and Dwyer, P., in Minister for Works v. Geraldton Lumpers' Union (1927) 6 W.A.I.G. 332. See also the remarks of Dunphy, P., in Western Australian Government Tramways' Union v. The Commissioner of Railways (1947) 27 W.A.I.G. 523) Dwyer, P., in the Civil Service Association v. Public Service Commissioner ((1937) 17 W.A.I.G. 22) put the position in these words:—

The minutes represent the decision of the Court and the points which we have to discuss are first of all anomalies and then mistakes that are liable to occur, and then if there is anything the Court has omitted there is no reason why it should not be pointed out and attention will be paid to it before the award is issued. When the minutes are being discussed it is not a question of fresh evidence. It is then too late. If one side was allowed to bring fresh evidence the other side would also have to be and we should never have an end of the matter that came before us.

83. (1) The award shall be framed in such manner as shall best express the decision of the Court, avoiding all technicality where possible, and shall specify—

Terms of award.
No. 57 of 1912, s. 81.

- (a) each party on whom the award is binding, being in every case each industrial union, industrial association, or employer who is party to the proceedings at the time when the award is made, and every industrial union then represented on any such association;
- (b) the locality (if any) to which the award or any part thereof is limited;
- (c) the term of the award.

(2) The award shall also state in clear terms what is or is not to be done by each party on whom the award is binding, or by the employers or workers affected by the award, and may provide for an alternative course to be taken by any party.

84. (1) The Court may, in any award made by it, limit the operation of such award or any portion thereof to any particular locality, but except in so far as the award or any part thereof is so limited it shall be deemed to extend to the whole State.

Court may limit operation of award to particular area.
No. 57 of 1912, s. 82.

(2) The Court shall, if the operation of the award has been limited as aforesaid, have power, on the application of any employer, industrial union, or industrial association, to extend the operation of such award or any portion thereof.

S.83. "decision of the Court." It is competent for the Court to adopt an agreement which has been entered into between the union and the principal employers in the industry. Such an adopted agreement may be called an award by consent (see *Eastern Goldfields Shop Assistants v. Adams* (1940), 20 W.A.I.G. 181), but the Court is, of course, not bound to acknowledge such agreements. (See *W.A. Typographical Union v. Daily News* (1908), 7 W.A.A.R. 172; *Coastal Coachbuilders v. White & Co.* (1909), 8 W.A.A.R. 75; *Shop Assistants' Union v. Boans* (1910), 9 W.A.A.R. 186.)

The direction to the Court that it should in its awards avoid all technicality is clearly expressed in this section. The provisions for amendment contained in section 90 (post) are directed to the furtherance of this object. (See *A.W.U. v. Great Boulder Proprietary* (1923), 3 W.A.I.G. 13.)

(2) "or workers." It should be noted that although individual workers are not named in the award, yet they are bound thereby and are equally bound with the employer for any breach thereof. (See *Carpenters' Union v. Chandler* (1902), 1 W.A.A.R. 57.)

S.84. The Court has no power to limit the operation of an award to particular persons or institutions, although this object can be attained in an indirect manner by limiting the area of operation of the award in such a way as to exclude the locality where the person or institution which it is desired to exclude from the operation of the award, is carrying on business. (See *Trained Nurses' Association Award* (1935), 15 W.A.I.G. 236, per Dwyer, P., and see proviso to section 85 (post) and contrast position in N.S.W. section 29 of N.S.W. Industrial Arbitration Act, 1912.)

Provided that before acting under this subsection the Court shall give all parties, likely in its opinion to be affected, notice, whether by advertisement or otherwise, of its intention to extend the operation of such award, and shall hear any parties desiring to be heard in opposition thereto.

Award to be a common rule.

No. 57 of 1912, s. 83, renumbered as s. 85, amended by No. 5 of 1952, s. 20.

85. An award shall, whilst in force, be a common rule of any industry to which it applies, and shall, except to the extent mentioned in subsection (2)¹ of section thirty or in section ninety-eight A of this Act, and subject as hereinafter provided, become binding on all employers and workers, whether members of an industrial union or association or not, engaged at any time during its currency in that industry within the State.

Provided that if the operation of the award or any part thereof is limited to any particular locality, then the common rule shall not as regards matters to which the limitation applies operate beyond such locality.

¹ See footnote 1 to s. 40 (1) ante.

S.85. "whilst in force." See sections 90 and 93 (post). "of any industry to which it applies" and "engaged in that industry"; "The common object which it is sought to attain by the combined efforts of the employer and the worker indicates the industry in which they are engaged" (per Burnside, J., in *Amalgamated Engineers v. Parker and Son (FC)* (1926), 6 W.A.I.G. 377. See also section 42 (ante) and cases cited there). It must be remembered that the Act (section 6) defines the word "industry" to include, *inter alia*, "a branch of an industry or a group of industries" and the word as used in this section must be interpreted accordingly. It follows that the Court may make an award for a branch of an industry as well as for an industry in its fullest meaning. (*A.W.U. Goldfields Mining Branch v. Minister Controlling State Batteries* (1944), 24 W.A.I.G. 284. See also *Road Transport Union v. Beam Transport Limited* (1948), 28 W.A.I.G. 715.)

"Industry" has the same meaning in this section as it has in section 42. (See *Amalgamated Road Transport Union v. Fletcher* (1927), 7 W.A.I.G. 156.)

As a result of this interpretation it is necessary for unions when approaching the Court for an award to cite as respondents, such persons, companies or firms as are typical of the various industries, callings and vocations which they intend to bind. (See *Amalgamated Road Transport Union v. Ahern* (1928), 8 W.A.I.G. 347, where 301 respondents are cited; also *Hotel, Club, Caterers' Union v. Wiese* (1929), 9 W.A.I.G. 163, and section 42 (ante) and cases cited there.)

Normally the Court has no power to exclude any person or institution engaged in the industry from the common rule provisions of the Act, the only exceptions to this are contained in the proviso to section 94 (1) (a), section 123 (6). (See *Amalgamated Society of Engineers v. Arbitration Court*, 33 W.A.L.R. 125.) Persons can be excluded in an indirect way by limiting the area of operation of the common rule. (See section 84 (ante).)

When considering whether a worker is governed by an award, and if so, by what award, a problem frequently arises by virtue of the fact that the conditions of employment of the worker appear to be governed by more than one award. That is to say, it is often difficult to decide the precise nature of the industry in which the worker is engaged. To decide a case of this nature, the Court must consider the capacity in which the worker was engaged and what, substantially, has been the work he has been required to do. In the result, the award dealing with the substantial part of his work will be held to be the award which governs his employment. (See *Moullin v. Amalgamated Road Transport Union* (1938), 15 W.A.I.G. 175; *Hotel, Club, Caterers' Union v. A. E. Clarke* (1938), 18 W.A.I.G. 254; *Road Transport Workers v. McMillan* (1938), 18 W.A.I.G. 247; *Ways Limited v. Davis* (1929),

86. (1) The Court may at any time—

- (a) remit to an Industrial Board for inquiry and report, with or without directions, any industrial matter or dispute which the

Power to remit, etc.
No. 57 of 1912, s. 84;
No. 50 of 1925, s. 21.

28 A.R. (N.S.W.) 8; John Wills & Co. v. Operative Painters (1939) 19 W.A.I.G. 500; Operative Painters v. Claude Neon (1942) 22 W.A.I.G. 67; Wilson v. Dalgety & Co. (1940), N.Z.L.R. 323, especially Blair J., at p. 339.)

A similar situation arises when a portion of a worker's occupation is governed by an award and the remainder is not so governed, and here too the Court must look to the capacity in which the worker was engaged and to the substantial nature of the work performed. The Court must apply itself to the facts of each particular case and draw its own deductions. (See Dwyer, P., in John Wills & Co. v. Operative Painters Union (1939) 19 W.A.I.G. 500 at p. 501.) The Court will not split the contract of service and say that so many days have been spent at one occupation and so many at another. (See Moullin v. Amalgamated Road Transport Union (1938) 15 W.A.I.G. 175.) A worker may, in the course of his employment, do work which is included in the terms of an award, but unless the work so done, when considered in the light of the remainder of his duties, forms a substantial portion of his total employment, he cannot claim the benefit of that award. (See Diggle v. Hale School (1940) 19 W.A.I.G. 208 and distinguish McGhie v. Fremantle Harbour Trust 39 W.A.L.R. 111.)

Difficulties also arise when considering the rate of payment due to a worker who, under the same award, is engaged for part of his time under one designation and for part under another. Most awards now contain a "mixed functions" clause to meet this situation. For example of such a clause see clause 14 of Clerks' Award ((1939) 19 W.A.I.G. 182 at p. 183.) This clause can only be applied when it is possible to separate the two occupations and to say definitely that for a certain time the worker is employed in occupation A and for a certain time in occupation B. The clause has no application to the position where day in and day out, week in and week out, a man is employed doing a particular class of work which consists of an amalgamation of two or more positions. (See Enginedrivers Union v. Millars (1939) 10 W.A.I.G. 293 per Dwyer, P., at p. 294.) If the jobs and the time spent on each cannot be distinguished it would form a new avocation for the worker, and in industries where it is a common practice for workers to be engaged in such "mixed functions" a special designation covering such operations should be included in the award. (See Moullin v. Amalgamated Road Transport Union (1938) 15 W.A.I.G. 175.) A special designation may be included by way of amendment. (See Amalgamated Road Transport v. Keough (1931) 11 W.A.I.G. 262.)

If two awards, one industrial and one vocational, contain inconsistent provisions purporting to bind an employer with respect to a particular worker, then the employer, to the extent to which he is engaged in the industry covered by the industrial award, will be bound by that award and not by the vocational award. (See Amalgamated Engineers v. Minister for Water Supply (1940) 20 W.A.I.G. 88 and Operative Painters v. Brisbane (1942) 22 W.A.I.G. 172.)

The reference here to subsection (2) of Section 30 is an error—the subsection which was included in the Bill for the 1952 amendment Act was lost in Committee. See Hansard Vol. 131 (1952), p. 377.

Proviso: If an award is limited as to the area of its operation then it will only seize on to such work as is actually done within this locality. In considering whether particular work is governing by an award, which is limited as to locality, the place where the work is done is alone material, and the place where the head office or place of business of the employer or the registered office of the union is situated is not relevant. (See in re Amalgamated Road Transport Union (1929) 9 W.A.I.G. 328 and Walker v. Peel Estate Co-operative Co. (S.C.) (1931) 11 W.A.I.G. 184.)

It was held in in re Amalgamated Road Transport Union (9 W.A.I.G. 328) that, if part of the work is done outside the locality covered by the award and part inside, it would not be covered by the award unless a substantial part of such work is done inside, and what is "substantial" is a question of fact. In Walker v. Peel Estate Co-operative Co. ((1931) 11 W.A.I.G. 184) Draper, J., dissented from this test and held that the work done outside the area must be separated from the work done within, and that it was only to work done within the area that the award applied. It cannot be said that Draper, J.'s, decision has settled the law on this point. It would involve the apportionment of the hours worked in a weekly contract of service and this the Court is very loth to do.

The older doctrine of substantial employment, enunciated in in re Amalgamated Road Transport Union ((1929) 9 W.A.I.G. 328) still finds favour with the Court and is more likely to be applied to future cases. (See Dwyer, P., in John Wills v. Operative Painters (1939) 19 W.A.I.G. 500 at p. 501.)

When there is a probability that a portion of the work will be done outside the locality covered by the award a clause similar to the "mixed functions" clause should be inserted to make the position clear.

8.86. For the appointment of industrial boards see section 109 et seq.

(1) Under this subsection the Court may either give the Industrial Board power (a), to inquire into and report upon any industrial matter or dispute or (b) to make an award settling any industrial dispute. (See Iron Trades Award (1938) 18 W.A.I.G. 344 per Wolff, J., at p. 356.)

Court considers it desirable to have included in any reference for investigation, and upon which the Court desires information for the purpose of making an award; and the Court may, but shall not be obliged to, accept any conclusion arrived at or recommendation made by such Board, and all persons interested in such conclusions and recommendations shall be entitled to be heard before the Court. Any remission made as aforesaid may be withdrawn by the Court at any time and whether the Board has concluded its work or otherwise;

- (b) remit to a Board, with or without directions, for determination and award any industrial dispute, whereupon such Board shall have power to determine such dispute and make an award therein. Any remission made as aforesaid may be withdrawn by the Court at any time, and whether the Board has concluded its work or otherwise.

Power of
Court to
continue
an inquiry.

(2) The Court may at any time itself conduct any investigation, inquiry, or proceeding which has been remitted to a Board, and upon intimation being given to this effect by the Clerk to the Court to the Chairman of the Board, the Chairman shall forward to the Clerk to the Court a copy of the evidence taken before the Board and the exhibits thereto.

Upon such intimation by the Clerk to the Court the jurisdiction of the Board to continue the investigation, inquiry, or proceeding shall cease:

The Court will not remit to an Industrial Board a dispute for determination and award (b) unless the issues have been settled and the parties can show that they are in a position to open their cases immediately. (See Dwyer, P., in *Fire Brigades Employees v. W.A. Fire Brigade Board* (1936) 16 W.A.I.G. 213.)

And it must also be shown that the proposed Industrial Board would be in a better position to deal with the dispute than the Court would be. (See *Coastal Aerated Water Employees' Union v. MacKays* (1937) 17 W.A.I.G. 40 and 182.)

S.86. (2) Under this subsection the Court can reclaim a matter which it has referred to an Industrial Board and which is actually being dealt with by that Board. The mere formation of a Board to deal with any matter does not, of course, affect the jurisdiction of the Court with regard thereto, and should the Court subsequently find that it is in a position to hear the matter, it may call the case on and deal with it itself. (See Dwyer, P., in *Operative Painters v. Swansea* (1938), 18 W.A.I.G. 198 at page 199.)

Provided that the Court may at any time again remit to the Board any matter arising in such investigation or inquiry for report, and upon such reference the jurisdiction of the Board to inquire and report upon the matter so referred shall revive.

87. (1) The award of a Board when made under the authority of a remission as hereinbefore provided shall be signed by the Chairman and forwarded to the Clerk to the Court, who shall forthwith publish the same in the *Gazette* and notify the parties.

Award of Board.
No. 57 of 1912, s. 85;
No. 50 of 1925, s. 22.

(2) Such award shall, from a date fixed by the Board, within the locality for which the Board has jurisdiction, take effect and have the force of an award made by the Court.

88. (1) Subject as hereinafter provided, an appeal shall lie to the Court against any award of a Board made under the authority of a remission, or any part of such award.

Appeal to the Court from a Board.
No. 57 of 1912, s. 86;
No. 50 of 1925, s. 23.

S.87. (2) An Industrial Board, when making an award, cannot provide for a Board of Reference. The appointment of such Boards is a matter quite independent of the issues or of the dispute. The power to appoint such Boards has been vested in the Court (section 89) and such power cannot be delegated. (See *Amalgamated Engineers v. Forwood Down* (1939), 19 W.A.I.G. 210 and section 89 (post).)

S.88. "any person bound by the award." See section 85 (ante).

"or by any industrial union interested." These words have not been the subject of judicial interpretation. It would appear that any union having jurisdiction over an industry which is a branch of the same trade as that which is covered by the disputed award, or is so connected with the industry so bound that industrial matters relating to the one may affect the other, would be an interested union. (See section 62 (ante).)

Rules for the guidance of parties proceeding under this section were laid down by Dwyer, P., in the *Metropolitan Master Printers v. Printing Industry Employees*. ((1928) 9 W.A.I.G. 32.)

Appeals are to be by way of rehearing, (2) and brought by notice of motion in summary way. The applicant should specify whether part or the whole of the judgment is appealed from. On the hearing the Court will follow the principles applied to appeals by way of rehearing in the Full Court when the judgment appealed from has been given by a Judge without a jury. Findings of fact will be considered, but very strong evidence is necessary to upset findings of fact arrived at by an Industrial Board. (See *MacKay's Aerated Water v. Coastal Aerated Water Employees' Union* (1938), 18 W.A.I.G. 196.) If the Board has considered all the relevant evidence and has given a judgment which appears to be reasonable, the Court will not interfere. (*West Australian Timber Industry Union v. State Saw Mills* (1946), 26 W.A.I.G. 103.)

The Court will, however, revise an award of a Board if such award has created an anomaly, or if there has been a departure from principle. An instance of such a situation is where the Board departs from some general principle which has been established and constantly acted upon by the Court. Any alteration of such a standard is a matter for the Court itself. (*Commissioner of Railways v. West Australian Government Tramways' Union* (1948), 28 W.A.I.G. 736.)

Such appeal may be brought, by leave of the Court but not otherwise, by any person bound by the award, or by any industrial union interested therein, and shall be commenced within six weeks after publication of the award in the *Gazette*, or within such further time as the Court on an application for extension of time deems proper.

The dependency of an appeal against such award or part thereof shall not, unless the Court otherwise orders, suspend or delay the operation of such award or part thereof.

On an appeal the Court shall allow any person or industrial union interested to become a party to the proceedings.

(2) Every appeal under this Act shall be by way of rehearing or by case stated, and the Court may affirm, revise, or modify the award appealed against, and may give such decision and direction and make such order and award as ought to have been given or made in the first instance and may remit any matter arising out of or involved in the case to the Board, with or without directions and whether for report to the Court or for determination.

Board of
Reference.
No. 57 of
1912, s. 87;
No. 50 of
1925, s. 24.
No. 49 of
1941, s. 5.

89. (1) The Court by its award, or by order made on the application of any industrial union or person bound by the award, or by any industrial agreement, may—

- (a) appoint, or give power to appoint, for the purposes of the award, or the industrial agreement, as the case may be, a Board of Reference or Boards of Reference consisting of an equal number of employers' and workers' representatives, and a chairman; and

S.89. "or give power to appoint." In spite of these words, it has been held that the Court cannot delegate the power of appointment to an Industrial Board. In the *Amalgamated Engineers v. Forwood Down* ((1939) 19 W.A.I.G. 210 at page 210), Dwyer, P., said—

The appointment of such a Board is quite independent of issues or of a dispute, and is purely a matter for the Court. It is not a power exercisable by an Industrial Board, and it is not a power which the Court could delegate to an Industrial Board to exercise.

- (b) assign to a Board of Reference the function of allowing, approving, fixing, determining, or dealing with, in the manner and subject to the condition specified in the award or order, any matters or things arising under or out of the award or order which may require from time to time to be allowed, approved, fixed, determined, or dealt with by the Board.

(2) An appeal shall lie to the Court against any determination, decision, or finding of any Board appointed under this section, upon such conditions as may be prescribed.

No. 49 of
1941, s. 5.

90. With respect to every award, whether made before or after the commencement of this Act, the Court by order at any time, while the award is in force, may declare the true interpretation of the award, and shall have power to amend the provisions of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.

Special powers to interpret or amend award.
No. 57 of
1912, s. 88;
No. 49 of
1941, s. 6.

(b) A Board of Reference is not a Court and it cannot impose penalties or award costs. It cannot impel the attendance of witnesses. (See Dwyer, P., 6 W.A.I.G. 104.) They are intended to function while the award is in force, smoothing out difficulties and ventilating grievances as they arise. (See A.W.U. (Goldfields) v. Lancefield (1938), 18 W.A.I.G. 201.)

The Court's power to assign authority to the Board is somewhat restricted and must be limited to authority over matters or things "arising under or out of the award or order." (See Wiluna Gold Mines v. A.W.U. (1938), 18 W.A.I.G. 88.) And its function is still limited in this manner, although the Board is now (see section 5 of the Amending Act, 1941, No. 49 of 1941) appointed for the purposes of the award "or the industrial agreement, as the case may be." (See Wiluna Gold Mines v. A.W.U., above.)

A Board of Reference can have no power to overrule an award. The Board is the creature of the Court and not its master, and was never intended to have the authority of a Court of appeal or review. Circumstances often arise which were not anticipated at the time of the making of the award, and in the light of these new circumstances adjustments might be necessary. Such adjustments could be made by a Board of Reference, but the Board would not be justified in making any determination conflicting with the provisions of an award. Any determination it made would have the effect of an addendum having purely local application. (See Davies, A.P., in Metropolitan Superphosphate Workers v. Mt. Lyell (1937), 17 W.A.I.G. 423.) It could not possibly alter the provisions of the award. (See Dwyer, P., in A.W.U. v. Lancefield (1938), 18 W.A.I.G., 201 at page 202.)

The section is silent as to whether the Board should function in public or private. The Board is not a Court and *prima facie* its deliberations would be held in private. (See Scott v. Scott (1913), A.C. 457; R. v. Lewis (1917), 2 K.B. 254; the remarks of Dwyer, P., 6 W.A.I.G. 104, and Mayor of Tenby v. Mason (1908), 1 C.H. 457.)

The regulations (regulation 92 (d)) provide that Boards of Reference are to function in private unless the majority of the parties or the Chairman otherwise decides.

(2) The Court had, in its regulations (92 (1)), claimed the right to review the decision of a Board of Reference before this subsection was inserted in the Act (by No. 49 of 1941, section 5 (c)). The Court will not interfere with decisions of Boards of Reference on questions of fact, unless it is manifest that the Board has acted on wrong principles or given an unreasonable verdict. In re Dock Workers Agreement (1950) 30 W.A.I.G. 539.

S.90. "while the award is in force." An award may continue in force after the expiration of its term. (See section 93 (1) post).

The Court may, for the purposes of this section, exercise the powers conferred by paragraphs (vi) and (x) of section seventy-one.

"declare the true interpretation of the award." The early Courts were inclined to give a liberal interpretation to awards in an effort to avoid technicalities. (See *Fremantle Bakers' Union v. Currie* (1910), 9 W.A.A.R. 55) The principles now applied are the principles laid down in the Courts of Law for the construction of deeds, instruments and Acts of Parliament. "To apply any other set of principles would be dangerous in the extreme and would lead to intolerable confusion and uncertainty" (per Dwyer, P., in *Perth Electric Tramway Employees v. Commissioner of Railways* (1928), 7 W.A.I.G. 155, and see *A.W.U. v. Lake View & Star* (1934), 14 W.A.I.G. 279 at p. 280. See also the remarks of Dunphy, P., in *A.W.U. Westralian Branch v. Co-operative Bulk Handling* (1946), 26 W.A.I.G. 353, at page 354.) On an interpretation, the Court looks at the terms of the award, at its subject matter, and the circumstances of the subject matter, and from these forms its own opinion as to the proper interpretation. In case of ambiguity it is permissible to look at the history of the award but the transcript of argument before the Court on the making of the award should not be referred to. *Furniture Trades Award v. Foy & Gibson (W.A.) Limited* (1950) 30 W.A.I.G. 231, and see generally in re *Furniture Trades* (1950) 30 W.A.I.G. 539. The Court will not consider itself bound by any expression of opinion as to the meaning of the award made by it when handing down the award. (See *A.W.U. v. Bulk Handling*, above.)

The Court will adopt a more liberal attitude towards a clause in an award which was in the first instance drafted by the parties themselves (see *W.A. Shop Assistants v. Ahern* (1935), 15 W.A.I.G. 29); in these cases the interpretation on which the parties have acted will, if possible, be adopted. (See *W.A. Sawmillers v. Millars* (1935), 15 W.A.I.G. 105 and *Government Water Supply Employees v. Minister for Water Supply* (1936), 16 W.A.I.G. 96, per Dwyer, P., at page 97; *Westralian Brickyard and Pottery Workers' Union v. Brisbane and Wunderlich Ltd.* (1946), 26 W.A.I.G. 107; *The Western Australian Barmails and Barmen's Union v. Faltridge* (1948), 28 W.A.I.G.) Awards will always be interpreted in the light of any custom proved to exist in the industry. (See *Hotel, Club, Caterers' Union v. Boans* (1920), 14 W.A.A.R. 766; *W.A. Police Union v. Minister of Police* (1940), 21 W.A.I.G. 42, and "Custom," section 6 ante.)

The Court will not answer abstract or hypothetical questions (in re *Metropolitan Bakers' Award* (1910), 9 W.A.A.R. 9.)

There is no power to interpret unless there is an ambiguity, the function of the Court in this respect being only to make clear that which is of uncertain meaning. (See *United Furniture Union v. Washing Bros.* (1938), 18 W.A.I.G. 211.)

The Court will exercise its jurisdiction under this section, irrespective of whether any other Court has already interpreted the same section in an action for enforcement, but it will not allow this section to be used as an indirect method of appealing from an industrial magistrate. (See *Commissioner of Railways v. W.A. Locomotive Engine Drivers' Union* (1941), 21 W.A.I.G. 451, and *Amalgamated Society of Railway Employees v. Commissioner of Railways* (1940), 20 W.A.I.G. 72.)

"and shall have power to amend the provisions of the award for the purpose of remedying any defect therein, or of giving fuller effect thereto."

Compare section 92 (a) of the N.Z. Act and see in re *New Zealand Carpenters and Joiners' Union* ((1939), 39 Bk. of Awards, 1119).

There is not an unlimited power to amend, but is a power confined within very narrow limits. (See *Colliie Miners' Union v. Colliie Proprietary Coalfields* (1904), 3 W.A.A.R. 106; *Coastal Districts Master Tailors v. Tailors' Union* (1908), 7 W.A.A.R. 9.)

It is only a power to amend the provisions of an award for the purpose of remedying defects therein, or for giving fuller effect thereto. (See *Fremantle Branch Amalgamated Engineers' Union v. Millars* (1904), 3 W.A.A.R. 13.) The power of amendment is merely ancillary to the power of interpretation. (See *Draper, J., in United Furniture Trades Union v. A. Fovey* (1931), 11 W.A.I.G. 42.)

When it has been established, by the application of the legal rules of interpretation, that the award is ambiguous or that there is a defect therein, the Court is entitled to go into the whole of the surrounding circumstances and explore what avenues it may deem necessary, even to the extent of appointing experts to investigate and report, in order to ascertain the true intention and to remedy the defect. (See Dwyer, P., in *Chief Secretary v. Hospital Employees' Union* (1931), 11 W.A.I.G. 105. See also section 71 (6) (10) and *Nurses' Award* (1946), 26 W.A.I.G. 34 at p. 37.) A "defect" is something in the award which would render it inoperative. That which is erroneous is not necessarily defective. (See *Burnside, J., in Nungarra Miners' Union v. Black Range Goldmines* (1908), 7 W.A.A.R. 39.) And a difference of opinion as to the construction to be placed on an award is not a "defect." (See *Perth Electric Tramways Employees' Union v. Perth Electric Tramways* (1910), 9 W.A.A.R. 105, per Burnside, J., at p. 107.)

91. The powers by the last preceding section conferred upon the Court may be exercised on the application of any employer or industrial union or association bound by the award.

Application may be made to Court by any party. No. 57 of 1912, s. 89.

92. The term of an award may be any specified period not exceeding three years from the date of the award:

Currency and review of awards. No. 57 of 1912, s. 90, (amended by No. 50 of 1925, s. 25; No. 49 of 1941, s. 7), renumbered as s. 92, amended by No. 5 of 1952, s. 21.

Provided that it may be prescribed by an award that any provisions thereof may be referred to the Court for review at such intervals of time as the Court may think fit, with power to the Court to add to, vary or rescind such provisions.

Provided also, that at any time after the expiration of the first twelve months from the date of an award, and after the expiration of any subsequent period of twelve months, application may be made to the Court, by leave of the Court obtained by any party to the award, for a review of any of the provisions of the award, and the Court shall have power to add to vary or rescind such provisions.

Provided further, the Court may, when delivering an award or any amendment to an award, reserve liberty to apply to any party to the award to amend the award in regard to any matters to be specifically stated in the order conferring such leave, and such order may state the period of time (which may be less than twelve months) within which an application may be made under such order.

Inserted by No. 49 of 1941, s. 7.

This section only refers to the amendment of a provision contained in the award and has no application to the reference which preceded the award. Therefore, just as the award must be within the ambit of the dispute referred to the Court for adjudication, so any amendment thereto must also be within the scope of the original dispute. (See Dwyer, P., in W.A. Timber Industry Employees' Union v. Millars (1940), 19 W.A.I.G. 466 and section 69 (2) ante and cases quoted there.)

If the amendment is impossible because it falls outside the ambit of the original reference, the remedy is to move for a supplementary award. (See W.A. Newspaper v. Printing Industry Employees' Union (1940), 20 W.A.I.G. 79.)

S.91. As to those bound by an award see section 85 (ante).

S.92. The award must be for a specified period and that means a definite or certain period. (See Metropolitan Timber Employees' Union v. Millars and others (1911) 10 W.A.A.R. 119) and as the term is to be calculated as from "the date of the award" the Court has no power to make it retrospective. "A question was raised," said Burnside, J., in Amalgamated Timber Workers v. Millars ((1913) 12 W.A.A.R. 157 at p. 173) "as to whether we had jurisdiction to make an award retrospective in its effect. I have considered the statute and cannot see any power in the Act which enables the Court to do so. The statute says that an award of the Court shall take effect from its date." (See also Davies, A.P., in Chaffcutting Award (1926) 5 W.A.I.G. 290 and G. Smiths, C.J., in Australian Sugar Producers v. A.W.U. 23 C.L.R. 58 at p. 65, and Barton, J., at p. 73.)

Continuance
of award.
No. 57 of
1912, s. 91.
N.J. 50 of
1925, s. 27.

93. (1) Notwithstanding the expiry of the term of an industrial award, it shall, subject to any variation ordered by the Court, continue in force until a new award has been made.

(2) Notwithstanding the continuance of an industrial award after the term thereof has expired, any person or body bound thereby may, during such continuance, refer any industrial matter or dispute

The provisos contain two distinct provisions for periodical reviews—(1) for reviews at such intervals of time as the Court thinks fit, and (2) for twelve-monthly reviews when no provisions for review have been included in the award. Each period of 12 months is calculated from the date of the award and not from the date of the preceding review (see in re Commissioner of Railways (1927) 6 W.A.I.G. 229 and West Australian Operative Bakers' Union v. Perth and Suburban Bread Manufacturers (1943) 23 W.A.I.G. 275) and the Court will only consider a review once in every 12 months. (See United Furniture Trade Union v. W. H. Moore (1929) 9 W.A.I.G. 36. West Australian Operative Bakers' Union v. Perth and Suburban Bread Manufacturers (1943) 23 W.A.I.G. 275.) If, however, certain provisions of an award are reviewed this will not prevent the Court considering OTHER provisions of the same award during the same 12 months period. (See Evans Limited v. Hotel Club Caterers' Union (1930) 10 W.A.I.G. 160.)

It is only during the "subsequent periods" that leave of the Court need be obtained (re Commissioner of Railways (1927) 6 W.A.I.G. 229) and the granting of this leave is discretionary and the Court will consider every application on its merits. (See Perth Electric Tramways Employees v. Commissioner of Railways (1928) 8 W.A.I.G. 419). The practice is to grant this leave "fairly freely." Printing Award (1951) 31 W.A.I.G. 408.

It is, of course, not necessary that an industrial dispute should exist before this section can be availed of. (See Amalgamated Road Transport Union v. Mooney (1937) 17 W.A.I.G. 294).

The provisos only give power to review "such provisions." This is restrictive. It is only an existing provision which can be reviewed. It is not reviewing an existing provision to insert a new and separate provision altogether. The third proviso (which was inserted in 1941) is not so limited and when liberty to apply has been reserved the Court may add an entirely new provision to an award. The Court when acting under this section can vary any provision of an award beyond the scope or ambit of the original dispute. Merchant Service Guild (1951) 31 W.A.I.G. 404. The Court is given no power to cancel the entire award, although this object could be obtained by rescinding all the essential provisions. (See Fremantle Harbour Trust v. McIlwraith, McEacharn (1938) 18 W.A.I.G. 195.

It has been held in South Australia (Rubber Workshops case (1941) 16 S.A.I.R. 126) that to establish a claim for variations it is not necessary to prove the occurrence, since the making of the award, of some substantial change within the industry, or within the particular conditions under which it is carried on. Proof of any change in the original determination conditions which makes the award unjust or unfair or defeats its intention is a ground for variation.

The power to amend is a discretionary one and cannot be fettered by strict rules of practice. The discretion will be exercised on the facts of each case and in accordance with equity and good conscience. Merchant Service Guild (1950) 30 W.A.I.G. 404 and Printing Award (1951) 31 W.A.I.G. 408.

An application made under this section cannot be finally disposed of by an Industrial Board (see W.A. Government Tramways Employees v. Minister for Railways (1937) 17 W.A.I.G. 423) but the Court can refer such an application to an Industrial Board for the purpose of securing a report only. Any action taken must be taken by the Court. (See W.A. Timber Industry Employees v. Millars (1939) 18 W.A.I.G. 608.)

S.93. The Act now contains no provision enabling parties to an award to retire therefrom. The award, subject to any variation ordered by the Court, is to remain in force until a new award is made. (See Commissioner of Railways v. Amalgamated Society of Railway Employees (1926) 6 W.A.I.G. 115.)

The award will continue in force after the only union of workers party to it has been deregistered. In re A.W.U. (1953) 33 W.A.I.G. 81.

(2) An award terminates the dispute and there can be no fresh dispute during the currency of an award over the subject matter dealt with by the award. This subsection was inserted as a safeguard against the possibility of an industrial dispute over an industrial matter, which had been dealt with by an award whose term had expired, but which was still in force by virtue of subsection (1) above, not being investigated and disposed of. (See Dwyer, P., in Coal Miners' Union v. Amalgamated Collieries (1939) 18 W.A.I.G. 421 at page 422.)

to the Court, although the matter or dispute may be governed by the provisions of the award; and, subject to any order of the Court, such award shall continue in force pending a reference and until a new award is made.

94. (1) The Court may by any award—

- (a) prescribe a minimum rate of wage or other remuneration with special provision for a lower rate being fixed (by such tribunal or person in such manner and subject to such provisions as the Court may think fit to prescribe in the award) in the case of any worker who is unable to earn the prescribed minimum by reason of old age or infirmity, and with special provision, when deemed necessary, for a lower rate to be fixed by the Court in the case of junior workers;
- (b) prescribe such rules for the regulation of any industry to which the award applies as may appear to the Court to be necessary to secure the peaceful carrying on of such industry;
- (c) limit the working hours of piece-workers in any industry except workers engaged in the agricultural and pastoral industries.

Minimum wage, regulation of industries, and employment of members of unions.
No. 57 of 1912, s. 62.
Amended by No. 50 of 1925, s. 28.

S.94. See basic wage, section 123 *et. seq.*

As to junior, infirm and aged workers, see section 123 (6) post.

(1) (a) The words "old age" and "infirmity" are both of doubtful connotation, but at least it may be said that "old age" is not an absolute term, but is one which will vary with the industry in which the worker is employed, and that "infirmity" is not confined to mere physical incapacity or to the state or condition requiring the attention of a physician. (*A.W.U. Westralian Branch v. Goldfields Firewood Supply Ltd.* (1944), 24 W.A.I.G. 191.)

