HIGH COURT OF AUSTRALIA

Blackley

Vs.

Devondale Cream (Vic.) Pty. Ltd.

(Barwick C.J.(1), McTiernan(2), Kitto(3), Taylor(4), Menzies(5) JJ.)

2 February 1968

CATCHWORDS

Constitutional Law (Cth) - Inconsistency between Commonwealth and State laws - Award of Commonwealth Industrial Commission binding employers in respect of wages paid to non-unionists - Determination of State Wages Board prescribing minimum wage payable to employees - Non-unionists within operation of determination - Whether determination binding - Validity - The Constitution (63 & 64 Vict. c. 12), s. 109 - Conciliation and Arbitration Act 1904-1961 (Cth), ss. 61, 119 - Labour and Industry Act 1958 (Vict.), ss. 198, 199, 200.

HEARING

Sydney, 1967, October 18, 19; 1968, February 2. 2:2:1968
APPEAL from the Industrial Appeals Court of the State of Victoria.

DECISION

1968, February 2.
The following written judgments were delivered: -
BARWICK C.J. At the time relevant to these proceedings the respondent classification of work in an award made by the Commonwealth Conciliation and Arbitration Commission and known as the Transport Workers (General) Award (the award). By the award, the Commission prescribed, ordered and awarded that "the minimum rate of wage required to be paid by employers" who included members of an organization of employers of which the respondent was a member "shall . . . comprise the amount of the basic wage . . . and in addition the amount assigned in the following table . . . for an employee or work of a class indicated therein" (cl. 10). (at p256)

2. The obligation of the employers under the award extended so far as to require them to pay the prescribed wages to each of their employees whether or not the employee was a member of an organization of employees which was party to or bound by the award. Macdonald was not at any relevant time a member of any such organization. He was, however, a member of the Cold Storage Union of Victoria. (at p256)

3. There was current at the relevant time a determination of a wages board, namely, the Frozen Goods Board, set up under the Labour and Industry Act 1958 of the State of Victoria (the Victorian Act). The determination, which applies to the whole of the State of Victoria, is known as the Frozen Goods Determination, No. 1 of 1964. It purported to specify minimum rates of wages to be paid to persons employed in the process, trade, business, or occupation of freezing or refrigerating goods of

any kind for the purpose of trade or sale, including the packing and grading of such goods with certain immaterial exceptions. It also specified a great number of working conditions. Section 198 (1) of the Victorian Act provides that where any employer employs any person on work for which the lowest prices or rates have been fixed in such a determination, the employer shall be liable to pay and shall pay to such persons the price or rate so determined in full in money without any deduction whatever. The employee Macdonald was a person employed in a business covered by the determination. The amount fixed as the minimum rate by the Frozen Goods Determination in respect of the work actually performed for the respondent was larger than the amount fixed by the award in respect of that work. There is no dispute before this Court as to the nature of that work or as to the fact that it is work within a classification in the appropriate schedule to the award. (at p256)

4. The respondent was prosecuted on the information of the appellant for breach of the Victorian Act in that it did not pay its employee Macdonald during a specified week wages at the rate fixed by the Frozen Goods Determination. The magistrate who heard the information accepted a submission by the respondent that the Victorian Act in so far as it would impose an obligation upon the respondent to pay the wages fixed by the determination was invalid because of its inconsistency with the award; he therefore dismissed the information. The appellant appealed from this decision to the Industrial Appeals Court under s. 45 of the Labour and Industry Act 1958: but that Court affirmed the decision of the magistrate and dismissed his appeal. The appellant by this Court's special leave now appeals against the decision of the Industrial Appeals Court. (at p257)

5. There is no attack upon the award. Indeed, there could not have been in the courts in which the matter has been so far litigated: see s. 60 of the Conciliation and Arbitration Act 1904-1966 (the Act). In this Court there is no challenge to its constitutional validity. (at p257)

6. Consequently, consideration of the appeal begins with the undeniable proposition that, in the circumstances of the employment, the award validly provides that the minimum sum which the respondent shall be required to pay its employee Macdonald is the appropriate amount prescribed by the award. That such an obligation may be imposed upon an employer in respect of an employee who is not at any relevant time a member of an organization which is or has been in relevant dispute with the employer and bound by the award is well settled: Metal Trades Employers Association v. Amalgamated Engineering Union [1935] HCA 79[1935] HCA 79; ; (1935) 54 CLR 387 (at p257)

