H. C. OF A. 1911.

WILSON v. JONES.

Griffith C.J.

substantially the whole of the costs were incurred in establishing the validity of the codicil of 14th April 1903, I do not think that, even in that case, there would be any sufficient reason for altering the order made by *Street* J. as to the costs. For these reasons I think that the appeal should be dismissed.

BARTON J. I agree. It is only a weak form of expression to say that I share the doubt that *Street* J. expressed as to whether the appellant really believed the truth of the case he set up.

O'CONNOR J. I agree.

Appeal dismissed.

Solicitor, for appellant, *A. D. Oliver.*
Solicitor, for respondents, *A. C. Ebsworth.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . } RESPONDENTS,

H. C. OF A. 1911.

MELBOURNE, *May* 29, 30, 31; *June* 1, 2.

SYDNEY, *June* 27.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Industrial Conciliation and Arbitration—"Industry," meaning of—Registration of organization—Association of employés—Certificate of registration, effect of—Evidence of existence of dispute—Municipal corporation, exemption of, from federal legislation—Municipal trading—Commonwealth Conciliation and Arbitration Act 1904-1910 (*No.* 13 *of* 1904 *and No.* 7 *of* 1910), *secs.* 4, 21, 40A, 55, 57.

An "industry" contemplated by the *Commonwealth Conciliation and Arbitration Act* 1904-1909 means an enterprise in which both employers and employés are associated, and does not include the vocation of persons doing a particular kind of work in connection with several different classes of such enterprises.

Held, therefore, by *Griffith* C.J. and *Barton* and *Isaacs* JJ. (*O'Connor* and *Higgins* JJ. dissenting), that an association of land engine-drivers and firemen, whose members were employed indiscriminately in mines, in timber yards, in tanneries, in soap and candle works, &c., was not, under sec. 55 (1) (*b*), entitled to be registered as an organization.

A certificate by the Registrar of the registration of an organization given under sec. 57 of the above Act is not conclusive evidence of the validity of such registration.

A certificate given by the Registrar under sec. 21 of the above Act that a dispute relating to industrial matters is an industrial dispute extending beyond the limits of one State is not evidence of the existence of an industrial dispute within the meaning of the Act.

Per Higgins J.—It is the duty of the Court, on a case stated under sec. 31, to answer judicially the questions asked in pursuance of that section, and to leave the consequences of the answers for the President of the Arbitration Court to determine.

Semble, assuming that a municipal corporation is an instrumentality of State government, if the corporation engages in a trading enterprise, *e.g.*, the supply of electricity to those who choose to buy it, it is not in respect of such enterprise exempt from federal legislation under the rule laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91.

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration for the opinion of the High Court.

The following, so far as material, is the case stated:—

"1. The claimant is an association of employés which is in fact registered as an organization under the Act in or in connection with what is styled the industry of 'land engine-driving and firing.'

"2. Members of the association are employed for the purposes of engines in many undertakings of various characters, *e.g.*, in mines, in timber yards, in tanneries, in soap and candle works.

"3. Objection has been taken at the hearing by certain respondents that such an association is incapable of registration under the Act.

"4. No application has been made to the Registrar to cancel, or to apply for the cancellation of the association.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

"5. Objection has also been taken that certain of the respondents are not subject to the power of the Court, on the ground that they are State agencies or instrumentalities. For instance—

The Board of Water Supply and Sewerage, Sydney.

The Mayor, Aldermen, Councillors and citizens of the City of Melbourne.

"6. These respondents are constituted under State Acts, and the parties are at liberty to refer to all relevant Acts in argument.

"7. Objection has also been taken by certain of the respondents that, notwithstanding sec. 25 of the Act as amended, this Court is bound by the ordinary rules of evidence in dealing with evidence tendered to show that there is jurisdiction for this Court to arbitrate, *e.g.*, to show that there is or is not a dispute or a dispute extending beyond the limits of any one State.

"8. In pursuance of sec. 21 of the Act, the Registrar issued a certificate which has been put in evidence to the effect that 'the said dispute in connection with the land engine-driving and firing industry is an industrial dispute extending beyond the limits of any one State.'

"The claimant contends that the certificate is *primâ facie* evidence of the existence of a dispute relating to industrial matters, and in connection with the land engine-driving and firing industry, as well as of the fact that the dispute is one extending beyond the limits of any one State.

"9. I have prepared provisionally an award, but in consequence of the views of the High Court as expressed in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.*; the *Bootmaker's Case* (1), I am doubtful whether the High Court will not consider the provision for a Board of Reference to be a delegation of my discretion or powers and to be invalid in whole or in part. Sec. 40A of the Act purports to permit a delegation to some extent; but is section 40A valid?

"I submit the following questions for the opinion of the High Court—questions arising in the proceeding which are, in my opinion, questions of law :—

"1. Is an association of land engine-drivers and firemen

(1) 11 C.L.R., 1.

an association that can be registered under sec. 55 of the Act?

"2. If not, is the objection fatal to the claim when the case comes on for hearing?

"3. Are the respondents whose names appear in paragraph 5 hereof, or any, and if so which of them, subject to the jurisdiction or award of this Court?

"4. Is this Court 'bound by any rules of evidence' when evidence is tendered to show or to negative jurisdiction?

"5. Is the certificate of the Registrar to be treated as *primâ facie* evidence of the fact of the existence of a dispute relating to industrial matters, and in connection with the land engine-driving and firing industry, or of any other and what facts?

"6. Has this Court power to include in the award the provisions for a Board of Reference as appearing in the proposed award, or otherwise; and how otherwise?"

The only part of the award above mentioned which is material to this report is the following:—

"4. Board of Reference.

"Should any question or dispute arise between the parties out of this award, or respecting any other matter of their industrial relations, it may be referred to a Board of Reference. The Board of Reference includes either a Commonwealth Board or a Board for the State of employment.

"In either case the Board shall consist of an equal number of employers (or their representatives) and of employés (or their representatives), chosen in the manner approved (whether after or before the choice) by the Registrar or the Deputy Registrar.

"The certificate of the Registrar that the Board is properly constituted shall be conclusive for the purposes of this award.

"If the members present at the meeting of the Board are equally divided on any question, the decision of the Registrar or Deputy Registrar may be taken, and his decision shall be taken to be the decision of the Board.

"The decision of the Board shall be final and conclusive as between the parties to the reference."