(1) (b) The Court will not attempt the regulation of the details involved in the organisation, control and management of industrial enterprises. That must remain the responsibility of the owners. The Court has jurisdiction to alter the staffing of industries and has, in certain cases, stated that a minimum number of men shall be employed on a certain class of work, or that one type of labour must be employed in certain proportions to other types. This responsibility will, however, only be assumed by the Court under exceptional conditions, it generally being necessary to show that such interference is essential to safeguard the health of the workers engaged in the industry. (*See Mental Hospital Award* (1929), 9 W.A.I.G. 128.)

This subsection, when read in conjunction with the definition of "industrial matters" contained in section 6 (*ante*), has been held to be the foundation of the Court's jurisdiction to grant preference to unionists. (*See Wolf, J., in Building Trades Award* (1939), 18 W.A.I.G. 526.)

(c) This subsection is difficult, if not impossible to construe. The difficulty arises from the close juxtaposition of the words "pieceworkers" and "workers." A piecemaker is a "worker" as defined by the Act (page 16 *ante*), and is distinguished from other workers only in that he is paid in accordance with the quantum of work done by him, whereas all other classes of workers have their remuneration calculated on a time basis. If the subsection is read literally it commences with a grant of power which was unnecessary (see the definition of "Industrial matters," section 6, page 7 *ante*) and ends with a

(2) No minimum rate of wages or other remuneration shall be prescribed which is less than the basic wage determined under this Act or, if there is no such determination applicable, which is not sufficient to enable the average worker to whom it applies to live in reasonable comfort, having regard to any domestic obligations to which such average worker would be ordinarily subject.

Amount of costs or expenses to be fixed.
No. 57 of 1912, s. 93.

95. In every case where the Court, in its award or order, directs the payment of costs or expenses it shall fix the amount thereof, and specify the parties or persons by and to whom the same shall be paid.

restriction of power which is drastic in the extreme. Read in this manner the Court would have no power to regulate the hours of work in the agricultural and pastoral industries, with the practical result that the Court would be unable to regulate these industries at all. It is submitted that any construction is difficult without the insertion of the word "such" between the words "except" and "workers." For other possible interpretations (see the judgment of Dwyer, P., in A.W.U. Westralian Branch v. A. Crombie (1945), 25 W.A.I.G. 43). The Court has adopted the attitude that this subsection prevents it from placing any limitation upon the hours to be worked by workers in the pastoral or agricultural industries, and it would appear that any change of attitude can only be achieved by a legislative amendment (A.W.U. Farm Workers' Application (1946), 28 W.A.I.G. 191).

"Hours" and "Pieceworkers." See Part VII. post. Section 123 *et seq.*

(2) See section 123 (2) post.

The minimum wage must be based on the needs of the average worker, and not upon the ability of industry to pay. For the development of this conception of a "family wage" under 1 and 2 Ed. VII. No. 21, section 89, see Parker, J., in *Norseman Miners' Union v. Princess Royal Gold Mine* (1903) 2 W.A.A.R. 43 and also in *Colliie Miners' Union v. Colliie Proprietary Coalfields* ((1905) 4 W.A.A.R. 21 at page 30; also Mr. Somerville in *Gwalla Consolidated Ltd.* (1906) 5 W.A.A.R. 62 and in *Marvel Loch Miners' Case* (1909) 8 W.A.A.R. 54 at p. 60. It was through Mr. Somerville that the workers' claim to a "family wage" became articulate in the Court, though it was not until 1912 (see section 84 (2) of No. 57 of 1912) that the principle received legislative expression.

The Court will not increase the minimum wage to a point beyond that which is necessary for the maintenance of the average man, unless it has been satisfied that the industry is in a position to pay such increase. (See A.W.U. (Goldfields) v. Goldfields Firewood Supply Co. (1927), 7 W.A.I.G. 143, and also A.W.U. (Goldfields) v. Lake View & Star (1929), 9 W.A.I.G. 226.) If, however, an industry has customarily paid a wage which is in excess of the strict minimum, the Court will adopt such wage on the assumption that the industry can pay it (See *Club employees' Award* (1926), 6 W.A.I.G. 9.)

A wage, greater than the minimum, will not be awarded as an inducement to the worker to sacrifice his health. (See *Metropolitan Wine and Spirit Employees v. Mine & Co.* (1912) 11 W.A.A.R. 202 per Burnside, J., at p. 205. See "Risk money," Basic Wage (section 123) post.)

As to "average worker," "reasonable comfort" and "domestic obligations of such average worker," see section 123 post. The minimum wage inserted in an award is, of course, truly the minimum and the employer is absolutely at liberty to pay a larger wage. (*Carters and Drivers' Union v. Whoolley and Walsh* (1904) 3 W.A.A.R. 42.) This subsection has no application to apprentices. See in re *Carpenters' Award* (1954) 34 W.A.I.G. 165.

S.95. See section 71 (2) ante. It is unusual for the Court to grant costs in applications for an award. (See A.W.U. (Goldfields) v. Golden Horseshoe (1922) 1 W.A.I.G. 83.)

The Court has power to order the payment of "expenses" as well as costs and such expenses will include those incidental to the performance of all statutory formalities which have been made prerequisites to the Court's jurisdiction. (See *Amalgamated Tailors' Union v. Coultas & Son* (1908) 7 W.A.A.R. 169 overruling *Coastal Hotel Employees' Union v. Lofthouse* (1906) 5 W.A.A.R. 35.)

96. In all legal and other proceedings, it shall be sufficient to produce the award with the seal of the Court thereto, or a copy thereof certified as true by the Registrar or the Clerk of the Court, and it shall not be necessary to prove any conditions precedent entitling the Court to make the award.

Award under seal to be evidence.
No. 57 of 1912, s. 94;
No. 49 of 1941, s. 8.

97. No proceedings in the Court shall abate by reason of the death of any party, but such proceedings may by order of the Court be continued on such terms as the Court thinks fit by or against the legal representative of such party or by or against any person appointed by the Court to be the representative of such party.

No abatement on death of party.
No. 57 of 1912, s. 95.

98. The Court in its award, or by order made on the application of any of the parties at any time whilst the award is in force, may fix and determine what shall constitute a breach of the award, and what sum, not exceeding Five hundred pounds, shall be the maximum penalty payable by any party in respect of any breach.

Court to fix what constitutes breach of award and penalty therefor.
No. 57 of 1912, s. 96.

98A (1) Where on the application of an industrial union or person who in the opinion of the Court has a sufficient interest or of the Registrar, it appears to the Court

Power of Court to cancel or suspend terms of awards.
S. 98A added by No. 5 of 1952, s. 22.

- (a) that an industrial union which is a party to an order or award or industrial agreement has by act or omission contravened this Act, or an order, or award, or industrial agreement;

S.96. The Arbitration Court will take judicial notice of its own awards. (See *Hotel, Club, Caterers' Union v. Fancourious* (1913) 12 W.A.A.R. 63 and section 69 (1) ante.)

S.98. "of any of the parties." A person may be bound by an award although not a party thereto. (See section 85 (ante) and cases cited there.) Such a person could not make application to the Court under this section.

"whilst the award is in force." An award may be in force after the expiration of the term thereof. (See section 93 (1) ante.) The jurisdiction of the Court is here limited to determining what shall constitute a breach of an award—no power is given to treat an industrial agreement in the same way. (See *Dunedin Trams v. Forsyth* (1938) N.Z.L.R. 576 and section 98 of the New Zealand Act.)

And the jurisdiction is limited to breaches, the Court has no jurisdiction over attempts to commit a breach. (See *Metropolitan Timber Employees' Union v. Whittaker Bros.* (1904) 3 W.A.A.R. 11.)

An order was made under this section in *E. J. Ledger v. Coastal Districts Committee Amalgamated Engineering Union* (1952) 32 W.A.I.G. 77.

- (b) that a number of members of an industrial union, sufficiently large to form a substantial part of the industrial union refuses to accept employment either at all or in accordance with existing orders, awards or industrial agreements; or
- (c) that for any other reason an order or award or industrial agreement ought to be suspended or cancelled in whole or in part;

the Court may, by order, subject to such conditions or exceptions, or both, as it thinks fit, suspend or cancel for such period as it thinks fit, all or any of the terms or any order or award or industrial agreement in force so far as the order or award or industrial agreement applies to, or is in favour of, the industrial union or its members.

(2) The order for suspension or cancellation may be limited to persons named therein, to classes of persons, or to particular localities.

Provisions
for enforcing
awards.
No. 57 of
1912, s. 97.
Amended by
No. 50 of
1925, s. 30.

99. For the purpose of enforcing any award or order of the Court, whether made before or after the commencement of this Act, the following provisions shall apply:—

- (1) In so far as the award itself imposes a penalty or costs, it shall be deemed to be an order of the Court, and payment shall be enforceable accordingly under the subsequent provisions of this Act relating to orders of the Court.

S.99. The word "enforce" is used in this section and in section 100 in a restricted sense and only intends to compel those proceedings to be taken in the Arbitration Court or before Industrial Magistrates (section 103) which are for the purpose of punishing an employer or worker who refuses to abide by the terms of an award or an agreement and who may be called upon to pay very heavy penalties. It has no application to proceedings taken by an individual to recover damages consequent upon the breach of an award. (See *McMillan, J., in Collie Coal Co. v. Thomas Watts* (1913) 12 W.A.A.R. 146).

An action to enforce is in the nature of a criminal proceeding and the defendant must be brought fairly within the terms of the award. "The burden of establishing the proposition is in the first place on those who affirm it. If a man is charged with an offence the person alleging it must in the first instance establish it. If he does make out a *prima facie* case the other side is called upon to answer it . . . It is true that in the exercise of the arbitral functions of the Court a very wide discretion is given . . . but when the Court is exercising its judicial functions it is important that it should follow the principles which control the administration of justice," per *Burnside, J., in W.A. Midland Railway Employees v. Midland Railway Company* (1924) 3 W.A.I.G. 170.) The Court should, in such proceedings, observe the legal rules of evidence. (See *McMillan, J., in Amalgamated Society of Engineers v. Hill* (1926) 6 W.A.I.G. 124.) An action for enforcement cannot be brought by an individual workman (subsection 2). Such proceedings are initiated by the Registrar or any Industrial Inspector, or

- (2) If any party or person on whom the award is binding commits any breach thereof by act or default, then, subject to the provisions of the last preceding paragraph hereof, the Registrar or any Industrial Inspector or any employer or industrial union or association bound by the award may, by application in the prescribed form, apply to the Court for the enforcement of the award.
- (3) On the hearing of such application the Court may by order either dismiss the application or impose such penalty for the breach of the award as it deems just, and in

any employer or industrial union or association bound by the award. In practice the unions assume the responsibility for policing the awards, and the Court will give them all assistance possible. (See *Parker, J., in Norseman Miners' Union v. Crabbe* (1905) 4 W.A.A.R. 49 and the amendment to *Breadcarters' Award* (1935) 15 W.A.I.G. 24.)

(2) "commits any breach thereof." Whether it is necessary to prove *mens rea* to establish a breach of an award must depend for the most part upon the wording of the award in question. Generally the Court will deal with an action for a breach of an award in the same way as the Courts of Law deal with prosecutions under the revenue laws (as to which see *Lord Wright in Sherras v. De Rutzen* (1918) 1 Q.B. 1895) and *mens rea* will be presumed. (See *Davies, A.F., in Midland Railway Union v. Midland Railway Company* (1925) 5 W.A.I.G. 195. *Grade v. Director of Public Prosecutions* (1942) 2 All E.R. 118 at p. 139.)

The defendant will, if it is shown that the conditions of the award have not been complied with, be *prima facie* liable for a breach of the award, and to free himself from this liability he must show that he has acted prudently and in perfect good faith. (See *Lloyd v. Wilkinson* (1909) A.R. (N.S.W.) 488 and *Armstrong v. Williams* (1929) 35 I.G. (N.S.W.) 378.)

For although the exact degree of *mens rea* which it is necessary to prove in order to sustain a prosecution for the breach of an award must depend in the first place upon the wording of the actual provision which is alleged to have been contravened yet it can easily be seen that the insistence on the strict proof of *mens rea* would render the evasion of awards extremely easy and their enforcement well-nigh impossible. Thus it has been held that an employer who as a result of a misrepresentation made by the worker, pays the worker less than the award rate is guilty of a breach of the award. (Presumably on the grounds that it was negligent for the employer to accept the uncorroborated evidence of the worker.) (See *Wallace v. Draine* (1933).)

But an employer does not commit a breach of an award if without his knowledge or consent a worker is doing work in a higher grade than that in which he was engaged and paid. (See *W.A. Amalgamated Butchers v. Swan Meat Co.* (1908) 8 W.A.A.R. 17.) Nor does he commit a breach of an award if his employees neglect to avail themselves of the advantages secured to them under the award. The employer should place no obstacle in the way of the workman which would prevent or hinder his observation of the conditions of his employment laid down in the award. But there is no duty on the employer to do more. It is not his duty to COMPEL his workmen to accept the advantages due to them under the award. (See *W.A. Shop Assistants' Union v. Foy and Gibson* (1934) 14 W.A.I.G. 173.)

A finding of fact that the worker connived in a breach of an award does not enable the Court or an Industrial Magistrate, as the case may be, on the hearing of a prosecution under section 108 post to award to the worker less than the sum properly recoverable by him, although it may well form a ground on which an order for the payment of back wages may be refused *in toto* (see section 108 post).

"application in the prescribed form." Proceedings for enforcement are actually launched under this subsection and may be dealt with by the Court under section 101, or by an Industrial Magistrate under section 103. (See regulations 68-73.)

(3) Costs will, as a rule, be granted to the successful party in an action for enforcement, but the action must be genuine and not an indirect way of securing an interpretation. (See *A.W.U. (Goldfields) v. Golden Horsehoe* (1922), 1 W.A.I.G. 83.)

either case with or without costs: Provided that in no case shall costs be given against the Registrar or an Industrial Inspector.

- (4) If the order imposes a penalty or costs, it shall specify the parties liable to pay the same and the parties or persons to whom the same shall be payable.
- (5) The Court may, in addition to imposing a penalty for breach of an award, order that any party liable shall pay to any worker the difference between the amount paid and that which should have been paid under the award; and the penalty imposed shall be deemed to be increased by the amount so ordered to be paid, and such amount may be recovered accordingly.

(5) Compare section 121 of Industrial Code of South Australia (11 George V., No. 1453) from which this section is copied. (1926) 6 W.A.I.G. 277.)

This subsection was inserted by section 30 of No. 50 of 1925 to prevent a multiplicity of actions and to enable the breach of the award to be punished and back wages to be recovered in one action. To realise the full significance of the subsection, it is necessary to consider the actions open to the worker who has been paid less than the award rates. The worker may select one of three Courts in which to proceed.

(a) In the Local Court.—(See Local Courts Act, 1904, No. 51 of 1904) and amendments, and also *Swaney v. Wheatley*, 8 W.A.L.R. 199.)

(b) Or in the Police Court.—It was held in *Swaney v. Wheatley* (8 W.A.L.R. 199) that a servant who had entered into a contract of service with an employer for less remuneration than had been fixed under the award could not recover the difference between the amount due under his contract and the award rate by action in a Court of Summary Jurisdiction under the provisions of the Master and Servants Act, 1892 (No. 55 of 1892), which applies only to actions arising out of contract and not to a breach of a statutory duty. This decision is, however, no longer law, for section 180 (2) (post), which was introduced in 1912 (see section 123 (2) of No. 57 of 1912) provided that the amount due under an award may be recovered "as wages," and this means that it can be recovered in the same manner as wages. See *Turnbull v. Forbes* (1923), 3 W.A.I.G., per Northmore and Draper, J., *McMillan, C.J.*, dissenting.)

(c) Or in the Arbitration Court.—It was decided, under the Industrial Conciliation and Arbitration Act, 1902, that the Court had no jurisdiction to order payment to a workman of wages due under the terms of the award. The Court could, on the application of the union, punish the employer for any breach of the award, but it could not order the employer to pay back wages to a workman. (*Fremantle Bakers' Union v. Currie* (1910), 9 W.A.A.R. 55; *Peak Hill Miners' Union v. Peak Hill Gold Mines* (1904), 3 W.A.A.R. 68; *Eastern Goldfields Hotel Employees' Union v. Ellis* (1904) 3 W.A.A.R. 98; *W.A. Amalgamated Railway Employees' Union v. Commissioner of Railways* (1913), 12 W.A.A.R. 90.)

Although the Court, at an early date, established its right to direct that any portion of the penalty be paid to the workman who was aggrieved or had suffered some loss of wages (see *Swaney v. Wheatley* and *Lofthouse* (1906), 5 W.A.A.R. 57), yet this power was only exercised on rare occasions, and in practice the worker was left to proceed in the Local Court or the Police Court to recover the balance of the wages due to him. This led to much multiplicity, which it is the purpose of this section to overcome by enabling the Court to award back wages to the worker and so rendering it unnecessary for him to proceed against his employer in another Court. (See *Dwyer, P.*, in *Amalgamated Engineers v. Metters* (1926), 6 W.A.I.G. 26.)

The Court has no jurisdiction to enforce contracts between individuals; they must still be enforced in the Civil Courts. Thus, if the award is not in dispute and its application to work done is not questioned, the dispute being as to whether the work was done at all, or whether the employer authorised it, that is a private dispute between the worker and the employer and not within the jurisdiction of the Arbitration Court. (See *Amalgamated Engineers v. Malloch* (1920), 2 W.A.I.G. 57, and *Coastal District Engineers v. Arbitration Court* (1921), 23 W.A.L.R. 87, per *McMillan, C.J.*) The principle

100. For the purpose of enforcing industrial agreements, whether made before or after the commencement of this Act, the provisions of paragraphs two, three, four, and five of the last preceding section hereof shall *mutatis mutandis*, apply in like manner in all respects as if an industrial agreement were an award of the Court, and the Court shall accordingly have full jurisdiction to deal therewith.

Provisions for enforcing industrial agreements.
No. 57 of 1912, s. 98;
No. 50 of 1925, s. 31.

which appears to have been established in this case is somewhat difficult to understand. It is however a decision of the Full Court of the Supreme Court and it goes to jurisdiction and will therefore be followed. See *Salvaris v. Hotel, Club Caterers Union* (1953) 33 W.A.I.G. 219. The Court has ruled that in any proceeding for enforcement, where it is the intention to apply to the Court for the payment of moneys under this section, the complaint should be endorsed showing the amount due, giving particulars. (See *Dwyer, P., in Amalgamated Engineers v. Metters* (1926), 6 W.A.I.G. 57 and *Hotel, Club, Caterers' Union v. Y.M.C.A.* (1929), 9 W.A.I.G. 351, per *Craig, I.M.*) The making of an order for the payment of back wages under this section is completely within the discretion of the Court or the Industrial Magistrate, as the case may be, but if such an order is made, there is no discretion as to quantum and the total amount properly recoverable must be awarded. (See *Dwyer, P., in Westralian Brickyard Employees v. Brisbane* (1940) 18 W.A.I.G. 455, at page 457.)

Prior to this decision, the Industrial Magistrates had been attempting to do substantial justice by arbitrarily reducing the amount to be paid to the worker in all cases where the worker had joined in the breach of the award. (See the remarks of *Craig, I.M.*, in *Hotel, Club, Caterers' Union v. Connolly* (1940), 19 W.A.I.G. 395.)

As to the difficulties inherent in this method of recovering wages which involves a mixture of criminal and civil procedure, see *Craig, I.M.*, in *Hotel, Club, Caterers' Union v. Connolly* (1940) 19 W.A.I.G. 395.

What is the amount properly recoverable under this subsection? Is the amount that can be recovered limited to wages which have been earned within the preceding 12 months, or, in other words, is the limitation contained in section 180 (2) (post) applicable to this section?

It was held by *Craig, I.M.*, in *Perth and Fremantle Bread Carters v. Hansen* (1926) 6 W.A.I.G. 129 that section 180 (2) only applied to actions brought in a Court of "competent jurisdiction" and that it could therefore have no application to an action brought before an Industrial Magistrate for the breach of an award because such an action was not before a "Court of competent jurisdiction" within the meaning of section 180. However, as a matter of practice he intended to observe the time limitation in section 180 (2). (See also *Moseley I.M.*, in *Hotel, Club, Caterers' Union v. Spurge* (1929) 9 W.A.I.G. 352, and *Dwyer, P.*, in *Federated Moulders' Union v. Hoskins Limited* (1932) 12 W.A.I.G. 18.)

As to the appropriateness of the word "Court" with reference to Industrial Magistrates (see *Amalgamated Engineering Union v. Humphrey* (1927) 6 W.A.I.G. 277). In the *Westralian Brickyard Employees v. Brisbane* (1938) 18 W.A.I.G. 455, the Full Court (Northmore, C.J., *Draper* and *Dwyer JJ.*) held that under this subsection an Industrial Magistrate was not empowered to order an employer to pay to a worker, who was suing on the award, in the face of an inconsistent contract, a sum greater than the worker himself could recover if he took proceedings on his own account under section 180 (2). This subsection only empowers the Court or the Industrial Magistrate as the case may be, to make an order against a party liable to pay, and as the employer's liability to pay is limited by section 180 (2) to a period of twelve months it follows that the Court or Industrial Magistrate is not able to make an order for the payment of a greater sum than the amount that has accrued during that period. (See section 180 (post) and cases cited there.) As to whether a workman is entitled to a prescribed margin see section 125 post and cases cited there. It may be noted here that when a worker is said to be "suing on the award," it is not to say that the award is the foundation of his cause of action. The foundation of his action is always a contract express or implied to which the award annexes certain incidents. If the terms of the contract of service are inconsistent with the terms of the award the latter will prevail and may be enforced subject to the time limitation contained in section 180 (2). In such a case the worker is "suing on the award." It must be remembered however, that the award itself does not establish any contractual relationship and by itself does not give rise to any right to wages. (See *Brown v. Rubber* (1921) 23 W.A.L.R. 52 per *Burnside, J.*, at p. 56.)

The total sum ordered to be paid under this subsection must be treated as a penalty for purposes of appeal. (See section 108 (b) (post) and *Hill & Co. v. Amalgamated Society of Engineers* 28 W.A.L.R. 115.)

S.100. This section gives the Court no power to order specific performance. (See *W.A. Typographical Union v. Daily news* (1922), 1 W.A.I.G. 80.)

Jurisdiction
of Court to
deal with
offences.
No. 57 of
1912, s. 99.

101. (1) The Court shall have jurisdiction to try and determine all charges of offences against this Act or the regulations made thereunder, and to inflict punishment on any person convicted before it of any offence.

(2) Such jurisdiction shall be concurrent with that of Courts of summary jurisdiction.

Property
liable to
execution.
No. 57 of
1912, s. 100.

102. (1) All property belonging to any person or body bound by any judgment, order, conviction, or direction of the Court (including therein, in the case of an industrial union or industrial association, all property held by trustees for such union or association) shall be available in or towards satisfaction of the judgment, order, conviction, or direction, and if any such body is an industrial union or an industrial association, and its property is insufficient to fully satisfy the amount due under the judgment, order, conviction, or direction, its members and the members of any union represented on any such association shall be jointly and severally liable for the deficiency:

Provided that no member shall be liable for more than Ten pounds under this subsection:

Provided also that all goods protected from seizure on an execution under a judgment of a Local Court are protected against seizure under this Act and the regulations to the value of thirty pounds.

(2) For the purpose of giving full effect to the last preceding subsection hereof, the Court or the President thereof may, on the application of the person or body entitled to claim the enforcement of such judgment, order, conviction, or direction, make such

S.101. Although the hearing of an application for the enforcement of an award constitutes a trial of an offence within the meaning of the proviso of section 67 (4) (ante), yet the breach of an award is not an offence "against this Act or the regulations made thereunder," and therefore proceedings to enforce awards or agreements cannot be taken in Courts of summary jurisdiction under this section. (See *Davies, A.P.*, in *Midland Railway Union v. Midland Railway Company* (1925) 5 W.A.I.C. 195).

S.102. A limited company may be registered as an industrial union (section 17) in which case the individual liability of the members under this section must be read down so as not to conflict with the principle of limited liability, that is to say, so as not to render "a shareholder of an incorporated company liable for any further amount than that for which he is liable as a shareholder of such company." (See proviso to section 14 (ante).)

order or give such directions as are deemed necessary, and the trustees aforesaid and all other persons concerned shall obey the same.

(3) The property of any industrial union or association shall be deemed to include the property of any company, trades or industrial union, society, or other body forming part of or constituting the industrial union or association.

103. The powers and jurisdiction of the Court under the last preceding four sections may be exercised by any police or resident magistrate appointed by the Governor as an Industrial Magistrate for the purposes of this Act; and any order, conviction, or other decision of such magistrate shall be enforceable as if made by the Court.

Enforcement orders may be made by Industrial Magistrates. No. 57 of 1912, s. 101 (amended by No. 50 of 1925, s. 32; No. 42 of 1949, s. 3); renumbered as s. 103, amended by No. 56 of 1950, s. 3.

Goods protected from seizure in the local court are—Wearing apparel of person against whom the warrant is issued, of his wife or of his dependants; the bedding of such person and of each member of his family dependent upon him; his implements of trade and family photographs and portraits. (See section 126 of Local Courts Act, 1904, and I.A.A. Regulation 109.)

S.103. Prior to the appointment of Industrial Magistrates (see section 32 of No. 50 of 1925) the Court of Arbitration was the only tribunal competent to deal with applications for the enforcement of awards and agreements. The majority of enforcement cases are now heard before an Industrial Magistrate, and in the same manner as they had previously been heard before the Court itself, and any conviction of such Magistrate is enforceable in the same way as a conviction made by the Court. (See *Amalgamated Engineers v. Parker & Son* (1926), 6 W.A.I.G. 377, per McMillan, C.J.). Regulation 73 (a) provides that proceedings before an Industrial Magistrate shall be commenced and conducted in accordance with the procedure laid down in the Justices Act, 1902-1936, for proceedings before Justices for a simple offence. It has been held, however, (per Wallwork, I.M., in *Hotel, Club, Caterers' Union v. A. Rigoe*, 27 W.A.I.G. 837) that the making of a complaint under this Act to originate proceedings before an Industrial Magistrate is not subject to the period of six months' limitation as provided in section 51 of the Justices Act, and must now be taken as settled. See *Operative Painters v. Arcus Ltd.* (1954) 34 W.A.I.G. 53.

There was no appeal from an Industrial Magistrate to the Arbitration Court prior to amendment No. 42 of 1949, and the Court would not hear applications for interpretation which were merely attempts to bring such appeals in an indirect manner. (See Dwyer, P., in *Amalgamated Society of Railway Employees v. Commissioner of Railways* (1940), 20 W.A.I.G. 72, and notes to section 90 ante.) Appeal lies also to the Court of Criminal Appeal under section 108 (post).

"last preceding four sections" excludes section 98.

The foundation of the Industrial Magistrate's jurisdiction to enforce is section 99 (2). (See *Amalgamated Society of Engineers v. Hill* (S.C.) (1926), 6 W.A.I.G. 124.)

Proviso.—Prior to amendment No. 42 of 1949, it was held by the Full Court in *Westralian Brickyard Employees v. Brisbane* ((1940) 18 W.A.I.G. 455) that a bona fide belief that the words were capable of more than one meaning was sufficient to raise a question of interpretation that when such question had been raised the Industrial Magistrate had no option but to refer it to the Arbitration Court. Leave to appeal from this decision to the High Court was refused, but Latham, C.J., made certain remarks on the hearing of the application for leave which clearly indicated that the decision of the Full Court would not be followed by the High Court. He said there (18 W.A.I.G. 243)—

It is contended by the applicant for special leave that the mere allegation or assertion that a clause in an award is capable of more than one meaning is not sufficient to establish a condition postulated by the proviso to section 103. I agree with that argument. In my opinion, the mere assertion that certain words have a certain meaning is not sufficient to raise a question of interpretation. It is further

Appeal from
decision of
Industrial
Magistrate.
S. 103A
added by
No. 56 of
1950, s. 4.

103A. (1) In this section—

“appeal” means an appeal brought pursuant to the provisions of this section;

“decision” includes a conviction, penalty, order, order of dismissal and any other determination of an Industrial Magistrate;

“Industrial Magistrate” means an Industrial Magistrate exercising the powers and duties of the Court, referred to in the last preceding section;

“process” means a complaint, conviction, order, warrant, or other procedural document, record or proceeding before the Industrial Magistrate relating to the subject matter of an appeal.

(2) A party to proceedings before an Industrial Magistrate may appeal to the Court in manner prescribed in respect of the whole or part of the Industrial Magistrate’s decision.

(3) Jurisdiction is conferred upon the Court to hear and determine appeals.

(4) In exercising the jurisdiction conferred by the last preceding subsection, the Court may—

(a) hear and determine the appeal upon the evidence and proceedings before the Industrial Magistrate solely or upon that evidence and those proceedings and in addition upon such evidence, either oral or by affidavit, as the Court thinks fit to call or admit;

contended that even a bona fide assertion that certain words bear a certain meaning is not sufficient to raise a question of interpretation within the meaning of section 103. I also agree with that argument. A mere genuine belief by one party that certain words are capable of more than one meaning does not establish that a question of interpretation has arisen. I agree that there must be a real question. Whether a real question of interpretation arises must be determined in the first place by the tribunal before which it arises. In this case, the first person who had the duty of deciding was the Industrial Magistrate.

An application for enforcement is a trial of an offence within section 67 (4) of this Act and, whether the action be before the Court or an Industrial Magistrate, the parties may be represented by counsel. (See the proviso to section 67 (4) ante) but at his own expense. *Operative Painters v. Kalgoorlie Brewery* (1950) 30 W.A.I.G. 236.

The fact that during the conduct of the proceedings the Industrial Magistrate may, before the amendment No. 42 of 1949, have found it necessary refer to the Court a question of interpretation did not take the matter so referred outside its original category as being part of the proceedings for an offence within the meaning of the proviso to section 67. The proceedings were not thereby abated; there was merely a temporary alteration of personnel and the parties were not to be deprived of legal assistance on this account. (See *Dwyer, P., in Amalgamated Engineers v. Commissioner of Railways* (1940), 19 W.A.I.G. 502.)

- (b) make findings of fact and draw inferences from fact;
- (c) adjourn the hearing and determination of the appeal from time to time;
- (d) rectify or cause to be rectified any defects in substance or in form, variance, deficiency, excess or other defect or error in the processes and proceedings before, and the exercise or purported exercise of any power by, the Industrial Magistrate;
- (e) confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal;
- (f) remit the whole or part of the case to the Industrial Magistrate or another Industrial Magistrate for hearing or rehearing with or without the observations or opinion of the Court or such directions in law as the Court thinks fit;
- (g) exercise any power, which the Industrial Magistrate might have exercised, and any order of the Court made for the purpose shall be enforceable as if made by him;
- (h) make such orders as to terms, costs and all other matters as the Court thinks desirable and just.

104. (1) When any charge of an offence against this Act is pending in a Court of summary jurisdiction then, before the decision, the Court of Arbitration may, on the application of any party to the proceedings, issue a writ of *certiorari* commanding the removal of the proceedings into the Court of Arbitration, and the proceedings shall be removed accordingly, and the Court of Arbitration shall then have exclusive jurisdiction to try and determine the charge and to inflict punishment therefor.

Removal of prosecution for offence from Court of summary jurisdiction to Court of Arbitration
No. 57 of 1912, s. 102.

S.104. Section 101 (2) makes the Court's jurisdiction over offences against the Act and the regulations concurrent with the Courts of Summary Jurisdiction. This section gives the Arbitration Court predominance. (Davies, A.P., in *Midland Railway Union v. Midland Railway Company* (1925), 5 W.A.I.G. 196). Prima facie, the Court of Arbitration is the proper Court to deal with industrial matters, and should a charge of an offence against this Act be brought in a Court of Summary Jurisdiction, the Court of Arbitration will, while it has sufficient time at its disposal to deal with the matter quickly, issue the writ (*The Boot Trade Union of Workers v. J. A. Weaver Shoe Co.* (1945), 25 W.A.I.G. 134).

This section applies to proceedings for offences against the Act, and has no application to proceedings for the breach of an award or industrial agreement, which are being conducted before an Industrial Magistrate. (Davies, A.P., in *Midland Railway Union v. Midland Railway Co.*, above.)

(2) The powers conferred by this section may be exercised by the President at any time when the Court is not sitting.

Sheriff and other officers to be Officers of Court of Arbitration. No. 57 of 1912, s. 103. Amended by No. 50 of 1925, s. 33.

105. (1) The Sheriff of Western Australia, the Bailiffs of Local Courts, and all officers of police shall be deemed to be officers of the Court, and shall exercise the powers and perform the duties prescribed by any rules of Court made under this Act; and for the purpose of carrying out the provisions of this Act and in relation to any proceedings before the Court or the President and in relation to the making, carrying out and enforcing of any award, order, conviction, or direction of the Court or the President shall, except where otherwise provided in any rules made as aforesaid, exercise the same powers and perform the same duties as they may exercise and perform in relation to any judgment, order, conviction, or direction of the Supreme Court or any Local Court or Court of summary jurisdiction.

(2) All prison officials shall obey and carry out the writs, warrants, and orders of the Court so far as the same are addressed to them.

(3) Any writ or warrant of execution may, subject to this Act, be declared, by rules of Court, to have effect against any property (including land under the Transfer of Land Act, 1893-1946¹) as a writ of *fiery facias*, and it shall have such effect in respect of such property accordingly.

Industrial Inspectors. No. 57 of 1912, s. 104.

106. (1) Every inspector appointed under the Factories Act, 1904², shall be an Industrial Inspector under this Act for the whole State, and shall be charged with the duty of seeing that the provisions of any industrial agreement or award or order of the Court are duly observed, and with such other duties as are by this Act imposed on him.

¹ Now Transfer of Land Act, 1893-1954: See No. 73 of 1954, s. 5.

² See Act No. 44 of 1920.

S.106. Although Industrial Inspectors are, by this section and also by section 99 (2), given power to apply for enforcement orders and generally to see that the provisions of awards and industrial agreements are being observed, it is the unions themselves who in practice police their own awards. (See Draper, J., in *Westralian Brickyard Employees v. Brisbane* (1940), 18 W.A.I.G. 455, and remarks of Dwyer, P., in amendment to *Breadcarters' Award* (1935), 15 W.A.I.G. 24), and the Court will, generally by its award, confer all powers on the union secretary or other representative to enable them to see that the terms of the award are being observed. This right will be withheld if the Court has no confidence in the industrial integrity of a particular secretary or union representative. *Bootmakers award* (1948) 28 W.A.I.G. 107 at p. 109.

(2) Every inspector of mines appointed under the Mines Regulation Act, 1946¹, or the Coal Mines Regulation Act, 1946², shall be an Industrial Inspector, and shall be charged with the duty of seeing that the provisions of any such agreement, award, or order are duly observed in or about any mine or coal mine subject to his inspection.

(3) In the discharge of his duties under this Act an Industrial Inspector may require any employer or worker to produce for his examination any wages books, overtime books, and other books which he shall deem it necessary to examine, and may put any questions to any employer or worker and may exercise all such powers of entry and examination as are conferred on him by any of the aforesaid Acts.