7. To my mind, it is nothing to the point in deciding this case that the employee Macdonald could not have successfully sued the respondent for the wages thus prescribed, if the right view be that he could not. I find no need to discuss the possible views in this connexion nor to attempt to form a firm opinion upon that question. It is sufficient, in my opinion, for present purposes that the Act operating upon the award requires the respondent to pay to Macdonald not more than the stated sum as a wage for the performance of the work in question. In my opinion, it is the obligation which the statute imposes upon the respondent with which this appeal is concerned, not with the rights or obligations inter se of the respondent and its employee. It may be true that the award does not purport directly to regulate those rights and obligations. But that, to my mind, does not leave open an area in which laws may be made which impinge upon the obligation which the award imposes on the employer. (at p257)

8. But the appellant submits that the Victorian State Act operating upon the determination of the wages board may validly require the respondent to pay its employee a larger sum by way of wages for the performance of the same work than is prescribed by the award. The paramountcy of the

Commonwealth law, i.e., the Act and the award, is not challenged as indeed it could not be. But it is said, as well as I comprehend the argument, that because the Act working through the award gives no rights to the employee who is not a member of an organization bound by and entitled to the benefit of the award, the State may give to that employee rights against his employer which impose upon the employer different or, if it matters, larger obligations than those laid upon him by the Act and the award. It is said that this involves no inconsistency because the rights of "non-unionist" employees are not within the "field" which the Act and the award purport or intend to occupy. (at p258)

9. I am unable to accept such an analysis. It seems to me that it attempts to dissociate in an inadmissible way the right of the employee to recover a wage from the obligation of the employer to pay it. On the assumption I have for present purposes been prepared to make, the non-unionist employee has no right to recover the wage the award prescribes. But to so say does not deny that the employer bound by the award is under obligation to pay it - an obligation at least enforceable by the employee organization both civilly and criminally. Properly understood, the act and the award, in placing that obligation upon the employer, enacts, in my opinion, that the sum so to be paid is the only sum which by law the employer is obliged to pay. The description "minimum wage" must not, in my opinion, be allowed to obscure the fact that in truth the prescribed wage is the largest wage which the employer is required by the Act and the award to pay. It is also of course the least he can lawfully pay. But no room is left, in my opinion, for a statute of the State to require the payment of a larger sum by way of wages than the amount prescribed by the award. To give the employee a right to be paid the larger wage is, in my opinion, to come into direct collision with the provisions of the award. It is not possible, in my opinion, to dissociate his right from the obligation of the employer: but, in any case the Victorian Act purports to impose an obligation on the employer to pay the specified wage. (at p258)

10. In my opinion, there is no need in this case to seek to define the intended field of the federal legislation in order to resolve the question of inconsistency. The case, to my mind, is one of direct collision in which the State law, if allowed to operate, would impose an obligation greater than that which the federal law has provided should be the amount which the employer should be bound by law to pay. (at p258)

11. Obedience to the one, the award, is disobedience to the other, the determination. Payment by the respondent of wages conforming to the award involved it in disobedience of the State provisions. Of course both may be obeyed by the employer by abandoning the protection of the Act and award and paying the larger sum. But, in my respectful opinion, that they may both be obeyed in that sense indicates their inconsistency. (at p259)

12. However, if we are to consider what was the field of the Act and the award it should be concluded, in my opinion, that they clearly intend exclusively and exhaustively to regulate the obligations of the employers bound by the award towards all their employees as to all matters within the ambit of the dispute in settlement of which the award was made and, in particular, as to the wages which by law the employer should be bound to pay to all his employees. Thus, any State enactment which entered the field of those obligations would be inconsistent with the Act and award. (at p259)

13. As, in my opinion, the relevant provision of the Victorian State Act and the wages board determination for breach of which the respondent was charged is clearly inconsistent with the provision of the Act and award as to the wages to be paid, there is no need for me to indicate other

respects in which, in my opinion, relevant inconsistency exists between the two provisions. (at p259)

14. In my opinion, the appeal should be dismissed. (at p259)

McTIERNAN J. I agree in the judgment and reasons of the Chief Justice. (at p259)

KITTO J. In this case an information charging a contravention of a law of the State of Victoria was dismissed in the Metropolitan Industrial Court at Melbourne upon the ground that in its application to the facts alleged the law was inconsistent with a law of th Commonwealth, and accordingly was to that extent invalidated by s. 109 of the Constitution. The informant appealed unsuccessfully to the Industrial Appeals Court of the State of Victoria and now appeals to this Court pursuant to special leave granted under s. 39 (2) (c) of the Judiciary Act 1903-1959 (Cth). (at p259)