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Starke, for twenty-two of the respondents. As to the first question, the association is not validly constituted under the Act. In order to constitute an industrial dispute the dispute must be a dispute in an industry, and an industry is something which deals with the production or distribution of commodities. There must be some claim put by one party to another. There must be some *nexus* between the members of the class putting forward the claim. That *nexus* is to be found either in the industry in which they are employed or in some historical association in industries which have been worked together. Sec. 55 (1) (*b*) and Schedule B require an industry as the foundation of an organization, and Schedule B indicates that there must be an industry carried on by some employer. There must be some association together of the persons in a proposed organization before an organization can exist. [He referred to *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1).] If callings in the abstract are to be the basis of an organization, its members must be of one calling only, and this organization consists of persons belonging to different callings, *e.g.*, engine-drivers, firemen, greasers, &c. The definition of industry in sec. 4 does not use "calling" in that sense. The word there may refer to the calling of the employer, *e.g.*, an engineer. In sec. 2 (*d*) of the Act of 1910 the words "branch of an industry and a group of industries" show that there must be something which is called an industry. If persons may combine according to the services they perform, there might be an organization of manual labourers.

As to the second question, the certificate of the Registrar under sec. 57 is only conclusive as to the fact of registration, not that the organization is an organization. [He referred to the *Jumbunna Coal Case* (2).] Sec. 60 does not affect the right of a party to take the objection that the organization is not a lawful organization. [He referred to *Carroll* v. *Shillinglaw* (3); *In re National Debenture and Assets Corporation* (4) as to the effect of a certificate of registration.]

[ISAACS J. referred to *Brosnan* v. *Trait* (5).]

(1) 6 C.L.R., 309, at p. 370, *per Isaacs* J.
(2) 6 C.L.R., 309, at p. 312.
(3) 3 C.L.R., 1099, at p. 1108.
(4) (1891) 2 Ch., 505, at p. 527.
(5) 29 V.L.R., 280; 25 A.L.T., 37.

If the existence of the organization is a condition precedent to jurisdiction no certificate can validate the organization.

The fourth question turns upon sec. 25 of the Act of 1904 as amended by sec. 6 of the Act of 1910. The final determination whether there is a dispute must proceed upon legal evidence. Sec. 25 never comes into operation until the Court is properly seized of the case. The President may, for his own satisfaction, inquire whether there is a dispute, and may do so on what evidence he chooses, or he may leave the question alone. But when his award is attacked on the ground of want of jurisdiction this Court will determine the fact of the existence of a dispute upon legal evidence.

The fifth question is founded upon sec. 21 of the Act of 1904. That section is invalid under the Constitution. The Parliament cannot make the certificate of the Registrar proof of a fact upon which to found the jurisdiction of the Court. The certificate is only made evidence that something which is said to be a dispute extends beyond one State, not that something which is called a dispute is a dispute.

As to the sixth question, the Board is not one within sec. 40A (sec. 10 of the Act of 1910), and if it be compulsory on the application of one party, is unauthorized. If it is optional it is unauthorized, but can do the respondents no harm.

[GRIFFITH C.J.—If it is optional and a determination is given by the Board, how is it to be enforced? Is a breach of it subject to a penalty under sec. 44?]

There is no Court which could enforce it.

As to the third question, under the Constitution the Commonwealth cannot impede or interfere with State functions. Municipal government is a State function. Any function which is conferred upon such a body as a municipality to carry on for the benefit of the community, as opposed to private benefit, is a State function. If the Government, by its agency, takes control of such a matter as electric supply and uses it for the public benefit, it is a Government function. The only test of what is a Government function is, has the Government taken upon itself to do the thing for the benefit of the community? Until *South Carolina* v. *United States*

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

(1) the Supreme Court of the United States had always denied the power of the Federal Government to tax the funds of municipalities howsoever arising. The test put is, has the particular function been conferred upon the municipality by the State? [He referred to the *Electric Light and Power Act* 1896, secs. 10, 15, 16, 17; and the *Melbourne Corporation Acts* (6 Vict. No. 7, &c.).] All the moneys from electric lighting are paid into the general municipal fund, and the Commonwealth cannot tax that fund. Municipalities have been held to be State instrumentalities since *Merryweather* v. *Garrett* (2). *United States* v. *Railroad Co.* (3) is most strongly in favor of this view, and until the *South Carolina Case* (1) that view was maintained. Even if the power given is to carry on trade for the benefit of the public it still is a government function, and whether it is compulsorily exercised or is merely permissive. If a power is conferred upon a creature of the State which has no existence except as a creature of the State, the exercise of that power is by the State by means of its auxiliary. [He referred to *South Carolina* v. *United States* (4).]

[ISAACS J. referred to *Broughton* v. *Pensacola* (5); *Mount Pleasant* v. *Beckwith* (6); *Mobile* v. *Watson* (7); *Western Saving Fund Society* v. *City of Philadelphia* (8); *Bailey* v. *Mayor of New York* (9); and *Pioneer Co.* v. *Board of Education* (10), as showing that in the United States a distinction is drawn between those functions of municipalties which are regarded as State functions and those which are not, the distinction being based on the English cases of *Moodalay* v. *Morton* (11) and *R.* v. *McCann* (12).]

The English cases are not relevant to the present. They deal only with the question whether the occupation of buildings is occupation by a public official. The American decisions referred to deal with the question whether municipalities are liable for negligence in carrying out their duties, and it has been decided that in respect of property they hold, or contracts they enter into,

(1) 199 U.S., 437.
(2) 102 U.S., 472.
(3) 17 Wall., 322.
(4) 199 U.S., 437, at pp. 454, 458, 459, 464, 469.
(5) 93 U.S., 266, at p. 269.
(6) 100 U.S., 514, at p. 533.
(7) 116 U.S., 289, at p. 304.
(8) 31 Penn. St. R., 185.
(9) 3 Hill, 531.
(10) 136 Am. St. Rep., 1021.
(11) 1 Bro. C.C., 469.
(12) L.R. 3 Q.B., 141, at p. 146.

their liabilities are the same as those of private individuals. Here there is no doubt as to the liability of municipalities for negligence and as to their obligation to carry out contracts. Those cases have no bearing on the power of the Federal Government to interfere with municipalities. If this principle is not to be followed then the supply of electricity is as much a public purpose as railways or gas or water supply. No distinction can be made between electricity applied to public lighting and that sold to private persons. Whatever the principle to be applied is, this award will operate directly upon the general municipal fund, no matter how they were derived.

[GRIFFITH C.J.—Would not the express power as to conciliation and arbitration get rid of the implied power of non-interference?]