(4) Except for the purposes of this Act and in the exercise of his functions thereunder, an Industrial Inspector shall not disclose to any person any information acquired by him in the performance of his duties.

Penalty: Fifty pounds.

107. (1) No industrial matter (including any application for the enforcement of any industrial agreement or award of the Court) or dispute shall be referred to the Court by an industrial union or asso-

References to Court to be approved by resolution of union.

No. 57 of 1912, s. 105;

No. 50 of 1925, s. 50.

No. 49 of 1941, s. 9.

¹ Now Mines Regulation Act, 1946-1954: See No. 49 of 1954, s. 1 (3).

² Now Coal Mines Regulation Act, 1946-1951: See No. 26 of 1951, s. 2.

Wage Books.—The keeping of wage books is always provided for in awards, and the Court will make the employer as well as the worker responsible for their keeping, so that they may be produced as evidence against him. "One of the readiest ways of proof on applications for enforcement so far as wages are concerned is the production of the record showing exactly what amount had been received and what hours had been worked as ordinary time and overtime. To deprive the union of the assistance of this method of proof in the Court would be rendering their position as guardians of the law almost impractical" (per Dwyer, P., in amendment to Broad Carters' Award (1935), 15 W.A.I.G. 24).

Union secretaries are generally given the right to enter on business premises and to inspect wage books. This right may be general or confined to specific times. Such right of entry is an "industrial matter" (section 6) over which the Court has jurisdiction (section 61). (See Federated Clothing v. Archer, 27 C.L.R. 207, and Caretakers and Cleaners' Case (1941), 16 S.A.I.R. 308.)

S.107. A reference cannot be lodged in the Court until the matters mentioned in this section have been allowed for and disposed of. (See Dwyer, P., in W.A. Timber Industry Employees v. Millars (1940), 19 W.A.I.G. 466, and also in Metropolitan and South-West Engineers' Union v. Bunning (1910), 9 W.A.A.R. 11, and Metropolitan Shop Assistants v. Foy & Gibson Ltd. (1912), 11 W.A.A.R. 57.)

A resolution by the Governing body to refer to the Court a dispute with an employer over one item does not justify a reference to the Court alleging a dispute about another matter. (See South-West Book Binders' Union v. E. S. Wigg & Co. (1908), 7 W.A.A.R. 7, per Burnside, J.)

ciation otherwise than pursuant to a resolution of the governing body of such industrial union or association.

(2) In the case of an industrial dispute, such resolution shall be published in a newspaper circulating in the district in which the registered office of the union or association is situated.

(3) If, in the case of an intended reference by an industrial union, a request in writing signed by not less than ten per centum of the union is made to the governing body within fourteen days after such publication to submit the matter of the intended reference to a ballot of the members, such ballot shall be taken in the prescribed manner, and the dispute shall not be referred to the Court unless a majority of the members who record their votes vote in the affirmative.

(4) In the case of an association, if within fourteen days after the publication of such resolution a majority of the industrial unions represented on the association, at special meetings to be called for the purpose of taking such resolution into consideration, pass resolutions forbidding the reference, the dispute shall not be referred to the Court.

(5) The provisions of this section shall not apply to any counter proposals or counter claims made by the party or parties respondent to the dispute.

Inserted by
No. 49 of
1941, s. 9.

Proceedings
not to be
impeached
for want
of form.
No. 57 of
1912, s. 108.
(amended by
No. 42 of
1949, s. 4)
renumbered
as s. 108,
amended by
No. 5 of
1952, s. 23.

108. Proceedings in the Court or before the President shall not be impeached or held bad for want of form, nor shall the same be removable to any Court

Any amendment in the reference which would have the effect of including new matters therein must also be dealt with in the manner indicated by this section. (See *Meekatharra Miners' Union v. Ingleston Ltd.* (1910), 9 W.A.A.R. 158.)

(3) "prescribed manner." (See regulation 49.)

It is only necessary to secure a "majority of the members who record their votes." Contrast this with the position under the 1902 Act, section 97. And see *Meekatharra Miners v. Ingleston*, per Burnside, J., at page 161.

(5) This subsection does not enable the Court to consider new matter under section 92. Any addition, variation or rescission under section 92 must be within the ground covered by the original dispute, and anything outside these boundaries is in reality the subject matter of a fresh dispute, and must be submitted to the Court in accordance with the provisions of this section. (*A.W.U. Westralian Branch v. Co-operative Bulk Handling Ltd.* (1944), 24 W.A.I.G. 188.)

S.108. (Compare section 97 of the New Zealand Act and see *New Zealand Waterside Workers v. Frazer* (1924) N.Z.L.R. 689.) In *re Nicholson* (4 C.L.R. 362), Griffith, C.J., while considering a similar section in the Conciliation and Arbitration Act, 1902 (section 87), pointed out that there must always be an exception to a provision of this kind, namely, that the relevant decision was within the jurisdiction of the Arbitration Court. That was in 1906. Since

by *certiorari* or otherwise; and no award, order, or proceeding of the Court or before the President shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature on any account whatsoever:

Provided that when any person has been convicted by the Court itself or by an Industrial Magistrate whose decision has been confirmed wholly or partly by the Court on appeal of any offence, or of the breach of any industrial award or agreement, and

- (a) a term of imprisonment is imposed on him without the option of a fine; or
- (b) a fine or penalty is imposed on him exceeding twenty pounds;

that date, section 64—which declares that the Arbitration Court shall have jurisdiction to determine whether any matter referred to it is an industrial dispute and that any findings of the Court on this point shall be final and conclusive and not questioned in the Supreme Court or elsewhere—has found its way into the Act.

Northmore, C.J., in the *Master Builders' case* ((1939) 18 W.A.I.G. 615) held that the object and intention of this section was to reinforce section 108 by doing away with the exception referred to by Griffith, C.J., in *Nicholson's case* (4 C.L.R. 382) and to make absolute the provisions contained in section 108 to the effect that the decisions of the Arbitration Court shall be unimpeachable. Dwyer, J., was not prepared to say that the Supreme Court was prevented from interfering in every case, and held that prohibition would be granted if the Arbitration Court held that to be an industrial dispute that which must be regarded as being "in every way foreign to and quite lacking in all elements of an industrial dispute, and the action of the Arbitration Court in dealing with it as being an arbitrary and unwarrantable usurpation of authority in a matter in which it has no concern." If the finding of the Arbitration Court can be supported by any "not impossible interpretation of the statute" it cannot be interfered with. (See Dwyer, J., in *Master Builders' case* (1939) 18 W.A.I.G. 615 at p. 616.)

It is doubtful if even this slender power in the Supreme Court to interfere with the decisions of the Arbitration Court could be supported in view of the wording of section 64 and of this section—and this view is supported by Northmore, C.J., in the *Master Builders' case* ((1939) 18 W.A.I.G. 615 at p. 616.)

It is quite settled that if the Arbitration Court keeps within its jurisdiction it will be immune from supervision and interference from the Supreme Court. "once the Court enters upon a consideration of a question within its jurisdiction," said Wolff, J., in *Warner v. Court of Arbitration* ((1942) 22 W.A.I.G. 28) "no misconception of the principles it should apply and no misstatement of fact is subject to the remedial process of this (i.e., the Supreme Court). That was the principle clearly laid down in section 108 of the Act as expounded in *Nicholson's case* and lately again in the *Master Builders' case*."

And again in the words of Isaac, J., in the older case of *Amalgamated Carpenters v. Haberfeld* (5 C.L.R. 33) "If the Court had jurisdiction to entertain and to determine the application in which the order is made, error either of law or fact will not justify prohibition." (See also in *re Great Boulder* 25 W.A.L.R. 144 and in *re Saunders & Stuart Limited* (1934) (F.C.) 14 W.A.I.G. 75.)

Proviso.—An appeal lies under this section from an Order of an Industrial Magistrate. (See McMillan, C.J., in *Amalgamated Engineers v. Parker & Son* (1926) 6 W.A.I.G. 377.)

Although the use of the words "conviction by the Court" is not the most appropriate way of referring to convictions by Industrial Magistrates. (See *Amalgamated Engineering Union v. Humphreys* (1926) 6 W.A.I.G. 277.)

he may, in the prescribed manner appeal to the Court of Criminal Appeal constituted under the Criminal Code against the conviction and sentence, or against either of them, and such Court may, on or in respect of the appeal, give any such judgment, make such orders, and exercise such powers as it could give, make, or exercise on or in respect of an appeal under Section 668 (six hundred and sixty-eight) of the said Code, and the provisions of such Code shall so far as capable of application apply *mutatis mutandis* to such appeal, but the validity of an industrial award or agreement made or purporting to be made under this Act, or any Act repealed hereby, shall not be called in question on any such appeal.

Conciliation
Commis-
sioner.

Cf. No. 2 of
1940 of
N.S.W., s. 15.
No. 46 of
1943, s. 4.

PART IVA.—CONCILIATION COMMISSIONER.

108A. (1) The Governor may appoint a person to be the Conciliation Commissioner.

(2) The rate of salary of the Conciliation Commissioner shall be fixed by the Governor.

(3) Subject to this section, the Conciliation Commissioner shall be appointed for a term expiring on his attaining the age of sixty-five years.

Industrial Magistrates have often, in doubtful cases, imposed a penalty exceeding £20 so that the defendant could take advantage of the right of appeal but the practice is not favoured by the Arbitration Court (in *Amalgamated Road Transport v. Moullin* (1933) 13 W.A.I.G. 166).

Dwyer, P., has pointed out (see *Hill v. Amalgamated Engineers* 28 W.A.L.R. 115 and *Ounderdin Farmers Co. v. A.W.U.* 36 W.A.L.R. 34) that the legislature has deliberately limited the right of appeal to two very definite and specific cases and that it would be contrary to the intention of the legislature to facilitate appeals in other cases. The total sum ordered to be paid under section 99 (5) will be treated as a penalty for the purpose of appeal under this section. (See *Hill & Co. v. Amalgamated Society of Engineers* 28 W.A.L.R. 115.)

"prescribed manner." See Regulations 117 and 118, and form 82. It is conducted in the same way as an appeal from a conviction of a jury heard before a Judge sitting in the criminal jurisdiction of the Supreme Court.

Under section 668 of the Criminal Code the Court of Criminal Appeal may—

- (1) affirm the judgment given at the trial; or
- (2) set aside the verdict or judgment and order a verdict of not guilty or other appropriate verdict; or
- (3) arrest the judgment; or
- (4) amend the judgment; or
- (5) make such order as justice may require;

or the Court may send the case back to be amended or re-stated. The Court of Criminal Appeal may award costs on an appeal brought under this section. (See *Hill v. Amalgamated Engineers*, above.)

(4) The Conciliation Commissioner may be suspended from his office by the Governor for misbehaviour or incompetence, but shall not be removed from office except in manner following, that is to say:—

- (a) The Minister shall cause to be laid before Parliament a full statement of the ground of suspension within seven sitting days after such suspension if Parliament is in session, or if not, then within seven sitting days after the commencement of the next session.
- (b) The Commissioner suspended under this subsection shall be restored to office unless each House of Parliament within twenty-one sitting days from the time when such statement has been laid before it declares by resolution that the Commissioner ought to be removed from office and if within the time aforesaid each House of Parliament so declares the Commissioner shall be removed by the Governor accordingly.

(5) The Conciliation Commissioner shall be deemed to have vacated his office—

- (a) if he resigns his office by writing under his hand addressed to the Governor;
- (b) if he becomes bankrupt, compounds with his creditors, or makes an assignment of his salary or estate for their benefit;
- (c) is or becomes of unsound mind; or
- (d) is proved to be guilty of inciting any industrial union or any worker or employer to commit any breach of this Act or of an industrial agreement or award.

(6) The Conciliation Commissioner shall, while he holds such office, be deemed to be an employee appointed for a term of years to a statutory office

Cf. No. 34
of 1938, s. 6
(3) and (4).

under the Government of the State within the meaning and for the purposes of the Superannuation and Family Benefits Act, 1938-1947¹, and he shall be entitled to have his services as Conciliation Commissioner reckoned as service for the purposes of leave and allowances under the Public Service Act, 1904-1948², and the regulations made thereunder.

(7) The Conciliation Commissioner shall, upon his appointment, take the oath of allegiance and the judicial oath.

Jurisdiction
and powers
of Concilia-
tion Com-
missioner.
No. 46 of
1943, s. 4.

108B. The Conciliation Commissioner shall, in relation to any industrial matter or dispute remitted to him by the Court, have, and may exercise the jurisdiction, powers, and authorities of an industrial board duly constituted by the Governor under section one hundred and nine of this Act, and shall have and may exercise the following further jurisdiction, powers and authorities:—

- (a) Those of the chairman of any industrial board duly constituted by the Governor under section one hundred and nine of this Act.
- (b) Such further and other jurisdiction, powers and authorities of the Court and of the President as may be respectively delegated to him from time to time by the Court or by the President, as the case may be:

Provided that the Court or the President, as the case may be, may at any time revoke or vary any such delegation.

¹ Now Superannuation and Family Benefits Act, 1938-1955: See No. 36 of 1955, s. 1 (3).

² Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

S.108B. As to the jurisdiction powers and authorities of an Industrial Board see section 109 post. It is apparent that the main function of the Conciliation Commissioner is to relieve the Court and the President from pressure of work. The Commissioner is in all respects subordinate to the Court and cannot function at all on his own initiative as he cannot become seized of any matter unless and until it has been remitted to him by the Court. It may be noted that although the President can delegate his powers to the Commissioner he is unable to remit any industrial matter or dispute to him this being a matter reserved to the Court. Compare sections 88 and 89 ante.

108C. (1) Any party to any proceedings before the Conciliation Commissioner may, within the time and in the manner prescribed, appeal to the Court from any decision, award, or order made by the Conciliation Commissioner and the Court shall have jurisdiction to hear and determine the appeal.

Appeals.
S. 108C
inserted by
No. 46 of
1948, s. 4,
amended by
No. 56 of
1950, s. 5.

(2) On the hearing of an appeal under this section, the Court may confirm, reverse, vary, amend, rescind, set aside or quash the decision the subject of the appeal and may remit the whole or part of the case to the Conciliation Commissioner with or without the observations or opinion of the Court and whether for report to the Court or for determination.

Subsec. (2)
added by
No. 56 of
1950, s. 5.

PART V.—INDUSTRIAL BOARDS.

109. (1) Industrial Boards may, on the recommendation of the Court, be constituted by the Governor for any calling, industry, or undertaking recommended by the Court.

Boards—
Constitution
and func-
tions of.

No. 57 of
1912, s. 107;
No. 50 of
1925, s. 35.

S.108C. Leave is not required to bring an appeal from a Conciliation Commissioner. Contrast the position with appeals from Industrial Boards, section 90 ante. It is submitted that the Court will only allow an appeal when the decision award or order is wrong in principle or when an anomaly has been created.

S.109. The creation of Industrial Boards by the Industrial Arbitration Act Amendment Act, 1925 (No. 50 of 1925) was part of a co-ordinated scheme for the decentralisation of the Court along functional lines. The amending Act made an attempt to drain off the accumulated work which was glutting the Arbitration Court at that time by creating six subsidiary bodies which were to perform certain functions hitherto performed by the Court. It was of the essence of the scheme that these bodies were to be subordinate to the Court which was to remain the controlling and co-ordinating authority. The ancillary machinery then created consisted of—

- (1) Industrial Magistrates, section 103.
- (2) Industrial Boards, sections 109 et seq.
- (3) Boards of Reference, section 89.
- (4) Boards of Demarcation, section 74.
- (5) Compulsory Conferences, section 171;
- (6) Conciliation Committees, section 120 and
- (7) —by No. 46 of 1948—Conciliation Commissioner.

The appointment of the Conciliation Commissioner has to a large extent rendered the appointment of Industrial Boards unnecessary. Clerks Union Application (1949) 29 W.A.I.G. 614.

For the second reading of the Bill introducing this reform see W.A. Hansard, Vol. 70, p. 502, et seq.

This process was advanced a further stage by the Industrial Arbitration Act Amendment Act, 1948 (No. 46 of 1948). This Act introduces Part IVA into the present Act and provides for the appointment of a Conciliation Commissioner. See Part IV.A ante. The Conciliation Commissioner may be said to be in his own person a Deputy Court and Deputy President and in appropriate circumstances he may exercise all the powers and functions of both. He is, however, at all times inferior to the Court and under the control of the Court. The appointment of a Conciliation Commissioner does not decentralise the Court. His function is solely to relieve the Court from pressure of work.

See sections 36, 87 and 88 (ante).

(2) The functions of such Boards shall be—

- (i) the making of an award in any industrial dispute remitted to the Board by the Court under this Act; or
- (ii) the making, after inquiry, recommendations to the Court as to the regulation of any calling or callings for the purpose of enabling the Court to make an award; or inquiring into and reporting to the Court on any matter remitted by the Court.

Members.

(3) Each such Board shall consist of a chairman, and of two or four other members, as may be recommended by the Court.

(4) The Governor shall appoint as the members of such Boards, other than the chairman, persons who have been nominated by the employers or industrial unions of employers and the industrial unions of workers concerned respectively, and who have been recommended by the Court.

One-half in number of such members shall be representatives of the employers, and one-half in number of such members shall be representatives of the workers.

(5) Upon any failure to so nominate, representatives of employers or workers, as the case may be, shall be recommended by the Court and appointed by the Governor.

Whether the constitution of an Industrial Board should be recommended is a matter for the discretion of the Court. When parties come before the Court asking that the formation of such a Board should be recommended they should in the first instance have their issues settled and they should be in a position to open their cases immediately. Application should not be made until the case is ripe for hearing. (See Dwyer, F., in *Fire Brigades Employees v. W.A. Fire Brigade Board* (1936) 16 W.A.I.G. 213.)

It must also be shown that an Industrial Board would be in a better position to dispose of the matter than the Court. (See *Aerated Water Employees' Union v. Mackays* (1937) 17 W.A.I.G. 40 and 182.)

The formation of an Industrial Board does not in any way prevent the Court from taking the case. Notwithstanding such an appointment, the Court can, if it has time, call the case on and hear it before itself. (See Dwyer, F., in *Operative Painters v. Swansea* (1938) 18 W.A.I.G. 198, p. 199.) "by the Governor," see section 23 of Interpretation Act.

(2) A perusal of this subsection and of sections 86, 118 and 119 show that the Act contemplates two kinds of reference to Industrial Boards. A Board may be given limited powers only or it may be given power to deal with a reference as comprehensively as the Court could itself and to make an award. (See *Iron Trades (Metropolitan) Award* (1938) 18 W.A.I.G. 344 per Wolff, J., at p. 357.)

(6) The Chairman of a Board shall be some other person appointed by the nominated members; but if such members are unable to agree upon an appointment, the chairman shall be appointed by the Governor on the recommendation of the Court.

Chairman.

(7) On the chairman and members being appointed, a Board shall be deemed to be constituted.

(8) The employers or industrial unions of employers or industrial unions of workers concerned shall be entitled, on one occasion only but not oftener, to vacate the office of any member appointed to represent them respectively, whereupon a vacancy shall arise which shall be filled by a fresh appointment on the nomination of the employers or industrial unions concerned, as the case may be, of a person who shall be appointed by the Governor on being recommended by the Court.

110. Every appointment of a member of a Board shall be notified in the *Gazette*.

Gazetted of appointments.

No. 57 of 1912, s. 108;

No. 50 of 1925, s. 36.

A copy of a *Gazette* containing a notice of such appointment purporting to have been published in pursuance of this Act shall be conclusive evidence that the person named in such notice was legally appointed to the office named, and had power and jurisdiction to act in such office, and such appointment shall not be challenged.

111. All powers of a Board may be exercised by a majority of the members thereof.

Exercise of powers.

No. 57 of 1912, s. 109;

No. 50 of 1925, s. 37.

112. Each member of a Board shall, upon his appointment, take an oath that he will faithfully exercise and discharge the powers and duties of his office without fear or favour to any person, and will

Oath to be taken by members.

No. 57 of 1912, s. 110;

No. 50 of 1925, s. 38.

It has, however, been held that a Board cannot in its award make provision for a Board of Reference. That power has been given to the Court and to the Court alone and cannot be delegated to another body. (See *Amalgamated Engineers v. Forward Down* (1939) 19 W.A.I.G. 210 and section 89 (ante).) An appeal by way of rehearing lies from an award of an Industrial Board to the Court, but leave of the Court must be obtained (See section 88 (ante). See also Regulations 82 and 90.)

(6) The chairman is appointed by the nominated members and not by the parties to the dispute and therefore, strictly speaking, the parties are unable, on an application to the Court for the appointment of a Board, to indicate who will be chairman thereof. (See the remarks of Dwyer, P., in *United Metropolitan Timber Workers' Union v. Millars* (1938) 18 W.A.I.G. 199.)

not therein wilfully make any false or inaccurate statement, and will not disclose any matter or evidence before the Board or the Court relating to—

- (a) trade secrets; or
- (b) the profits or losses or the receipts and outgoings of any employer; or
- (c) the books of an employer or witness produced before the Board or the Court; or
- (d) the financial position of any employer or of any witness;

and if he violates his oath he shall be liable to a penalty not exceeding five hundred pounds, and on conviction of such offence he shall cease to hold office, and shall not be eligible for re-appointment.

Failure of member to attend.

No. 57 of 1912, s. 111; No. 50 of 1925, s. 39.

113. If any member of a Board, without reasonable excuse, neglects on two successive occasions to attend meetings of the Board duly convened, or to vote when present at any such meeting on any question duly submitted to the Board, he shall be liable to a penalty not exceeding five pounds, and the Minister may declare his office vacant, and thereupon such member shall cease to hold office.

Dissolution of Board and removal of member.

No. 57 of 1912, s. 112; No. 50 of 1925, s. 40.

114. (1) The Minister, on the recommendation of the Court, may at any time—

- (a) dissolve a Board;
- (b) remove any member of a Board from his office on the ground that such member cannot attend with reasonable regularity the meetings of a Board, or is not properly discharging his duties as a member of such Board.

Effect of vacancy caused by resignation.

(2) During any vacancy in a Board (other than in the office of chairman) the continuing members may act as if no vacancy existed: Provided that in the case of a Board with four nominated members, during the vacancy in the office of one of such members, in order to prevent unequal voting, one of the representatives of the party having two representatives shall refrain from voting on any question on which a division is called.

(3) A new Board may be appointed to take the place of a Board that has been dissolved, or the members of which have resigned or have ceased to hold office.

New Board.

Members ceasing to hold office on a Board shall be eligible for appointment to the new Board.

The provisions of this Act relating to the constitution and manner of appointment of boards shall apply to the appointment of such new board.

115. (1) Where from any cause a member of a Board ceases to hold office the Minister may appoint another member in his place to represent employers or workers as the case may be who shall be duly nominated and recommended by the Court.

Appointment to vacancies.
No. 37 of 1912, s. 113;
No. 50 of 1925, s. 41.

(2) Where a person is appointed to any vacancy on a Board the Board as newly constituted may continue the hearing of and may determine any part-heard case.

116. The members of a Board shall be paid such fees, expenses, and allowances as may from time to time be fixed by the Governor.

Fees, etc.
No. 57 of 1912, s. 114;
No. 50 of 1925, s. 42.

117. (1) Proceedings before a Board shall be commenced only by remission to the Board by the Court.

Commencement of proceedings.
No. 57 of 1912, s. 115;
No. 50 of 1925, s. 43.

(2) All meetings of a Board shall be convened by the chairman by notice served upon the members in the manner prescribed.

(3) Parties to a remission and other persons concerned shall be summoned to attend the meetings of Boards by the chairman in the manner prescribed.

118. A Board may, on the remission to them of any industrial matter or dispute by the Court, with or without directions, whether for determination and award or for inquiry and report—

Powers of Board.
No. 57 of 1912, s. 116;
No. 50 of 1925, s. 44.

(a) investigate such cause judicially;

S.117. (2) "in the manner prescribed." (See Regulation 89 and Form 75.)

(3) "in the manner prescribed." (See Regulation 90 and Form 76.)

S.118. (b) The Board by this section has been given power to conduct its proceedings in public, but *prima facie* the public is excluded from deliberations of subsidiary boards of this nature. (See *Scott v. Scott* (1913) A.C. 457. *R. v. Lewis* (1917) 2 K.B. 254. *Mayor of Tenby v. Mason* (1908) 1 Ch. 457 and remarks of Dwyer, F., in 6 W.A.L.G. at p. 104.)

- (b) conduct its proceedings in public;
- (c) adjourn the proceedings to any time or place;
- (d) admit and call for such evidence as in good conscience they think to be the best available, whether strictly legal evidence or not;
- (e) where empowered to make an award make such award;
- (f) in other cases make any recommendation which they deem proper with regard to any industrial matter or dispute remitted to them, and in such recommendation specify in what manner and to what extent in any particular the power of the Court to make awards should in the opinion of the Board be exercised.

Power to administer oaths, etc.
No. 57 of 1912, s. 117;
No. 50 of 1925, s. 45.

119. The chairman or any member of the Board may require any person (including a member) giving evidence before a Board to give his evidence on oath or affirmation, and for such purpose may administer an oath or take an affirmation.

In the exercise of its powers, and for the purpose of obtaining evidence, and compelling the attendance of persons to give evidence, and the punishment of persons failing to attend when summoned or refusing to give evidence or produce documents, and for making any order as to the payment of costs and expenses, including the expenses of witnesses, the Board shall have all the powers and authorities of the Court, and shall be deemed to be the Court.

PART VI.—CONCILIATION COMMITTEES.

Notification of districts.
No. 57 of 1912, s. 118;
No. 50 of 1925, s. 47.

120. The Minister may, for the purposes of this Part of this Act, by a notification in the *Gazette*, constitute districts, and may cancel or amend any notification made under this section.

S.119. See section 71 (ante) and section 77 (ante).

Conciliation committees are in the first place formed on a geographical basis, although within the specified area their functions may be limited to dealing with specified callings. Industrial Boards are constituted on an industrial basis, i.e., for any "calling, industry or undertaking." And unlike industrial boards conciliation committees are in the nature of standing committees for their particular districts and are to meet when summoned to do so by their chairman or by the Minister. (Section 122.)

Such notification may extend to all the callings in the district, or be limited to any specified calling or callings.

121. (1) The Minister may, in the manner prescribed, constitute for any such district a conciliation committee consisting of a chairman and two or four other members, as the Minister may determine, and to be appointed by him, one half in number of whom shall be nominated as prescribed by the employers or industrial union or unions of employers concerned and the other half nominated as prescribed by the industrial union or unions of the workers concerned, or failing any such nomination shall be recommended by the Court.

Conciliation committees.

No. 57 of 1912, s. 119;

No. 50 of 1925, s. 48.

The chairman shall be chosen by the unanimous agreement of the other members, but if no such agreement is arrived at, or if the chairman so chosen is unable or refuses to act, he shall be appointed by the Minister.

(2) Subject to this section and so far as they may be applicable, such of the provisions of Part V. of this Act as relate to the office of members of Boards shall apply to any member of a committee constituted under this section.

122. (1) Any such committee shall meet on being summoned by its chairman, as prescribed, or at the request of the Minister, and shall inquire into any industrial matter or dispute in connection with the calling concerned, or any of them, if more than one.

Inquiry by committee.

No. 57 of 1912, s. 120;

No. 50 of 1925, s. 48.

S.121. (1) "in the manner prescribed." See Regulation 93 (a). It would appear that, if the functions of the Conciliation Committee are not limited to a specified calling or to specified callings, all employers and industrial unions of workers engaged in or connected with any industry carried on within the district would be "concerned" with its formation and would have the right to nominate members. If, however, its functions were limited to specified callings, only employers and unions engaged in or connected with that specified calling could be said to be "concerned" therewith. It may be noted here that the personnel of a committee, which is not limited to any specified calling, may have no knowledge of, interest in, or be in any way concerned with an industrial dispute into which it is inquiring under section 122 (1) post, because, as such a committee consists of members nominated by employers and unions engaged in or connected with any calling within the district, there is no guarantee that employers or workers engaged in the specified calling in which the dispute has occurred will be represented thereon.

S.122. As to the effect of an industrial agreement, see section 40 (ante). "certified as prescribed." (See Regulation 93 (c) and Form 77.)

(2) The chairman shall preside at all meetings of a committee, and shall endeavour to induce the other members to come to an agreement, but shall not take any part in the decisions of the committee.

Agreement
to have effect
as industrial
agreement.

(3) If such agreement is come to, it shall be reduced to writing and signed by the other members on behalf of the employers or industrial unions of employers and the industrial unions of workers concerned.

Such agreement, on being certified by the chairman as prescribed, shall be filed in the office of the Clerk of the Court, and shall have effect as an industrial agreement between the parties thereto.

PART VII.—BASIC WAGE.

Declaration
of basic
wage.
S. 123
repealed
and new
section
substituted
by No. 20 of
1950, s. 2.

123. (1) The Court shall have jurisdiction at any time and from time to time to determine and declare—

- (a) a basic wage to be paid to male workers;
- (b) a basic wage to be paid to female workers; and

Part VII.—BASIC WAGE.

S.123. This part was introduced by section 100 et seq of the 1925 Arbitration Act Amendment Act (No. 50 of 1925). Prior to this date a separate minimum wage was fixed in each award.

1. (a) Under this section which was introduced by No. 20 of 1950 the Court may declare and determine "at any time and from time to time." Prior to this amendment the Court's jurisdiction was limited to a determination and declaration "before the fourteenth day of June in every year." (1949) 29 W.A.I.G. 7 at p. 11.

(b) Females.—The basic wage for women was until 1951 fixed—somewhat arbitrarily—at 54 per cent. of the male basic wage. The Court considered that the woman worker was free from the domestic obligations which surround the average male worker and "to contend that 54 per cent. of the wage prescribed for a man, a wife and two dependent children is not sufficient for the maintenance and support of the adult single woman seems to be contradiction in terms of arithmetic." (Per Dwyer, P., in B.W.D. (1935) 15 W.A.I.G. 86.) The ratio of the female to the male basic wage was reconsidered by the Court in November, 1951, and it was then fixed at 65 per cent. of the male basic wage this being the approximate mean of female basic rate in Queensland and New South Wales. Basic Wage (Female) Declaration (1951) 31 W.A.I.G. 497. When an award prescribes a minimum wage without reference to sex then the employer must pay any adult female worker the minimum so prescribed (Federated Clerks' Union v. Commissioner of Main Roads (1943) 23 W.A.I.G. 120, Metropolitan Hairdressers and Wigmakers' Union v. H. Lovering (1926) 6 W.A.I.G. 239.) On the other hand if the relevant award prescribes a minimum wage for a male adult worker and does not profess to regulate the employment of female labour within the industry and does not prohibit the employment of females then the employer is entitled to employ female adult workers outside the award (Pastrycooks and Confectioners' Union v. John Wills & Co. Ltd. (1931) 11 W.A.I.G. 172. General Accessories Pty. Ltd. v. Operative Painters (1943) 23 W.A.I.G. 278).

The Court will always consider the family obligations which the law casts upon the male (Hotel Club Caterers' Employees' Union v. Hardman (1912) 11 W.A.A.R. 137) and apart from this consideration would not award equal wages for both sexes if the result of such action would be to drive women from industry. (See Coastal Districts United Clerks v. Sandover (1913) 12 W.A.A.R. 150.) If, however, it has become customary in an industry to pay

(c) wherever and whenever necessary differential basic wages to be paid in respect of special or defined areas of the State.

(2) In this Act the expression "basic wage" means a wage which the Court considers to be just and reasonable for the average worker to whom it applies.

(3) In determining the basic wage, the Court shall take into consideration—

(a) the amount which the Court deems sufficient to enable such average worker to live in reasonable comfort, having regard to any domestic obligation to which such average worker would be ordinarily subject; and

equal wages the Court will adopt such an arrangement. (See *Hollingworth v. W.A. Barmen's and Barmaids' Union* (1926) 6 W.A.I.G. 340) and for that particular industry award a minimum wage, under section 94 (1) without discrimination on the grounds of sex.

The question of equal pay for the sexes was considered at some length by the Conciliation Commissioner in the *Printing Industry Award* (1950) 30 W.A.I.G. 424.

(c) The Court declares three basic wages. That is to say, one for each of the following areas:—

(a) Metropolitan;

(b) South-West Land Division;

(c) Goldfields. (See B.W.D. (1930) 10 W.A.I.G. 87.)

(3) (a) Prior to the amendment of 1950 (No. 20 of 1950) the State basic wage was determined with reference only to the principle stated in this subsection. To this date therefore the basic wage was a "needs" basic wage and as such could be contrasted with the basic wage under the Commonwealth Act which since the Basic Wage Inquiry 1937 (37 C.A.R. 583) has been composed of two elements, namely the "needs" component which is variable and the "prosperity loading" which is constant. In Western Australia the total basic wage being a "needs" basic wage was (prior to 1950) subject to variation according to the index figures and for this reason was more susceptible to changing living costs than is the Commonwealth basic wage. (B.W.D. (1943) 23 W.A.I.G. 95 at p. 98.)

"average worker"—The average worker is the unskilled worker, who is married with a wife and two children dependent upon him. Children are considered to be dependent until the age of 16 (see B.W.D. 1926). Statistics reveal that the average number of dependent children under 16 per married male worker is 1.42 and thus it will be seen that the Court in providing for two dependent children is on the generous side and "space is thereby left whereby omissions are supplied in the regimen of requirements and there is also vacant space providing elasticity by way of reduction in amount should the necessity of the times demand it." (Per Dwyer, P., in B.W.D. (1942) 22 W.A.I.G. 135.)

"reasonable comfort." This is a relative conception and may change from time to time to meet changing conditions. See Dwyer, P., in B.W.D. (1927), 7 W.A.I.G. 62). The first basic wage declaration was made on the 11th June, 1926 (see B.W.D. 1926). In this initial finding Dwyer, P., rejected both the Harvester Equivalent (per Dwyer, P., in B.W.D. (1942), 22 W.A.I.G. 135) and the findings of the Commonwealth Basic Wage Commission. Neither of these standards could be applied without modifications to the Western Australian situation. The Commission was only concerned with the wage sufficient for the average employee or typical family in the community and not for the average unskilled worker which was to be the basis for the basic wage under this Act. Industry could not afford to pay the wage found necessary for such "average employee," and as it had not been adopted in the Eastern States it would be fatal to local industry to adopt it here. The Harvester wage was likewise rejected. It had no scientific basis and appears to have been an adoption of the wage which was in fact being paid at that time by the more reputable employers in and around Melbourne. The standard adopted was one lying somewhere between that of the Basic Wage Commission and that of the Harvester Judgment reduced to a family of four. The food regimen was taken from the findings of the Commission (see B.W.Q.A. (1942), 22 W.A.I.G. 227, per Dwyer, P., at page 228) and the rent element was fixed from local evidence. In B.W.D. of 1938 (18 W.A.I.G. 151), mainly as a result of the increase in the national income, the absolute wage was increased by 5s., and in this year, too, a new food regimen was adopted.