2. The facts charged were that during a particular week the defendant, the respondent in the appeal, employed one Macdonald on work for which the lowest rates had been fixed in a certain determination of the Industrial Appeals Court established under the Labour and Industry Act 1958 (Vict.), and did on 31st March 1966 at South Melbourne in contravention of the provisions of the Act fail to pay in full to Macdonald the appropriate rates for such work. (at p259)

3. At the hearing, proof was given of the determination of the Industrial Appeals Court, called the Frozen Goods Board Determination, and of a federal award called the Transport Workers (General) Award, 1959. The State determination fixed certain weekly and hourly rates as the lowest that might be paid to any person employed in certain kinds of work including the work in which the respondent had employed Macdonald. To the rates so fixed ss. 198, 199 and 200 of the Labour and Industry Act applied. Section 198, according to its terms, made the respondent liable to pay to Macdonald without any deduction the rate determined as the lowest for his work, and gave the employee a right to recover the same notwithstanding any smaller payment or agreement to the contrary. Section 199 empowered a court imposing a penalty under the Act to order the offender to pay arrears payable under the Act. Section 200 made it an offence (inter alia) to employ a person at a lower rate than the rate determined, or to contravene or fail to comply with any of the provisions of the determination or of the provisions of the Act relating to determinations. (at p260)

4. The federal award had been made by the Conciliation and Arbitration Commission under the provisions of the Conciliation and Arbitration Act 1904-1961 (Cth) in settlement of a dispute between the Transport Workers Union of Australia (a registered organization under that Act, which will be referred to as the union) and a number of employers. The log of claims to which the dispute related is not in evidence, but it is common ground that the material provisions of the award were validly made as being within the ambit of an inter-State industrial dispute and appropriate to its settlement. What this involves I shall have to discuss, but first it is necessary to state the material provisions of the award. First there was a general provision that, with immaterial exceptions and exemptions, the award should be binding on the union, its officers and members, and should be binding on the named employers in respect of all their employees of the classifications enumerated in table "B" appearing in cl. 10 of the award, "whether such employees are members of the claimant union or not". Clause 10 was headed "Wages" and it provided:

> "The minimum rate of wage required to be paid by employers
> shall, in any area or place indicated in the following table
> 'A', comprise the amount of the basic wage assigned therein

to that area or place, and in addition the amount assigned in the following table 'B' for an employee or work of a class indicated therein." (at p260)

5. Then followed provisions requiring payment of a weekly basic wage set out in table "A" in respect of (inter alia) a part of Victoria which included South Melbourne and an additional amount according to classifications set out in table "B", including a classification into which Macdonald fell in respect of his employment by the respondent. (at p261)

6. The Conciliation and Arbitration Act provided by s. 61 that an award determining an industrial dispute should be binding on (amongst others) all parties who, having been notified of the industrial dispute, did not satisfy the Commission that they were not parties to the dispute, and also all members of organizations bound by the award. (It is not contested on this appeal that the Victorian Chamber of Manufactures, having been cited, was bound as a party to the dispute, and that consequently the respondent as a member of that organization was itself bound by the award.) By s. 119 the Act provided for the imposition by certain courts of a penalty for any breach of non-observance of an award by a person bound by it ; and it provided also that in proceedings for such a penalty the court might order an employer who had not paid an employee an amount to which he was entitled under an award to pay to the employee the amount of the underpayment. By s. 122 a penalty was provided for wilfully making default in compliance with an award ; and s. 123 conferred upon "an employee entitled to the benefit of an award" a right to sue in any court of competent jurisdiction for any payment by way of wages within twelve months from its becoming due to him. (at p261)

7. The fact and nature of the employment of Macdonald by the respondent were proved. The fact was also proved that the respondent paid Macdonald an amount which was less than the lowest rate fixed by the Frozen Goods Board Determination for the work that he was employed by the respondent to do. Finally, it was established that Macdonald was not at any material time a member of the union mentioned in the federal award. (at p261)

8. For the reasons indicated in Collins v. Charles Marshall Pty. Ltd.(1955) [1955] HCA 44; 92 CLR 529, at pp 548, 549, affirmed (sub nom. Charles Marshall Pty. Ltd. v. Collins) (1957) AC 274, at p 286, it is necessary to put aside s. 65 of the Conciliation and Arbitration Act which purports to invalidate (inter alia) a determination of a State industrial authority to the extent of any inconsistency with a federal award or in relation to a matter dealt with in a federal award. The question before us depends basically upon the meaning and application of s. 109 of the Constitution which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. The relevant State and federal laws here in question are, on the one hand, the provisions of the Labour and Industry Act in so far as, according to their terms, they required the respondent to pay Macdonald the rate which the determination fixed as the lowest rate to be paid to an employee doing his work, and, on the other hand, the provisions of the Conciliation and Arbitration Act in so far as they gave legal force to those provisions of the Transport Workers (General) Award which were expressed to bind the respondent to pay Macdonald, notwithstanding that he was not a member of the union, the amount of the minimum rate of wages prescribed for his classification. (at p262)