No. The power of conciliation and arbitration is in the same position as that of taxation. The taxation power is general, but this Court has applied to it the doctrine of non-interference with State agencies. As to the Sydney Board of Water Supply and Sewerage, he referred to 43 Vict. No. 32, secs. 8, 32, 34; 51 Vict. No. 28; 53 Vict. No. 16.

Hall, for the claimant. As to the first question, the word industry may be looked at from the employés' view as well as from the employers'. In the former case a man's calling in the ordinary sense is his industry. His industry is determined, then, by the class of work he does—*e.g.*, engine-driving, carpentering. His employer may then be said to be connected with that industry, and a number of employers connected with that industry could form an organization. The Court should decide this question having regard to sec. 55 of the Act of 1910, although this organization registered before that Act. A man's calling does not alter so long as he does the same class of work.

As to to the second question, the Arbitration Court can deal with a matter in which the organization concerned has not been properly registered if it can then be properly registered. When a means is provided for getting rid of a registration, and that means is not availed of, the party who might have availed himself of it is estopped from denying the validity of the registration when the case comes on. The President, under sec. 57, is entitled

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

to treat the certificate of the Registrar as conclusive evidence of the registration, and that the association was registrable. Even if the registration can be attacked it is only by prohibition.

[HIGGINS J.—Sec. 60 (1) (*h*) shows that cancellation of registration may be applied for upon a ground which goes to the root of the jurisdiction.

ISAACS J.—referred to the *Companies Act* 1908 (Eng.) sec. 17 as to the effect of a certificate.]

As to the fourth question, the inquiry as to whether there is jurisdiction is a "proceeding under the Act" within sec. 25 as amended by sec. 6 of the Act of 1910. [He referred to *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1).]

As to the fifth question, the certificate presupposes a dispute. The Registrar would not be justified in giving his certificate unless he found there was a dispute.

As to the sixth question, the only provision for a Board of Reference is in sec. 40A. This Board is not within that section, but may be brought within it by providing for the President appointing a Board consisting of persons selected by employers and employés. Sec. 40A is valid. So long as the Parliament maintains the arbitral form of dealing with industrial disputes they may choose whatever means they like to carry out their power.

As to the third question, counsel did not argue as to Board of Water Supply and Sewerage, Sydney. As to the City of Melbourne, in *Murray* v. *Wilson Distilling Co.* (2); *South Carolina* v. *United States* (3) is referred to without casting any doubt upon it.

[GRIFFITH C.J.—It has been taken for granted so far that municipal bodies in Australia are entitled to all the rights and exemptions to which they have been held to be entitled in the United States. That is a very large assumption.]

The distinction laid down in *South Carolina* v. *United States* (3) between functions carried on by municipalities for public pur-

(1) 4 C.L.R., 488, at p. 496.
(2) 213 U.S., 151, at p. 173.
(3) 199 U.S., 437.

poses and those for other purposes is a valid one. The Court will not apply the doctrine of State instrumentalities to municipalities unless it is clear that the State has cast upon the municipalities the duty of doing the particular work in question.

Starke, in reply.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. The first question submitted by the special case is whether an association of land engine-drivers and firemen is an association that can be registered under sec. 55 of the *Commonwealth Conciliation and Arbitration Act*. That is a pure question of construction. Our duty is to construe the Act as we find it, and not to substitute what we think would be a more convenient or useful construction.

The facts relevant to this question are thus stated:—

"The claimant is an association of employés which is in fact registered as an organization under the Act in or in connection with what is styled the industry of 'land engine-driving and firing.' Members of the association are employed for the purposes of engines in many undertakings of various characters, *e.g.*, in mines, in timber yards, in tanneries, in soap and candle works."

Sec. 19 (*b*) of the *Commonwealth Conciliation and Arbitration Act* provides that the Court shall have cognizance of, *inter alia*, "all industrial disputes which are submitted to the Court by an organization, by plaint, in the prescribed manner." The plaint in the present case purports to be submitted to the Court under that provision, and unless the case falls within it the Court has not any jurisdiction to deal with it since it is not within any other provision. The question, therefore, goes to the root of the proceedings.

The term "organization" means an organization registered pursuant to the Act (sec. 4). Sec. 55, which prescribes the conditions of registration, is as follows:—

"55. (1) Any of the following associations may, on compliance with the prescribed conditions, be registered in the manner prescribed as an organization:—

H. C. OF A. 1911.

FEDERATED ENGINE DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Griffith C.J.

"(*a*) Any association of employers in or in connection with any industry, who have in the aggregate, throughout the six months next preceding the application for registration, employed on an average taken per month not less than one hundred employés in that industry; and

"(*b*) Any association of not less than one hundred employés in or in connection with any industry."

Sec. 4 defines the term "industry" as follows:—

"'Industry' means business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

The words from "excepting only" to the end of the definition have been repealed by sec. 2 (*d*) of the Amending Act of 1910, and the following words substituted "and includes a branch of an industry and a group of industries." The registration of the claimant organization was however made in 1908, and its validity depends upon the law as it then stood; but I do not think that the amendment, even if it applied to the present case, would make any difference in the result.

The question for determination, then, is whether the claimants are an association of "employés in or in connection with any industry" within the meaning of sec. 55 (1) (*b*). The answer to the question depends upon the sense in which the term "any industry" is there used.

It is to be noted that the words are not "persons engaged in any industrial vocation" or "engaged in industry," but "employés in or in connection with any industry."

It is, however, contended for the claimants that the term "any industry," as used in the second member of sec. 55 (1), means "industrial vocation," that is to say, that it is sufficient that the associated employés shall be engaged in the same calling or vocation, entirely irrespective of the branches of industry in which their employers are engaged. The respondents for whom

Mr. *Starke* appeared contend, on the other hand, that the term "industry" as used in sec. 55 (1) (*b*) connotes an entirety different from and outside of the mere personal vocation of the employé, and should be construed objectively, as denoting a collective enterprise in which, to use the words of sec. 7, employers and employés are associated.

It is conceded that the facts as set out in the special case are stated with a view to raise, and do sufficiently raise, this point.

The claimants do not deny that in sec. 55 (1) (*a*), which speaks of "employers in or in connection with any industry" and, of "employés in that industry," the word "industry" must bear the meaning put upon it by the respondents. The respondents, very naturally, ask, why should the same word, twice used in the same section in the same phrase "in or in connection with any industry," have a different meaning according as the phrase is used to qualify the term "employer" or "employé?"

The claimants' contention is based on the words "calling," "service" and "employment" in the definition of "industry." Each of those words is capable of being used either subjectively or objectively. For instance, the phrase "A. B. is employed in gardening" may mean either that A. B. is employed by another person to do gardening work or that he occupies himself in gardening. That is to say, the words "are employed" in the definition may be used in the passive or in the reflective sense. When a word is capable of two meanings reference must be had to the subject matter and to the context to ascertain the true sense.