(b) As it is apparent from the decisions that were prior to 1950 the capacity of industry was always regarded as a factor relevant to the determination of a basic wage. This subsection however now expressly recognises the possibility of the basic wage being something more than and in excess of a "needs" wage. And a result of this, as in the Commonwealth Court, is that the basic wage is not so sensitive as before to changes in price levels. B.W.D. (1950) 30 W.A.I.G. 336; Q.A.B.W. (1953) 33 W.A.I.G. 502.

The following factors must be taken into consideration when determining the standard to be adopted:—

(a) *Interstate Competition.*—It follows from the fact that trade and commerce between the States must be absolutely free (see section 92 of the Commonwealth Constitution) that wages in this State must be kept at a level which will enable industry here to stand up to Eastern States competition. (See 1928 B.W.D. 6 W.A.I.G. 95.) The Court will not, however, follow slavishly the standard adopted in the Eastern States, and in so far as the Eastern States assessment is based upon a principle to which this Court is unable to subscribe, it will not be followed. (See Dwyer, P., in B.W.D. (1942), 22 W.A.I.G. 134.)

(b) *Increased or Decreased Productivity.*—Although it has been held (per Dwyer, P., in 1930, B.W.D. 10, W.A.I.G. 87) that the standard will only be reduced to conform to a falling off in production as a last resort, and after the application of all other remedies and palliatives, yet there has been a tendency—very marked in the last few years—for the Court to alter the standard in conformity with fluctuations in the national (i.e., State) income. (1932 B.W.D., 12 W.A.I.G. 59.) Dwyer, P., said—

... the amount of the national income since it is the fount out of which all things are paid would necessarily have some bearing (i.e., on the standard to be adopted) to the extent that a considerable falling off there might mean that the workers were receiving an undue proportion as contrasted with other members of the community. In which case it would be necessary to inquire whether the workers' standard should not receive revision.

And Wolff, J., in the 1939 B.W.D. (19 W.A.I.G. 152, at page 153) put the position in the following words:—

The national income should be one of the main elements of an inquiry by any tribunal called upon to assess a living wage for, in making a basic wage declaration we are, in fact, apportioning in a degree and a marked degree at that, a part of the national income.

And finally, the remark of Dwyer, P., in the 1941 B.W.D. (21 W.A.I.G. 100) should be considered, he said there—

The Act clearly says that the basic wage is fixed upon the "needs" basis, but whilst this is the case, by another section of the Act (section 6 (h)), the Court is inferentially required to bear in mind "what is fair and right in relation to industrial matters, having regard to the interests of the persons immediately concerned and of the community as a whole." It would be folly for the Court and not in the interests of the workers to prescribe a wage which cannot be paid by industry or which would have the effect of impeding the progress of industry in the State.

(See also 1942 B.W.D., 22 W.A.I.G. 134.)

The Government Statistician's figures as to the extent of production and to the size of the national income will be accepted by the Court on their face value. (See Dwyer, P., in *Railway Award* (1928), 8 W.A.I.G. 213.)

(c) The Court will also consider hours, holidays and conditions generally in so far as these are alternative ways in which the workers may share in an increase in production. (See 1927 B.W.D., 7 W.A.I.G. 62.)

The Court has not, however, an absolutely free hand in determining the basic wage. The basic wage is fixed to enable "the average worker to whom it applies to live in reasonable comfort," and that is an end in itself. The Court is not at liberty to use the basic wage as an instrument for the furtherance of a general economic theory. Questions of general financial policy remain the responsibility of the Legislature. "It seems to me," said Dwyer, P., in the 1932 B.W.D. (12 W.A.I.G. 59), "to follow from the foregoing (i.e., section 123 and 994 (2)) that it is not our present duty to consider the rehabilitation of the financial system of the Australian States or interstate competition, or other cognate matters. Questions dealing with the balancing of the national ledger, the difference between imports and exports and the alteration in the rate of exchange, though very interesting, are outside the scope of the inquiry, or only very remotely connected with it. If these matters are to be considered, they must be dealt with by special legislation amending the provisions above quoted forming part of the Arbitration Act."

The basic wage will not be altered as the result of the introduction of child endowment because that would have the effect of shifting the incidence of taxation. (See 1941 B.W.D., 21 W.A.I.G. 100.) The incidence of taxation itself is never a relevant consideration (Basic Wage—Interim Declaration (1947), 27 W.A.I.G. 39, at page 40, per Dunphy, J.).

"be ordinarily subject": These words are used to qualify the phrase "any domestic obligation" and connotes something in the nature of an average of such obligation. (See Dwyer, P., in 1927 B.W.D. 7 W.A.I.G. 62.) The average domestic obligation of the average worker has been held to be to support a wife and two dependent children, although this is a rather greater degree of dependency than is revealed by statistics. (See 1942 B.W.D., 22 W.A.I.G. 135.)

- (b) the economic capacity of industry and any other matters which the Court deems relevant and advisable but so as not to reduce the basic wage below an amount deemed necessary by the Court to meet the requirements of paragraph (a) of this subsection and determined without regard being had to the matters mentioned in this paragraph.

(4) In the application of the basic wage to industrial agreements and awards so far as a wage is thereby determined for workers who receive from their employer without charge board and lodging, or lodging, or board, or partial board, or other allowances which are deemed by the Court to be a just set-off, the monetary value thereof as assessed by the Court shall be deemed, pro tanto, payment of a portion of the wage received by the worker.

(5) In determining the basic wage the Court shall not deem itself bound by any previous decision of the Court or any other Court determining a minimum or basic wage.

(6) The Court may exercise its jurisdiction under subsection (1) of this section on its own motion, and shall exercise such jurisdiction if and whenever requested so to do either by a majority of industrial unions of workers for the time being or by the Western Australian Employers' Federation (Incorporated).

Provided that no new determination pursuant to any such request shall be made by the Court until the expiration of twelve months from the commencement of its then last preceding determination.

(4) "without charge." This proviso only deals with cases where the employer makes provisions in certain directions for his workers without any charge and when there is a charge made, the provisions for which it is made can no longer be regarded as allowances within the meaning of this proviso. Thus when workers were charged by their employers 1s. per week per room rent, at a time when the average rent for similar accommodation in Perth was 22s. per week per house, no deduction could be made on this account because such a concession was not an "allowance" within the meaning of the subsection. (See Timber Industry Award (1930), 10 W.A.I.G. 92.)

(5) "Each annual hearing is an independent hearing and the Court is not bound by any previous decision of itself or any other Court in determining the basic wage. (Per Dwyer, P., in (1942), B.W.D. 22 W.A.I.G. 134.)

(7) By leave of the Court any party concerned may be represented at and take part in any inquiry which may be held by the Court when determining the basic wage. The Court may allow such reasonable costs to the parties as it may deem to be sufficient and such shall be payable from moneys appropriated by Parliament for the purposes of this Act.

(8) The determination of the Court shall be presented to the Minister, who shall cause it to be published forthwith in the *Gazette*.

(9) Subject to section one hundred and twenty-seven, the basic wage so declared shall operate and have effect from such date as the Court declares and shall remain in force until the day before the date from which the next declaration of the basic wage under this section operates and has effect.

(10) Subject to section one hundred and twenty-seven, after the declaration of the basic wage as aforesaid, no award or industrial agreement shall be made which prescribes a lesser wage than the basic wage, except in the case of junior, infirm or aged workers, or apprentices.

(7) The principles on which the Court will grant leave are considered in the Basic Wage Declaration (1949) 29 W.A.I.G. 7.

(9) "From such date as the Court declares." The declaration must take effect in all industries as and from the same date irrespective of variations in pay days. Basic Wage (Female) Declaration (1951) 31 W.A.I.G. 497.

(10) Compare section 27 of New South Wales Act and section 94 (2). The minimum wage fixed in an award under section 94 may be substantially in excess of the basic wage, it cannot of course be less. (See *Hollingworth v. W.A. Barmen's Union* (1926) 6 W.A.I.G. 340 and section 125 (b) post.)

"Junior, infirm or aged workers": (Compare section 94 (1) (a) ante.) The rate payable to junior workers should in a large measure reflect the market for that particular labour; it should take into account the factor of turnover, and should be so adjusted as to prevent the tendency to utilise junior labour in tasks when adult labour should be employed. The Court should see that there is no exploitation with a view to obtaining cheap labour. (See *W.A. Shop Assistants v. Northey Bros.* (1940) 19 W.A.I.G. 307.) The Court has systematised the wage to be paid to junior workers by expressing it to be a certain percentage of the basic wage with the result that the wage is adjusted from time to time without the necessity of approaching the Court. (*Furniture Trades' Award* (1926) 6 W.A.I.G. 344.)

The under rate may be paid to a man as being infirm, whatever his age, if he is subject to an infirmity which renders him incapable of producing the standard result required of the competent worker. (See *A.W.U. v. Goldfields Firewood Supply Co.* (1938) 18 W.A.I.G. 24, per Davies, A.P., at p. 30.)

When by the award an infirm worker is to obtain a certificate from the secretary of his union permitting him to be employed at such lower rate it is the duty of the employer to see that such certificate has been obtained. (See *Metropolitan Electrical Trades Union v. Unbehau and Johnston* (1907) 6 W.A.A.R. 35.)

It is also incumbent upon an employer before employing a junior worker at less than the minimum wage to ascertain beyond all doubt that such worker has not attained the age at which such minimum applies. (See *Coastal Hotel Employees' Union v. Lofthouse* (1906) 5 W.A.A.R. 35.)

124. [Repealed by No. 20 of 1950, s. 3.]

Existing awards and agreements.
No. 57 of 1912, s. 122;
No. 50 of 1925, s. 101.

125. Awards and industrial agreements made after the commencement of this Part of this Act shall prescribe and distinguish separately—

New awards and agreements.

No. 57 of 1912, s. 123;
No. 50 of 1925, s. 102.

- (a) the basic wage; and
- (b) other wages or allowances, and/or additional remuneration; and
- (c) any deductions therefrom.

It is however submitted that an employer who has not been negligent but has been misled by the wilful misrepresentation of the worker and is thereby induced to pay to the worker a less wage than his age entitles him to receive is not guilty of a breach of the award. (See *Cox v. McMurtie* (1909) A.R. (N.S.W.) and section 99 (ante) and cases cited there.)

It must also be remembered that under certain circumstances a worker under the age of 21 may nevertheless be entitled to claim the rate of pay prescribed for an adult. Whether such a worker can claim adult wages in any particular case can only be ascertained by reference to the particular award under which he is working. The problem can never be answered by the application of any hard and fast rule of law. (*United Furniture Workers' Union v. Aherns Ltd.* (1945), 25 W.A.I.G. 291 per Dunphy, P., at p. 292.)

It certainly cannot be laid down as a proposition of law that every worker who performs the duties prescribed for an adult is entitled to an adult rate of pay and nor is the converse a proposition which can be maintained without reference to the particular facts. (See *United Furniture Workers' Union v. Aherns Ltd.* above.)

This subsection constitutes, with section 94 (1) (a), the only power the Court has to exempt persons in an industry from the operation of an award, and its only power to discriminate. (See *Amalgamated Society of Engineers v. Arbitration Court* 33 W.A.L.R. 125). An adult "learner" who is not an apprentice cannot be paid less than the basic wage. *Bread Carters Award* (1950) 30 W.A.I.G. 66.

See "apprentices" Part VIII., section 128, et seq.

S.125. The basic wage, as the name implies, is the base from which other wages are calculated. Awards and agreements declare the basic wage ruling at the time of their making and generally "other wages" are expressed as being so much in excess of that base. However, all that is required of this section is that the two classes of remuneration, i.e., the "basic wage" and "other wages and allowances" should be distinguished separately. It does not require that the "other wages or allowances and/or additional remuneration" must be prescribed as the addition of two separate sums, the basic wage and the added sum. (See *McTiernan, J.* in *Amalgamated Collieries v. True* (1939) 18 W.A.I.G. 227 at p. 233.) The sum by which wages for skilled trades exceeds the base is called the "margin."

Margins: The margin and the base are quite different conceptions and are fixed on different principles.

"It must be remembered," said Dwyer, P., in the *Mining Industry Award* (1934) 14 W.A.I.G. 223 at p. 227 "that when we are dealing with the basic wage and the tradesman's wage, though the former necessarily forms part of the latter we are nevertheless dealing with two entirely different concepts."

"The basic wage is the lowest amount which the Act, speaking for the conscience of the community, with a view to the maintenance of a certain standard of living, permits the Court to allocate to the adult worker whose conditions of employment it is regulating. It is the irreducible minimum and as such it necessarily, so far as its amount is concerned, forms part of all other amounts prescribed for payment in an award or industrial agreement, but there the relationship ends. Margins may be infinitely various and should be considered as a fair minimum to be added to the base and paid to the class or person to which or to whom they are applied according to the nature of their work or his work and responsibility, but without obstacle to any payment in excess of that amount."

The margin is awarded as a premium for skill. (See Dwyer, P., in *Bricklayers' Award* (1930) 10 W.A.I.G. 239) and to substantiate a claim for a margin the use of skill as distinct from mere common sense must be proved. (See *Commissioner of Railways v. W.A. Amalgamated Society of Railway Employees* (1929) 9 W.A.I.G. 153.)

Ordinarily a margin will not be increased unless it be shown that the skill or responsibility required to perform a particular work has increased. *Railway Award (Amendment) (1947) 27 W.A.I.G. 269 per Dunphy, J., at page 271; Tramway Award (1947) 27 W.A.I.G. 517 at page 521, nor will it, in the absence of special circumstances, be altered by way of amendment to an extant award. Tramways Award (1950) 30 W.A.I.G. 175.*

If a margin is awarded the Court must distinguish it separately from the basic wage but there is no obligation upon the Court to fix a margin and it may content itself with prescribing a minimum wage only. (See *A.W.U. v. Lake View and Star (1929) 9 W.A.I.G. 226, per Dwyer, P., at p. 227.*)

When awarding a margin the Court will consider—

(a) *Conditions of the Industry*: The margin must never be taken as fixed and will fluctuate with the conditions of the industry. (See *Wolff, J., in the Building Trades' Award (1939) 18 W.A.I.G. 526, also Dwyer, P., in the Timber Industry Award (1930) 10 W.A.I.G. 92.*)

The ability of industry to pay is a factor of variable weight depending upon the structure of the particular industry. *Gold Mining Award (1947) 27 W.A.I.G. 549.*

(b) *Eastern State Competition*: The Court is more influenced by this consideration when fixing margins than it is when determining the basic wage. Its bearing on the question of margins is "so fundamental that it need not be emphasised." (Per Dwyer, P., in *Engineers, Moulders and Boilermakers' Award (1932), 12 W.A.I.G. 62 at p. 63, and also in the Timber Industry Award (above) and in the 1936 B.W.D., 16 W.A.I.G. 83 at p. 85, and per Jackson, J., in Coal Mining Award (1952) 32 W.A.I.G., 489 at p. 490 and Engine Drivers Award (1953) 33 W.A.I.G. 173.*)

This factor is more important in some industries than in others—for instance "it is traditional in Western Australia to follow precisely the Federal decision with respect to margins in the Metal Trades. *Metal Trades Award (1947) 27 W.A.I.G. 269 per Dunphy, J., at p. 271.*

(c) *The accepted Australian standard for skilled labour*: This is perhaps merely another angle from which to view the question of Eastern States competition. The Court will always endeavour to ascertain the value which is being placed upon similar types of skilled labour in other parts of Australia, and this is especially so in industries with Australian-wide ramifications. (See *Wolff, J., in Iron Trades' Award (1938) 18 W.A.I.G. 344, see also Railway Award (1937) 17 W.A.I.G. 397 (Davies, A.P.), Amalgamated Engineers v. Amalgamated Collieries (1937) 17 W.A.I.G. 411, Amalgamated Engineers v. Lake View and Star (1938) 18 W.A.I.G. 56.*) There is, so far as this Court is concerned, a growing tendency to follow the margins as fixed elsewhere in Australia but before doing so the Court will require to be satisfied that the avocation being dealt with has not only the same name as the avocation for which an Australian margin has been established but also that in fact the avocations require substantially the same degree of skill and responsibility. When these facts have been established "there are very strong arguments in favour of the proposition that a margin for skill for the same type of work in the same industry should be constant, irrespective of the locality of the work or the industry." (*Locomotive Engine Drivers' Union v. The Commissioner of Railways (1948) 28 W.A.I.G. 251 per Dunphy, P. Furniture Trades Award (1948) 28 W.A.I.G. 392. Fibrous Plasters' Award (1949) 29 W.A.I.G. 248.* The Court will not, however, follow certain portions of an award made elsewhere (i.e., a Federal Award) and disregard other portions and thus if a union bases its claim for increased margins on the terms of a Federal award then it must be prepared to have the Federal wage scale applied in toto. (*Locomotive Engine Drivers' Union v. Commissioner of Railways, above.*) The practical question of what is the Australian standard has given the Court much difficulty, for in practice the so-called Australian standard has proved to be "rather elusive." (Per *Wolff, J., in Building Trades Award (1939), 18 W.A.I.G. 526 at p. 527.*) If on examination there is found to be a general rule or standard with respect to a particular margin and there is a reasonable similarity between the nature of the work performed in this State and the other States where such a standard exists, it is very difficult for the Court to refuse to award an equivalent margin. On the other hand the Court never accepts as a matter of course the margins paid elsewhere for what may appear superficially to be similar work. It must be shown that the work is reasonably identical and the skill and responsibility very much the same before the Court will take cognisance of a standard which is shown to exist elsewhere (*United Furniture Trades Union v. Boans Limited and others (1948) W.A.I.G.*)

The Court will certainly not adopt Federal margins as of course and without evidence. *Metal Trades Award (1949) 29 W.A.I.G. 491.*

Margins fixed in the Eastern States are of no assistance when it is apparent that they were granted by consent as in such case they may not be a true assessment of skill and responsibility. *Bread Carters Award (1950) 30 W.A.I.G. 66 and Printing Award (1950) 30 W.A.I.G. 534.*

Margins bear no fixed ratio to the base. (See *Iron Trades Award, 1938, 18 W.A.I.G. 344*) and they will not fluctuate with the cost of living. (See *Railway Award (1928) 8 W.A.I.G. 217*) with the result that during periods of rising money wages there is a tendency for the wage of the skilled worker to draw nearer to that of the unskilled worker. (See the remarks of Dwyer, P., in the *Locomotive Engine Drivers' Award (1929) 8 W.A.I.G. 354 at p. 359.*) *Metal Trades Award (1951) 31 W.A.I.G. 574 at page 585.*

Who is entitled to be paid the Margin? The margin is paid as a premium for skill, but it is not always necessary for the worker to prove he possesses that skill before he is entitled to the margin. *Burnside, J. in the W.A. Amalgamated Society of Engineers v. Commissioner of Railways (1925) 4 W.A.I.G. 181 at p. 182* put the position thus—

In the past the Court has acted on the principle that if a worker is called upon to perform the duties of a skilled worker, then we do not inquire into the question of whether he possesses the skill of that particular worker. He must be paid the wages of that skilled worker whether he can do the work or not. I take the safe rule to follow to be this: if the work which the person is required to do is such that requires the skill of a tradesman to do ordinarily, if it is the work which tradesmen are trained to do and which they do do, and if you put a person on to do it, you are assumed to do so with the knowledge or on the assumption that he possesses the skill, and it does not lie in your mouth afterwards to turn round and say that he has not got that skill. But if the class of work which is required to be done does not require the skill of the operator, although it is ancillary to the performance of his work, it does not follow that any other person who comes in to assist him to do it comes under the category of a skilled worker.

To determine whether a worker is entitled to the margin one must have regard to the work actually done by him and not to his vocation or skill. "It is axiomatic," said Dwyer, P., in *Engineers, Boltermakers and Moulders' Award (1932) 12 W.A.I.G. 62 at p. 64* "in this Court that wages must be regulated according to the nature of the work done and not according to the qualifications of the person who does the work." (See *Country Retail Butchers' Award 19 I.G. (N.S.W.) 63 F.C.*) Thus if a skilled tradesman is employed on unskilled work or on work unconnected with his trade he is not entitled to be paid a wage applicable to his skill. (See *W.A. Amalgamated Society of Engineers v. Commissioner of Railways (1925) 4 W.A.I.G. 183.*) Conversely if a man is employed as a tradesman the fact that he may not have the requisite skill may be a ground for discharging him but it is no ground for not paying him the award rates for tradesmen. (See *Typographical Union v. Frank Daniels (1920) 14 W.A.A.R. 764.*) A worker is to be paid the award rates applicable to the work which he actually does and not for the work which he was nominally engaged to do (*W.A. Branch of Meat Employees v. Nelson D'Raine (1929) 9 W.A.I.G. 45. W.A. Branch of Meat Employees v. Anderson (1926) 6 W.A.I.G. 24. W.A. Branch Meat Employees v. J. Behn (1925) 5 W.A.I.G. 199. Master Butchers v. Meat Industry Employees' Union (1929) 9 W.A.I.G. 299. W.A. Barmen's Union v. Olsen (1937) 17 W.A.I.G. 444. W.A. Caretakers' Union v. C.M.L. (1940) 19 W.A.I.G. 391. Metropolitan Barmalds' Union v. Arthur Williams (1932) 11 W.A.I.G. 199. United Furniture v. Dimond Bros. (1940) 20 W.A.I.G. 88. Drury & Grainger (1910) A.R. (N.S.W.) 123. Adams v. Landon (1917) A.R. (N.S.W.) 255.*)

"allowance and/or additional remuneration."

Industry Allowance: "An industry allowance, as its name implies is confined to the special circumstances of a particular industry or undertaking in which workers are engaged irrespective of the class of workers employed." (Per Dwyer, P., in the *Mining Industry Award (1934) 14 W.A.I.G. 223.*) It may be granted because of the prosperous condition of the particular industry. "It seems only fair and equitable," said Dwyer, P., in the *Mining Award* (per Dwyer, P., in the *Mining Industry Award (1934) 14 W.A.I.G. 223*) "that the worker engaged in this industry should receive some benefit from the appreciation of the product of his labour." Whether the prosperity of an industry should show itself in the form of increased wages will to a large extent depend upon the industry concerned. A prosperity allowance will not be granted to workers engaged in an industry which is at the same time a monopoly and a public utility because this would be condoning the making of a profit above that which is a fair return on the investment and which should be returned to the consumer in the shape of reduced prices (see *Superphosphate Workers' Award (1930) 10 W.A.I.G. 124*) nor will such an allowance be given to workers engaged in a prosperous business which is in receipt of a Government subsidy. (See *Sugar Refining Employees v. C.S.R (1932) 12 W.A.I.G. 234.*)

Peculiar conditions of service in certain industries may justify the Court awarding an additional hourly wage to workers engaged therein, and such workers receive this allowance, not so that their standard will be thereby raised above that of other workers, but to enable them to maintain the standard enjoyed by workers of like skill in other industries. Thus an additional hourly wage will be awarded to offset a working week, which, owing to the nature of the industry, is shorter than the normal working week (see *Minister for Works v. Geraldton Lumpers' Union (1927) 6 W.A.I.G. 332*) or to offset time lost through weather conditions or from being compelled to "follow the job" (See *Amendment Painters' Award (1932) 12 W.A.I.G. 159.*)

District Allowance: "A district allowance is not a wage; it is an amount added to the wage appointed to be paid to the worker for the purpose of equalising his position and circumstances as far as may be." to those obtaining in the place where the base operates. (See Dwyer, P., in *Mining Industry Awards (1934) 14 W.A.I.G. 223 at p. 227.*) It is the means whereby in the first and most important sense the difference between the cost of living where an undertaking is being carried on and that of some central place selected as the norm or mean is made up, and in addition to that

Automatic increases or decreases.
No. 57 of 1912, s. 124; (amended by No. 50 of 1925, s. 103) renumbered as s. 126, amended by No. 20 of 1950, s. 4.

126. The basic wage prescribed in every award and industrial agreement shall, from time to time, automatically become increased or decreased so that it conforms to and is in parity with the basic wage

to give compensation for such circumstances as isolation and the absence of the amenities of life usually associated with a larger centre. (See Dwyer, P., in *A.W.U. v Goldfields Firewood Supply Co.* (1941) 21 W.A.I.G. 363 at p. 365 and Jackson, J., in *Civil Service Agreement* (1950) 30 W.A.I.G. 427.) And to determine such allowance all things must be taken into consideration—the cost of living, the nature of the accommodation, isolation, opportunities of social life and other similar matters. (See Dwyer, P., in *Mining Awards* (1937) 17 W.A.I.G. 27 at p. 29.) The Court will certainly not deprive workers away from a city centre of the rent constituent of the basic wage which they avoid paying by living in the bush. (See *Timberworkers' Award* (1942) 22 W.A.I.G. 237, per Dwyer, P., at p. 239.)

The district allowance may not be the same for all workers and the Court may order a larger district allowance to a married man than to a single man. (*A.W.U. (Blue Asbestos) Award* (1947) 27 W.A.I.G. 46.) But see to the contrary the *Blue Asbestos Award* (1949) 29 W.A.I.G. 454. The district allowance is provided for the "average worker" namely the married worker with two children. An apprentice or a junior worker is not an "average worker" and should receive only a percentage of the district allowance. *Mining (Iron Ore) Award* (1949) 29 W.A.I.G. 497.

Away-from-home Allowance: This is awarded when a worker is sent away from his home for a temporary purpose in his employer's business. It has no application to the situation where the worker is permanently employed in one locality for in such a case the worker should establish his home at his place of employment and the disabilities resulting from the location of the place of employment should be compensated for by a district allowance.

If the nature of the worker's occupation prevents him from living at home thus compelling him to maintain two homes an additional allowance will be made. (See *Minister for Works v. A.W.U.* (1931) 11 W.A.I.G. 21.)

Tool Allowance: This is given solely to compensate a worker for the wear and tear on his tools, being his own property, employed by him in his work. It is not, strictly speaking, portion of a worker's remuneration. Although in awards this allowance is expressed to be so much a week it should be paid pro rata in accordance with the amount of work actually done and in this manner be to some extent equated with the wear and tear on the tools actually experienced (*A.W.U. Mining Branch v. Goldfields Firewood Supply Ltd.* (1945) 25 W.A.I.G. 50).

Risk Money: This will not normally be granted. "It seems to me that the remedy for such a practice would be the adoption of a safer method and not to accord extra payment and so sanction the continuance of an UNNECESSARILY risky procedure." (Per Davies, A.P., in *Amalgamated Engineers v. Internal Combustion Ltd.* (1937 17 W.A.I.G. 297.) "I dislike," said Wolf, J., in *Water and Sewerage Employees v. The Minister for Water Supply* (1939) 18 W.A.I.G. 575 at p. 578) "paying bonuses to men for taking risks or working in unpleasant conditions unless the conditions ARE SUCH THAT THEY CANNOT REASONABLY BE OBTAINED." When, however, the work carries with it risk to body or health and when such risk cannot be overcome an allowance will be made for it. (See *Mining Awards* (1922) 2 W.A.I.G. 46.) No allowance will be made for a disadvantage which is fairly incidental to the normal operation of the industry.

"It must be considered," said Dwyer, P., in the *Railway Award* ((1939) 19 W.A.I.G. 24), "fundamental to wage regulation that the amount of wages for any particular calling or avocation is intended to cover all necessary, incidental and normal working such as may be expected to be experienced in carrying out the duties of the work. All trades have their special disabilities. You cannot be a blacksmith, or a boilermaker, or a fitter without soiling your hands or your clothes. It is only when there is SOME VERY MARKED DEPARTURE FROM THE NORMAL that allowances should be considered or granted. The particular margin for any trade must necessarily include all the general characteristics, disabilities and skill of the trades concerned."

Risk money or dirt money cannot be used as an indirect way of increasing the margin.

(c) "any deductions therefrom." The only deductions allowed by the Act are for board and lodging which has been supplied by the employer without charge. The employer may supply board and lodging so as to keep the worker on the premise and always on call. Such an arrangement results in restrictions being placed upon the freedom of the worker which are both irksome and irritating and is designed to benefit the employer and not the worker. Under these circumstances the Court will order that an amount arbitrarily fixed but known to the Court to be less than the actual cost of such board and lodging to be deducted. The deduction is so fixed to compensate the workers for the restrictions placed upon their private liberties. (*Nurses' Award* (1946) 26 W.A.I.G. 34, per Dunphy, P., at p. 36.)

(2) Other deductions, such as an arbitrary 10 per cent. deduction to offset a fall in production, are not permissible in this State. (See Dwyer, P., in 1931 B.W.D. 11 W.A.I.G. 82.)

S.126. The automatic adjustment indicated in this section applies only to the basic wage and has no application to "other wages or allowances, and/or additional remuneration" 125 (b) above.

as last determined by the Court: Provided that in the case of junior, infirm or aged workers or apprentices, in respect to whom a lower basic wage may have been prescribed, such increase or decrease shall be *pro rata* to such lower rate of wage.

127. (1) The State Government Statistician shall, as soon as practicable after the end of each and every quarter in the year, supply to the Court a statement indicating by price index numbers and other information the variation (if any) in the cost of living which has occurred during the then last preceding quarter, and if such statement shows that a change of one shilling or more per week has occurred in the cost of living, then, notwithstanding anything in this part of this Act to the contrary, the Court shall of its own motion consider such statement and may adjust and amend the basic wage declared and for the time being in operation under this Act; and the Court shall, when making

Provision for review and adjustment of basic wage during the currency thereof. Inserted by No. 41 of 1930, s. 3; as s. 124A, renumbered s. 127, amended by No. 20 of 1950, s. 5.

"lower basic wage" must be taken to mean "a lesser sum than the basic wage" (section 123 (2)) which, except for this section, gives no indication of the existence of a "lower basic wage."

Section 125 does not require that the "other wages or allowances and/or additional remuneration" must be prescribed as the addition of two separate sums, the basic wage and the added sum (see section 125 ante). Thus when the basic wage and the additional remuneration are separately prescribed, the total wage being the aggregate of these two amounts, then the element consisting of the basic wage is liable to be increased or decreased by the operation of this section just as if it had been prescribed by the award as the minimum wage without any addition. When, however, a piece rate is fixed which bears no ascertainable mathematical relationship to the basic wage such rate will remain fixed and unaffected by alterations of or adjustments in the declared basic wage, for the operation of this section is limited to the "basic wage prescribed in every award." (See Amalgamated Collieries Ltd. v. True (1939) 18 W.A.I.G. 227.)

See Apprentices (post) section 130 (4).

S.127. The figures supplied by the State Statistician will be accepted by the Court at their face value. If the tables are incorrect in any particular, exception should be taken in the correct quarter and this is not to the Court but to the Statistician himself. (See Railway Award (1928) 8 W.A.I.G. 213 and B.W.A. (1942), 22 W.A.I.G. 227, per Dwyer, P., at p. 229.) The Act does not say what the "cost of living" means but it has been held to mean the basic wage as last declared adapted to any change in the purchasing power of money revealed by the price index numbers supplied by the Statistician. (See 1931 Q.A.B.W. 11 W.A.I.G. 166.) The figures may show that an adjustment is only necessary in one portion of the State (1931 Q.A.B.W. above). An adjustment made under this section operates as from the day preceding the day on which such adjustment was made. (See Operative Painters' Union v. Waltex (1941), 21 W.A.I.G. 160.) For some time it was the practice that any increase upon a quarterly adjustment was to take effect as from the commencement of the first pay period following the adjustment (Q.A.B.W. (1947) 27 W.A.I.G. 38). Such practice was, however, short lived and the Court will now declare that the adjustment is to take effect as from the date upon which it is made with the proviso that payment of the increase may at the employer's option be delayed until the end of the first pay period which commences after the Court's declaration (B.W.D. (1947) 27 W.A.I.G. 44).

Margins, industrial and district allowances are not amended under this section, but they will be affected in so far as every alteration of the base will alter the base-margin ratios. (See 1941 Q.A.B.W. 21, W.A.I.G. 235.)

"shall consider . . . may adjust" : The Arbitration Court has always considered that the adjustment, even where there is a variation of over a shilling per week in the cost of living, to be a discretionary matter for the Court. On the first occasion on which this subsection was availed of (1931) 11 W.A.I.G. 18). Dwyer, P., pointed out that if there had been a variation

any adjustment and amendment of the said basic wage, have regard to the change in the cost of living indicated as aforesaid.

(2) Any adjustment and amendment made by the Court under subsection one of this section shall be deemed to be a determination of the Court, and shall be presented to the Minister, who shall cause the same to be published forthwith in the *Gazette*.

(3) As and whenever the basic wage is adjusted and amended by the Court under this section, the basic wage for the time being prescribed in every award and industrial agreement shall automatically become increased or decreased so that it conforms to and is in parity with the basic wage as so adjusted and amended by the Court.

of over a shilling per week in the cost of living the Court SHALL consider the same, "and then follows a DISCRETION that the COURT MAY adjust and amend the basic wage in accordance with the figures supplied." As a matter of practice the Court always did adjust when a variation of over a shilling had occurred, and this practice gave rise to the impression that the variation in such a case was mandatory.

"The fact that adjustments have been made without exception appears to have given rise to the expectation that these adjustments were a matter of right; but of course they are not. The Act is quite clear that they are discretionary, and the Court would be abrogating its function and becoming a mere recording instrument if it were to treat them otherwise." (Per Dwyer, P., in 1942 Q.A.B.W. 22, W.A.I.G. 131.) Dunphy, P., seems to have been of the contrary opinion. See Q.A.B.W. (1948) 28 W.A.I.G. 41, 44, 45.

The first occasion on which the Court refused to adjust, in the face of a rise in the cost of living of over a shilling per week, was in the first quarterly review in 1942. The Court held here (22 W.A.I.G. 28) that "shall" was mandatory and that "may" was permissive merely, and this position was upheld by the Full Court. Northmore, C.J., said there (Warner v. Court of Arbitration (1942) 22 W.A.I.G. 28.)

In my view those are plain words which plainly leave it to the discretion of the Court either to adjust the basic wage or to leave it unaltered.

Warner's case must now be taken to have settled the question. See Q.A.B.W. (1953) 33 W.A.I.G. 502 per Jackson, J. It is submitted however that the Court can only refuse to adjust or amend when the basic wage, having regard to "the change in the cost of living" which has taken place is still sufficient to satisfy the needs of the average worker because this is the irreducible minimum. See section 123 (3) (a) and (b).

(See also Q.A.B.W. (1942) 22 W.A.I.G. 227.)

This view has since the basic wage ceased to be a "needs wage" become of great importance. There is now no *prima facie* case for adjustment upwards following an increase in the cost of living. Before any such adjustment will be made the Court must be satisfied that the increased wage is within the economic capacity of industry. As to this the onus is on those who seek the increase. See: Q.A.B.W. (1954) 34 W.A.I.G. 269.