9. Both laws were susceptible of obedience at the one time : if the respondent had paid Macdonald at the lowest appropriate rate fixed by the State determination, or at any rate higher than that, he

would by so doing have complied with both laws. But it is said that inconsistency between them nevertheless existed because the intention of the federal law according to its true construction was to provide the exclusive answer to the very question to which the State law offered its own answer. If that is so, the argument for inconsistency should necessarily be upheld, on the authority of conclusive decisions of this Court and the Privy Council. (at p262)

10. But identification of the question to which the respective laws addressed themselves is all-important ; for the binding authorities on inconsistency insist in the plainest terms that where a federal law and a State law are both capable of being observed at the one time there is no inconsistency between them unless the federal law intends to lay down the only rule upon the subject for which the State law purports to prescribe a rule of its own. "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and s. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (Hume v. Palmer [1926] HCA 50; (1926) 38 CLR 441) But the reason is that, by prescribing the rule to be observed, the federal statute shows an intention to cover the subject matter and provide what the law upon it shall be" : Ex parte McLean [1930] HCA 12; (1930) 43 CLR 472, at p 483 In O'Sullivan v. Noarlunga Meat Ltd.(1957) AC 1, at p 28 the Privy Council approved this statement, and approved also the well-known statement of Isaacs J. in Clyde Engineering Co. Ltd. v. Cowburn (1926) 37 CLR 466, at p 489: "If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." Their Lordships then added : "In applying this principle it is important to bear in mind that the relevant field or subject is that covered by the law said to be invalid under the section" (i.e., s. 109)(1957) A.C. 1, at pp. 27, 28. (at p263)

11. What, then, was the question, or subject, with which the State law here relevant purported to deal? What was the subject of the "lowest wage" provisions of the State determination? Plainly it was the lowest rates of wages that employees in the industry should be entitled as against their employers to receive. It formed part and shared the character of the more general subject, namely the mutual rights and obligations of employees and employers under the terms and conditions of employment in the industry. Was it, then, the subject, or included in the subject, to which the federal Act and the minimum wage provisions of the award together were addressed ? This is a question of construction. (at p263)

12. The appellant bases his whole argument on the proposition that the question to which the federal provisions gave their answer was, what should be the minimum rates of wages for the employees of the employers bound by the award. But this is ambiguous, and it is of critical importance to perceive and resolve the ambiguity. The question may mean, what should be the minimum rates of wages to which any employee, whether unionist or not, should be entitled as against his employer ; but on the other hand it may mean, what should be the minimum rates of wages which the members of the union shall be entitled both to receive from the employers for their own services and also to have the employers pay to non-union employees for theirs. These questions are in completely different fields. The first is a question as to the rights and obligations inter se of each employee, whether unionist or non-unionist, and his employer. The second is the same in respect of unionist employees, but in respect of non-unionists it is a question as to the rights and obligations inter se of the union and its members on the one hand and each of the employers on the other. That is to say that as regards non-unionists it is a question as to the extent to which the employers' freedom to engage non-union employees on such terms and conditions as they may be willing to accept shall be

curtailed so that the members of the union shall not be at a disadvantage in the labour market. It is true that this latter question relates to the wages which the employers shall pay to their non-union employees, but it has nothing whatever to do with the legal situation between them. Consequently a federal law which, while intending to provide the exclusive answer to this question, does not exhibit any intention to confer rights upon the non-union employees and correlative obligations upon their employers leaves the subject of the non-unionist employees' minimum rights outside its operation, and therefore wide open to be governed by State laws which are capable of being simultaneously observed. (at p264)

13. One must, of course, recognize that it is not impossible for a State law governing mutual rights and obligations of employers and their non-union employees to be inconsistent with a federal law governing the mutual rights and obligations of the same employers and their unionist employees in respect of their non-unionist employees. For example, a provision of the former class which prescribed that the lunch-break should be taken only at a specified time of day would be inconsistent with a provision of the latter class which prescribed that the lunch-break shall be taken at a different time of day ; but the reason would be that observance of the one provision necessarily means disobedience of the other. Where, however, a federal provision conferring rights on A as against B as to the way in which B shall conduct himself in regard to a particular matter vis-a-vis C and a State provision conferring rights on C as to the way in which B shall treat him in regard to the same matter can both be observed on each relevant occasion - as is the case here, where the federal provision is in substance a prohibition upon paying non-unionists less than X dollars and a State provision is a command to pay non-unionists (as well as unionists) at least X + Y dollars - they are not incapable of standing together, for there is neither any opposition between their respective commands nor any implication in the federal provision that it shall be a source of rights in C against B in regard to that matter. (at p264)

