in order to gauge the impressions of offensiveness and disorderliness it might reasonably have conveyed to the public. Thus, elements which constituted a picture of offensiveness could also go to the question of disorderliness; the learned judges did not seek to divide the total picture into component parts and judge of the offensiveness or disorderliness of each part.

By this approach, the majority reached the stage where an opinion of the ordinary and reasonable man's reaction was required. If, especially in relation to the offensiveness of the defendant's conduct, they erred in that final stage, it was not, it is submitted, the result of an imperfect or unjust approach, but rather of the natural conservatism of the law.

*Jonathan Wells**

BLACKLEY v. DEVONDALE CREAM (VIC.) PTY. LTD.

ARBITRATION AND SECTION 109

The *Metal Trades* case[1] held that a Commonwealth award could regulate the minimum rate of wages to be paid by an employer to all his employees whether or not they were members of the disputing union, although there was no direct control over persons not involved in the dispute. In *Blackley* v. *Devondale Cream (Vic.) Pty. Ltd.*[2] the High Court considered whether such a provision was inconsistent with a State law obliging an employer to pay a higher rate. Devondale Cream employed Macdonald to do work covered by a classification in the Transport Workers Award, which laid down a minimum rate of wages to be paid to all employees whether or not they were members of the Transport Workers Union, the only union bound by the award. The company was a named party to the award, but Macdonald was not a Transport Workers Union member. The determination of the Frozen Goods Board, a Victorian statutory body, prescribed a higher rate of wages to be paid to Macdonald than that specified in the Arbitration Commission award. It was alleged that the company had failed to pay Macdonald the appropriate rates, in breach of the Labour and Industry Act 1958.

The company's contention that the rate fixed by the Frozen Goods Board was inoperative under section 109 of the Constitution for inconsistency with the federal award had been upheld at first instance, and by the Industrial Appeals Courts of Victoria. The appeal to the High Court against this decision was dismissed by a majority.

It was argued for the appellant that the State could give Macdonald rights against his employer since that subject was outside the field covered by the award. Barwick C.J. could not accept such a contention as " . . . it attempts to dissociate in an inadmissible way the right of an employee to recover a

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1. (1935) 54 C.L.R. 387.
2. (1967) 117 C.L.R. 253.

wage from the obligation of the employer to pay it"[3]. The award placed an obligation on the employer to pay a stated wage, which was enforceable both civilly and criminally. "Properly understood" the award stated that the specified wage was the only one which by law the employer was obliged to pay.

The rationale for such a provision in an award is to protect members from unfair competition by employees who will work for less than the award rate. A State law which required an employer to pay a higher wage to a non-union employee would not seem to be opposed to this. However, in *Clyde Engineering* v. *Cowburn*[4], Isaacs J. stated that "[a] State law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute". This dictum weighed heavily with Menzies J. and he had no difficulty in holding that the award intended to lay down complete and uniform rates of wages to be paid to all transport workers. His Honour agreed with Barwick C.J. that the emphasis should properly be placed on the employer's obligation to pay the wage, since this was the area common to the award and the State law. Since the award intended that the obligation it imposed on the employer should be the only one, it was of no moment whether Macdonald had an enforceable right to these wages under the award.

McTiernan J. concurred in the reasons given by Barwick C.J., and Taylor J. delivered a judgment to similar effect, stating that although some employees were not bound by the award, their wages could be indirectly affected. It was not then open to State law to modify in any way the determination of the Arbitration Commission.

Kitto J. dissented. Since both laws were susceptible of obedience at the same time, they were only inconsistent if the federal law provided a complete answer to the very question to which the State law offered its own answer. "What then, was the question, or subject, with which the State law here relevant purported to deal"[5]? His Honour defined the subject matter of the State determination as the lowest wage which employees in the industry should be entitled as against the minimum rates of wages which members of the union were entitled to receive from the employers for their own services, and also to have the employers pay the non-unionists for theirs.

Dicta by Latham C.J. and Dixon J. in the *Metal Trades* case were cited in support of the proposition that an award could only affect the legal relations of the actual disputants[6]. An award may have an indirect effect on third parties by controlling the behaviour of one of the disputants in relation to them, but it cannot confer enforceable rights and obligations on persons outside the dispute. Since the federal award did not give any rights to non-union employees, this area was wide open to control by State laws which were capable of being simultaneously observed. The federal award dealt with the relationships between union members and employers; the State law covered mutual rights and obligations of non-union employees and the employers. The

3. *Ibid.*, 258.
4. (1926) 37 C.L.R. 466, 499.
5. 117 C.L.R. 253, 263.
6. 117 C.L.R. 253, 265-6.

two laws dealt with different subjects and since both could be complied with by paying the higher rate fixed by the State authority, there was no inconsistency. While the majority emphasized that the obligation on the employer to pay the wage was the element common to both laws and therefore the only relevant consideration, Kitto J. showed that the only duties imposed by the award and State law arose in different contexts in the course of legislation upon two entirely different subject matters.

The possibility of obedience to both laws as a decisive test of inconsistency was rejected in *Cowburn's* case. The absence of a direct contradiction between two laws does not preclude inconsistency, even if it is possible to place them in different "fields". An award dealing with relations between an employer and one group of employees, and a State law dealing with the same employer and another group of employees are not *a priori* mutually exclusive. It is incorrect in this case to assert that the laws are unrelated, for both deal with the subject of minimum wages to be paid to non-unionist employees. In other words, the content of the duty must be considered independently of the relationships involved—for the purposes of s.109 it does not matter where the correlative rights lie.

In *Ex parte McLean*[7], Dixon J. stated that when both laws mean to state what shall be the law upon a specific matter "it probably would be of no importance whether each legislature was directing its attention to the same general topic, or had dealt with the same act or omission in the process of legislating upon two entirely different subjects". To much the same effect Latham C.J. held in *Colvin* v. *Bradley Brothers*[8] that "[t]he application of s.109 does not depend upon any assignment of legislation to specific categories which are to be assumed on an *a priori* basis to be mutually exclusive . . . If the Commonwealth law is valid it prevails over any State law which is inconsistent with it, even though . . . the Commonwealth Parliament could not have enacted [it] in all its parts". In the light of these cases, "inconsistent" cannot be given the limited meaning which Kitto J. ascribes to it.

At this point, it becomes clear that the real matter in dispute is not the respective rights and duties of the employers and employees, but the criteria for ascertaining inconsistency under s.109. Kitto J. was only prepared to apply a very limited test—in both laws the duty imposed on the employer must arise in the same context. The majority, however, was prepared to hold that any upsetting of the scheme of a Commonwealth award was inconsistent with it. Some of the obscurities in the judgment of the Chief Justice become clearer when it is speculated that this was the inarticulate basis of his decision. The assertion that, properly understood, the award enacted that the sum so to be paid was the only sum which by law the employer was obliged to pay, is really dependent on this basic premise. Similarly, His Honour's opinion that this was a case of direct inconsistency because "[o]bedience to the one, the award, is disobedience to the other, the determination" is not very convincing. Inconsistency was only produced because of the implied norm in the Conciliation and Arbitration Act that any interference with the scheme of an award would be inconsistent with it. It was, therefore, a case of indirect inconsistency.

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7. (1930) 43 C.L.R. 472.
8. (1943) 68 C.L.R. 151.

Whether or not the implication of this norm was justified is another matter, but the decision of the majority was probably more in accord with the rules developed in earlier cases.

The implications of the decision on the future of State industrial control are serious. The Arbitration Commission can now exercise an effectively exclusive control over any industry which falls even partially within its jurisdiction.

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