If on the other hand the statement supplied by the Government Statistician does not show a change of one shilling or more per week in the cost of living the Court has no jurisdiction to alter the existing figures (Q.A.B.W. (1947) 27 W.A.I.G. 44, per Dunphy, P.) If, however, changes of less than one shilling are still disclosed at the time of the annual inquiry they will be adjusted then (B.W.D. (1947) 27 W.A.I.G. 44, per Dunphy, P., at p. 45.)

(3) As any adjustment and amendment made under this section is deemed to be a determination of the Court (2), this subsection appears to be superfluous. (See section 126 above.)

As an appendix to the above sections dealing with the determination of the basic wage, it is proposed to review the Court's attitude to the following matters:—

(a) Hours, (b) overtime, (c) holidays, and (d) piecework.

(a) Hours: The fixation of hours of employment is an industrial matter. (See section 6 (ante).)

The Court cannot consider the question of hours *in vacuo*. They must be dealt with in conjunction with such things as margins, industry allowances, district allowances and all other conditions of the worker's employment. Whether an improvement in the technique of production is to be enjoyed by the worker in the form of increased wages, better general conditions or reduced hours is a question to be decided on the facts of each particular case. (See *Timberr yards & Sawmills Employees' Award* (1926) 6 W.A.I.G. 214 and also the *Goldmining Employees' Award* (1937) 17 W.A.I.G. 27.)

For this reason evidence of the hours worked in other countries will be of little assistance unless all the other working conditions are known and can be compared. (See *Wolff, J., in the Building Trades' Award* (1939) 15 W.A.I.G. 526.)

In the case of Government workers the Court will also take into consideration the extent to which their position is being improved by general Government Social Services. "I am prepared to admit," said Dwyer, P., in the *Railway Award* ((1939) 19 W.A.I.G. 24) "that the lesser hours is a most desirable thing in itself. It is an avenue of social amelioration. It may be a question of social justice. It is part of a large mass of competing social utilities involving choice and discrimination. It can be purchased at a price, but we cannot pay this price and at the same time keep up to their present high standard of other social services; or, in the alternative unless we are prepared to adopt an increased burden of taxation. These are questions for the Government not for the Court to determine."

Every application for a change of hours will be considered on its merits (see *Timberr yards and Sawmills Employees' Award* (1926) 6 W.A.I.G. 214 and also *Hospital Employees' Union v. Minister of Health* (1927) 7 W.A.I.G. 69), but the onus of proof is on the party desiring such change. (See *Timber Industry Award* (1930) 10 W.A.I.G. 92.) If it is proposed to remedy an undesirable position by an alteration in hours it must be proved, not only that such an undesirable position in fact exists, but also that an alteration in hours will be an appropriate remedy. (See *Chief Secretary v. Hospital Employees' Union* (1930) 10 W.A.I.G. 207.)

As to guarantee week clause see *Engine Drivers Award* (1949) 29 W.A.I.G. 605. In deciding on the number of hours which should be worked in any particular industry the Court regards all of the following factors as being relevant:—

(1) *Health*: The Court will reduce hours if it can be shown that the working of the hours at present being worked in any industry are, when taken together with the conditions of work unavoidably associated with such industry, injurious to the health of the workers concerned. (See *Fruiters and Paperhangers' Award* (1924) 4 W.A.I.G. 102, per Burnside, J., and *Chaifcutting Award* (1926) 5 W.A.I.G. 290, per Davies, A.P.) and it will for similar reasons refuse permission to an employee to work shift work. *Aerated Waters Workers Award* (1949) 29 W.A.I.G. 452.

And they may be reduced when the conditions of the industry fail short of causing ill-health and merely involve continuous strain and continuous application (see *Engineers, Boilermakers and Moulders' Award* (1926) 8 W.A.I.G. 271) but in a case of this kind it should be shown to the Court that the community at large will not suffer from such reduction, and in particular that output can be maintained. When, however, the present hours are having a detrimental effect on the workers' health they will be reduced whatever the effect upon output may be, for considerations of health are paramount and will override financial considerations. (See in re *Minister for Works* (1930) 10 W.A.I.G. 278, per Dwyer, P., at p. 281 and also the *Goldmining Award* (1937) 17 W.A.I.G. 27. See "Risk money" ante, section 125.)

(2) *Eastern States Competition*: Hours worked in the Eastern States and under Federal awards will always be taken into consideration (see *Davies, A.P., in Engineers and Moulders' Award* (1925) 5 W.A.I.G. 166, and *Dwyer, P., in Timberr yards and Sawmills Employees' Award* (1927) 6 W.A.I.G. 214) and the more vulnerable the industry in question is to Eastern States' competition the more weighty this consideration will be. (See *United Furniture Trades Union v. Boans* (1926) 6 W.A.I.G. 342, *Portland Cement Co. v. A.W.U.* (1926) 6 W.A.I.G. 350, and *Metropolitan Soap and Candle Manufacturers' Union v. Burfords* (1927) 7 W.A.I.G. 151 *Furniture Trades Award* (1949) 29 W.A.I.G. 469.)

In the *Metropolitan Soap case* (above) it was shown that a 48-hour week prevailed in the Eastern States for workers engaged in the soap industry and the Court refused to grant a 44-hour week here because it considered that the effect of such unequal standards would be to arrest any tendency to decentralise the industry and would result in the employers manufacturing all their requirements in the Eastern States. The Court showed clearly that were it not for this consideration, a 44-hour week would have been granted and provided in the award that "upon any competent wage fixing authority prescribing for Adelaide or Melbourne weekly hours of work less than 48 per week the hours to be worked under this clause shall be reduced so as to coincide with the hours so prescribed." In the *W.A. Coachbuilders' Union v. Master Coachbuilders* ((1928) 8 W.A.I.G. 258), *Dwyer, P.*, went so far as to say that on the question of hours "Interstate competition must necessarily be a deciding factor" . . . the necessity arising from the fact that trade, commerce and intercourse must, by virtue of section 92 of the Constitution be "absolutely free." (See *Coachbuilders' Award* (1936) 16 W.A.I.G. 23, the *Iron Trades' Award* (*Wolff, J.*) (1938) 18 W.A.I.G. 344 and the *Superphosphate Workers' Award* (1930) 10 W.A.I.G. 124.) In the *Superphosphate Workers' Award* ((1930) 10 W.A.I.G. 124) the factor of potential interstate competition was considered.

The Court will also consider the effect of competition from an industry which, although situated within the State, is not within the jurisdiction of the Court and thus free to work longer hours. (See *Operative Bakers v. Perth and Suburban Master Bakers* (1927) 7 W.A.I.G. 230 and also *United Furniture Trades Union v. Boans* (1927) 6 W.A.I.G. 342.)

(3) *Fatigue*: The Court will reduce hours and prescribe "tea breaks" (as to which see *Bootmakers Award* (1948) 28 W.A.I.G. 107 at page 110 and *Metal Trades Award* (1948) 28 W.A.I.G. 680 and *Mining (Iron Ore) Award* (1949) 29 W.A.I.G. 497) to lessen the incidence of fatigue, and will insist that those hours during which fatigue manifests itself to its greatest extent be dispensed with first. A reduction in the weekly hours of work will generally be achieved by deducting time from the end of each day (when the incidence of fatigue is greatest) and not by stopping work entirely on Saturday morning. The Court will certainly not ADD time to the normal day so that, without a reduction in the weekly hours of work, Saturday morning might be left free, for such a re-arrangement of working time would not be reducing but would be increasing the incidence of fatigue. (See *United Furniture Trade Union v. Boans* (1927) 6 W.A.I.G. 342, per Dwyer P.) It should not be thought, however, that the question of fatigue is the only matter to be considered by the Court when it is determining whether the weekly hours of work are to be spread over five or five and a half days. The effect upon production for reasons other than fatigue will be of importance. (*Mining (Iron Ore) Award* (1949) 29 W.A.I.G. 497.) The Court may also decline to order a five day week on the ground that it would impose too great an inconvenience upon the public generally and this aspect of the matter is of particular importance when dealing with industries which supply the housewife with essential supplies. (*Baking Award* (1950) 30 W.A.I.G. 223.) (As to the spread of hours see generally the remarks of Dunphy, P., in *Amalgamated Road Transport Union v. Australian Glass Manufacturers Co. Ltd.* (1946) 26 W.A.I.G. 358.) This question must be determined with regard to the nature of the work which may necessarily result in the hours of duty being spread over a longer period than eight hours. (*Dock Workers Award* (1950) 30 W.A.I.G. 185.) Nor will it reduce hours when the only result of its so doing would be that more overtime would be worked. (See *Sugar Refining Employees v. C.S.R.* (1932) 12 W.A.I.G. 234.)

The Court considers that the optimum week is one of about 44 hours, and therefore the factor of fatigue, important when considering a reduction from 48 to 44 hours per week, if of little importance when it is sought to reduce hours from 44 to 40. (See *Railway Awards* (1939) 19 W.A.I.G. 24.)

(4) *The financial Condition of the Industry*: In times of financial tightness and depression this consideration will be extremely important if not conclusive. In the amendment to the *Railway Awards* (1930) 10 W.A.I.G. 270 Dwyer, P., said—

"I intend to base my opinion solely upon the present state of finance both public and private as that position quite overshadows the other matters involved, and the considerations involved quite outweigh in importance all such debatable questions as output, industrial fatigue, monotony and other cognate matters usually associated with an application like the present."

The Court will not reduce the hours in industries whose financial position would not enable them to carry the extra wage costs involved. The granting of shorter hours in these industries would compel them to cease, or at least restrict their operations and would not benefit the workers generally. (See Dwyer, P., in *Engineers (Goldfields) Award* (1928) 8 W.A.I.G. 388. A.W.U. *Westralian Branch v. Lake View and Star* (1927) 27 W.A.I.G.) Conversely it is always a strong argument in an application of this kind to show that the industry concerned is in a strong financial position. (See *United Furniture Trade v. Boans* (1927) 6 W.A.I.G. 342.) The Court will consider the financial position of the State generally, when fixing the hours applicable to Government servants, and the unsatisfactory condition of State finances will be a ground on which to apply for the extension of hours for such workers, but it must be shown not only that such conditions exist but also that an extension of hours is an appropriate remedy. (See *Chief Secretary v. Hospital Employees' Union* (1930) 10 W.A.I.G. 287.) In the regulation of the hours applicable to Government departments no one department or group of departments will be considered in isolation. (See in re *Minister for Works* (1933) 13 W.A.I.G. 30, and *Railways award* (1939) 19 W.A.I.G. 24.)

(4) *Effect on Output*: The Court will be more ready to grant a reduction in hours if it can be shown that such reduction will not appreciably reduce output. (See *Engineers, Boilermakers and Moulders' Award* (1928) 8 W.A.I.G. 271. *Federated Boilermakers v. Commissioner of Railways* (1929) 9 W.A.I.G. 229. *Coastal Amalgamated Engineers' Union v. Dobbie* (1919) 14 W.A.A.R. 211.)

Alter however when a direct relationship can be shown to exist between the time worked and the output. (See *Superphosphate Award* (1930) 10 W.A.I.G. 124.)

(5) *Time Spent Following the Job*: The Court will prescribe a working week, shorter than that generally prevailing, for industries which compel the worker to "follow the job," for in these industries the worker spends a great deal of his time travelling and such time is not included in the time worked. (See *Timber Industry Award* (1930) 10 W.A.I.G. 92 and the *Bricklayers' Award* (1930) 10 W.A.I.G. 239.)

The Court will prescribe shorter hours for night work which, although not *ipso facto* unhealthy is considered to be "unnatural" and "unsocial." (See *Pastrycooks' Award* (1930) 10 W.A.I.G. 244.)

A reduction will be considered more favourably when wage costs are low in comparison to the total cost of production. (See *Superphosphate Workers' Union v. Cuming, Smith and Mt. Lyell* (1935) 15 W.A.I.G. 162.)

(b) *Overtime*: "Overtime means," said Dwyer, P., in *Metropolitan Superphosphate Workers v. Cuming Smith* ((1927) 6 W.A.I.G. 275), "what the literal interpretation would lead us to believe, viz., time worked in any one week in excess of ordinary working hours. Thus, if there is a regular time for beginning work and leaving off work, any time worked prior to the former and subsequent to the latter would be overtime. If a certain definite number of hours comprised a week's work any hours in excess of these would constitute overtime. Again, if it is an established practice to finish work for the week on midday on Saturday any time worked after that hour would constitute overtime." The Court does not look with favour on the working of overtime and it awards penal rates for such work not as a reward for the worker but as a deterrent to the employer. (See Dwyer, P., in the *Tramways Award* (1928) 6 W.A.I.G. 352 and it follows that when the occasional working of overtime is incidental to a particular industry and cannot be avoided penal rates will not be awarded for it, and the worker must be taken to have known of his liability to work occasional overtime when he entered such industry. (See *Tramways Award* 6 W.A.I.G. 352 above.) If the employer pays a wage greater than the minimum laid down in the award any overtime worked must be paid for at a rate based on this agreed rate and not on the rate laid down in the award. (See *Federated Clerks' Union v. Goode Durrant* (1929) 9 W.A.I.G. 150.)

(c) *Holidays*: The Court has power to make provision for holidays (*Coastal Dairymen's Union v. Master Dairymen* (1904) 3 W.A.A.R. 57) and it is a power which is frequently exercised. Unless there is a provision in the award to the contrary, a worker does not become entitled to his annual holiday until the completion of a full year's service. (See Dwyer, P., in *Hospital Employees v. Minister for Health* (1927) 7 W.A.I.G. 68.)

To meet this position awards generally provide that the workers' right to holidays accrues from day to day and that should his contract of service terminate prior to completion of a year's service he is to be entitled to holiday pay pro rata. (See *Metropolitan Brick Co. Ltd. v. Brickyard Employees* (1940) 19 W.A.I.G. 351.)

Holidays are primarily given with the object of allowing the worker ease from his duties. Properly conceived they are a period of rest and recreation during which the worker may restore his vigour and so maintain his efficiency. (See Dwyer, P., in *Hospital Employees v. Minister for Health* (1927) 7 W.A.I.G. 68 and also in the *Tailors' Award* (1939) 19 W.A.I.G. 157.) Holidays are a privilege in the nature of a bonus that is given to the worker as a reward for faithful service during the preceding 12 months. The notion of faithful service is implicit in such a grant and thus holidays may be forfeited for serious or wilful misconduct, i.e., a strike. (See Dwyer, P., in *A.W.U. v. Goldfields Firewood Supply Co.* (1941) 21 W.A.I.G. 363.) A provision in an award taking away holiday rights from persons implicated in a strike is not void as a penalty. (See *Amalgamated Collieries Ltd. v. Bardi* (F.C.) (1938) 18 W.A.I.G. 237.)

As a result of a general application with respect to holidays and annual leave made to the Court in 1946 the Court set the following standards for annual leave and holidays:—

- (a) All workers except seven-day shift workers are entitled to two weeks' annual leave on full pay;
- (b) Seven-day shift workers are entitled to at least two weeks' annual leave on full pay and greater leave if the Australian standard so indicates;
- (c) All workers are entitled to a standard of ten public holidays each year, unless in a particular industry the Australian standard indicates that a lower number is generally applicable, or proof is advanced to demonstrate that such holidays are beyond the economic capacity of a particular industry or whenever there is some other industrial compensation. (Holiday and Annual Leave Application (1946) 26 W.A.I.G. 354.)

These general standards—(a) and (b) being definitely minimums—can now be said to have been definitely established in this State.

(d) *Piecework*: The Act contains no definition of "piecework" or "piece-worker." Burnside, J., in *Carpenters' Union v. A. T. Brine* ((1910) 9 W.A.A.R. 249 at p. 257) said—

"When a person is employed to do piecework he is entitled to do it in his own time, in his own way and without any supervision and his employer on completion of the job to reject it as a whole or to accept it, but he is not to interfere with the progress of the work and decide as to when it is to be done, where it is to be done, or in what order it is to be done."

By insisting on the absence of control by the employer over the pieceworkers, Burnside, J., would include within the definition persons who do not stand in a relationship of employer and "worker" to one another and over whom the Court has no jurisdiction. See definition "worker" section 6 ante. His definition would thus appear, at least for the purposes of this Act, to be too wide. The employer must have some control over the manner in which the pieceworker does his work, for if such control be lacking the pieceworker would not be a "worker" but an independent contractor. The definition of piecework which may be adopted for the

PART VIII.—APPRENTICES.

Apprenticeship Board.
No. 57 of
1912, s. 125;
No. 50 of
1925, s. 54.

128. (1) The Governor may appoint a board of three members, to be called "the Apprenticeship Board," which shall be constituted as follows:—

(a) One member shall be nominated by the industrial unions of employers in the building trade;

purposes of this Act is to be found in Webster's Revised Unabridged Dictionary, viz., "work done by the piece or job; work paid for at a rate based upon the amount of work done rather than on the time employed." And whether an employee is a worker (pieceworker) or an independent contractor may be a "razor blade" question turning on fine distinctions of fact and can only be decided after a close consideration of all the circumstances. (See *Plasterers' Award* (1929) 9 W.A.I.G. 313.) Contract work means work done under conditions which exclude the relationship of employer and employee. A pieceworker is paid according to what he does and is an employee. (See *Corbitt v. Clarke* V.R.S. (1909) A.R. (N.S.W.) 192, *A.W.U. Westralian Branch v. A. Crombie* (1945) 25 W.A.I.G. 43.)

The Act does not abolish piecework. The power to fix the "remuneration" of workers (section 6 "Industrial matters") includes the power to fix rates for piecework. (See *Carpenters' Union v. Builders and Contractors* (1903) 2 W.A.A.R. 30 and also *Rooth, J.*, in *Amalgamated Carpenters and Joiners v. Bunning* (1912) 11 W.A.A.R. 82 at p. 86 and *Burnside J.*, in *Meekatharra Miners' Union v. Ingleston* (1910) 9 W.A.A.R. 158 at p. 160.)

The Court will usually fix a rate for piecework which will secure to a competent worker using reasonable effort during prescribed working hours a percentage (generally 10 per cent.) over and above the time rate for similar work. (See *A.W.U. (Goldfields) v. Goldfields Firewood Supply* (1938) 18 W.A.I.G. 24 and *Dwyer, P.*, in the *Bricklayers' Award* (1930) 10 W.A.I.G. 239 at p. 241.) Piece rates are therefore always based upon an actual or notional time wage. (See *Timber Award* (1936) 16 W.A.I.G. 275.) The award may prescribe a minimum wage to be paid to the pieceworker and in such a case the minimum wage must be paid irrespective of the amount of work actually done. (See *Timber Industry Award* (1930) 10 W.A.I.G. 92.) When pieceworkers are in this way guaranteed a minimum, the employer is always given freedom of action in dismissing such workers. (See *Dwyer, P.*, in *Amalgamated Collieries v. Coal Miners' Union* (1931) 11 W.A.I.G. 255 at p. 257.) When this clause comes into operation as a result of the pieceworker being unable for any reason to earn on piece rates the minimum wage it has not the effect of converting the pieceworker into a day worker—the pieceworker does not on that account cease to be a pieceworker (*A.W.U. Westralian Goldfields Branch v. Goldfields Firewood Supply Ltd.* (1945) 25 W.A.I.G. 50.)

It was held in *True v. Amalgamated Collieries (F.C.)* ((1937) 17 W.A.I.G. 429) that the earnings of the pieceworker, being correlated to the amount of work done, and having no ascertainable relationship to the basic wage, which is based upon the amount of time worked, are not affected by an alteration in the basic wage under section 129 of the Act. On appeal to the High Court this decision was upheld (*Amalgamated Collieries Ltd. v. True* (No. 1) (1938) 18 W.A.I.G. 227). *Dixon, J.*, put the position thus: "The amounts fixed by the award as tonnage rates are in fact no more than inseparable money sums per ton worked. Their relation to the basic wage is not disclosed, they do not show that the amount of the basic wage is an element in their composition and it is impossible to say whether any arithmetical relationship exists." (See sections 125 and 126 ante.) The Court may correlate piece rates with the basic wage by providing that the total earnings of pieceworkers should be increased or decreased as the case may be by an amount equal to the increase or decrease in the basic wage. (See *Amalgamated Collieries v. True* (No. 2) (1939) 18 W.A.I.G. 608 (F.C.).)

The Court favours piecework systems so long as they are subjected to adequate control and supervision. (See *Bricklayers Award* (1930) 10 W.A.I.G. 239, per *Dwyer, P.*, at p. 241. *Engineers and Moulders' Award* (1932) 12 W.A.I.G. 62, per *Dwyer P.*, at p. 64. *W.A. Timberworkers v. Millars* (1940) 19 W.A.I.G. 466. *WA Newspapers v. Printing Employees' Union* (1940) 20 W.A.I.G. 188.)

Piece rates will not be revised merely because it is shown that pieceworkers are earning considerably higher wages than time workers. Piece rates are designed to reward ability and output and it is of the essence of the system that the pieceworker should be permitted to earn more than the time-worker. (*Colliery District Deputies' Union v. Amalgamated Collieries* (1940) 19 W.A.I.G. 447.)

Part VIII.—APPRENTICES.

This Act makes no attempt to codify the law relating to apprentices but merely to adapt the law as existing to local and contemporary conditions. To ascertain the law applicable to any particular position one would have

- (b) one member shall be nominated by the industrial unions of workers in the building trade;
- (c) the third member shall be appointed chairman, and shall be a member of the Court of Arbitration.

(2) No person shall be employed or become an apprentice in the building trade otherwise than as prescribed by this section and the regulations.

Penalty: One hundred pounds.

(3) Whenever any person who is indentured as an apprentice to the Board shall have already served for some period as an apprentice to the building trade (including service with the parent of the apprentice), such service shall be taken into consideration in fixing the period of apprenticeship to the Board.

(4) Every such apprentice shall be indentured to the Apprenticeship Board in the prescribed form, and shall be placed from time to time with an employer under an agreement of apprenticeship between the Apprenticeship Board, the apprentice, and the employer, with power reserved to the Board to abrogate any agreement, and to transfer the apprenticeship from one employer to another:

Provided that the members of the said Board shall not be personally liable under this Act or under any agreement or indenture of apprenticeship entered into with the said Board, nor shall such members

to consider, not only the relevant State award, if any, but also the apprenticeship laws in force in England on 1st January, 1873 (see section 1 of 37 Vic. No. 12) the provisions contained in any relevant Commonwealth awards, if any, the provisions contained in the Master and Servant Act, 1892 (35 Vic. 28) and to a lesser extent the Child Welfare Act, 1947 (No. 66 of 1947). Education Act, 1928-1935 (No. 33 of 1928) and Factories and Shops Act, 1920-1947 (No. 44 of 1920), reprinted in Vol. 1 Reprinted Acts (1939). No attempt will be made here to set out and analyse all the law applicable to apprentices in this State, and attention will be confined to the provisions of this Act.

The foundation of the Court's jurisdiction is contained in the definition of "industrial matters" in section 6 (f) ante. (See in re Frieze 11 W.A.L.R. 18.)

The Act contains no definition of "apprentice" and "apprenticeship" but the latter has been held to mean "the relationship which arises out of a contract whereby one person, who is called the master or employer, becomes bound to teach another person who is called the apprentice, a profession or trade, and the latter becomes bound to learn it and to serve the master as an apprentice." (See Burnside, J., in the *Painters and Paperhangers' Award* (1924) 4 W.A.I.G. 102 at p. 103.)

The apprentice must be distinguished from the "learner" who is a worker who is *permitted* to learn but whom the employer is not bound to teach and to whom the employer is not bound for any definite term,

be liable to any action or proceeding at the instance of any apprentice or employer or other person joined in such agreement or indenture.

(5) The Governor may, on the recommendation of the Court, by regulation define the term "building trade" for the purposes of this section.

Apprentice-
ship
generally.
No. 57 of
1912, s. 126;
No. 50 of
1925, s. 55.

129. (1) Every person desirous of becoming an apprentice shall be employed on probation for a period of three months to determine his fitness or otherwise for apprenticeship. In the event of his becoming an apprentice, such probationary period shall be counted as part of the term of apprenticeship.

(2) No premium shall be paid to or accepted by an employer for taking an apprentice.

(3) It shall be provided in every agreement of apprenticeship—

(a) that technical instruction of the apprentice, when available, shall be at the employer's

and also from the "improver" who is generally a qualified journeyman employed below the customary wage while obtaining additional experience; and lastly from the junior who has no right to be taught and who, unlike the apprentice, is paid according to his age.

S.128 The Apprenticeship Board has only jurisdiction over the "building trade" which has been defined (see section 2 of Building Trade Apprentices Regulations Government Gazette, 1st June, 1928) to mean "the following trades, callings or avocations, namely:—

- (a) Bricklaying (including tuckpointing);
- (b) stonemasonry (including all forms of stone cutting and fixing and monumental masonry);
- (c) plastering (including modelling but excluding cement and plaster-sheet making and the making of cement tubs, baths and cisterns)."

The other sections of the trade such as the painting, the carpentering and the plumbing, did not wish to participate in the scheme because they felt that they would be unable to obtain sufficient representation on the Board as constituted under subsection (1) of this section, and they were therefore omitted. (See the remarks of Dwyer, P., in the Building Trades Award (1939) 18 W.A.I.G. 526 at p. 531.)

For the purpose of this section an "apprentice" has been defined to mean "any person of any age who is apprenticed to learn or to be taught any of the industries, crafts or callings to which these regulations apply, and, where the context so admits, includes an apprentice on probation." (See section 31 of B.T.A.R.)

(1) As to the nomination of members of the Board and their tenure of office see section 3 of B.T.A.R.

(2) Proceedings in respect of breaches of the regulations are instituted and conducted in the same manner as proceedings for the enforcement of an award. (See section 30 of B.T.A.R.)

(3) The apprentice is, in the first place, indentured to the Board and it is the Board which assumes the responsibility for placing him with an employer. The advantage to be secured from this procedure is of course that the apprentice may, by being moved from one employer to another according to fluctuations in the trade, be assured continuity of employment. If the employer is unable to employ his apprentice full time the Board may suspend the apprenticeship. (See Building Trade Regulations in Government Gazette, 13th June, 1930.)

S.129. (1) As to services on probation, see sections 2, 3, and 4 of Apprenticeship Regulations, 1941, and section 6 of B.T.A.R.

expense, and shall be in the employer's time, except in places when such instruction is given after the ordinary working hours;

- (b) that in the event of any apprentice, in the opinion of the examiners, not progressing satisfactorily, increased time for technical instruction shall be allowed at the employer's expense to enable such apprentice to reach the necessary standard.

(4) Any employer who, when required by the Court, or by the Apprenticeship Board in the case of apprenticeships in the building trade, to enter into an agreement of apprenticeship, neglects or refuses to do so without reasonable cause shall be guilty of an offence.

Penalty: Fifty pounds.

(5) This section applies to apprenticeship generally to any industry to which this Act relates.

(6) So far as the Act to declare the law relating to masters and apprentices (37 Victoria, No. 12) is inconsistent with the provisions of this Act, or of any industrial agreement or award, it shall be of no effect.

This section and section 130 would indicate that the length of service—not fixed by the Act—should be substantial. See: Goldfields Firewood Award (1941) 21 W.A.I.G. 363. Bread Carters Award (1950) 30 W.A.I.G. 66.

(2) The Court will ascertain whether a sum of money paid by the worker to the employer is a premium or not from an examination of the facts of the particular case. The real purpose of the money so paid must be discovered and it matters not what the parties themselves declare its purpose to be. (See *Cook v. Henri* (1928) 8 W.A.I.G. 291.)

(3) As to technical instruction, see section 11 (f) of Apprenticeship Regulations and also sections 24 to 28 thereof. For the position in the Building Trade see sections 15-17 of B.T.A.R. Failure to make satisfactory progress may have other results than that laid down in (3) (b) hereof. The employer may, on the recommendation of the examiners withhold the increase of wages accruing to the apprentice (see section 34 of Apprenticeship Regulations) or, on the failure to pass two consecutive examinations, the Court may cancel the apprenticeship agreement (see section 35). As to the position in the Building Trade (see section 18 of B.T.A.R.).

(6) 37 Vic. No. 12 was enacted to remove all doubts as to the application of the English Law relating to apprentices to this State. The Act was entitled "An Act to declare the law relating to Masters and Apprentices," and by section 1 thereof made all the laws in force in England as on January 1, 1873, with regard to—

- (a) the persons who may take or become apprentices;
- (b) the number of apprentices which may be taken by any one master;
- (c) the mode of binding apprentices;
- (d) the rights and liabilities of the parties to any contract of apprenticeship;
- (e) the assigning and turning over of the apprentices; and,
- (f) the dissolution of apprenticeships;

Registration of agreements of apprenticeship.

No. 57 of 1912, s. 127;

No. 50 of 1925, s. 56;

No. 49 of 1941, s. 10.

130. (1) No apprentice shall be employed by an employer in an industry which is subject to an industrial agreement or award, otherwise than by an agreement in writing registered with the Registrar.

(2) Application for the registration of an agreement for apprenticeship shall be made by the employer to the Registrar within fourteen days from the date of the agreement.

(3) Subject to section one hundred and twenty-eight, subsection (3), service under an agreement of apprenticeship shall not commence until registration, unless an application for registration has been duly made within the prescribed time, in which case, on registration of the agreement, service thereunder shall be deemed to have commenced from the date of the agreement, or such other date (not being earlier than the date of the agreement, or such other time as may be mutually agreed between the industrial union of workers and the employers) as may be thereby fixed:

Provided that if it is proved to the satisfaction of the Court that by inadvertence, or from some cause for which there is sufficient excuse, an application for

except where they were inapplicable to the circumstances of the colony, in force in the colony. Any law thus made applicable to this State must give way in the face of an inconsistent provision in this Act or in an award or agreement made under this Act; in the absence of any such provisions the common law will apply. (See *A.W.U. (Goldfields) v. Goldfields Firewood Supply Co.* (1941) 21 W.A.I.G. 363, *United Furniture v. Zimpel* (1926) 6 W.A.I.G. 129 and *W.A. Operative Bakers v. Froude* (1937) 17 W.A.I.G. 95.)

S.130. (1) Registration does not create the relationship of apprentice and master that relationship is created by the contract (see *W.A. Plumbers' Union v. Sherwood* (1925) W.A.I.G. 189) but such registration is a condition precedent to the lawful employment of an apprentice. (See *United Furniture Trades v. Perth Leadlight and Glazing* (1935) 15 W.A.I.G. 188.) Registration merely implies that all the obligations with regard to the agreement have been observed by the employer so as to render him immune from any penalty for non-compliance with the pertinent provisions of the award and it gives no added force to the validity of the document itself. (Per Davies, A.P., in *W.A. Operative Bakers v. Froude* (1937) 17 W.A.I.G. 95.)

(3) The "prescribed time" must refer to the 14 days mentioned in subsection (2) above although this is not strictly speaking "prescribed" (see section 6 ante). The meaning of the latter part of this subsection appears to be anything but clear. Paraphrased it would appear to mean this—If the application for registration has been made within 14 days from the date of the agreement then on registration service shall be deemed to have commenced from the date of the agreement or from some date later than the date of the agreement "as may be thereby (i.e., by the registration) fixed" by the Registrar. If it is desired to commence service at some date prior to the date of the agreement then that date ("or such other time") must be mutually agreed upon between the union and employer concerned. The proviso deals with applications made *after* the prescribed time. Here service will date from the registration although the Court may "otherwise direct." The Court could therefore direct that service should be deemed

registration was not made within the prescribed time, the Court may permit the registration after the expiration of such time, but in such case the service shall date from the registration, unless the Court otherwise directs.

(4) Except as provided by this section, every agreement of apprenticeship shall be subject to the provisions of any industrial agreement or award in force for the time being applicable to apprenticeship in the industry to which the agreement relates.

(5) Notice of application for the registration of an agreement for apprenticeship shall be given by the Registrar to the industrial unions or associations of workers or employers in the industry, and any such union or association may, within a time to be fixed by a notice (not being less than fourteen days from the date thereof), give notice to the Registrar of its objection to the registration of the agreement, and the grounds thereof.

On receipt of such notice of objection the Registrar shall refer the matter to the Court, and the Clerk of the Court shall notify all parties concerned of the time and place appointed for the hearing, and the Court may make such order for registration of the agreement or otherwise as it thinks fit.

to have commenced as from the date of the agreement, and, further would appear to have power, even in the absence of any agreement between the employer and the union, to ante date the agreement—a thing which cannot be done when the application is made within the prescribed time without such mutual agreement. (See *Amalgamated Engineering Union v. C. W. Houghton* (1939) 19 W.A.I.G. 515.)

(4) This subsection was inserted by the Industrial Arbitration Act Amendment Act, 1925, to overcome the position revealed by the Full Court case of *Brown & Burns v. Hubber* ((1921) 23 W.A.L.R. 52) where it was decided that an apprenticeship agreement entered into on the terms and conditions laid down in an award or industrial agreement was not affected by and remained in force in the face of a subsequent award or industrial agreement, containing inconsistent provisions, which came into operation while the apprenticeship agreement was still extant. (See also *Amalgamated Engineers v. White & Co.* (1923) 2 W.A.I.G. 177, *W.A. Plumbers v. Sherwood* (1925) 5 W.A.I.G. 183 and *Coastal District Engineers v. Hill* (1925) 5 W.A.I.G. 319.)

Apprenticeship agreements are now subject to the provisions of the relevant award or industrial agreement in force for the time being. (See *Dwyer, P.*, in *W.A. Operative Bakers v. Perth Master Bakers* (1928) 8 W.A.I.G. 279.)

(5) The fact that the apprenticeship agreement, which otherwise complies with the Act and the relevant award contains a clause which may be held to be in restraint of trade is no ground for refusing registration. The parties will in such a case be left to their common law rights. (See *W.A. Operative Bakers v. Froude* (1937) 17 W.A.I.G. 95.)

(6) Except as provided in subsection (4) of section one hundred and twenty-eight an apprentice shall not be transferred from one employer to another otherwise than by an agreement in writing registered by the Registrar. The provisions of subsection (5) of this section shall *mutatis mutandis* apply to the registration of any such transfer.

(7) No apprentice employed under a registered agreement shall be discharged by the employer for alleged misconduct until the registration of the agreement of apprenticeship has been cancelled by order of the Court on the application of the employer.

(8) If at the commencement of this section any employer in an industry to which this section applies is employing any person as an apprentice under an agreement that has not been registered with the Registrar, such employer shall forthwith apply for the registration of such agreement under this section, and service under such agreement shall be deemed not to have commenced until registration, unless on an application by the employer, or by or on behalf of the apprentice, the Court shall otherwise direct.

(9) The breach or non-observance by an employer of any of the provisions of this section shall be an offence against this Act.

Penalty: Fifty pounds.