14. That the federal law with which we are here concerned did not intend to deal at all, let alone exhaustively, with the subject of the lowest rates of wages which non-unionist employees should have a right to receive from employers in the industry is, it seems to me, a necessary conclusion from the language of the award, from the terms of the Act and from the limited character of the authority which the arbitral body was exercising when it made the award. The language of the award is plain enough : the employers who are bound are bound, not in favour of all their employees whether members of the union or not, but "in respect of" all such employees. There is an eloquent abstention from any form of words which might suggest that the award is conferring rights on employees who, being non-members of the union, were strangers to the dispute and the settlement of it. The Act likewise refrains from conferring any rights to the benefit of an award upon employees who are not bound by the award ; and the specification in s. 61 of the persons bound by an award does not include an employee who was neither a party to the dispute which the award settled nor represented by an organization which was a party to it. The provisions as to enforcement of awards, ss. 109, 119, 123, show plainly that such an employee cannot recover wages by virtue of the award. So far as he is concerned the award is res inter alios acta. The authority to make it was conferred as an exercise of the Parliament's power under s. 51 (xxxv.) of the Constitution to make laws with respect to arbitration for the settlement of industrial disputes extending beyond the limits of any one State ; and it would obviously be foreign to the whole concept of the settlement of a dispute, and to the whole concept of an arbitration for that purpose, to give the arbitrator authority to regulate the rights and obligations of persons who, not being parties to the dispute, could not in the nature of things be parties to the arbitration for its settlement. (at p265)

15. This is not only recognized by but is the foundation of the judgments in this Court which establish that a federal award may validly contain provisions protecting members of a disputing union by forbidding the disputing employers to give to non-members of the union less advantageous terms or conditions of employment than the award prescribes for members of the union (provided, of course, that the ambit of the dispute is wide enough for the purpose). Indeed, before the principle was established, Isaacs J., in contending for it, put the matter squarely upon its correct basis. In Amalgamated Engineering Union v. Alderdice Pty. Ltd. ; In re Metropolitan Gas Co. (1928) 41 CLR 402, at p 420 his Honour said : "The Act necessarily contemplates a dispute between given disputants. The Court, of course, cannot go beyond the dispute of those parties. It can only grant something for their benefit and in relation to them. But that is not the point here. The point is : What can they dispute about as an industrial matter affecting their relations ?" The italics are his Honour's, and I adopt their emphasis. Only "their" relations are within federal competence. The general question was settled in 1935 in the Metal Trades Case [1935] HCA 79; (1935) 54 CLR 387 , from which it will suffice to make two quotations. Latham C.J. said : "An agreement between two persons may produce an effect upon third persons, but it can impose duties or confer rights only upon those who make the agreement. Similarly an award may produce an effect upon third persons, but it can directly affect the legal relations only of those who were parties to the arbitration proceedings of which it is the result" (1935) 54 CLR, at p 403 . And Dixon J. was no less specific : "The reason for the award would be to compose the difference between the disputants, and it would be an award 'with respect to reciprocal duties and obligations of the parties appearing or represented in that dispute'. But one of the reciprocal duties would be to employ strangers only on the same terms as those parties" (1935) 54 CLR, at p 437 (at p266)

16. Six justices endorsed this view in R. v. Kelly; Ex parte Victoria [1950] HCA 7; (1950) 81 CLR 64 , in a joint judgment which contained very pertinent words : ". . . in such a case there is ex hypothesi a dispute between the organization and the employers whom it is sought to affect by the award. The award does not affect any non-disputant. It does not create . . . actual rights and duties as between persons who are non-disputants . . . it does nothing that is 'foreign to arbitration' (per Isaacs J. in Arnall's Case [1929] HCA 35[1929] HCA 35; ; (1929) 43 CLR 29, at p 44)"(1950) 81 CLR, at p 82 (at p266)