The terms to be interpreted are not "calling," "service" and "employment" standing alone, but those terms qualified by the words "in which persons are employed for pay," etc., suggesting something outside of and larger than the employés and in which they may be embraced. When the same words qualify the terms "business," "trade," "manufacture" and "undertaking," the term so qualified obviously means the collective enterprise in which the employés are engaged, and the word "employed" is, equally obviously, used in what in inflected languages is called the passive voice. If ordinary rules of construction are applied, the terms "calling," "service," "employment," and the word

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO LTD.

Griffith C.J.

"employed" used in connection with them, must receive the same construction. On the contrary view there is a sudden change of meaning of the same word in the same sentence, and the phrase "in which persons are employed," which as to part of the subject means "in which persons are employed by an employer," means as to another part "in which persons engage."

Regarding the matter as one of ordinary grammatical construction these considerations would, in my opinion, be conclusive. But there is much more in the case. The words "employment" and "employed" are frequently used in the Act, and in every instance, leaving out the contested one of sec. 55 (1) (*b*), in the sense which I have indicated as the right one to be adopted in that instance also. I will refer to a few of them. In the definition of the term "industrial dispute" in sec. 4 we find "Industrial dispute . . . includes (i.) any dispute as to industrial matters arising between an employer or an organization of employers on the one part and an organization of employés on the other, and (ii.) any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State." Here the employé is regarded as a person employed by an employer in an industry in which both are engaged.

So, in the definition of the term "industrial matters" that term "includes all matters relating to work, pay, wages, reward, hours, privileges, rights, or duties of employers or employés, or the mode, terms, and conditions of employment or non-employment," where the concept of association with mutual rights and obligations, is involved.

So, in sec. 7 we find "Where persons, with a view to being associated as employers and employés respectively in any industry . . . have entered into an industrial agreement with respect to employment in that industry."

Again, in the provisions of sec. 38 relating to the (now declared invalid) common rule, where the Court is required to have regard to the extent to which the industries or the persons affected enter or are likely to enter into competition with one another, the term "industry" is clearly used in the sense which I have indicated to

denote some relationship in which employers and employés are associated. It is not necessary to pursue the matter further.

The only answer made to this reasoning is the argument *ab inconvenienti* which is, at best, a weak one, and not infrequently involves a *petitio principii*. It is said that it would be inconvenient not to allow persons engaged in a common industrial vocation, such as carpenters, to form an association or organization. So far as regards associations there is nothing to prevent them from doing so. But so far as regards an organization which is registered for the purposes of litigious proceedings in the Court, very different considerations arise.

In the first place, it might be equally inconvenient that all persons who employ—say—carpenters, should be regarded, contrary to the fact, as carrying on a common enterprise or industry, and so become liable to be involved in one vast litigation. A good illustration is afforded by the present case, in which the award as proposed would extend to employés engaged in industries of all possible kinds, from drivers of locomotives or of winding engines on mines to men in charge of small gas engines used in industries in which the use of engine power is merely subsidiary, and to employers engaged in equally diverse industries.

In the second place, that is not the scheme of the Act. The unit of aggregation for the purpose of industrial agreements and proceedings in the Court is not the handicraft, but the collective enterprise in which employers and employés are associated. Provision is accordingly made for the grouping together of employers engaged in the same industry, as well as of employés similarly engaged. In either case the parties associated presumably have a common interest in the matters in dispute. See, for example, secs. 7 and 55 (1) (*a*). The distinction between associations of persons who follow the same or similar vocations, on the one hand, and organizations on the other, is emphasized by the definition of the term "association" in sec. 4, where a trade union, which is usually composed of such persons, is taken as the typical instance, while the "organization" that may be registered and may become a litigant, must be such an association as is defined by sec. 55 (1) (*b*).

The Act as framed has regard to the interests of all parties

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Griffith C.J.

concerned, employers as well as employés, and not, as seems sometimes to be taken for granted, to the interests of one party only. The scheme of the Act assumes, on the contrary, that the employers concerned in an industrial dispute extending beyond the limits of one State have a substantial solidarity of interest already existing, antecedent to and independent of the dispute.

I adhere to what I said in *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Son Proprietary Limited; Woodworkers' Case* (1) on this point:—

"The dispute must be single in the sense that there must be a substantial community of interest amongst the demandants and amongst those who refuse the demand."

It seems to me as impossible to deny that the employers and employés concerned in an industrial dispute must be engaged in the same industry, as to affirm that every person who employs a carpenter or engine-driver is, in any relevant sense, engaged in the industry of carpentry or engine-driving, or to say that there is a community of industrial interest between a farmer who employs an engine-driver to drive a stationary engine in Queensland and a company which employs drivers of locomotive engines in Tasmania.

To these considerations it may be added that the regulation of wages or hours of employment for the whole body of persons engaged in the same vocation, but employed in different industrial enterprises, may be fitly regarded as a proper subject for a law to be made by a Parliament having authority to deal with such matters, or by some delegated legislative authority, such as a Wages Board, rather than as a subject for litigation or arbitration.

I am aware that attempts have been made to turn the Act into a scheme for effecting this purpose. But, as I have said in previous cases, the Arbitration Court has no legislative authority: its functions are to settle actual disputes between actual employers or groups of employers on the one hand and employés on the other, and then only when the dispute extends beyond one State. Nor in my opinion was the Act, any more than the provision in sec. 51 (xxxv.) of the Constitution, designed to facilitate the manufacture of disputes for the purpose of bringing them

(1) 8 C.L.R., 465, at p. 490.

before a federal tribunal. On the contrary, it was designed, however it has been sought to be applied, to promote industrial peace.

For these reasons I am of opinion that the opinion tentatively expressed by my brother *Isaacs* in the *Jumbunna Case* (1) is sound, and that "an industry contemplated by the Act is . . . one in which both employers and employés are engaged, and not merely industry in the abstract sense, or, in other words, the labour of the employé given in return for the remuneration received from his employer."

The first question must therefore, in my judgment, be answered in the negative.

The second question is whether the objection is fatal to the claim when the case comes on for hearing. It is contended for the claimants that the Registrar's certificate of registration is conclusive. Sec. 57 provides that the certificate shall until proof of cancellation be conclusive evidence of the registration of the organization mentioned in it and that it has complied with the prescribed conditions to entitle it to be registered. The prescribed conditions to be complied with by associations are declared by sec. 55 (2) to be those set forth in Schedule B, which are all of a directory nature setting forth steps to be taken by an association before registration.