If the ratio of apprentices to tradesmen is correct the Court will not prevent the registration on the ground that the facilities for adequate training do not exist. It is the employer's responsibility to see that his apprentice is taught his trade, and if this is not being done the appropriate remedy is to bring an application for enforcement, or, alternatively, to apply to the Court to transfer the apprentice to another employer. (See *Todroff v. Furniture Trades Union* (1941) 21 W.A.I.G. 153 and *Amalgamated Engineers v. W. J. Lawton* (1939) 19 W.A.I.G. 204). As to the ratio clause to be found in all awards—if this clause permits the employment of an apprentice to every two or "fraction of two" journeymen, the fraction of two cannot be less than one for "a fraction of a journeyman cannot teach anybody." (See *Amalgamated Engineers v. Dobbie* 11 W.A.A.R. 163.)

If the relevant award makes no provision for apprentices they may still be employed and a written agreement made subject to the provisions of the Act, may be registered. (See *Dwyer, P., in A.W.U. (Goldfields) v. Goldfields Firewood Supply Co.* (1941) 21 W.A.I.G. 363 at p. 365.)

(7) The employer must establish his right to discharge before the Court will cancel the agreement. "Misconduct" will normally be defined in the award or in the apprenticeship regulations which are incorporated into the award. (See section 18 thereof.) If this is not done the employer will be thrown back on his common law rights, and at common law the apprenticeship contract can only be put an end to by the employer if the conduct of the apprentice is such as to render work and service impossible. (See *Water v. Fryer* 1922) 1 K.B. 499, per *Shearman, J. M.C.L. Print v. Dixon* (1928) 8 W.A.I.G. 108. *Perth Hospital Board v. Coakley* (1942) 22 W.A.I.G. 245

131. (1) The Court, with the approval of the Governor, may make regulations—

Regulations
as to
apprentice-
ship.

(a) prescribing the method in which apprentices shall be indentured and placed with employers, and the terms and conditions of apprenticeship;

No. 57 of
1912, s. 128;
No. 50 of
1925, s. 57.

(b) prescribing the matters to be taught to apprentices, the methods, times, and conditions of instructing apprentices, and the examinations (if any) which shall be passed by them;

(c) for the training of apprentices in technical schools or otherwise;

(d) for the examination of apprentices, and the appointment and payment of examiners; and

(e) prescribing all such other matters relating to apprentices as may be deemed necessary or desirable.

S.131. Regulations were made under this section by the Court, with the approval of the Governor in 1926 and were tabled on the 26th August of that year. On the 12th October, 1926, they were disallowed by the Legislative Council. The Court then drew up a set of model conditions for apprentices which were based on the disallowed regulations, and these regulations, known as "the Apprenticeship Regulations, 1941," are incorporated into awards and agreements by reference. The provisions contained in these regulations may be modified to meet any peculiar circumstances pertaining to a particular industry. These regulations are quite distinct from the Building Trade Apprenticeship Regulations which are regulations in the proper sense of the word and have application to all apprenticeships in the building trade. (See *Government Gazette*, June 1, 1928; June 13, 1930; and June 5, 1931.)

The following is an epitome of the standard conditions of apprenticeship as set out in the Apprenticeship Regulations, 1941—

"Apprentice" means any person of either sex of any age (but not less than 14, see section 6 "Worker" ante) who is apprenticed to learn or to be taught any industry, trade, craft, or calling to which these regulations apply, and includes an apprentice on probation.

Every apprentice must in the first place be employed on probation for a period of three months and such probationer must be registered. The actual agreement of apprenticeship is not entered into until this probation period has run out.

The employer must keep his apprentice constantly at work (see *Davies Sign Service v. Operative Painters' Union* (1935), 15 W.A.I.G. 324) and teach or cause him to be taught his trade and also give him such technical training as may be necessary. The apprentice must on the other hand faithfully serve his employer and conscientiously accept the technical training provided. These duties may be enforced in the same manner as the Award itself.

The Court may appoint an Apprenticeship Board (of three or five) to supervise the working of the apprenticeship system in certain trades or callings, and such Boards may, within their limited jurisdiction, exercise all powers given to the Court by these regulations except those powers which have been specially assigned to the Court by the Act.

Apprenticeship agreements are to be drawn up in the form approved by the Court, and to be signed by the employer, by the guardian of the apprentice, by the apprentice and by the Registrar. Such agreement is to be completed within one month of the termination of the probationary period, and is to be subject to the award in force for the time being applicable to apprentices in the industry.

Normal term to be five years.

(2) The Governor may, on the recommendation of the Apprenticeship Board, by regulations prescribe the wages to be paid by employers to apprentices employed in the building trade, when such wages are not fixed by an industrial agreement or award, and by such regulations may impose a penalty not exceeding twenty pounds for any breach thereof.

Provided that this section shall not operate in limitation of the powers of the Court in respect to industrial matters.

The Court has power to transfer the apprentice from (a) one employer to another and/or (b) from one trade to another, either temporarily or permanently if the employer is unable to train the apprentice, or for any other good cause. Compare section 128 (4). And an employer may, with the consent of the apprentice and guardian, transfer his apprentice to another employer carrying on business in the same locality. The second employer then becomes liable under the contract and the original employer is relieved of all his obligations.

The agreement may be cancelled by mutual consent and with one month's notice. And with the consent of the Court the agreement may be cancelled for misconduct or other cause which the Court deems sufficient.

A trustee in bankruptcy or a liquidator may terminate an apprenticeship agreement or may assign it. (See *Westralian Woodworkers v. Coxan* (1930), 10 W.A.I.G. 26.)

Time lost through sickness may with the consent of the Court be added to the original term and such term may be extended on the failure to pass two successive examinations.

The apprentice must, if resident within 12 miles of a technical school, attend such school for instruction in subjects provided for his trade. The minimum time to be spent in this way is four hours per week and such instruction is to be at the employer's expense. Any apprentice who fails to attend such school or who attends but misbehaves is deemed to commit a breach of the award and may be fined two pounds.

The Court shall appoint examiners who are to examine apprentices at times to be appointed by the Registrar. On failure to pass such examinations the examiners may recommend that the apprentice's increase in wage be withheld for a period not exceeding twelve months and on the failure of two consecutive examinations the Court may cancel the apprenticeship agreement.

The employer is to pay the apprentice for all time lost through sickness up to a total of two weeks per year, and is to make up the wages (for two weeks per year) of apprentices engaged in compulsory military or naval training. If an apprentice cannot be usefully employed during a strike the employer is relieved of his obligations under the agreement for the duration of the strike.

When the employer is temporarily unable to provide the apprentice with work the employer may employ such apprentice for a lesser time at least at a *pro rata* wage or may suspend the contract for such period and on such terms as the Court thinks fit. The contract is kept alive during the period of its suspension and at the end of such period will again fasten on to both the parties thereto. (See *McShane v. Hull* (1940), 20 W.A.I.G. 366.)

To ascertain the number of apprentices allowed at any time the average number of journeymen employed on all working days of the 12 months preceding such time shall be deemed to be the number of journeymen employed. In special circumstances the Court may allow an employer to exceed his quota and, conversely, prohibit an employer taking an apprentice when the circumstances are such that the apprentice is not likely to receive adequate training. (See on this point *Todoroff v. Furniture Trades* (1941), 21 W.A.I.G. 153.)

Wage Fixation for Apprentices: The Court has fixed the wages to be paid to apprentices on the principle that they should be a certain percentage of the basic wage, the percentage so fixed varying in accordance only with years of experience. The avocation of the apprentice has no bearing upon his remuneration and for this reason all apprentices in Western Australia are on an equal footing so far as their wages rates are concerned. (*United Furniture Trades Award* (1926), 6 W.A.I.G. 344.) The Court has refused an application to have apprentices' wages fixed as a percentage of the tradesman's rate. The proposal would in the opinion of the Court tend to obscure "the peculiar sanctity of the relationship of master and apprentice." (*United Furniture Trades v. Barnett Glass W.A. Ltd. and Others* (1948), 28 W.A.I.G. 710).

PART IX.—OFFENCES.

132. (1) A person who takes part in a lockout or strike commits an offence against this Act.

Penalty: In the case of an employer or industrial union, five hundred pounds; and in other cases, fifty pounds.

The fixing of the apprentices' rates as a percentage of the tradesmen's rates has been described as a "communist principle" and a "selfish proposition" per Dunphy, P., in the Bootmakers Award (1948) 28 W.A.I.G. 107 at page 109. The reasons for fixing the wage as a percentage of the basic, in so far as they were expressed, were not to this date (1948) very satisfactory. It is difficult to see why the alternative method should have been rejected on such highly emotional and somewhat mystical grounds. Very good reasons for the present practice do in fact exist and they are discussed by Jackson, J., in re Carpenters Award (1954) 34 W.A.I.G. 165. The services of an apprentice are not paid for entirely in cash but as to a certain extent are given in consideration of the obligation of the master to teach. In some industries, however, the Court will allow apprentices a percentage not only of the basic wage but also of the industry and district allowance. (A.W.U. Westralian Branch v. Lake View and Star (1948), 28 W.A.I.G.).

8.132. The Court is given jurisdiction to try and determine all charges of offences against the Act by section 101 (ante), and by the same section such jurisdiction is made concurrent with that of Courts of Summary Jurisdiction. A person charged with such an offence must be fairly brought within the terms of the Act, and the laws of evidence are to be administered strictly. (See McMillan, C.J., in Amalgamated Engineers v. Hill (1926), 6 W.A.I.G. 124.) Parties to such proceedings may be represented by counsel (see Proviso to section 67 (4) ante) and an appeal will lie to the Court of Criminal Appeal in certain cases. (See proviso to section 108 (ante)). The Court of Arbitration may remove any such action pending in a Court of Summary Jurisdiction by writ of certiorari and then proceed to try and determine the charge itself (see section 104 (ante)). Such actions may also be heard before Industrial Magistrates (see section 103 (ante)).

As to definition of "strike" and "lock-out" see section 6 ante. Although strikes and lockouts have been made unlawful in this and other Australian States as a logical corollary to the compulsory fixation of industrial conditions by arbitration tribunals yet it is not altogether true to say that the right to strike, which was acquired by the workers in this State by the Conspiracy and Protection of Property Act (64 Vic. No. 19), was exchanged for the benefits bestowed on the workers by the Arbitration Act. (See Burnside, J., in Millars v. Holman (1906), 9 W.A.L.R. 125, and Evatt, J., in McKernan v. Fraser 46, C.L.R. 343 at page 373; also Operative Bakers' Case (1943), 23 W.A.I.G. 183.) This was indeed the position under section 30 of the Industrial Conciliation and Arbitration Act of 1902 where the prohibition against strikes only applied "whenever an industrial dispute shall be referred to a Board or the Court" and only to the parties to such proceedings. Under this section, however, which first appeared in the Act as section 98 of 1 and 2 Ed. VII, No. 21, the prohibition extends to "any person" and it may well be that owing to the principle on which the workers are organised or for some other reason (see sections 8 and 21 ante) their society is unable to become registered and thus unable to approach the Court. Such a society is not in the position to take advantage of the arbitration machinery (although it may be brought under the jurisdiction of the Court if a dispute in which it is involved has caused a cessation of work (see section 61 (a) ante) and the members of such a society cannot be said to have exchanged their rights under the Conspiracy Act for the benefits of the Arbitration Act. The Court will certainly not allow a society which claims to have retained the right to strike to use the Court as an alternative means for settling their dispute.

"It is useless," said Dwyer, P., in Mining Awards (1934) 14 W.A.I.G. 223, "for a body which claims such a privilege (i.e. to strike) outside the law to come to the Court for the settlement of conditions to obtain in the industry. A union even apart from the question of legal penalties cannot serve two masters, namely, the law of the land as contained in the Industrial Arbitration Act and the old discarded and now illegal system of force and compulsion. To accept the use of the Court of Arbitration when its judgments are favourable and to ignore it or to rebel against it when unfavourable is a proposition which stands self-condemned and following the same line of reasoning so also it is beyond the pale of reason and justice for either of the two contending parties in the industrial sphere to endeavour by force or threats to impose upon the other new systems of industrial regulation or new industrial conditions against the will of such other. If there is to be industrial arbitration it must be wholly embraced or not at all. It cannot be embraced at will and thrown aside at will." (See also the Registrar v. W.A. Printing Employees' Union (1928), 8 W.A.I.G. 105, per Dwyer, P., at page 105.)

A strike does not *ipso facto* terminate the contract of service though it will furnish cause for dismissal. (See Amalgamated Collieries Ltd. v. Bard (FC) (1938), 18 W.A.I.G. 237, per Draper, J.) On the other hand the termina-

Prohibition of strikes or lock-outs.

No. 57 of 1912, s. 129, renumbered as s. 132, amended by No. 5 of 1952, s. 24. Subsec. (1) repealed and re-enacted by No. 5 of 1952, s. 24 (a).

(2) Nothing in this section shall prohibit the suspension or discontinuance (not being in the nature of a strike or lock-out) of any industry or of the working of any persons therein for good cause independent of an industrial dispute; but on a prosecution for any contravention of this section the onus of proof that any such suspension or discontinuance is not in the nature of a strike or lock-out, and that such independent good cause exists, shall lie on the defendant.

Subsec. (3)
amended by
No. 5 of 1952,
s. 24 (b).

(3) Every person who makes any gift of money or other valuable thing to or for the benefit of any person who is a party to any strike or lock-out, or to or for the benefit of any industrial union, industrial association, trade union, or other society or association of which any such person is a member, shall be deemed to have aided in the strike or lock-out within the meaning of this section but the provisions of this section do not derogate from any other provision of this Act relating to aiding in an offence against this Act.

tion by workers, acting in combination and with the intention of coercing their employer, of their contract of service will in itself constitute a strike though it may not be a breach of contract. (See *Evatt, J.*, in *McKernan v. Fraser* 46 C.L.R. 343, and see the New Zealand case of *Ross v. Moston* (1917, G.L.R. 87.)

(a) "in the nature of a lockout or strike." The prosecution need not show that the defendant has taken part in a strike or lockout as the case may be, it is sufficient if it shows that he has taken part in conduct which is *eiusdem generis* therewith. (See *Registrar of Friendly Societies v. E. A. Whittaker* (1914), 13 W.A.A.R. 59.)

(b) The offence here is the suspension or discontinuance of employment before a reasonable time has elapsed for reference of the dispute to the Court or during Court proceedings. Thus the dismissal of employees may lack the ingredient of intent necessary to make it a lockout (as to which see *W.A. Supply Co. v. Registrar of Friendly Societies*, 6 W.A.A.R. 199) and yet be an offence under this subsection.

(2) The onus is on the defendant under this subsection to show "good cause independent of an industrial dispute." In the case of an employer defendant that onus will be discharged if it can be shown that the servant has conducted himself in a way inconsistent with the faithful discharge of his duties of service, for that would constitute misconduct which would justify his dismissal. The misconduct need not be misconduct in the carrying out of the worker's contract of service with the employer. It is sufficient if it is prejudicial or likely to be prejudicial to the interest or reputation of the employer. Thus if two employers are associated for their mutual protection one of such employers would be justified in dismissing such of his workers as are supporting a strike being conducted by the workers of the other employer. The employer charged with the doing of something in the nature of a lockout could, under such circumstances, say to his workers, "You are unlawfully attacking the interests of a person whom I have lawfully agreed to protect and for that reason I decline to continue to employ you." (See *Registrar of Friendly Societies v. E. A. Whittaker* (1914), 13 W.A.A.R. 59, and *Pearce v. Forster* 17 Q.B.D., 542, per *Lones, L.J.*) This subsection is discussed by the Full Court in *Morrison v. Colgan & Bogue* (1951 31 W.A.I.G. 695. It is difficult to say what meaning can now be given to this subsection in the context of a worker charged under Section 132 (1). See definition of "strike" section 6 ante.

(3) This subsection is declaratory of the law as laid down by the Full Court in *Millars v. Holman* ((1906) 11 W.A.L.R. 125). Such conduct will be restrained by injunction.

(4) [Subsection (4) repealed by No. 5 of 1952, s. 24 (c).]

133. Where persons, with a view to being associated as employers and workers respectively in any industry or representatives of such persons have entered into an industrial agreement with respect to employment in that industry, any of such persons who, without reasonable cause or excuse (the proof whereof shall lie on him), refuses or neglects to offer or accept employment upon the terms of the agreement shall be deemed to have taken part in or done something in the nature of a lock-out or strike, as the case may be.

Employers or workers refusing to offer or accept employment upon the terms of an award or agreement. No. 57 of 1912, s. 130.

134. Any industrial union or association of employers or workers which, for the purpose of enforcing compliance with the demands of any employers or workers, orders its members to refuse to offer or accept employment, shall be deemed to have taken part in or done something in the nature of a lock-out or strike, as the case may be.

Union ordering its members to refuse to offer or accept employment. No. 57 of 1912, s. 131.

[(4) Were it not for this subsection, in order to sustain a prosecution against a union it would be necessary to show that the striking members were acting under union instructions or control. (See *Collie River Miners' Union v. Splatt*, 9 W.A.L.R. 7.) A union will be restrained by injunction from instigating or aiding its members in doing anything in the nature of a strike. (See *Registrar v. Perth and Fremantle Bakers' Union* (1918), 14 W.A.A.R. 777.) A union may be deregistered for failure to discipline its members and so permitting them to resort to direct action, although it is not proved that the union instigated or aided the strike so as to render itself liable under this subsection. (See *Registrar of Industrial Unions v. Amalgamated Road Transport Union* (1936), 16 W.A.I.G. 349, and section 29 ante.) Once it is shown that the majority of the members of the defendant union are on strike the union is liable under this subsection, and it would be no defence for such union to show that its members were also members of some other union and that it was in their capacity as members of such other union that they were striking. (See the remarks of Dwyer, P., in *Registrar of Industrial Unions v. Amalgamated Road Transport Union* (above).)

When the matters referred to in this subsection are proved, the liability of the union or association, as the case may be, is absolute. A union or association is however not absolutely liable for offences against the Act committed by its officers. To make the union or association vicariously liable one must show more than that its servant has committed the offence. Evidence must be lead showing that the act complained of was expressly authorised by the body sought to be made liable or at least identifying that body in some way with the illegality (*Cuming Smith and Mt. Lyell Farmers Fertilizers v. W.A. Amalgamated Society of Carpenters and Lachberg* (1946), 26 W.A.I.G. 99).]

S.133. This section only deals with a refusal to offer or accept work on the terms laid down in an industrial agreement, and if this is done it will constitute something in the nature of a strike or lockout whether there is intention to coerce or not. See section 6 "strike" ante, and for a discussion of the common law and the position under the arbitration legislation of the other States in this connection, see the judgment of Evatt, J., in *McKernan v. Fraser* (46 C.L.R. 343) and *Brown, P.*, in *Hall v. Russell* (1920) 3 S.A.I.R. 152.)

S.134. To sustain a prosecution under this section it would, unlike the preceding section, be necessary to prove that the action was taken "for the purpose of enforcing compliance with demands." Compare definition of

Employer
not to
dismiss
worker on
account of
application.
No. 57 of
1912, s. 132.

135. (1) No employer shall dismiss any worker from his employment or injure him in his employment or alter his position to his prejudice by reason merely of the fact that the worker is an officer or member of an industrial union or association or of a society or other body that has applied to be registered as a union or association or is entitled to the benefit of an industrial agreement or award.

Penalty: Fifty pounds.

(2) In any proceeding for any contravention of this section it shall lie upon the employer to show that any worker proved to have been dismissed or injured in his employment or prejudiced whilst an officer of an industrial union or association or such a society or body, or whilst entitled as aforesaid, was dismissed or injured in his employment or prejudiced for some reason other than that mentioned in this section.

Worker not
to cease
work on
account of
application
of employer.
No. 57 of
1912, s. 133.

136. (1) No worker shall cease work in the service of an employer by reason merely of the fact that the employer is an officer or member of an industrial union or association or of any society or other body that has applied for registration as an industrial union or association or is entitled to the benefit of an industrial agreement or award.

Penalty: Twenty-five pounds.

(2) In any proceedings for any contravention of this section it shall lie upon the worker proved to have ceased work in the service of an employer whilst

"strike" and "lockout" in section 6 ante. And unlike section 132 (4) ante it would be necessary to prove that the union or association as the case may be actually ordered its members to refuse to offer or to accept employment.

S.135 and S.136. Sections 135 and 136 are reciprocal, in the first section the worker and in the second section the employer being protected against victimisation. The Court will always be very zealous to see that nothing of this nature should take place in industries over which it has control. Once a *prima facie* case has been established it is for the defendant to show that his action was taken "for some other reason." See Dwyer, P., in *Fire Brigades Employees v. W.A. Fires Brigades Board* (1927), 6 W.A.I.G. 239.)

Compare section 52 of New South Wales Act, under which it has been held that the employer is not liable for dismissing an employee by reason merely of the fact that the employer is a member of an industrial union if the incompetence of the employee is partly the cause for his dismissal (see *United Furniture Trade Society v. Anthony Hordern* (1904), A.R. (N.S.W.) 74; see also *Hunt v. Commissioner of Railways* (1928), A.R. (N.S.W.) 151). It has been held in New Zealand (see section 110 of N.Z. Act) that in order to obtain a conviction under a provision of this kind it is necessary to prove that the defendant acted solely from the motive or one of the motives described in the section. (See *Chapman, J., in Inspector of Awards v. Kellow* (1904) 7 G.L.R. 323.)

the employer was an officer or member of an industrial union or association or of such a society or body, or was entitled as aforesaid, to show that he ceased so to work for some reason other than that mentioned in this section.

137. (1) Where it appears reasonably likely to the Court.

Power of Court to make order.
S. 137 repealed and re-enacted by No. 5 of 1952, s. 25.

that an act, omission or circumstance will occur, or has occurred, or having occurred, will be repeated or continued; and that

the result

of the act, omission, circumstance, repetition, or continuance,

is or will be

(a) to cause, contribute to, or hasten the occurrence of a lock-out or strike;

(b) to jeopardize or delay settlement of, or to continue, an existing lock-out or strike;

(c) to cause, or contribute to, cancellation of registration under this Act of an industrial union, except under subsection (1) of section twenty-nine of this Act;

(d) to cause, contribute to, constitute or continue a contravention of this Act, or of an award, order, or industrial agreement or law; or

Cl. O. & A. Oth. s. 29 (1), (b) and (c).

S.137. (1) Deals with breaches of an industrial agreement or of an award while (2) deals with breaches of the Act itself. (See *Amalgamated Collieries v. Coal Miners' Union* (1927), 7 W.A.I.G. 247.) The Court will not grant an injunction nor a mandamus if any other remedy is available. (See *Collieries Miners' Union v. Amalgamated Collieries* (1925), 3 W.A.I.G., 130 and *Hotel Club Caterers' Union v. Sawkins* (1939), 19 W.A.I.G. 97.)

An injunction will be granted under subsection (2) to restrain workers from doing anything in the nature of a strike, and an injunction will also lie against a union if it can be shown that it is aiding or encouraging its members to take any such action. (See *the Registrar v. Perth and Fremantle Bakers' Union* (1918), 14 W.A.A.R. 777.)

The Court will not issue an injunction to restrain conduct which may be inconsistent with an award which has not yet been made. One cannot be guilty of a breach of an award which has not existence. (See *Burnside, J., in Amalgamated Society of Engineers v. Kent* (1915), 14 W.A.A.R. 776.)

- (e) to jeopardize the security and proper use of the funds and other property of an industrial union or needlessly dissipate or improperly conceal those funds or that property;

the Court may make such order as it considers necessary to terminate or avoid that result.

(2) The Court may

- (a) make the order on the application of a person, who, in the opinion of the Court has a sufficient interest, or of its own motion;
- (b) specify in the order, the person or class of person, to whom, or the body or class of body, to which the order applies, or that the order applies generally to all persons and all bodies;
- (c) if the order is to commence to operate upon service or notification of the order or of the happening of any other event, specify in the order how the service or notification may be effected or the happening ascertained; and
- (d) make the order, unconditionally, or subject to such conditions or exceptions or both, as the Court thinks fit, without limitation of time or for a specified time or until subsequent order of the Court.

(3) If the order provides that it is to commence to operate upon service or notification of the order or on the happening of any other event, the order commences to operate on service or notification of the order or ascertainment of the happening as specified.

(4) If the order is subject to conditions or exemptions or both, a contravention of the conditions or exemptions constitutes a contravention of the order.

(5) (a) By subsequent orders the Court may from time to time as it thinks fit, vary, or suspend or cancel the order, wholly or in part.

(b) The provisions of subsections (2), (3) and (4) of this section apply in respect of subsequent orders.

138. (1) The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as has the Supreme Court in respect of contempts of Court, and this power extends to an act or omission constituting a contempt, notwithstanding that the act or omission is prescribed by this or any other Act as an offence, or that a penalty is prescribed or provided by this or any other Act for the offence, or that the offender has been punished for the offence if, after having been so punished, he repeats or continues the offence; and without prejudicing the generality of the power, where the Court considers that a contempt may be appropriately punished by a fine, it may inflict a fine.

Power of Court to punish contempts. S. 138 repealed and re-enacted by No. 5 of 1952, s. 26. Cr. C. & A. Oth., s. 29A.

(2) A person who counsels, procures, aids, abets, instigates to or incites to a contempt of the Court is deemed to have committed a contempt and shall be punishable accordingly.

(3) A person who by act or omission contravenes an order made in exercise of authority conferred by this Act commits a contempt of the Court.

(4) The provisions of subsection (3) of this section do not derogate from any other provision of this Act relating to contempt.

(5) The President when acting alone in exercise of a power or authority conferred by this Act, has the same power to punish contempts of his power and authority whether in relation to his judicial powers and functions or otherwise as has the Court in respect of contempts of Court and the provisions

S.138. The non-payment of the witnesses' expenses would be a good cause for his refusal to give evidence. (See Yarloop Timberworkers' Union v. Millars (1903), 2 W.A.A.R. 105.)

The Arbitration Court has no inherent power to commit for contempt. (See Coastal Slaughtermen v. Daily News (1903), 2 W.A.A.R. 6 per Parker, J.)

The Court has only power to punish for contempt in the face of the Court (see Northmore, J., in in re Justus Behn (1929), 9 W.A.I.G. 236) and this is so even though its power in this regard is the same as that of the Supreme Court. (See McMillan, C. J., in in re Justus Behn (above), and compare section 114 of New Zealand Act.)

of the preceding subsections of this section apply *mutatis mutandis* in respect of those contempts of the President's power and authority.

Obstruction
of Court.
No. 57 of
1912, s. 136.

139. [*Repealed by No. 5 of 1952, s. 27.*]

Penalty for
obstructing
performance
of duty
imposed by
this Act,
etc.
S. 140 re-
pealed and
re-enacted
by No. 5 of
1952, s. 28.

140. A person who—

- (a) resists or obstructs a person in the performance of a duty imposed or the exercise of a power conferred by or pursuant to this Act;
- (b) being lawfully required to do so fails to produce or exhibit a document or allow a document to be examined;
- (c) wilfully misleads a person in any particular likely to affect the exercise of a power so conferred or the discharge of a duty so imposed;
- (d) being lawfully asked a question by a person pursuant to this Act fails to answer truthfully to the best of his knowledge, information and belief;
- (e) being an officer of an industrial union, refuses to assist in the taking of any ballot by providing for the use of the Returning Officer or his assistants such register and lists of the members of the industrial union as the Returning Officer requires; or
- (f) falsely represents in an application made under this Act that he is a member of an industrial union,

commits an offence against this Act.

Penalty: Twenty-five pounds or imprisonment for three months.

Counselling
or procuring
offences.
No. 57 of
1912, s. 138,
renumbered
as s. 141,
amended by
No. 5 of
1952, s. 29.
Subsec. (1)
added by No.
5 of 1952,
s. 29 (a).

141. (1) In this section—

“encourage” includes counsel, procure, aid, abet, instigate to, and incite to.

(2) Every person who, or union, association, or other body which, is directly or indirectly concerned in the commission of any offence against this Act, or takes part in, or encourages the commission of any such offence shall be deemed to have committed that offence, and shall be punishable accordingly.

(3) An attempt to commit an offence against this Act is an offence against this Act and is punishable as if the offence had been committed.

Subsec. (3) added by No. 5 of 1952, s. 29 (d).

(4) A person charged with committing an offence may be convicted of an attempt to commit an offence.

Subsec. (4) added by No. 5 of 1952, s. 29 (d).

(5) (a) In the event of a lock-out or strike occurring in an industry, the Court may order an industrial union whose executive or members take part in or encourage the lock-out or strike to pay a penalty not exceeding five hundred pounds.

Subsec. (5) added by No. 5 of 1952, s. 29 (d).

(b) It shall be a defence in any proceedings for an order under paragraph (a) of this subsection that the industrial union by the enforcement of its rules and by other means reasonable under the circumstances endeavoured to prevent its members from taking part in or encouraging and continuing to take part in or encourage the lock-out or strike.

142. (1) Where it is alleged

that one and the same offence has been committed by two or more persons, or

that related offences have been committed respectively by two or more persons,

charges of the offence or the offences, as the case may be, may be joined in the one complaint,

notwithstanding that the offence or offences are alleged to have been committed otherwise than at the same time, and notwithstanding that in

Joinder of charges. S. 142 re-enacted and re-enacted by No. 5 of 1952, s. 30.

5(a) This subsection was applied in *re Seamen's Union* (1953) 33 W.A.I.G. 83. S.142. This section only refers to an attempt to commit an offence against the Act; the Court has no power to punish an attempt to commit a breach of an award. (See section 99 ante and *Metropolitan Timber Employees' Union v. Whittaker Bros.* (1904), 3 W.A.A.R. 11.)

cases where there is a principal offender a complaint is not made against the principal offender or that the principal offender is not amenable to justice.

(2) The Court of Arbitration, Court of Petty Sessions, or the Industrial Magistrate, as the case may be, before whom the complaint is brought, may proceed with the trial of the matters of complaint together, but if of opinion that a defendant is likely to be prejudiced by the joinder, may require the complainant to elect upon which matter of complaint he will proceed, and may direct that the matter of complaint so elected shall be tried separately.

Continuing offences.
S. 142A added by No. 5 of 1952, s. 31.

142A. Where this Act prescribes an act or omission as an offence and prescribes a penalty for the offence, and the offence is a continuing offence, but is not punishable as such, the maximum penalty for each day the offence is continued is one-twentieth of the penalty so prescribed.

Formerly Part IXA.

Interpretation.
Part IXA.
Inserted by No. 31 of 1935, s. 5, as s. 140, renumbered s. 143.
Amended by No. 5 of 1950, s. 31.

PART X.—GOVERNMENT OFFICERS.

143. In this Part, and for the purposes of this Part, and subject to the context—

“Association” or “the Civil Service Association” means the Civil Service Association of Western Australia Incorporated.

S.143. Put briefly, Government officers within the meaning of this part are employees of the State who are eligible to become members of the Civil Service Association, and who are not qualified to become members of any society which is registered or in a position to become registered under part II of the Act. Membership of the Civil Service Association is confined to any person in the employment of the Government of Western Australia who—

- (a) is a classified officer under the Public Service Act; or
- (b) is employed in a temporary capacity under section 36 of the Public Service Act, 1904; or
- (c) is employed under section 12 of the Agricultural Bank Act, 1906, the Forest Act, the Main Roads Act or any other Act of Parliament now in force or hereafter enacted whereby any board, commission or other body is constituted to administer any such Act;
- (d) is otherwise employed on a daily or weekly wage or annual salary, in any of the established branches of the Public Services, including State trading concerns, business undertakings, and Government institutions controlled by boards, in a clerical, professional or general capacity, and is not eligible to be a member of any industrial union registered under the provisions of the Industrial Arbitration Act, 1912-1949, or any amendment thereof.

(See the Constitution and Rules of the Civil Service Association, rule 4.)

This part does not extend to Crown employees who are eligible to become members of industrial unions registered under the Act; with regard to these workers the Crown is in the same position as any other employer. (See definition of “employer,” section 6 ante.)

“Commissioner” means the Public Service Commissioner.

“Court” means the Court of Arbitration constituted under section forty-four of this Act.

“Employer” means in relation to any particular group of Government officers, the Minister of the Crown, body corporate, or other body or person by or under whom any Government department, State Trading Concern, State Instrumentality or State Agency, in which such group of Government officers is employed, is administered. In the case of Government officers who are public service officers under and within the meaning of the Public Service Act, 1904-1948¹, the Commissioner shall be deemed to be the “employer” within the meaning of that term as herein defined.

“Government officer”, subject as hereinafter provided includes—

- (1) Generally, every person employed in the service of the State, whether in a Government department, State Trading Concern, State Instrumentality, or State Agency, and whether permanently, temporarily, or provisionally, whose salary or remuneration in such employment is paid out of the public moneys of the State, or out of the revenue or funds of a Government department, State Trading Concern, State Instrumentality or State Agency, under the authority or by virtue of any general or special appropriation in or under any Act of Parliament, and who is, or is eligible and qualified to become a member of the Civil Service Association under and in accordance with the Constitution and rules of that association from time to time in force; and

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955 s. 1 (3).

(2) In particular, without in any way limiting the generality of paragraph (1) hereof, every person who is employed—

- (a) in any capacity as an officer under and within the meaning of the Public Service Act, 1904-1948¹, and its amendments; or
- (b) on the staff of the Agricultural Bank of Western Australia under the Commissioners of the Agricultural Bank of Western Australia; or
- (c) on the administration staff under the Commissioner of Main Roads; or
- (d) on the administration staff of the Forests Department under the Forests Act, 1918-1931²; or
- (e) on the administration staff of the Western Australian Transport Board under the State Transport Co-ordination Act, 1933-1946³; or
- (f) on the administration staff of the Metropolitan Market Trust under the Metropolitan Market Trust Act, 1926-1941; or
- (g) on the administration staff of any public hospital which is managed and controlled by a Minister of the Crown under and for the purposes of the Hospitals Act, 1927-1948⁴; or

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

² Now State Transport Co-ordination Act, 1933-1954: See No. 68 of 1954, s. 1 (3).

³ Now Forests Act, 1918-1954: See No. 43 of 1954, s. 1 (3).

⁴ Now Hospitals Act, 1927-1955: See No. 51 of 1955, s. 1 (3).

- (h) on the administration staff of any other board, trust, commission, or other body corporate established by any Act of Parliament to carry on, conduct, manage, or control any undertaking or activity on behalf of the State; or
- (i) on the administration staff of any harbour trust or harbour board,

and who is, or is eligible and qualified to become a member of the Civil Service Association as aforesaid:

Provided that the term shall not include—

- (i) any officer of either House of Parliament under the separate control of the President or Speaker or under their joint control; or
- (ii) any officer employed on the teaching staff of the Education Department under the Education Act, 1928-1943², or the regulations made thereunder; or
- (iii) any officer within the meaning of that word in the Railways Classification Board Act, 1920-1945³; or
- (iv) any person who is a member or eligible and qualified to become a member of an industrial union registered under the provisions of Part II. of this Act, or is a person to whom any award or industrial agreement which

² Now Education Act, 1928-1955: See No. 44 of 1955, s. 1 (3).