17. Finally, in Reg. v. Graziers' Association of N.S.W.; Ex parte Australian Workers' Union [1956] HCA 31; (1956) 96 CLR 317, the Court dealt specifically with the effect of a prescription in an award of the minimum rates to be paid to employees as read with a provision that the award should be binding on certain employers "in respect of their employees whether members of the union or not". In a joint judgment Dixon C.J., McTiernan J. and I said: "We are concerned only with its operation under the words 'or not'. By those words it purports to impose a duty upon the employers not to pay less than a stated minimum" (my italics) "to employees not members of the organization. To whom is this duty owed? Certainly not to such employees themselves. They are not parties to the dispute." Then we went on to point out that the inclusion of the provision in the award had in that case been sought by the employers, with the purpose of destroying the rights of the employees who were not members of the disputing organization to a higher minimum wage under a State award, and added: "It has no purpose except to exclude the operation of the State law and it can have no effect unless it be that." We had no occasion to decide whether it could have that effect, for we thought that there was no such dispute as would enable the provision to be validly made. Fullagar J., however, said that it was not clear to him that the result (of inconsistency) would actually follow, "because State awards give rights to individual non-unionists, whereas a federal award, to which they would not be parties, could not give such rights"(1956) 96 CLR, at p 324 To my mind there is no valid answer to this. His Honour referred by way of contrast to the decision in H. V. McKay Pty.

Ltd. v. Hunt [1926] HCA 36; (1926) 38 CLR 308, where the Court held that a State determination which according to its terms as applied to the circumstances of the case bound a certain employer to pay a minimum wage to a certain employee was invalid for inconsistency with a federal award, also prescribing a minimum wage, which had been made in settlement of a dispute to which both the employer and an organization of which the employee was a member were parties. The contrast with such a case as the present, where the employee was not a member of the organization, is in my opinion of fundamental importance. (at p267)

18. For these reasons I am of opinion that the Industrial Appeals Court was in error in holding that the information had been rightly dismissed, and the appeal should be upheld. (at p267)

TAYLOR J. This appeal by special leave arises out of proceedings in which the respondent was prosecuted for a breach of s. 198 (1956) 96 CLR, at p 324 of the Labour and Industry Act 1958 (Vict.). That sub-section provides that:

> "Where any employer employs any person on work for which the lowest prices or rates have been fixed in a determination, such employer shall be liable to pay and shall pay in full in money without any deduction whatever to such person the price or rate so determined."

The information alleged that the defendant having employed one Frank Murray Macdonald during the week ending on 15th September 1965 on work for which the lowest rates had been fixed in the determination of the Industrial Appeals Court made on 2nd August 1965 in connexion with a determination of the Frozen Goods Board did on 31st March 1966 at South Melbourne fail to pay in full to the said Frank Murray Macdonald the appropriate rates for such work in contravention of the provisions of the Labour and Industry Act 1958. (at p267)

2. By the Frozen Goods Determination (which I shall refer to as the determination) the minimum rates which might be paid to persons engaged in certain classifications of employment were fixed at the rates therein specified and it seems that Macdonald was, in fact, employed in work of a description covered by the determination. However, the respondent claims that the work upon which he was employed was also covered by an award of the Commonwealth Conciliation and Arbitration Commission (the award) and it was pointed out that the minimum rates payable to employees pursuant to that award were lower than those payable pursuant to the determination. In these circumstances it was contended that there was an inconsistency between the award and the determination and, between the respective statutory provisions which gave them force, and that, to the extent of the inconsistency, the Commonwealth provisions must be taken to prevail. The magistrate before whom the matter initally came accepted this submission and, thereupon, dismissed the information. A subsequent appeal to the Industrial Appeals Court was also dismissed and this appeal is now brought against the order of dismissal made by that Court. (at p268)

3. It is conceded for the purposes of the appeal that the work upon which Macdonald was engaged was work of a kind covered by both the determination and the award. But the argument is that, since he was not a member of the Transport Workers Union of Australia - the employees' organization which was the only employees' organization party to the dispute in settlement of which the award was made - he was not bound by the provisions of that award. That this is so is clear enough from the provisions of s. 61 of the Conciliation and Arbitration Act and the proposition has been plainly acknowledged by decisions of this Court. But a majority of the Court in Metal Trades Employers

Association v. Amalgamated Engineering Union (1935) 54 CLR 387 held that it was competent for an organization of employees to raise an industrial dispute with employers concerning the rates to be paid, not only to members of the organization, but also to employees who are not members. That is to say that an industrial dispute, as defined, may be raised by a demand by an employees' organization which relates, not only to matters pertaining to the relations between the members of the organization and employers, but also with respect to matters pertaining to the relations of employers with non-unionists engaged in the same industry. However, it is not competent for employers to raise a dispute by a demand made by employers upon an organization of employees that specified rates shall be paid to non-unionists employed by them (Reg. v. Graziers' Association of New South Wales; Ex parte Australian Workers' Union [1956] HCA 31; (1956) 96 CLR 317) (at p268)