In my judgment an association which is not within the categories defined in sec. 55 is incapable of being registered. The conditions are conditions to be complied with by an association which is assumed to be capable of being registered. Its existence as such must precede the compliance. That existence is in one sense, no doubt, a condition precedent to registration, but it is not one of the conditions prescribed in Schedule B and referred to in sec. 57. The notion that a certificate by the Registrar, which is a mere ministerial act, should have the effect of validating a thing which the law does not allow to be done is *primâ facie* improbable. The cases of *In re National Debenture and Assets Corporation* (2) in the Court of Appeal and *Carroll* v. *Shillinglaw* (3) in this Court, emphatically negative it.

(1) 6 C.L.R., 309, at p. 370.
(2) (1891) 2 Ch., 505.
(3) 3 C.L.R., 1099, at p. 1108.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Griffith C.J.

The second question must therefore be answered in the affirmative.

This is sufficient to dispose of the case, since no award can be made upon a claim brought forward by the present claimants. But in compliance with the strongly expressed desire of my brother *Higgins* I will say a few words on the remaining questions. I premise by saying that in my opinion the function of the High Court upon a case stated under sec. 31 is judicial and not advisory, and is limited to determining questions of law actually arising in the case and necessary for its decision.

I need not again refer to the opinion of the Judges in *M'Naghten's Case* (1) which I quoted in the *Woodworker's Case* (2). But although anything further that I have to say is extra-judicial there are occasions on which extra-judicial utterances are excusable.

The third question submitted is whether the Board of Water Supply and Sewerage, Sydney, and the Corporation of the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne are subject to the jurisdiction or award of the Arbitration Court. Upon examination of the Statute of New South Wales under which the Sydney Water Supply and Sewerage Board is constituted it appears that the Board is in the strictest sense a Department of the State Government. Its receipts go into, and its disbursements are defrayed from the Consolidated Revenue, and all its actions are subject to the control of the Governor in Council. It was not contended before us that the question could be answered in the affirmative with respect to this Board, or that the case was in this respect distinguishable from the *Railway Servants' Case* (3).

With regard to the Melbourne Corporation we were invited to hold that a municipal corporation is an instrumentality of the State Government, and is entitled to the same immunity from interference by the federal power as the Government Departments of the States. I express no opinion upon the grave and difficult question of how far, if at all, the doctrines which have been laid down in the United States of America on this subject

(1) 10 Cl. & F., 200.

(2) 8 C.L.R., 465, at p. 485.

(3) 4 C.L.R., 488.

should be regarded as implicitly adopted by the Constitution of the Commonwealth. But as at present advised I see no serious reason for doubting that, if a municipal corporation chooses to engage in what has lately been called "municipal trading," and joins the ranks of employers in industries, it is liable to the same federal laws as other employers engaged in the same industries. This limitation is, indeed, I think, generally accepted in the United States (see *South Carolina* v. *United States* (1) and the decisions of the Supreme Courts of New York and Pennsylvania cited in that case).

The fourth question is whether the Court is bound by any rules of evidence when evidence is tendered to show or to negative jurisdiction. With much respect, this is not in my opinion a question of law arising in the proceeding within the meaning of sec. 31. Whether the Court has or has not jurisdiction, *i.e.*, whether an industrial dispute actually exists, and if so whether it extends beyond the limits of any one State, are questions of fact. The jurisdiction of the Court depends upon the existence of the facts. If the existence is challenged by proceedings for prohibition in this Court, or possibly on an attempt to enforce the award, the fact must be determined independently, and the opinion of the President of the Court on the point is not binding. In other words, the existence of the facts is a condition of jurisdiction.

If they exist, it is quite immaterial to inquire by what route the President arrived at a right conclusion. If they do not, it is equally unimportant to inquire how he fell into error. In such a matter this Court is not a Court of Appeal from him.

But the first duty of every judicial officer is to satisfy himself that he has jurisdiction, if only to avoid putting the parties to unnecessary risk and expense. In this respect a grave responsibility rests upon the President, whose jurisdiction is limited both by the Constitution and the Act. This responsibility is not diminished by the possibility that he may be misled by imperfect or erroneous information. The mode of satisfying himself may vary in different cases. In most cases that come before an ordinary Court of law it is not necessary to make any inquiry

(1) 199 U.S., 437.

H. C. OF A 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Griffith C.J.

on the subject, although in some cases it is. In dealing with the question of jurisdiction the President must exercise his discretion as to the evidence which he will receive and upon which he will act, and is no more fettered in that exercise than in receiving evidence upon any other matter in his Court. I do not think that in this respect the amendment of sec. 25 makes any difference.

The fifth question is whether the certificate of the Registrar is "to be treated as *primâ facie* evidence of the fact of the existence of a dispute relating to industrial matters, and in connection with the land engine-driving and firing industry, or of any other and what facts?"

Sec. 21 provides that:—"A certificate by the Registrar that any dispute relating to industrial matters is an industrial dispute extending beyond the limits of any one State shall be *primâ facie* evidence that the fact is as stated."

The fact to be stated is that a "dispute relating to industrial matters is an industrial dispute extending beyond the limits," &c., not that the dispute is in existence, which is a fact to be ascertained *aliundi*, and to which the section has no application. But, since the section can only come into play where there is no other evidence of the extension of the dispute, and the certificate would probably not be given unless the fact were notorious, the point is not of any practical importance.

The sixth question is whether the Arbitration Court has power to include in the award certain provisions relating to a Board of Reference set out in the draft award, which are in effect that, if any question should arise between the parties out of the award or respecting any other matter of their industrial relations, it may be referred to a Board of Reference, to be constituted by election in manner approved by the Registrar, and whose decision is to be final.

So far as regards the words "respecting any other matter," &c., it is conceded that the Court has no such power. As to the rest I have some difficulty in knowing whether the words "may be referred" are intended to mean "referred by either party against the wish of the other," or "referred by consent of both parties." In the latter view the effect would be a voluntary

reference outside the award altogether, and deriving its efficiency from the ordinary law, and not from the award. In the former view the effect would be to enable the Board to supplement the award by a direction a breach of which might, under secs. 44 and 49, be enforced by fine. I do not think that this would be competent.

The proposed delegation does not purport to be made under the powers conferred by sec. 40A of the Act of 1910, so that it is not necessary to express any opinion on that section, which, indeed, could not fitly be expressed except in a concrete case raising the validity of some order or direction purporting to be made in exercise of the powers conferred by it.