³ Now Railways Classification Board Act, 1920-1950: See No. 4 of 1950, s. 2.

has been declared a common rule, made and in force under and by virtue of the provisions contained in this Act elsewhere than in this Part of this Act, applies, notwithstanding that such person may also be, or be eligible and qualified to become, a member of the Civil Service Association; or

- (v) any person who is at the commencement of this Act, or at any time hereafter, becomes a member of any society distinct from the Civil Service Association, which is eligible or qualified to apply for registration as an industrial union under Part II. of this Act.

Amended by
No. 56 of
1950, s. 6 (a).

- (3) This definition shall not apply to any person who in all other respects is a Government officer as herein defined if and when he occupies a position the maximum rate of salary of which is fixed at an amount exceeding the justiciable salary.

“Minister” means the Minister of the Crown charged with the administration of this Act.

Added by
No. 56 of
1950, s. 6 (b).

“justiciable salary” means a salary which corresponds at the time when it is determined, to the then current equivalent—

after taking into account basic wage variations and any other variations authorised by this Act, or by an agreement entered into, or an award promulgated pursuant to the provisions of this Act—

of a total salary at the first day of July, one thousand nine hundred and fifty, of one thousand and five pounds a year payable to

a Government officer who is regarded, for the purpose of the classification or reclassification of the office occupied by him, as located in the area determined by the Court for the purpose of fixing the basic wage as the Metropolitan Area.

“President” means the President of the Court.

“Registrar” means the Registrar of Industrial Unions appointed and holding office under this Act.

144. This Part of this Act shall be read in conjunction with the Public Service Act, 1904-1948¹, and its amendments.

This Part to be read with Public Service Act, 1904.

Inserted by No. 31 of 1935, s. 5, as s. 141.

145. This Part of this Act shall apply only to Government officers within the meaning of that term in section one hundred and forty-three of this Act.

This Part to apply only to Government officers.

Inserted by No. 31 of 1935, s. 5, as s. 142.

146. Notwithstanding anything to the contrary contained in any other Act, or in any other Part of this Act, but subject to the provisions of this Part, the Court shall have and may exercise original jurisdiction, as hereinafter provided for and defined, in respect of matters relating and incidental to the employment of Government officers.

The Court to have original jurisdiction under this Part.

No. 57 of 1912, s. 143.

147. Subject to this Part of this Act, the Association shall have and enjoy all the rights and privileges of an industrial union registered under Part II. of this Act, and the Commissioner and other employers as defined in this Part shall have and enjoy all the rights and privileges of an employer to whom the provisions of this Act contained elsewhere than in this Part apply, in relation to the following matters:—

Civil Service Association to have rights and privileges of an industrial union, and Public Service Commissioner and other employers to have rights and privileges of an employer.

No. 57 of 1912, s. 144.

(a) The bringing before the Court of matters within its jurisdiction under this Part; and

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

144. If any provision in the Public Service Act is inconsistent with the Arbitration Act the latter shall prevail. (See section 2 of Public Service Amendment Act, 1935 (No. 28 of 1935).)

- (b) attending and appearing, and the conduct of proceedings before the Court on the hearing and determination of any matter by the Court; and
- (c) any proceedings necessary to compel the observance of or compliance with any award or order made by the Court in the exercise of its jurisdiction under this Part.

Provided that the provisions of this section, insofar as they relate to the Association, shall not operate or have effect unless and until the Association shall have complied with the provisions of subsection (1) of section one hundred and forty-eight of this Act.

Association's
constitution
and rules.
No. 57 of
1912, s. 145.

148. (1) Forthwith after the commencement of this Part, the Association shall deposit a true copy of its constitution and rules as then in force, certified in writing under the hands of the president and the secretary of the Association with the Registrar.

(2) After a copy of the constitution and rules of the Association has been deposited with the Registrar as aforesaid, the provisions contained in such constitution and rules which prescribe the conditions under which a person is eligible and qualified to be or become a member of the Association shall not be altered or amended in any manner by the members of the Association, except with the approval of the Court, on an application by the Association and then only in such manner as the Court may by its order direct.

(3) Whenever the Court shall have directed that any of the said provisions of the said constitution and rules shall be altered or amended, an office copy of the order shall be deposited with the Registrar.

(4) The copy of the constitution and rules of the Association deposited with the Registrar as aforesaid, and the office copy of every order of the Court authorising the alteration or amendment of the same as aforesaid, or any copy thereof or extract therefrom certified under the hand of the Registrar shall be admissible as evidence, without any further proof, in any matter before the Court.

149. (1) Whenever, after the commencement of this Part of this Act, the members of the Association propose to make application to the Court for its approval of an alteration or amendment of the constitution and rules of the Association as then in force, notice of such application in writing signed by the president of the Association shall be given to the Commissioner, and every other employer within the meaning of this Part, at least one month prior to filing the application in the Court; and such notice shall contain particulars of the alteration or amendment sought to be made and to be submitted for the approval of the Court.

Notice to
Commissioner of
intention
to amend
Rules of the
Association.
No. 57 of
1912, s. 146.

(2) Upon receipt of an application, the Clerk of the Court shall refer the same to the President; and if the President considers that any industrial unions registered under Part II. of this Act are likely to be affected by the application, he may, by notice in the prescribed form, cause the Association to be supplied with a list of the names and registered offices of such industrial unions, and direct the Association to serve each of such unions with a copy of such application and notice of the date fixed for the hearing of the same.

(3) If the Commissioner or any other employer aforesaid, or any industrial union which has received notice under subsection (2), wish to oppose the proposed application, he or it shall give notice thereof in writing under his or its hand to the secretary of the Association within twenty-one days after receiving from the Association notice of its proposed application, and shall state in his or its notice the grounds upon which he or it opposes the application, and shall file a copy of such notice with the Registrar.

(4) If the Commissioner or other employer or industrial union aforesaid fails to give notice as provided for in subsection (3) hereof, the Association may proceed with its application *ex parte*, and the Commissioner or other employer or industrial union shall not be entitled to appear before the Court or be heard in opposition to the application, except by special leave of the Court.

(5) Where the Commissioner or other employer or industrial union has given notice as provided for in subsection (3) hereof, he or it shall be entitled to appear before the Court on the hearing of the application, and to oppose the granting of the same.

(6) Every application by the Association under this section shall be made in the manner prescribed by regulations.

(7) The Court may grant or refuse either wholly or in part any application made by the Association under this section, or make, in regard to the subject-matter of the application, such order as it may think just.

150. Subject to this Part, and as hereinafter provided, the Court shall have original jurisdiction in relation to the employment of Government officers—

- (a) to define classes and determine and fix grades within such classes, and to provide the minimum and maximum salaries of each class;
- (b) to determine the method by which Government officers shall be advanced from the minimum to the maximum of the salary assigned to their class through the grades within their class;
- (c) to determine and fix the rates of all allowances to be paid to classes of Government officers, in addition to their salary, occupying positions within classes as defined by the Court, when such classes of officers are entitled to such allowances; and to define the circumstances in which any such allowance shall be payable to such classes of Government officers; and

Original jurisdiction of the Court. No. 57 of 1912, s. 147 (amended by No. 26 of 1937, s. 2) renumbered as s. 150, amended by No. 56 of 1950, s. 7.

S.150. The powers and jurisdiction of the Court of Arbitration with respect to the employment of Government officers are limited to the particular matters referred to in this section, and therefore any right, privilege, obligation or general condition of service of Government officers which is not provided for in this section but which is included in an industrial agreement cannot be enforced by proceedings in the Arbitration Court or in the Industrial Court. (See *Civil Service Association v. Board of Management of Perth Public Hospital* (1937) 17 W.A.I.G. 445, per Craig, I.M.) The Court has no jurisdiction to grade or classify particular Government officers which remains the responsibility of the Commissioner. (See (a) and (11) of the proviso and section 9 (2) of the Public Service Act.)

- (d) to determine and fix the rates of payment for overtime to be paid to classes of Government officers, in addition to their ordinary salary, occupying positions within classes as defined by the Court when such classes of officers are entitled to payment for overtime; and to define the circumstances in which payment for overtime shall be made to such classes of Government officers.

Provided that—

- (i) the jurisdiction of the Court under paragraph (a) of this section shall be limited to defining classes and grades and determining and fixing rates of salary for and in respect of such classes up to, but not exceeding the justiciable salary;
- (ii) subject to section one hundred and fifty-one of this Act, nothing in this section shall affect or interfere with the exercise by the Commissioner in relation to public service officers under the Public Service Act, 1904-1948¹, or by any other employer in relation to any group of Government officers under his administration, of any powers of classification or of any other power in relation to any of the matters aforesaid within the jurisdiction of the Court under this section; but subject to paragraph (iii) of this proviso any act, matter or thing done by the Commissioner or other employer in relation to any matter in respect whereof the Court has jurisdiction as aforesaid shall be liable to be reviewed, nullified, modified or varied by the Court in the course of exercising its jurisdiction in respect of such matter under this Part.
- (iii) nothing in this section shall confer or be deemed to confer upon the court any jurisdiction or power to review, nullify, modify, or vary the placing by the Commissioner of the office held by a particular Government officer appointed under the Public Service

Amended
by No. 36 of
1937, s. 2.

Inserted by
No. 26 of
1937, s. 2.

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

Act, 1904-1948¹, in a particular class in any scheme of classification made or adopted by the Commissioner under the provisions of the said Act, or the placing by any other employer of the office held by a particular Government officer under his control in a particular class in any scheme of classification lawfully made or adopted by such other employer, if and so long as the classes prescribed in such scheme of classification are not inconsistent with classes which have been defined in relation to the employment of the Government officers affected by such scheme of classification by an award or order of the Court in the exercise of its jurisdiction under paragraph (a) of this section, or with classes which have been defined in relation to the employment of the Government officers affected by such scheme of classification by an agreement which has been made between the Association and the Commissioner or other employer and deposited with the Registrar as hereinafter in this Part provided for; but this paragraph shall not in any way limit or restrict the right of the Court to define classes conferred upon the Court by paragraph (a) of this section.

Commissioner or other employer to define grades and salaries of higher officers consistently with grades and salaries defined by the Court.
No. 57 of 1912, s. 148.

151. As and whenever the Court in the exercise of its jurisdiction under section one hundred and fifty of this Act, or the Association and the Commissioner or other employer by an agreement in this Part hereinafter provided for, shall define classes and rates of salary or determine and fix rates of allowances or of payment for overtime, the Commissioner in relation to public service officers under the Public Service Act, 1904-1948¹, occupying positions which are outside the jurisdiction of the Court, and every other employer affected by the award of the Court or by the agreement aforesaid in relation to

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

S.151. "shall vary or make such adjustments": This would appear to be mandatory; contrast with "may adjust and amend" appearing in section 127 (1) ante.

Government officers under his administration occupying positions which are outside the jurisdiction of the Court, shall vary or make such adjustments in the conditions of employment of such public service officers or of such Government officers aforesaid as shall be necessary to maintain a reasonable consistency between the conditions of employment of such public service officers and such Government officers aforesaid, and the conditions of employment of the other public service officers or the other Government officers under the administration of such employer aforesaid occupying positions which are within the jurisdiction of the Court as defined and determined by the Court in the course of exercising its said jurisdiction or as defined and determined in such agreement aforesaid, as the case may be.

152. (1) The Court may make such awards and orders as may, in its opinion, be necessary for the proper exercise of its jurisdiction under this Part; such awards and orders shall be in the prescribed form; and effect shall be given thereto according to the tenor thereof.

Court may make awards and orders.
No. 57 of 1912, s. 149;
No. 26 of 1937, s. 3.

(2) Every award or order of the Court, whereby under paragraph (a) of section one hundred and fifty of this Act classes are defined in relation to the employment of Government officers, shall for the purpose of facilitating compliance therewith, the enforcement thereof and the placing correctly in the classes so defined of the offices of the Government officers to which such classes relate, state therein the fundamental basis or principle upon which such classes are defined, either alone or in relation to the other classes, and upon which the placing of the offices of such Government officers in the various classes defined as aforesaid shall be determined.

Inserted by No. 26 of 1937, s. 3.

153. On the hearing of any matter by the Court two persons (one nominated by the Association and one nominated by the Commissioner, or other

Assessors may sit with Court.
No. 57 of 1912, s. 150.

S.152. (2) Compare section 154 (4), 155 (5) and 156 (4).

S.153. Compare section 71 (x) ante. Assessors are not members of the Court and are called in an advisory capacity only. (See *Coastal Operative Bootmakers v. W.A. Metropolitan Boot Manufacturers* (1903) 2 W.A.A.R. 115.)

employer concerned), may, with the consent of the Court, and shall, if so required by the Court, sit with the Court as assessors solely to aid the Court with their counsel.

Provisions relating to existing conditions of employment.

No. 57 of 1912, s. 151;
No. 26 of 1937, s. 4.

154. (1) Subject to this Part, any classification or reclassification, and any other conditions of employment of the Public Service officers under the provisions of the Public Service Act, 1904-1948¹, occupying positions which are within the jurisdiction of the Court and the conditions of employment governing the service of any other Government officers under the administration of any other employer, occupying positions which are within the jurisdiction of the Court in force or operation at the time of the commencement of this Part, shall continue in force and operation unless and until the same is or are revised, altered or amended as in this section hereinafter provided for.

(2) After the commencement of this Part the Association may, in the form and manner prescribed, apply to the Commissioner or to the other employer concerned in the operation of any classification, reclassification, or conditions of employment mentioned in subsection (1) hereof for a revision, alteration, or amendment thereof, or of any portions thereof in relation to any matter contained therein in respect whereof the Court has jurisdiction under section one hundred and fifty of this Act, and thereafter may negotiate with the Commissioner or the other employer aforesaid with a view to obtaining the revision, alteration, or amendment desired.

(3) If following upon any negotiations referred to in subsection (2) hereof a mutual agreement is reached concerning the revision, alteration, or amendment of the classification, reclassification, or conditions of employment aforesaid, or of any portion thereof, the terms of such mutual agreement shall be reduced to writing, and shall be signed or duly executed by the Association and the employer

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

S.154. (4) See sections 152 (2), 155 (5), 156 (4) and section 7 of Industrial Arbitration Act Amendment Act No. (2) 1937, No. 26 of 1937.

as the parties thereto, and forthwith thereafter shall be deposited with the Registrar, and a copy thereof shall be published by the Registrar in the *Government Gazette*.

(4) Where by any agreement mentioned in subsection (3) of this section classes are defined in relation to the employment of Government officers such agreement shall, for the purpose of facilitating compliance with such agreement, the enforcement thereof and the placing correctly in the classes so defined of the offices of the Government officers to which such classes relate, contain a statement of the fundamental basis or principle upon which such classes are defined either alone or in relation to the other classes and upon which the placing of the offices of such Government officers in the various classes defined as aforesaid shall be determined. Unless and until any such agreement contains the statement aforesaid the Registrar shall refuse to receive the agreement under subsection (3) of this section; and if the parties cannot agree upon the terms of any statement aforesaid, a dispute shall be deemed to have arisen which shall be determinable by the Court under and in accordance with the provisions of this Part.

Inserted by
No. 26 of
1937, s. 4, as
subsec. (3a),
renumbered
subsec. (4).

(5) The agreement when deposited with the Registrar in accordance with subsection (3) hereof shall have the effect of an award of the Court, and as from the date when it is deposited as aforesaid shall continue to operate for the same period of time as awards of the Court ordinarily continue to operate under this Part, or for such shorter period as may be expressly fixed by the agreement.

Formerly
subsec. (4).

(6) If, following upon any negotiations referred to in subsection (2) hereof, no mutual agreement is reached concerning the revision, alteration, or amendment of the classification, reclassification or conditions of employment aforesaid, or of any portion thereof in relation to a matter contained therein in respect whereof the Court has jurisdiction as aforesaid, a dispute shall be deemed to have arisen between the Association and the employer concerned

Formerly
subsec. (5).

in the said negotiations in relation to such matter, and shall be determinable by the Court under and in accordance with the provisions of this Part.

Commissioner and others may exercise powers subject to conditions.
No. 57 of 1912, s. 152;
No. 26 of 1937, s. 5.

155. (1) The Commissioner, in respect of the Public Service officers under the Public Service Act, 1904-1948¹, and other employers in respect of other Government officers employed under their administration may, subject to any award or order of the Court, or any agreement deposited with the Registrar as provided for in this Part, and subject to the provisions in this section hereafter contained, exercise any power conferred upon him by the Public Service Act, 1904-1948¹, or any other Act, and may do any act, matter or thing necessary or incidental to the exercise of such power, notwithstanding that the exercise of such power or the doing of such act, matter, or thing may relate to a matter which is within the jurisdiction of the Court and may concern or affect Government officers occupying positions which are within the jurisdiction of the Court.

(2) As and whenever the Commissioner or other employer referred to in subsection (1) hereof proposes to exercise any power, or do any act, matter or thing as provided for in subsection (1) hereof in relation to any matter within the jurisdiction of the Court, and which concerns or affects Government officers occupying positions within the jurisdiction of the Court, he shall, before exercising such power or doing such act, matter, or thing, give to the Association in the form and manner prescribed notice of his intention to exercise such power, or do such act, matter, or thing together with such information and particulars as may be necessary or requisite to enable the members of the Association fully to understand the nature of the power, or of the act, matter, or thing and the purpose, object, and effect of the exercise of such power, or the doing of such act, matter or thing of which notice has been given as aforesaid.

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

S.155. This section deals with the procedure to be followed when the Commissioner or other employer desires an alteration in a matter which is within the jurisdiction of the Court under this Part; section 154 deals with the converse case—when the association desires the change.

(3) Upon receipt of a notice given under subsection (2) hereof, the members of the Association shall, in accordance with the constitution and rules of the Association, and within three months after the date of the receipt of the notice, or within such further time as the President on the application of the Association may allow, consider, and decide whether the Association shall agree or object to the exercise of the power, or the doing of the act, matter, or thing proposed, and also within such period or further time aforesaid, the Association shall, in the prescribed manner, give notice of such decision to the party from whom it has received the said notice under subsection (2) hereof.

(4) If the Association agrees and gives notice thereof as required by subsection (3) hereof, the Commissioner or other employer proposing to exercise the power, or to do the act, matter, or thing agreed to shall cause an agreement in writing to be prepared which shall properly and sufficiently place on record the nature of the power to be exercised, or of the act, matter, or thing to be done, and the purpose, object, and effect of the exercise of the power, or of the doing of the act, matter, or thing, and such agreement shall be duly executed by the Association, and the party proposing to exercise the power, or to do the act, matter, or thing referred to in the agreement.

(5) Where, by any agreement mentioned in subsection (4) of this section, classes are defined in relation to the employment of Government officers such agreement shall, for the purpose of facilitating compliance with such agreement, the enforcement thereof and the placing correctly in the classes so defined of the offices of the Government officers to which such classes relate, contain a statement of the fundamental basis or principle upon which such classes are defined, either alone or in relation to the other classes and upon which the placing of the offices of such Government officers in the various classes defined as aforesaid shall be determined. Unless and until any such agreement contains the statement aforesaid the Registrar shall refuse to receive the agreement under subsection (6) of this section, and if the parties cannot agree upon the

Inserted by
No. 26 of
1937, s. 5, as
subsec. (4a),
renumbered
subsec. (5).

terms of any statement aforesaid, a dispute shall be deemed to have arisen, which shall be determinable by the Court under and in accordance with the provisions of this Part.

Formerly
subsec. (5).

(6) When the agreement referred to in subsection (4) hereof has been executed as aforesaid, it shall be deposited with the Registrar and a copy thereof shall be published by the Registrar in the *Government Gazette* and as from the date it is so deposited shall operate as and have the effect of an award of the Court for the same period of time as awards of the Court ordinarily operate, or for such shorter period as may be expressly fixed by the agreement.

Formerly
subsec. (6).

(7) If the Association fails to give any notice of its decision as required by subsection (3) hereof, the Commissioner or other employer proposing to exercise the power, or do the act, matter, or thing as aforesaid, may at any time after the expiration of the time fixed by subsection (3) hereof, for the service of notice of the decision of the Association, make application in the prescribed manner to the Court for an award or order authorising and confirming the exercise of the proposed power, or the doing of the proposed act, matter, or thing, and upon the hearing of such application, neither the Association nor any Government officer shall be entitled to appear or be heard in opposition to the application, except by special leave of the Court.

Formerly
subsec. (7).

(8) If, after receipt of a notice under subsection (2) hereof, the Association objects and gives notice of such objection as required by subsection (3) hereof, a dispute shall be deemed to have arisen between the Association and the Commissioner or other employer concerned, as the case may be, and shall be determinable by the Court under and in accordance with the provisions of this Part.

Powers of
Association.
No. 57 of
1912, s. 153;
No. 26 of
1937, s. 6.

156. (1) Subject to any award or order of the Court or any agreement deposited with the Registrar as provided for in this Part, and subject to any resolution or other authority of the members of the Association passed or given in accordance with the constitution and rules of the Association, the Association, acting on behalf of any group of Govern-

ment officers occupying positions which are within the jurisdiction of the Court, may at any time by notice in the prescribed manner request the concurrence of the Commissioner, or of any other employer concerned, in any proposal of the Association as defined and described in the notice, which relates to any matter within the jurisdiction of the Court.

(2) Upon receipt of a notice under subsection (1) hereof, the Commissioner or other employer to whom such notice is given shall consider the proposal, and within three months after the date of the receipt of the notice, or within such further time as the President on the application of the Commissioner or other employer shall allow, shall decide whether he agrees or objects to such proposal and shall, within the time or further time aforesaid, give notice in the prescribed manner to the Association of his decision.

(3) If the Commissioner or employer referred to in subsection (2) hereof agrees and gives notice thereof to the Association as required by subsection

* Sections 151 to 153 of the Act No. 57 of 1912 (in this reprint sections 154 to 156) were amended by the Act No. 26 of 1937, and such amendments affected agreements which had already been entered into under the said sections before the amendment thereof. Accordingly, special provisions in relation to such agreements were made in section 7 of the Act No. 26 of 1937, which reads as follows:—

Provisions relating to Agreements already existing and Deposited with the Registrar.

7. Where, at the time of the commencement of this section, any agreement has already been made and deposited with the Registrar under and in accordance with the provisions of section one hundred and fifty-one or section one hundred and fifty-two, or section one hundred and fifty-three of the principal Act, and is still subsisting, and such agreement defines classes in relation to the employment of Government officers, but does not contain a statement of the fundamental basis or principle upon which such classes are defined, either alone or in relation to the other classes, and upon which the placing of the offices of the Government officers to which such classes relate shall be determined, the following provisions shall apply, that is to say:—

- (a) The parties to the agreement already made and deposited with the Registrar as aforesaid may agree mutually upon the fundamental basis or principle upon which the classes defined in the said agreement shall be deemed to have been defined and upon which the placing of the offices of the Government officers to which the said classes relate in such classes defined as aforesaid shall be determined.
- (b) When the parties have agreed upon a fundamental basis or principle as provided for in paragraph (a) hereof, the Association or the other party shall cause such agreement to be reduced to writing, such written agreement shall then be executed by the Association and the other party to the agreement, and shall be deposited with the Registrar and a copy thereof shall be published by the Registrar in the *Government Gazette*.
- (c) When an agreement referred to in paragraph (b) hereof has been deposited with the Registrar as aforesaid, such agreement shall be deemed to be supplementary to and incorporated with, and shall be read as one with, and shall subsist concurrently with the agreement already previously executed and deposited with the Registrar as aforesaid to which it relates and as from the date it is so deposited, and during the currency of the agreement to which it relates, but no longer, shall operate as and have the effect of an award of the Court.

(2) hereof, the Association shall cause an agreement in writing to be prepared which shall properly and sufficiently place on record the nature of the proposal agreed to and the purpose, object, and effect of such proposal, and such agreement shall be duly executed by the Association and the Commissioner or the other employer concerned therewith, as the case may be.

Inserted by
No. 26 of
1937, s. 6, as
subsec (3a),
renumbered
subsec. (4).

(4) Where, by any agreement mentioned in subsection (3) of this section classes are defined in relation to the employment of Government officers, such agreement shall, for the purpose of facilitating compliance with such agreement, the enforcement thereof and the placing correctly in the classes so defined of the offices of the Government officers to which such classes relate, contain a statement of the fundamental basis or principle upon which such

(d) Unless and until the parties to the agreement already prior to the commencement of this section deposited with the Registrar as aforesaid, arrive at, execute and deposit with the Registrar a mutual agreement supplementary to the said deposited agreement as provided for in paragraphs (a), (b), and (c) of this section, then, while the said deposited agreement continues in force and operation, and for the purpose of facilitating compliance with the said deposited agreement, the enforcement thereof and the placing correctly in the classes defined by such agreement of the offices of the Government officers to which such classes relate, the said classes shall be deemed to have been defined, and the placing correctly in such classes of the offices of such Government officers shall be determined in accordance with the nature and responsibility of the duties of the office as the fundamental basis or principle so that an office, which in comparison with other offices to which the said classes relate carries the least onerous and the least responsible duties shall be placed in that class for which the lowest rate of salary is fixed by the agreement, an office which, in comparison with other offices to which the said classes relate, carries the most onerous and the most responsible duties shall be placed in that class for which the highest rate of salary is fixed by the agreement, and the other offices to which the said classes relate shall consistently with the placing of offices in the lowest and highest classes as aforesaid be placed in the various other classes intervening between the said lowest and highest classes, according as the nature and responsibility of the duties of such offices vary in comparison with the other offices to which the said classes relate.

(e) When the placing of an office in a defined class is to be determined in accordance with paragraph (d) hereof on the basis of the nature and responsibility of the duties of the office, then in the course of such determination consideration shall be given *inter alia* to the following matters, namely:—

- (i) The degree of skill, training, and initiative required for the work and/or for supervising the work or the degree of responsibility for public safety.
- (ii) The financial or administrative importance of decisions to be made, actions to be taken, books to be kept or documents to be prepared by the officer holding the office.
- (iii) The effect of the work of the office upon revenue and/or expenditure; and
- (iv) the financial or administrative effect of mistakes which may be made by the officer in the performance of the duties of the office.

S.156. (4) See notes on section 165 (5) post.

The following section, section 7 of the Industrial Arbitration Act Amendment Act, 1937, although not specifically included in the principal Act as a section thereof, may be considered here.

classes are defined, either alone or in relation to the other classes and upon which the placing of the offices of such Government officers in the various classes defined as aforesaid shall be determined. Unless and until any such agreement contains the statement aforesaid the Registrar shall refuse to receive the agreement under subsection (5) of this section, and if the parties cannot agree upon the terms of any statement aforesaid a dispute shall be deemed to have arisen, which shall be determinable by the Court under and in accordance with the provisions of this Part.

(5) When the agreement referred to in subsection (3) hereof has been executed as aforesaid, it shall be deposited with the Registrar, and a copy thereof shall be published by the Registrar in the *Government Gazette*, and as from the date it is so deposited shall operate as and have the effect of an award of the Court for the same period as awards of the Court ordinarily operate, or for such shorter period as may be expressly fixed by the agreement. Formerly
subsec. (4).

(6) If the Commissioner or other employer referred to in subsection (2) hereof fails to give any notice of his decision as required by subsection (2) hereof, the Association may, at any time after the expiration of the time fixed by subsection (2) hereof for the service of the notice of the decision of such party, make application in the prescribed manner to the Court for an award or order authorising and confirming the said proposal, and upon the hearing of such application the party who has failed to give notice of his decision as aforesaid shall not be entitled to appear or be heard in opposition to the application, except by special leave of the Court. Formerly
subsec. (5).

(7) If after receipt of a notice from the Association under subsection (1) hereof, the Commissioner or other employer to whom such notice is given objects to the proposal and gives notice of such objection as required by subsection (2) hereof, a dispute shall be deemed to have arisen between the Association and the Commissioner or other employer concerned, Formerly
subsec. (6).

as the case may be, and shall be determinable by the Court under and in accordance with the provisions of this Part.

The Court may hear and settle disputes.
No. 57 of 1912, s. 154.

157. (1) When any dispute has arisen within the meaning of this Part, the Association or the Commissioner or other employer concerned in the dispute may, in accordance with regulations, make application to the Court for a settlement of such dispute and the Court may hear such application and settle the dispute.

(2) Any other application for any purpose under this Part which is cognisable by the Court or the President shall be made in accordance with regulations.

The Court may appoint a board of reference.
No. 57 of 1912, s. 155.

158. The Court may refer to any person or persons as a board of reference under this Part any dispute or matter before it, or any question arising in any such dispute or matter, for investigation and report, and may accept or act on the report of or evidence taken by any such person or persons, or any part of such report or evidence, and may refer to experts for their opinion any questions of a professional or technical nature.

Court may declare agreement to be a common rule.
No. 57 of 1912, s. 156.

159. Subject as hereinafter provided, the Court may declare that any agreement deposited with the Registrar as provided for in this Part, which relates only to certain Government officers, or to a certain group of Government officers, shall relate to and operate also in respect of other Government officers or other groups of Government officers occupying positions which are within the jurisdiction of the Court, notwithstanding that they may be employed in a different branch or section of the service of the State from that in which the Government officers or group of Government officers to whom the agreement expressly relates are employed:

S.158. The Board contemplated by this section is quite different from the Board of Reference appointed by the Court under section 89 of the Act, its functions resemble more closely those of an Industrial Board under section 109 (2) (ii) of the Act. See also section 86 (1) (b) ante.

Provided that, before acting under this section the Court shall give all parties likely in its opinion to be affected, notice in the prescribed form of its intention to extend the operation of such agreement, and shall hear any parties desiring to be heard in opposition thereto.

160. The Court may order that any agreement deposited with the Registrar as provided for in this Part may be varied, so far as it is inconsistent with any award of the Court made in its jurisdiction under this Part, or with any other agreement deposited with the Registrar as aforesaid, and such agreement shall be deemed to be amended or varied, as the case may be, and take effect accordingly.

Variation of
agreement
to conform
with award.
No. 57 of
1912, s. 157.

161. Subject as hereinafter provided, the term of an award made by the Court in its jurisdiction under this Part shall be five years from the date of the award. Provided that—

Currency
and review
of awards.
No. 57 of
1912, s. 158.

- (i) the Court may, at the request or with the consent of the association and the employer concerned in the award, fix the term of an award for a period less than five years;
- (ii) it may be prescribed by an award that any provisions thereof may be referred to the Court for review, at such intervals of time as the Court may think fit, with power to the Court to vary or rescind such provisions;
- (iii) at any time after the expiration of the first twelve months from the date of an award, and after the expiration of any subsequent period of twelve months, application may be made to the Court by leave of the Court for a review of any provisions of the award, and the Court shall have power to vary or rescind such provisions.

S.160. Compare section 43 ante.

S.161. The maximum term for an award under part IV of the Act is three years. (See section 92 ante.) As to (ii) and (iii) above see provisos to section 92 ante, but note that the power of the Court under the second proviso to section 92 is larger than under section 161 (iii)—a result of the 1941 amending Act (No. 49 of 1941) which deleted the words "to vary or rescind" appearing in section 92 and substituted the words "to add to, vary or rescind" in lieu thereof.

Continuance
of award.
No. 57 of
1912, s. 159.

162. (1) Notwithstanding the expiry of the term of an award under this Part, it shall, subject to any variation ordered by the Court, continue in force until a new award has been made, or an agreement in substitution of such award has been entered into and deposited with the Registrar.

(2) Notwithstanding the continuance of an award under this Part after the term thereof has expired, the Association or the Commissioner or other employer bound by the award may, during such continuance, refer any matter within the jurisdiction of the Court to the Court, although the matter may be governed by the provisions of the award; and, subject to any order of the Court, such award shall continue in force pending a reference, and until a new award is made or an agreement in substitution thereof has been entered into and deposited with the Registrar.

Currency
and con-
tinuance of
agreements.
No. 57 of
1912, s. 160.

163. Subject to any variation or amendment thereof by the Court, every agreement deposited with the Registrar as provided for in this Part shall continue in force for the period of five years, or for such shorter period as may be fixed in such agreement, and shall continue in force after the expiration of such five years, or such shorter period aforesaid, as the case may be, until the expiration of three months' notice in writing given by either party concerned in the agreement to the other of an intention to determine the agreement.

Basic wage
adjustments
may be made
in certain
cases.
No. 57 of
1912, s. 161,
amended by
No. 56 of
1950 s. 8.

164. Subject as hereinafter provided, provision may be made by the Court by any award of the Court, or by the parties to any agreement in such agreement that, apart from any annual increment of salary to which Government officers may be entitled under such award or agreement, the rate

S.162. Compare section 93 ante. This section is wider than section 93 insofar as it permits the parties to an award, by means of "an agreement in substitution" to retire from an award.

S.163. The maximum term for an industrial agreement under part III is three years. (See section 37 (2) ante and section 37 (5) and (6).) A party need give only thirty days' notice of its intention to retire from an industrial agreement under part III (see section 37 (6)).

S.164. The basic wage is of course a weekly wage and the Government salaries are yearly; the aggregate amounts of the variations are computed after the basic wage has been converted into an annual salary, i.e., by multiplying by 52 1/6th (see Civil Service Agreement 18 W.A.I.G. 649). The purpose

of the salary of Government officers to whom the award or agreement, as the case may be, applies shall from year to year be increased or reduced, as the case may require, by an annual amount which is equivalent to the aggregate amounts in each year of the variations between the amount of the basic wage declared by the Court under Part VII. of this Act and in operation at the commencement of the award, or agreement aforesaid, and the amounts of any basic wages subsequently declared by the Court under Part VII aforesaid and in operation during the continuance of such award or agreement.

Provided that—

- (i) this section shall apply only to Government officers occupying positions in respect whereof the maximum rate of salary does not exceed the justiciable salary; and
- (ii) the rate of salary of Government officers shall be varied as provided for in this section by the variation in the annual equivalent calculated to the nearest one pound of the basic wage as aforesaid.

165. (1) Save and except to the extent by which other provisions are made expressly in this Part, and also to the extent by which the provisions of this Part negative, modify, or vary the same, the provisions contained elsewhere in this Act more particularly mentioned and enumerated hereunder shall be deemed to be incorporated in and form part of this Part, and shall, so far as may, in the opinion of the Court, be necessary and convenient for enabling the Court effectually to carry out the provisions of this Part and to give effect to the objects and intention of the provisions of this Part, apply, and where, in the opinion of the Court, possible, shall be made applicable *mutatis mutandis* to and for the exercise by the Court of its jurisdiction under this Part.

Incorporation in this Part of provisions contained elsewhere in this Act.
No. 57 of 1912, s. 162;
No. 26 of 1937, s. 8.

of this section is to graft on to public service salaries the adjustments made from time to time in the basic wage. Quære whether the limitation contained in the first proviso would prevent the section applying to a Government officer whose maximum salary proper is under £700 per year but whose total remuneration by reason of basic wage increments is in excess of £700 per year. (The Civil Service Association v. the Public Service Commissioner (1943), 23 W.A.I.G. 187.)

(2) The provisions contained elsewhere in this Act and under subsection (1) of this section deemed to be incorporated in and to form part of this Part are the following, that is to say:—

- (a) The whole of Part IV (sections forty-four to one hundred and eight, both inclusive).
- (b) The whole of Part XI (sections one hundred and sixty-six to one hundred and eighty, both inclusive).