4. By s. 61 of the Conciliation and Arbitration Act an award determining an industrial dispute is binding on all parties who appear or who were represented before the Commission and upon certain other categories of person but these do not include employees who were not and are not members of an employees' organization. This means, of course, that Macdonald was not bound by the award. Consequently, it is said, his rights, given to him by the Labour and Industry Act, cannot be affected and the award, which purports to apply to all employees doing work of the specified classifications "whether such employees are members of the claimant union or not", means that the obligation to pay the specified rates to non-unionists was an obligation imposed upon employers only qua the employees' organization and other persons bound by the award. But there can be no doubt that, although s. 61 is expressed in terms which do not include non-unionists in the categories of persons who are to be bound by an award, their rates of wages may be indirectly affected thereby for the respondent was bound by the award and to have paid the employee less than the rates specified in the award would have constituted an offence under the Commonwealth Act (ss. 119 and 122). (at p269)

5. In this case, however, the rate prescribed by the determination was higher than that prescribed by the award and, upon the basis broadly outlined above, it was argued that the obligation upon the respondent to pay the rates prescribed by the award was an obligation imposed only qua the union and that Macdonald's right to the higher rate prescribed by the determination remained unaffected. We have not before us, however, the log of claims which originated the dispute in settlement of which the award was made. It may, of course, have demanded that non-unionists should be entitled to receive wages at not less than the rates prescribed for all employees. Or it may have demanded that the minimum rate for non-unionists should be the same as that prescribed for members of the union and whether higher or lower than the rate, if any, prescribed by or under any State law. But to have had the log before us would not have assisted the appellant for, in proceedings such as these, it would not be possible for him to impugn the award on the ground that it extended beyond the ambit of the dispute (Harrison v. Goodland [1944] HCA 41; (1944) 69 CLR 509). We must, therefore, take the award as we find it. In terms it provides (cl. 10) that the minimum rate of wages required to be paid by employers shall, in any area or place indicated in the annexed Table A, comprise the amount of the basic wage assigned to that area or place and in addition the amount assigned in the appended Table B for an employee or work of a class indicated therein. The award was made on 20th February 1959 and the determination on 2nd August 1964 and, by the latter instrument a higher rate of wages was prescribed for employees performing the work which Macdonald was engaged to perform and was, in fact, performing. In my view, it was not, by reason of s. 109 of the Constitution, operative, by virtue of the Labour and Industry Act, to impose upon the respondent an obligation to pay a higher minimum rate than that prescribed by the Award (cf. per Isaacs J. in Cowburn's Case [1926] HCA 6; (1926) 37 CLR 466, at pp 491 et seq). The fact that the

determination was made after the award is, however, not of significance for the result would be the same if the determination had been made earlier. (at p270)

6. This, I think, is sufficient to dispose of the appeal and I do not, therefore, proceed to examine the consequences of the proposition that the wages prescribed by the award are wages prescribed to be paid for work performed subject to the many provisions of the award. There are, of course, many differences between the conditions prescribed by the award and those prescribed by the determination. Reference was made to some of these in the course of argument and to the difficulty, or, even, the impossibility of seeking to define the respondent's obligations by reference to both of these instruments, or, partly by reference to one and partly by reference to the other. (at p270)

7. I would dismiss the appeal. (at p270)

MENZIES J. The question for decision upon this appeal by special leave from the Industrial Appeals Court of Victoria, is, whether an employer commits an offence under the Labour and Industry Act 1958 (Vict.) - which I shall call "the State Act" - when, being a party to a federal award prescribing the minimum wages to be paid to all employees, including employees not members of a union a party to the award, it pays an employee, who is not a member of such a union, less than the wages fixed by a determination of a Victorian wages board, established under the Labour and Industry Act, as the lowest rate to be paid to a person doing the work of that employee. (at p270)

2. In the circumstances just stated an offence under s. 198 of the Victorian Act was committed by the respondent in respect of its employee, one Macdonald, unless the relevant provisions of the Labour and Industry Act are inconsistent with federal law, i.e., the Conciliation and Arbitration Act - which I shall call "the Commonwealth Act" - requiring compliance with awards made thereunder. (at p270)