BARTON J. Before beginning to discuss question 1 it is well to advert to one of the general rules for the construction of Acts of Parliament, that "the same words must be *primâ facie* construed in the same sense in the different parts of the Statute" (per *Chitty* J. in *Spencer* v. *Metropolitan Board of Works* (1). In *R.* v. *Poor Law Commissioners*; *In re Holborn Union* (2), Lord *Denman* C.J. said for the Court, "We disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament on the ground of a supposed general intention in the Act."

Of course, the inference from an identity of terms can be rebutted by a context showing that in the instance in question the word or phrase is used in a sense different from that which it conveys elsewhere in the Statute. The Principal Act requires in sec. 4 that the meanings there given to a number of expressions shall be attached to them wherever they occur in its provisions, "except where otherwise clearly intended." But it is of course necessary in this as in other cases to interpret the interpretations themselves where argument is raised as to the meaning of any of them; and this task has been undertaken by both parties to the special case.

An "association" is defined as "any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or

(1) 22 Ch. D., 142, at p. 149. (2) 6 A. & E., 56, at p. 68.

H. C OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

protecting the interests of employers or employés." The distinction between trade or other unions, and associations or bodies representing the interests of employers or employés, is noticeable. It must have been present to the mind of Parliament, as a matter of common knowledge, that a trade union did then, as it does now, often consist of a number of persons grouped together in respect of their pursuit of some one vocation, such as that of carpenters, that of engine-drivers, that of shop assistants or that of carters, while, on the other hand, the employés in a particular concern often did, as they do now, band themselves together, in a union or otherwise, in respect of that concern as an entire and collective undertaking, such as a dockyard, a foundry, a flour-mill, a boot-factory or a colliery. But, as will be seen, it is not every "association" that is entitled to become an "organization" by registering under the Act, any more than every body of men forming a trade union has such a right. "Employer" is next defined as "any employer in any industry," and "employé" as "any employé in any industry"; and as under sec. 55 (of which more presently) it is among the requisites to lawful registration as an "organization" that the body seeking to be registered should be an "association of employers in or in connection with any industry," or "an association of . . . employés . . . in or in connection with an industry," it is convenient to consider now what appears to be meant by an industry in the definitions of "employer" and "employé." Applying the rule of construction already mentioned, we have the term "industry" *primâ facie* meaning the same thing in both of them. If it does, it is used in both to denote the enterprise in which the employer invokes the services of the employé, and which is carried on by their co-operation. An industry, therefore, is looked on as an entirety, existing only by the relation of employer and employé. If any other meaning of an industry can be found which will fit the employé it certainly will not fit the employer. To adopt any other meaning, therefore, would result in applying the word to each in a different sense, which in the absence of a compelling context is against the rule of construction.

Well, is "industry" used elsewhere in any different sense? In the same sec. 4, "'Industry' means business, trade, manufacture

undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits." It is only because of the employment for pay, &c., that either the employer or the employé is in an industry at all. That was plain enough before, but it is the essence of this definition. A reciprocal relation is postulated which shows that the "industry" in which it exists is some enterprise carried on as a concrete whole by an employer with the aid of his employés. The words "calling, service, or employment" are used in the same sense as "business, trade, manufacture, undertaking," to denote the sphere occupied by the exertions of the employer and those whom he employs. They depend for their full meaning, as the earlier words do, on the condition that in them "persons are employed for pay" or other recompense. The thing meant is the whole enterprise; the "service" in which "persons are employed for pay;" and it is that enterprise which an industry is defined to mean. I do not see how it can be urged with reason that in this definition a "business" in which a man is employed for pay, and a "calling" in which he is so employed, are not equally industries in the sense of industrial concerns, or that they are mere vocations of workmen; or that "pay," "hire," "advantage" and "reward" are not equally used to denote the compensation which the employed has from the employer.

The exception of "persons engaged in domestic service" was much relied on in support of a different construction. But it will be seen that the conception of an industry which is evinced in the definition down to this exception is maintained in the rest of the Act, and to adopt the claimants' interpretation of the definition would lead to the dilemma that we must either do violence to these other provisions, or, adopting their interpretation, admit that it is in the very definition of an industry that the term is used in a sense to be disregarded in every other part of the Statute in which it is found. I think then that the exception as to domestic service must be looked on as introduced for more abundant caution, possibly to prevent the supposition that one class of persons engaged in paid work was included in a definition

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

intended to denote whole enterprises in their collective sense. I cannot regard the words as altering or modifying the meaning so plainly conveyed by the prior part of the section. It is a common experience to find in Acts of Parliament provisions added, by way of exception, to sections in the subject matter of which they are not inherent, their proper place being in the category of substantive provisions. In this case, for instance, the object desired could better have been attained by a short clause to the effect that nothing in the Act should apply to the persons comprised in these two exceptions. It is plain that it was intended to exclude them altogether from the operation of the Statute. In 1910 the exceptions were omitted, and after the word "reward" these words were added: "And includes a branch of an industry and a group of industries." As the claimant association was registered in 1908 this alteration does not affect the present question. The definition must be read as it stood in 1908.

The meaning of an industry is further indicated by a phrase in the definition of "industrial dispute," and as it is referred to by my learned brother *Isaacs* in his judgment in the *Jumbunna Case* in a passage highly applicable to the definition section (1) I quote his words:—

"An industry contemplated by the Act is apparently one in which both employers and employés are engaged, and not merely industry in the abstract sense, or in other words, the labour of the employé given in return for the remuneration received from his employer. As suggessted, not only by the words defining 'industry' itself, but also by Schedule B, and by such a phrase in the definition of 'industrial dispute' as 'employment in industries carried on by or under the control of the Commonwealth,' &c., an 'industry' as intended by Parliament seems to be a business, &c., in which the employer on his own behalf is engaged as well as the employés in his employment. Turning to the specific definition of 'industry,' it rather appears to mean a business (as merchant), a trade (as cutler), a manufacturer (as a flour miller), undertaking (as a gas company), a calling (as an engineer), or service (as a carrier), or an employment (a general term like 'calling'—embracing some of the others, and intended

(1) 6 C.L.R., 309, at p. 370.

to extend to vocations which might not be comprised in any of the rest), all of these expressions so far indicating the occupation in which the principal, as I may call him, is engaged whether on land or water. If the occupation so described is one in which persons are employed for pay, hire, advantage, or reward, that is, as employés, then, with the exceptions stated, it is an industry within the meaning of the Act."