(3) Notwithstanding anything to the contrary contained in this section, no forfeiture or penalty of any kind shall be imposed or inflicted upon the Commissioner or any other employer for any alleged breach of any award or order of the Court, or of any agreement deposited with the Registrar as provided for in this Part; but if the Court shall find that any breach as alleged has been committed, or that there has been any failure on the part of the Commissioner, or any other employer in any respect to observe or give effect to any award or order or agreement aforesaid, the Court shall submit a report of its findings to the Governor, and forthwith, on receipt of such report, the Governor shall cause any breach or dereliction as aforesaid mentioned in such report to be corrected.

Amended by
No. 26 of
1937, s. 8.

(4) For the purposes of this section, any reference in the provisions contained elsewhere in this Act, which by subsection (1) hereof are deemed to be incorporated in this Part, to an industrial union or the officers of an industrial union, shall be deemed to be a reference to the Association and the officers of the Association; any reference to a member of an industrial union shall be deemed to be a reference to a member of the Association; any reference to a worker shall be deemed to be a reference to a Government officer; and any reference to an employer shall be deemed to be a reference to the Commissioner, or to an employer as defined in this Part, as the case may require; and any reference to an award shall be deemed to be a reference to an

S.165. (2) (a) This subsection incorporates sections 92 and 93 of the Act into this part, although they contain provisions inconsistent with sections 161 and 162 respectively.

award or order made by the Court under this Part, and also subject to subsection (5) of this section, to an agreement deposited with the Registrar and in force under the provisions of this Part.

(5) Nothing in this section shall confer or be deemed to confer upon the Court any jurisdiction, authority, or power, whether upon an application for an interpretation or for the enforcement of an award or an agreement or otherwise to hear and determine any matter which relates to any decision of the Commissioner in relation to the placing of the office of a Government officer employed under the Public Service Act, 1904-1948¹, in a particular class in a scheme of classification made by the Commissioner under the provisions of the said Public Service Act, 1904-1948¹, which affects the Government officer concerned, or which relates to any decision of any other employer in relation to the placing of the office of a Government officer under his control in a particular class in a scheme of classification lawfully made by such employer, which affects the Government officer concerned: Provided that nothing in this subsection shall in any way limit, affect, or prejudice the jurisdiction of the Court to hear and determine whether upon an application for interpretation or for the enforcement of an award or of an agreement or otherwise any allegation by the Association that in any scheme of classification made by the Commissioner under the provisions of the Public Service Act, 1904-1948¹, the classes into which the Government officers affected by such scheme of classification have been divided are not in conformity with the classes defined by an award of the Court or by an agreement deposited with the Registrar

Inserted by
No. 26 of
1937, s. 8.

¹ Now Public Service Act, 1904-1955: See No. 53 of 1955, s. 1 (3).

S.165. (5) This subsection and also sections 150 (iii), 152 (2), and 155 (4), 155 (5), 156 (4) and section 7 see p. 110 (ante) were all enacted by the Industrial Arbitration Act Amendment Act (No. 2), 1937. All these amendments work together for the same end and will be considered here together. Under the Public Service Act (consolidated in appendix to 1930 Statutes) the Commissioner has power to grade individual officers (section 9 (2)) and to enable officers to appeal from such classifications of the Commissioner a Public Service Appeal Board (see No. 14 of 1920) was set up with jurisdiction to hear and determine such appeals (section 6). After the passing of the 1935 amending Act (No. 31 of 1935) which brought the Civil Service within the scope of the Arbitration Act it was held by the Public Service Appeal Board in the case of R. Dolg (unreported) that as the Court of Arbitration had, in respect of matters relating to and incidental to the employment of Government officers at salaries under £700 per annum, been

under the provisions of this Part then in force and relating to the said Government officers or that in such scheme of classification the rates of salary fixed in respect of any class prescribed therein are not in conformity with the rates of salary fixed for such class by an award of the Court or by an agreement deposited with the Registrar under the provisions of this Part then in force and affecting such scheme of classification.

PART XI.—MISCELLANEOUS.

Formerly
Part X.
Registrar.
No. 57 of
1912, s. 163.
Amended by
No. 46 of
1943, s. 5.

166. (1) The Governor shall from time to time appoint some person to be Registrar of Industrial Unions, and may also appoint some person to be Assistant Registrar of Industrial Unions, who—

- (a) shall have and may exercise all or any of the powers and authorities, and shall discharge the duties under this Act of the Registrar during the illness, temporary incapacity, or temporary absence from office of the Registrar;

given original jurisdiction to define classes . . . to provide minimum and maximum salaries of each class . . . to fix rates of allowances and payments for overtime, the right of appeal to the Public Service Appeal Board by an officer occupying a position fixed under £700 per annum and in connection with a matter within the jurisdiction of the Court which can be the subject of an award of the court or is competent to be the subject of an agreement between the Commissioner and the Civil Service Association under Part X. no longer existed.

It was at the same time pointed out that, although a class would usually be defined by its common attributes, essential qualities or general characteristics, yet it may be defined in many ways, that is to say, by qualifications, special training, supervisory capacity, grave trusts and responsibility, meritorious service, age or period of employment may be taken as the basis of classification and that it would be impossible for the Board to determine whether an officer had been placed in his appropriate class unless the Arbitration Court at the time of the award or the parties at the time of their agreement had revealed some collective formula as to how the class was to be constituted. The purpose of these amendments can now be seen. By section 150 (iii) and 165 (5) the jurisdiction of the Court to review the placing by the Commissioner of the office held by any particular Government officer in a particular class is expressly negatived, and by the Public Service Appeal Board Act Amendment Act (1937) No. 27 of 1937 section 2, section 6 of the principal Act is amended to expressly vest such appellate jurisdiction in the Board. To overcome the other difficulty to which attention was drawn by the Chairman of the Public Service Appeal Board in the above case, sections 152 (2), 154 (4) and 155 (5) and 156 (4) make it mandatory both in agreements and in awards to state the fundamental basis or principle upon which the classes therein are defined and no appeal to the Public Service Appeal Board can be made in the absence of such a statement (see section 2 of the Public Service Appeal Board Amendment Act (1937); and also proviso (b) to the said section 2 and section 7 of the Arbitration Act Amendment Act, 1937.)

As an example of a statement of "the fundamental basis or principle," see agreement between the Civil Service Association and the Agricultural Bank (section 2 (b) 18 W.A.I.G. 649).

Generally speaking it may be said that within the "automatic range" the fundamental basis of classification is age and period of employment while outside such range it is the nature and responsibility of the duties of the office.

PART XI.—MISCELLANEOUS.

- S. 166. (1) See Friendly Societies Act, 1894 (58 Vic. 23).

- (b) shall have and may exercise such powers and authorities of the Registrar as the President or the Registrar may from time to time assign to him in writing, either generally or in any particular case.

(1A) In the absence of proof to the contrary, it shall be presumed that anything done by the Assistant Registrar in purported exercise of any power conferred by this Act on the Registrar is lawfully authorised under this section.

No. 46 of
1948, s. 5.

(2) It shall be the duty of the Registrar whenever a total or partial cessation of work occurs in or in connection with any industry to make immediate inquiry into the cause thereof, and if on such inquiry he shall be of the opinion that any person has committed or is committing any breach of this Act, or of any industrial agreement or award of the Court, he shall forthwith acquaint the Court and the Crown Law officers accordingly.

No. 50 of
1925, s. 53.

(3) In the carrying out and discharge of his duties under this section, the Registrar shall be entitled to the assistance of all industrial inspectors and officers of the Court.

167. (1) It shall be the duty of the Clerk of the Court to publish in the *Gazette* all industrial agreements and awards filed in his office, and all orders of the Court whereby industrial agreements and awards are amended, interpreted, or affected. All such industrial agreements, awards, and orders, and, in addition, all the various notices and matters set out in the Second Schedule to the Act shall be published in the *Western Australian Industrial Gazette*.

Publication
in *Gazette*
of awards,
etc.

No. 57 of
1912, s. 164;
No. 49 of
1941, s. 11.

(2) The production of the *Gazette* or the *Western Australian Industrial Gazette* in which is published any industrial agreement, award, or any order of the Court as aforesaid, or any notification made under

No. 49 of
1941, s. 11.

S. 166. (2) See section 170 post.

S. 167. The Court had held before the enactment of subsection (3) above (by section 11 of No. 49 of 1941) that the Court should accept the figures supplied both by the State and Commonwealth Statistician at their face value, and that if any party should wish to dispute such figures objection thereto should be taken in the proper quarter and that is to the statistician responsible for such figures and not to the Court (see *Railway Award* (1928), 8 W.A.I.G. 213). Although the Court will accept the figures themselves as being *prima facie* correct, it will not accept, in the same way, any conclusions which the statistician may draw from his figures.

the authority of this Act, or any of the notices or matters set out in the Second Schedule to the Act shall, before all Courts and persons acting judicially, be *prima facie* evidence of such agreement, award, order, notification, notice or matter and of any of the matters stated therein.

No. 49 of
1941, s. 11.

(3) The production of the *Statistical Register* compiled by the Government Statistician or by the Government Statistician's Office, containing any statistical information relevant to the consideration of any matter before the Court, or a copy of the same purporting to have been printed by the Government Printer, shall be *prima facie* evidence of the correctness of the matters therein stated.

Judicial
notice to
be taken
of certain
matters.

No. 57 of
1912, s. 165.
Amended by
No. 46 of
1948, s. 6.

168. All Courts and all persons acting judicially shall take judicial notice of—

- (a) the official signature of any person who holds or has held the office of President, Conciliation Commissioner, Clerk of the Court, Registrar, Assistant Registrar or Industrial Inspector; and
- (b) the appointment and official character of any such person.

Stamp duty
not payable
in certain
cases.

No. 57 of
1912, s. 164.

169. No stamp duty shall be payable upon or in respect of any registration, certificate, agreement, award, or instrument effected, issued, or made under this Act.

Powers of
Court to
direct
investiga-
tions and
the institu-
tion of
proceedings.

No. 57 of
1912, s. 167.
Amended by
No. 46 of
1948, s. 7.

170. (1) The Court may, of its own motion—

- (a) direct any record to be kept by any person for the purpose of affording evidence of the compliance or non-compliance with any award or order of the Court, or with any industrial agreement;

S.170. (1) (a) The most common record that the Court directs should be kept is a time and wage book and both the employer and the worker are made responsible for its proper keeping. "We all know," said Dwyer, P., in the amendment to the Breadcarters' Award ((1935) 15 W.A.I.G. 24) "that unions have to police awards, and I think it is a matter of commonsense and common knowledge that one of the readiest ways of proof on an application for enforcement so far as wages and overtime payments are concerned is the production of the records showing exactly what amount had been received and what hours had been worked as ordinary time and as overtime. To deprive the unions of the assistance of this method of proof in the Court would be rendering their position as guardians of the law almost impracticable."

- (b) direct the Registrar, Assistant Registrar, or any industrial inspector to investigate and report to the Court concerning any industrial dispute, breach of any industrial award or agreement, or of any provision of this Act which the Court may believe to exist or to have occurred;
- (c) direct any proceedings to be instituted and carried on by the Registrar, Assistant Registrar, or an industrial inspector in respect of any such breach;
- (d) confer on the Registrar, Assistant Registrar, or industrial inspector such powers as the Court may deem necessary to enable him to carry its directions into effect;
- (e) empower any person to exercise any power or perform any duty which is or may be vested in the Assistant Registrar or an industrial inspector by or under this Act, including this section.

(2) The Registrar, Assistant Registrar or industrial inspector shall carry out all directions so given to him.

(3) No order for costs shall be made against the Registrar, Assistant Registrar, or an industrial inspector or any other person in proceedings instituted or carried on by him pursuant to the direction of the Court.

171. (1) The President may, whenever in his opinion it is desirable for the purpose of preventing or settling an industrial dispute, and notwithstanding that a lockout or strike may exist, summon any person to attend, at a time and place specified in the summons, at a conference presided over by himself.

President
may convene
compulsory
conference.
No. 57 of
1912, s. 168.

This section should not be construed to mean that the exclusive right to bring prosecutions for breach of the Act is vested in the Court or in any particular officer or person. The section is an emergency section empowering the Court to enforce the performance of duties by officers of the Court or to enable other persons to exercise the powers and to perform the functions vested in an Industrial Inspector. The right to prosecute, vested in all members of the public by section 41 of the Interpretation Act (Interpretation Act, 1918) is left unimpaired. (See *Mooney v. Chugg* (1940) 20 W.A.I.G. 89.)

(e) As to the functions of Industrial Inspectors, see section 106 ante.

(2) "Any person" in the last preceding subsection includes any person, whether connected with an industrial dispute or not, whose presence at the conference the President thinks is likely to conduce to the prevention or settlement of an industrial dispute.

(3) Any person so summoned shall attend the conference and continue his attendance thereat as directed by the President.

Penalty: One hundred pounds.

(4) The conference may be held partly or wholly in public or in private, at the discretion of the President.

(5) Whenever a conference has been held under this section, and an agreement has been reached as to the whole or some portion of the matters in dispute, the President shall sign and cause to be filed with the Clerk of the Court a memorandum of the matters upon which an agreement has been reached, and the terms and conditions agreed upon; and unless otherwise ordered, and subject to any direction by the President, such memorandum shall thereupon have the force and effect of an award of the Court, and shall be enforceable accordingly:

Provided that before any such memorandum is signed all industrial unions and employers that in the opinion of the President may be affected thereby shall be notified, and shall be afforded the opportunity of being heard.

(6) Whenever a conference has been held under this section, and an agreement has been reached as to some of the matters in dispute, but not as to the whole of the matters in dispute, the President may refer to the Court the matters in dispute as to which no agreement has been reached, and the Court shall have jurisdiction to hear and determine such matters so referred to it, and may incorporate in its award all matters as to which an agreement was reached at the conference.

S.171. The power to refer to the Court is given to the President by subsection (6) and (7) above; the jurisdiction of the Arbitration Court to deal with such reference is contained in section 61 (b) (ii) ante.

(7) Whenever a conference has been held under this section and no agreement has been reached, the President may refer to the Court all or any of the matters in dispute, and the Court shall have jurisdiction to hear and determine the same.

172. (1) In this section the term "industrial dispute" includes any threatened or impending or probable industrial dispute.

Compulsory
conference
with Com-
missioners.
No. 57 of
1912, s. 169.

(2) The Minister may appoint Commissioners for the purpose of preventing or settling any industrial dispute, and notwithstanding that any lock-out or strike may exist.

(3) Such Commissioners may summon any person to attend, at a time and place specified in the summons, at a conference.

The words "any person" in this section include not only persons engaged in or connected with an industrial dispute, but also any person, whether con-

All discussion which takes place at such a conference is without prejudice and nothing which transpires there can be made use of before the Court. (See Burnside, J., in re United Clerks' Union (1913) 12 W.A.A.R. 9.)

A compulsory conference is a useful device for overcoming a difficulty, which has arisen during the currency of an award, the settlement of which will enable the parties thereto to carry on until its expiration. (See Registrar v. Perth and Fremantle Operative Bakers' Unions 14 W.A.A.R. 777.)

The President's power under this section is discretionary and will not be exercised as a matter of form. It should be shown that a conference is an appropriate means to an end, and that it will not merely be a round-about method of approaching the Court. (See Burnside, J., in re United Clerks' Union (1913) 12 W.A.A.R. 9.)

(5) An agreement filed with the clerk under this subsection shall have the "force and effect" of an award, but it is not as an agreement filed under section 65 (2) ante, "deemed to be an award." An agreement entered into under this section is therefore in a similar position to an agreement made a common rule under section 42 ante.

Although such agreement will be subject to the provisions of section 62 ante yet the power to vary contained in that section will only be exercised with respect to it under exceptional circumstances. The terms of an agreement entered into under this subsection, and these remarks apply also to an agreement entered into under section 65 (2), have only been settled after much discussion between the parties, they in all probability represent much in the way of compromise and will only be varied on the proof of exceptional circumstances. (See Amalgamated Road Transport Union v. Australian Glass Manufacturers (1940) 20 W.A.I.G. 483.)

(4) *Prima facie* the conference is held in private. See the remarks of Dwyer, P., in 6 W.A.I.G. at page 104.

If there is no dispute in existence one cannot be made by calling a conference under this section. (See Burnside, J., in re United Clerks Union (1913), 12 W.A.A.R. 9.)

S.172. (1) Compare definition of "industrial dispute" in section 4 of Commonwealth Conciliation and Arbitration Act, 1904-1934, and see Merchant Service Guild v. Newcastle Steamship Co. ((1913) 16 C.L.R. 591).

Once the Court has made an award there can be no dispute within the meaning of this section dealing with the same subject matter within the same area during the currency of the award. (See Dwyer, P., in the Coal Miners' Union v. Amalgamated Collieries (1933), 18 W.A.I.G. 421 at page 422.)

(3) "any person," compare section 171 (2) ante.

nected with an industrial dispute or not, whose presence at the conference the Commissioners think is likely to conduce to the prevention or settlement of the industrial dispute.

(4) Any person so summoned shall attend the conference and continue his attendance as directed by the Commissioners.

(5) The conference may be held partly or wholly in public or private, at the discretion of the Commissioners.

(6) In furtherance of such conference the Commissioners shall have and may exercise any of the powers of the Court, and the provisions of section seventy-seven relating to evidence shall apply, as if the Commissioners were the Court acting in exercise of its jurisdiction when an industrial dispute is referred to it.

(7) The Commissioners may make such order as to costs, and for the payment to be made to persons summoned for their attendance, as may be made by the President at a compulsory conference convened under section one hundred and seventy-one.

(8) The Commissioners may take evidence on oath or affirmation, and for that purpose any Commissioner may administer an oath or affirmation.

(9) Any person summoned to attend before the Commissioners who fails to attend and to continue his attendance shall be liable to a penalty not exceeding five hundred pounds.

(10) Where a conference has been held under this section, and an agreement as to the whole or part of an industrial dispute is reached, the Commissioners shall sign and cause to be filed with the Clerk of the Court a memorandum of the matters

(7) As to the power of the President to award costs, see section 76 ante.

(10) "shall . . . have the force and effect of an award," compare section 171 (5) ante.

The terms of a memorandum filed under this subsection must not conflict with the provisions of any valid award whose term has not expired. Otherwise there would be in existence covering the same subject matter and the same area two sets of regulations which would be inconsistent with and destructive to each other. "Such a state of things is against the spirit and intention of the Act and is contrary to it," per Dwyer, F., in *Colliery Coal Miners v. Amalgamated Collieries* ((1938) 18 W.A.I.G. 421, at page 422). The Commissioners cannot, even with the consent of the parties, enlarge the jurisdiction given to them by the Act; and they cannot be used as an Appeal Court from a decision of the Arbitration Court (18 W.A.I.G. 422 above).

on which an agreement has been reached and of the terms and conditions agreed upon, and such memorandum shall thereupon have the force and effect of an award of the Court for a period therein specified, and shall be enforceable accordingly, and the provisions of this Act relating to awards shall apply:

Provided that before any such memorandum is signed, all industrial unions that in the opinion of the Commissioners may be affected thereby shall be notified, and shall be afforded an opportunity of being heard.

(11) Where a conference has been held under this section, but agreement has not been reached as to the whole of the industrial dispute, the Commissioners shall furnish a report in writing to the Court of their proceedings on the matter in dispute as to which agreement has not been reached, and the Court shall have jurisdiction to hear and determine any matter so referred to it as an industrial dispute under this Act.

(12) The Minister may, for the purposes of this section, appoint one Commissioner instead of several Commissioners, and in such case the Commissioner so appointed shall have and may exercise the powers of Commissioners appointed under this section.

173. Where a conference has been held under section one hundred and seventy-one or one hundred and seventy-two of this Act, and an agreement as to the whole or part of the matters in dispute is not reached, but all parties to the dispute consent in writing to the dispute or the matters in difference being heard and determined by the President or the Commissioners, as the case may be, the President or the Commissioners shall have all the jurisdiction and powers of the Court to hear and determine the dispute, and the award of the President or the Commissioners shall have the effect of an award of the Court.

After conference President or Commissioners may, by consent, exercise powers of Court.
No. 57 of 1912, s. 170.

Registered unions and associations not affected by Acts against illegal societies.
No. 57 of 1912, s. 171.

174. No industrial union or association duly registered under this Act shall, from the date of such registration, and while so registered, be affected by the provisions of any Act of the Imperial Parliament against corresponding societies or unlawful combinations in respect of any matters done in compliance with the registered rules of such union or association.

Powers of unions to recover fines, etc.
No. 57 of 1912, s. 172.

175. All fines, fees, levies, and dues payable under its rules to an industrial union or association by any member thereof or to any industrial association by any union represented thereon may, in so far as they are owing to the union or association for any period subsequent to the registration thereof, be sued for and recovered in a Court of summary jurisdiction.

S.174. There is no Imperial legislation relative to trade unions operative in this State. If this section is an attempt to whittle down the power of the Imperial Parliament to legislate for this State it is clearly invalid and ultra vires under section 2 of the Colonial Laws Validity Act, 1865.

S.175. Compare section 68 of the Commonwealth Conciliation and Arbitration Act and section 15 of New Zealand Act.

If the union is not registered under this Act or under the Trade Unions Act (1 and 2 Ed. VII, No. 19) its agreements with its members are unenforceable in so far as they are in restraint of trade. If none of the objects of the union are illegal or in restraint of trade and if the means whereby it proposes to carry out such objects are not illegal, then its agreements with its members will be enforceable at common law. Societies of this kind have the right to sue their members which is quite independent of statutory support. (See *Gozney v. Bristol Trade and Provident Society* (1909), 1 K.B. 901.)

If the union is not registered under the Arbitration Act and if its objects are in restraint of trade it can obtain a certain recognition of its contracts by registering under the Trade Unions Act. Section 4 of this Act enacts that the agreements of a union shall not, merely for the reason that the purposes of the union are in restraint of trade, be void or voidable. The effect of this concession is limited by the following section, section 5, which provides that "nothing herein shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the following agreements, namely:—(b) any agreements for the payment by any person of any subscription or penalty to a trade union. This section, though it restricts the operation of, does not completely undo section 4. The agreements are declared not to be directly enforceable but this does not divest them of all legal effect whatsoever. (See *Yorkshire Miners' Association v. Hawden* (1903) 1 K.B. 308 and 1905 A.C. 256.)

Under this section the union may sue for fees, fines, etc., in the Local Court or in a Court of Summary Jurisdiction. The word "may" as used in this section is permissive and not mandatory, and the union may take action in whichever Court it considers to be more efficacious. (See *West Australian Timberworkers v. Tom Rice* (1933) 13 W.A.I.G. 181.)

If proceedings are taken in a Court of Summary Jurisdiction the limitation contained in section 51 of the Justices Act would apply and only such money which had become payable to the union within the period of six months prior to action being taken could be recovered.

(c) In an action in the Local Court dues which have been owing for more than twelve months cannot be recovered because the provision contained in section 9 (3) (h) is mandatory and when a member's dues are twelve months in arrears he ceases, whether he has been struck off or not, to be a member of the union and no further dues become payable. (See *W.A. Operative Plasterers v. Evans* (1940) 19 W.A.I.G. 537.)

A branch of a society cannot sue to recover dues on behalf of the union, but it could, if registered as an industrial union under section 8 (2) ante, sue to recover dues owing to itself. (See *Davidson v. Australian Carpenters* 23 C.L.R. 143). The omission of the words "in the name of the organisation," which appear in section 68 of the Commonwealth Act, from this section would not appear to have altered the law in this regard. (See *West Australian Timberworkers v. Tom Rice* (1933) 13 W.A.I.G. 181.)

176. Every dispute between an industrial union or association and any of its members, or between an industrial association and any union represented thereon, shall be decided in the manner directed by the rules of the union, or, where the dispute is with an association, by the rules of the association.

Disputes between unions and members.
No. 57 of 1912, s. 173.

(2) On the application of a union or association, the Court may order the payment by any member or (in the case of an association) by any union represented thereon of any fine, penalty, or subscription payable in pursuance of the rules afore-said, or any contribution to a penalty incurred or money payable under an award or order of the Court; but no such contribution on the part of a member shall exceed Ten pounds.

177. The Court may, on the application of any industrial union or association, order that any member thereof shall cease to be a member as from a date and for a period to be named in the order, or that any union represented on an association shall cease to be so represented from such a date for such a period.

Court may order that persons cease to be members of unions, etc.
No. 57 of 1912, s. 174.

178. (1) No employer or worker or person acting on behalf of an employer or worker shall ask, demand or receive or pay or provide or offer to pay or provide any premium, payment or reward for or in respect of the employment or engagement of any worker in any industry which is the subject of an award or industrial agreement: Provided that no-

Prohibition on obtaining premiums in respect to employment.
Inserted by No. 49 of 1941, s. 12, as s. 174A, renumbered s. 178.

The onus lies upon the union to establish the right to the amount claimed and, if the point be taken, it must be shown that the rules of the union have been observed in the proceedings out of which the claim arises. The dues must be "payable under its (i.e., the union's) rules," and unless it can be shown that the claim arises regularly in accordance therewith the union cannot recover. (See *Burnside, J., in McClintock v. McKenney* (1919) 21 W.A.L.R. 56 and also *Osborne v. Greymouth Wharf Labourers* (1911) 30 N.Z.L.R. 634 and the New Zealand Act, section 15).

S.176. A union may be registered without providing in its rules any provisions for the settlement of disputes between its members or between itself and industrial associations. (See section 9 (3) ante.)

(2) See the proviso to section 14 ante.

S.178. (1) Whether a sum of money paid by the worker to the employer is a premium can only be ascertained after an examination of the facts of the particular case. (See *Cook v. Henri* (1928) 8 W.A.I.G. 291).

It is not a condition precedent to the recovery of the premium that the defendant should have been convicted of the offence of receiving the premium in contravention of this section. (See *West v. Fowler* (1935) V.L.R. 404 and compare section 9 (4) of the New Zealand Shops and Offices Amendment Act, 1936 (No. 11 of 1936).)

This section was inserted in the Act by section 12 of the Industrial Arbitration Act Amendment Act, 1941.

thing in this subsection contained shall apply to an employment or engagement through the agency of an employment broker acting in the ordinary course of his business under the Employment Brokers Act, 1909-1918.

(2) No person shall accept for publication or publish in a newspaper, periodical or otherwise any advertisement of an offer to accept or receive any premium, payment or reward of the kind referred to in the preceding subsection.

Penalty for breach of either of the above subsections shall not exceed fifty pounds.

(3) Notwithstanding the penalty provided by this section, any sum or payment made in contravention of this section by or on behalf of any person in respect of the employment or engagement of any worker may be recovered back by action at suit of any industrial inspector or at suit of the person by whom or on whose behalf such payment was made in any Court of competent jurisdiction.

Regulations.
No. 57 of
1912, s. 175,
renumbered
as s. 179,
amended by
No. 56 of
1950, s. 9.

179. (1) The Court may, with the approval of the Governor, make regulations for any of the following purposes:—

- (i) Prescribing the forms of certificates, notices, returns, or other instruments or documents to be used for the purposes of this Act;
- (ii) prescribing the duties of the Clerk of the Court and of all other officers and persons acting in the execution of this Act;
- (iii) Providing for the mode in which recommendations by industrial unions as to the appointment of members of the Court shall be made and authenticated;
- (iv) regulating the practice and procedure of the Court and providing for the effective exercise of its original and appellate jurisdiction more especially but not so as to limit the generality of its powers in the premises with reference to—

S.179. (1) "with the approval of the Governor," see section 23 of the Interpretation Act, 1918.

Compare section 160 of the New Zealand Act and section 72 of the New South Wales Act.

- (a) the times and places for the sitting of the Court;
- (b) the summoning of parties and of witnesses;
- (c) the allowances to witnesses;
- (d) the enforcement of the awards, orders, judgments, convictions, and sentences of the Court;
- (v) prescribing what fees shall be paid in respect of any proceeding before the Court, and the party by whom such fees shall be paid;
- (vi) regulating the practice and procedure before an industrial magistrate for and incidental to the enforcement of industrial agreements and awards, and prescribing the costs to be allowed in such proceedings, and the fees to be paid, and the allowances to witnesses;
- (vii) providing for the registration of junior workers under a prescribed age employed in any industry;
- (viii) prescribing any act or thing necessary to supplement or render more effectual the provisions of this Act as to the conduct or proceedings before the Court; and
- (ix) providing for any matters which by this Act are required or permitted to be prescribed or which it may be necessary or convenient to regulate (either generally or in any particular case) for giving effect to this Act.

(2) Any regulations made or purporting to be made under this Act—

- (i) [*Deleted by No. 56 of 1950, s. 9 (b).*]
- (ii) [*Deleted by No. 56 of 1950, s. 9 (b).*]
- (iii) may impose a penalty not exceeding twenty pounds for any breach thereof;
- (iv) may provide for the imprisonment of any person in default of payment of any fine or penalty payable under any award, order, judgment, conviction, or sentence of the Court, but so that the term of imprisonment shall not exceed the term that a person

might be required to serve under the Justices Act, 1902¹, or any amendment thereof, in respect of the non-payment of a fine of similar amount;

(v) shall, subject as hereinafter provided, and except in so far as they may be in conflict with the express provisions of this or any other Act, be conclusively deemed to be valid.

(3) [*Subsection (3) deleted by No. 56 of 1950, s. 9 (c)*].

(4) [*Subsection (4) deleted by No. 56 of 1950, s. 9 (c)*].

(5) [*Subsection (5) deleted by No. 56 of 1950, s. 9 (c)*].

Prohibition
of con-
tracting out.
No. 57 of
1912, s. 176.

180. (1) Subject to section forty-one no person shall be freed or discharged from any liability or penalty or from the obligation of any industrial award or agreement by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award or agreement, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled.

(2) Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose.

¹ Now Justices Act, 1902-1954: See No. 73 of 1954, s. 5 and 2nd Schedule.

(2) (iv) Under section 167 of the Justices Act (Consolidated in appendix to the 1930 Statutes) the term of imprisonment for the non-payment of a fine is on the following scale:—Under £2 three days and in other cases three days for every additional £1 disregarding any fractional part of a pound. The maximum period is six months.

If no established practice custom or usage of the Court and no regulation is applicable to any particular case, then the practice for the time being of a Supreme Court shall, as far as is applicable, be applied. (See regulation 135).

As to the power of the Court to make regulations applicable to apprentices, see section 131 ante.

S.180. (1) This subsection was inserted to overcome the position which was created by the decision in *Tydeall v. Commissioner of Railways* ((1910) 9 W.A.A.R. 97) where it was held that it was competent for the employer or the worker to waive any provision in an award or industrial agreement.

(2) See section 99 (5) ante and cases cited there.

It was held in *True v. Amalgamated Collieries* ((1937) 17 W.A.I.G. 429 (Full Court)) that when a worker was suing on his contract of service and had no need to pray in aid section 180 (2) the limitation contained therein had no application. It was only when the worker was suing for award rates "notwithstanding any contract or pretended contract to the contrary" that his action was subjected to the limitation of twelve months. On appeal the majority of the High Court held (*Amalgamated Collieries of W.A. Limited v. True* (1937), 59 C.L.R. 417) that in every case in which a worker was seeking to recover as wages an amount which was fixed by an award he was (whether entitled to it by the provisions of his contract of service or not) seeking to recover an amount to which this subsection declared him to be entitled and that therefore the twelve month limitation applied. *Evatt and McTiernan, J. J.* (dissenting), took the same view as the Full Court and were of the opinion that as the worker was entitled to the amount claimed under the terms of his contract of service, he had no need to rely upon the right given him by this subsection and was therefore not bound by the limitation therein contained (at pages 432 and 439).

The same view was taken to the Privy Council where the decision of the Full Court was restored ((1940) 20 W.A.I.G. 223). The Privy Council (Lord Russell) pointed out that if Section 180 (1) stood by itself it would be impossible for a worker, who had contracted to work for a wage rate lower than that set out in the award, to recover anything whatever. He would be unable to sue on his contract owing to subsection (1) and would be unable to sue on a *quantum meruit* or implied contract in the face of his express contract to the contrary, section 180 (2) was therefore inserted to enable him, in spite of an inconsistent contract, to recover the amount calculated at the award rate, "as wages." This statutory right was subject to a short period of limitation, but the time during which he can enforce a contract which is not inconsistent with an award is not affected. "Such worker" is limited to a worker whose contract or pretended contract "is to the contrary." "As wages" implies that the worker may recover, as if payable under a contract of service, money due as a statutory right, and "such amount" means the amount which the worker is given the right to recover. The use of the words is "hereby declared entitled" implies that a new right is being created by this subsection and it is only to the right so created that the period of limitation attaches.

A worker enforcing the right given him by this subsection is often said to be suing "on the award" as distinct from suing on his contract of service. The expression may be misleading. The award itself does not establish any contractual relationship and by itself does not give rise to any claim for wages. The foundation to the claim for wages is always contractual, and the expression "suing on the award" really means enforcing various incidents which the law has attached to the relationship between the parties which has been created by the contract. (See *Burnside, J.*, in *Brown v. Hubber* (1921) 23 W.A.I.R. 52 at p. 56).

FIRST SCHEDULE.

The Industrial Conciliation and Arbitration Act, 1902,
1° and 2° Edward VII., No. 21.

The Industrial Conciliation and Arbitration Act Amendment Act, 1909, No. 47 of 1909.

No. 57 of
1912; The
Schedule.
Sec. 4.

SECOND SCHEDULE.

Notices and Matters for Publication in the "Western Australian Industrial Gazette."

1. Retirements from industrial agreements.
2. Notices of concurrence in industrial agreements.

Sec. 167.
Inserted by
No. 49 of
1941, s. 13.

Industrial Arbitration.

3. Any determination of the basic wage under Part VII. of this Act.

4. Any order of the Court in the nature of a mandamus or injunction to compel compliance with an award or industrial agreement.

5. Decisions of the Court relating to the enforcement of awards and industrial agreements or to breaches of the Act or regulations or to the interpretation of awards or industrial agreements.

6. Decisions of industrial magistrates.

7. Any order of the Court or President validating the registration of any rules or amendments of rules of a society or industrial union.

8. Any order of the President adding to, amending, or rescinding any rule of a union which has or may have the effect of altering the constitution of the union.

9. Any order of the Court consenting to the change of name of a union.

10. A list of industrial unions registered in pursuance of the provisions of the Act, together with the registered offices of such unions.

11. Any order of the Court, appointing a special board and any member or chairman thereof, and all decisions of any such board.

12. Any order of the Court appointing a board of reference, and/or assigning any matter thereto, and any decision of such a board.

13. Notification of the constitution or dissolution of any industrial board, and the appointment or removal of the members and chairman thereof, or any order of the Court remitting any industrial dispute or industrial matter thereto.

14. Any matter which is prescribed or which is directed by the Court or the President to be published or which the Registrar may deem expedient to publish.

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TO THE

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