3. It is now fully established that an award, made under the Commonwealth Act, can validly impose obligations upon an employer in respect of employees not members of a union party to the award. In this case therefore the Transport Workers (General) Award, 1959 - an award made under the Commonwealth Act - (which I shall call "the federal award") required the respondent to pay his employee Macdonald, who was not a member of the Transport Workers Union, at the appropriate rate of wages therein prescribed as the minimum rate of wages to be paid. The Frozen Goods Determination made by the wages board under the State Act (which I shall call "the State determination") prescribed as the lowest rate to be paid to a person employed as Macdonald was employed a rate of wages higher than the minimum rate fixed by the federal award. In fact the respondent paid Macdonald at a rate lower than those prescribed by either the federal award or the State determination. The respondent was prosecuted for breach of the State Act and its only defence was that the State Act, in so far as it is material, was inconsistent with federal law and was to that extent invalid. That defence succeeded. An appeal to the Industrial Appeals Court failed. The respondent has no merits, but is entitled to any advantage that it can obtain from the existence of federal law imposing obligations upon it. (at p271)

4. The question is then, whether a State command to an employer to pay a non-unionist employee at a minimum rate of wages higher than that prescribed by federal law as the minimum rate of wages to be paid by the employer to that employee gives rise to inconsistency between State and federal laws with the resulting invalidity of the State law. I have posed the question this way because it is with the obligation of the employer and not the rights of the employee that this case is concerned. The respondent is charged with a criminal offence under State law ; its failure to pay the minimum

wages prescribed by the federal award would expose it to prosecution under federal law. It is the existence of different prescriptions, each supported by the sanctions of the criminal law, that gives rise to the real difficulty in this case. The legal rights of Macdonald under the federal award do not seem to me to require examination. (at p271)

5. It was established by the Metal Trades Case [1935] HCA 79; (1935) 54 CLR 387, that, in the settlement of an industrial dispute between employers and an organization of employees, obligations can validly be imposed upon the employers in respect of employees not members of unions party to the dispute. The reason for this decision is not I think of particular importance here ; what is of importance is the result, namely, that there comes into existence an obligation resting upon employers under federal law and supported by legal sanctions to pay the minimum rates prescribed. The point now to be determined, as it appears to me, is simply whether this obligation under federal law is exclusive and exhaustive. The appellant contends that it is not, and that State law can validly impose different and more onerous obligations upon employers than those imposed by federal law so long as there is no actual contradiction of federal law by State law. It was pressed upon us that the respondent here in paying the minimum rate of wages determined by the State determination would also be fulfilling his obligation under federal law to pay the minimum rates fixed by the award. This of course is true enough but to my mind it is not decisive. The problem here arises in different circumstances, namely, where the payment of wages at a particular rate would meet the employer's obligations under federal law but would not meet its obligations under State law, if applicable. (at p272)

6. Although the question now arises simply in relation to minimum rates of pay, it could, of course, arise with respect to other minimum requirements of which some instances may be given. Thus, if minimum prices were to be fixed under a valid law of the Parliament, could a State by its legislation fix higher minimum prices ? Again, if minimum insurance rates were to be fixed under a valid law of a parliament could a State fix higher minimum rates ? Finally, could a State fix a higher minimum age for marriage than that fixed by Commonwealth law? In general there is little doubt that a negative answer should be given to each of these questions notwithstanding that it would be possible to obey both laws. Such laws would fail for inconsistency on the simple ground that the Commonwealth law was intended to be exhaustive and exclusive leaving no room for any State prescription. Nearer home, perhaps, are the actual decisions that State laws that would require payment of wages in excess of award minimum wages are unconstitutional in circumstances when both the employer and the employee in question are bound by the federal award. (Clyde Engineering Co. Ltd. v. Cowburn [1926] HCA 6; (1926) 37 CLR 466; H. V. McKay Pty. Ltd. v. Hunt(1926) [1926] HCA 36; 38 CLR 308) I see no reason why the same conclusion must not be reached in this case if attention be directed - as I think it should - to the obligations of employers rather than to the rights of employees. (at p272)

7. Because I have reached the conclusion that the obligations imposed by federal law upon employers bound by the Transport Workers (General) Award to pay wages at the minimum rates fixed is exhaustive and exclusive with respect to unionist and non-unionist employees alike I consider the decision appealed against was correct and that this appeal should be dismissed. (at p273)

8. There is what is perhaps merely an alternative way of stating the matter. In Clyde Engineering Co. Ltd. v. Cowburn [1926] HCA 6; (1926) 37 CLR 466, it was decided that a State law is inconsistent with federal law if its effect, if enforced, would be to destroy the adjustment of industrial relations made by a federal award. Part of the adjustment made by the award here was the

fixing of common minimum wages to be paid by employers to unionists and non-unionists alike ; if the State law were to be enforced the employers bound thereby must, as a matter of legal obligation, pay non-unionist employees a different and higher minimum wage than that payable under the award to unionists. In this way there would be an interference with the adjustment of industrial relations made by the award. Instead of common conditions there would be different conditions for unionists and non-unionists. (at p273)

ORDER

Appeal dismissed with costs.

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