This view of the meaning of an industry as defined is fully supported by subsequent provisions. Sec. 7 deals with the refusal or neglect "to offer or accept employment" in cases "where persons, with a view to being associated as *employers and employés respectively in any industry*, or representatives of such persons, have entered into an industrial agreement with respect to employment in that industry." The word "industry" as used here brings us back to the definition, and elucidates the use of the word in what I have termed its collective sense, as some enterprise or concern in which an employer and a body of employés are mutually engaged, or a number of enterprises of the same kind. Further support appears on consideration of sub-secs. (*f*) and (*g*) of sec. 38. For though these provisions have been held invalid, they may be looked at as examples of the sense in which the Statute uses the terms "industry" and "industries." I refer particularly to the power to direct within what area or under what conditions a common rule is to bind "*the persons engaged in the industry whether as employers or employés.*" It seems to me plain beyond any reasonable doubt that the industry of the employé must be that of the employer also, for they are both to be "engaged" in it, whether at the moment they are actively prosecuting it or not. The conclusion is confirmed by study of the authority given by sec. 41 to enter for purposes of inspection "any building, mine, mine-working, ship, vessel, place, or *premises of any kind wherein or in respect of which any industry is carried on*," &c. Carried on by whom? Obviously by the employer as well as the employés. Carried on where? Obviously in the place or premises in which the one employs the others: and so once more we come back to the definition clause only to find the sense of this section and that of the definitions identified. Such expressions as those quoted from secs. 7, 38 and

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIAITON OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

41 could scarcely be used in relation to a number of sections of persons performing work of only one subdivision or class in scores or hundreds of concerns not merely widely separated, but widely differing in nature as well as in name, carried on by many employers between whose businesses no identity, nor any resemblance, nor indeed the slenderest tie of common interest exists. How can a number of employers thus diverse and unlike in their aims combine to any purpose for mutual protection in the absence of the common interest which is the very motive of defence? How can conciliation or arbitration operate in the full measure contemplated by the Act under such conditions?

Let us look at the use of the term in the provision made for registration by sec. 55. On compliance with the prescribed conditions an association may be registered as an organization, if it be "an association of *employers in or in connection with any industry*," or "an association of . . . *employés in or in connection with any industry*." (I leave out all words not material to the meaning of an "industry").

Whichever of the two meanings contended for be given to the term, it is clear that the "industry" affords in the contemplation of this section—as I think it does throughout the Act—the *nexus* of interest which associates the employés on the one hand and the employers on the other. It is with reference to the conditions of that "industry" that either association, if registered, will contest a claim brought by the other before the Court. If the "industry" means the mere calling or vocation of a person, that term does not apply to both parties. If it fits the employés it does not fit the employer. That will appear plainly enough if one attempts to apply it to both in the sense the claimant would give it. But to have a rational meaning in this connection it must be applicable to both. Besides, no context is suggested as requiring a change from the meaning clearly conveyed in the first branch (*a*) of the section.

"Industry" therefore, as defined in the 4th section, and as used elsewhere in the Act, means a concern or concerns carried on by employers, in which the employés work with the employers for wages or other recompense. It does not mean the mere vocations of sections of workmen not bound together in respect

of their connection with an enterprise or enterprises of the same kind, but carrying on, in widely diverse undertakings—for example, "in mines, in timberyards, in factories, in soap and candle works"—one out of the many classes or divisions of work which are necessary for completely constituting and conducting such undertakings. Such sections of workmen may form associations for their mutual support and protection, and nothing that has been said in this case casts a doubt on the legality of such bodies, but they are not associations of employés "in or in connection with any industry" as the term "industry" is used in the Act. A great part of the intention of the Act is that one party may be able to treat with the other—employers with employed—in respect of the conditions of employment in the concerns which are known as industries (I use the word "conditions" in the large sense in which the Act refers to "industrial matters"), or to make agreements with the other party on disputed questions touching such conditions, or failing agreement, to bring the other party before the Court by plaint for its award on the points in dispute affecting the concern or concerns and the interests of either party therein. To facilitate the attainment of these ends, associations, whether of employers or of employés, are permitted on certain conditions to register as organizations in connection with the particular concern or concerns, that is, the industries in which they employ or are employed. But, as has been shown, whatever other conditions may be fulfilled, registration cannot be legally granted to an association unless it exists in or in connection with an industry in the meaning given by the Act to that term. The claimant association here is not composed of employés in connection with any industry within the meaning of the Act. Engine-driving and firing are vocations largely used in a vast number of industries. But for the purposes of this Act, vocations though they are, they do not constitute an industry. The claimant association therefore was not entitled to registration, and I answer question 1 in the negative.

In dealing with question 2 regard must be had to sec. 19. The Court is to have cognizance of three kinds of industrial disputes. As there has not been either a certificate under sub-

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVER'S AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

sec. (*a*) or a request under sub-sec. (*c*), and the alleged dispute has been submitted by plaint, it comes under sub-sec. (*b*). But in order to make a valid submission by plaint the claimant must be an organization, sub-sec. (*b*). I take it that must mean a legally constituted organization, for organizations as parties to industrial disputes have no existence save under the provisions of this Act. By sec. 4 an "'organization' means any organization registered pursuant to this Act, and so far as applicable it also includes any proclaimed organization to which the Governor-General declares this Act to apply." The claimant association is not a proclaimed organization. It claims a right to sue by virtue of its registration. But if I have answered question 1 rightly, it is not a legally registrable body. Its claim to become a party by submitting a plaint is based on a registration which was given to it without statutory warrant. As it can only exist as a claimant by virtue of a legal registration, the objection is fatal unless the position is saved, as it is said to be, by the certificate of registration as an organization which the Registrar has issued to the claimant association. That certificate is, by sec. 57, "until proof of cancellation," "conclusive evidence of the registration of the organization therein mentioned and that it has complied with the prescribed conditions to entitle it to be registered." This point is completely disposed of by the decision of this Court in *Carroll* v. *Shillinglaw* (1), and by the case of *Baroness Wenlock* v. *River Dee Co.* (2), cited in all the judgments in the first mentioned case. The certificate of the Registrar is conclusive that all things required by the Act to be done by an association claiming to be registered have been duly done. But it has no greater effect. The Statute has not given to an officer of the Court power to validate anything which is void *ab initio*, such as the registration of an association which was in its very essence incapable of being made an organization by the fact of registration.

I therefore answer question 2 in the affirmative.

As the claim thus fails upon a fatal objection, answers to the remaining questions are not strictly necessary. The points have become, if I may say so with great respect, academical, and our

(1) 3 C.L.R., 1099.

(2) 38 Ch. D., 534.

answers to them will be extra-judicial. Moreover, I share the doubt already expressed whether these are, within the meaning of sec. 31 (2), questions "arising in the proceedings," and whether this Court in now pronouncing upon them will not take on itself the functions of an adviser. Nevertheless, my learned brother the President has stated that it will be of value to him in the performance of his duties to have the opinions of the Court, and I therefore venture to give mine, but not as decisions, for, apart from questions 1 and 2, our answers will not now decide anything.

Question 3 has been amended by his Honour so as to include only the two bodies which stand first and second in the list appended to paragraph 5 of the special case.

Mr. *Starke*, on behalf of these two respondents, contends that they are instrumentalities of the Governments of their respective States, and that as such they can neither be taxed nor regulated by any federal law. As to the first-named body, the Board of Water Supply and Sewerage, reference was made to the New South Wales Act which constitutes it (43 Vict. No. 32), passed in 1880, and to two amending Acts passed respectively in 1888 and 1890. That of 1888 reconstitutes the Board on a somewhat altered basis, but its powers and character in respect of the question to be answered remain practically unaltered. They are purely governmental. All the revenues pass into the Consolidated Revenue Fund of the State, and the expenditures are issued from that fund. A responsible Minister, the Secretary for Public Works, is charged with the administration of the Act, and subject to the Act the Board is to be deemed a Public Department of the State under Executive control. The Executive may disallow any act of the Board except a contract already entered into. Claims for compensation are to be made against the Minister, who is to be the nominal defendant in actions for things done by the Board. These and other provisions clearly make the Board part of the State's system of government, and its transactions as clearly cannot be subjected to federal control. As to this respondent, therefore, question 3 must be answered in the negative.

The case of the body incorporated as the Mayor, Aldermen and Citizens of the City of Melbourne imports different considerations.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

The jurisdiction of the Commonwealth Arbitration Court is questioned by that respondent as to any and every part of its functions. The claimant association contends that the corporation is not exempt in any respect, and that at least its operations under the *Electric Light and Power Act* 1896 (No. 1413) are such as to entitle the Court to include its employés in an award made in a dispute to which it is made a party. The corporation undertakes, in addition to the ordinary functions of local government, the business of supplying electric light and power to consumers. It is paid for the current that it supplies, and the payments fall into the municipal revenue. In respect of that undertaking it has the same powers and incurs the same obligations as a company carrying on the same business would have and incur. In argument, the question was narrowed down to its bearing upon the corporation's business of electric supply.

Whether in respect of its strictly governmental functions a municipal corporation is immune from federal interference to the extent that the ordinary instrumentalities of State government are immune, or to any extent, is a question which need not be discussed now. For present purposes it may be assumed that Mr. *Starke* was right in contending that a municipal corporation is a part of the governmental power of the State and therefore immune to the same extent. Is the business of supplying electric current under the conditions stated, when carried on by a local governing body under the authority of State legislation, exempt? As that question may come before us some day for an enforceable judicial decision, any view expressed now is to be taken as extra-judicial and not as final. With that qualification, I am of opinion that such an undertaking so conducted is not entitled to immunity. The rule laid down in *D'Emden* v. *Pedder* (1) and other cases is founded on necessity. The functions of government in Commonwealth or State are divided into three great branches—the legislative, the executive, and the judicial. It is of vital importance to the necessary efficiency of government that it should be protected against invasion or encroachment, for the Constitution must be taken to have intended the duration in unimpaired stability of both Commonwealth and State when it created the

(1) 1 C.L.R., 91.

one and guaranteed the powers which it reserved to the other. To allow the governmental functions of either to be impaired by the other is to undermine either that which was created or that which was guaranteed. This being the basis on which rests the doctrine that the instrumentalities of government must not be interfered with on the one hand or the other, what is the necessity—for every implied power must rest on necessity—for protecting the purely business or trading enterprises of a municipality against federal taxation or the operation of any other admitted federal power? How can it be said that in such a case the functions of government are impaired or its stability threatened? A Government may take purely trading enterprises upon itself; but its necessary function of governing the people is not weakened a jot if, having lost money by trading in commodities, or by manufacturing goods, it sells its stock or its plant, and retains only the duties cast upon it by its constitution. Nor is its governing authority the less if in respect of its trading or manufacturing enterprises it is compelled like other traders or manufacturers to obey, for instance, a federal regulation of inter-State commerce or to pay a federal tax, imposed with constitutional authority upon the kind of business which it has taken upon itself. Among several American cases cited, that of *South Carolina* v. *United States* (1) was the latest bearing on the proposition just stated. It was there held (2) that the licence taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are agents of the State, which has itself engaged in that business. This decision, which appears to me to be a very sensible one, was recognized as law in 1909 in the case of *Murray* v. *Wilson Distilling Co.* (3). The principle on which it proceeds is equally sound when the question is not one of taxation, but such an one as is now remitted to us. If true in its application to the Government of a State, the principle is at least equally clear when the enterprise is that of a local governing body acting under the authority of State legislation. Our own decision in the *Railway Servants' Case* (4), that a State Railway Service was an instrumentality of State

(1) 199 U.S., 437.
(2) 199 U.S., 437, at p. 463.
(3) 213 U.S., 151.
(4) 4 C.L.R., 488.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

Government, was cited to us. That decision rested mainly on the fact that the Constitution had specially recognized such a service as possessing the character claimed for it. We suggested no doubt at all of the correctness of the decision in the *South Carolina Case* (1).

My opinion is therefore against the claim of the corporation of Melbourne to be exempt from the jurisdiction and award of the Court in respect of its undertaking under the *Electric Light and Power Act* 1896.

Question 4 asks whether the Court, when at the hearing of an industrial dispute its jurisdiction is brought into controversy, is "bound by any rules of evidence," or whether it may "inform its mind in such manner as it thinks just?" It is argued that the answer to this question depends on sec. 25 of the Principal Act, amended in 1910 in immaterial particulars. Is an objection to jurisdiction part of the "hearing and determination" of an industrial dispute, or are those words used in the section to describe only ordinary proceedings within jurisdiction? Probably the latter is the intention of the Act. If that is the true position, there is not much difference in the result. When a hearing is allowed to proceed without jurisdiction, prohibition will lie. As prohibition is not sought by way of appeal, the superior Court does not concern itself with the adequacy of the means which the primary tribunal has adopted to test its jurisdiction, or the technical admissibility of the evidence which it has accepted for that purpose. If the primary tribunal has heard no evidence upon it, the grant or refusal of prohibition will not depend on that fact. But these considerations do not affect the duty, nor should they influence the conduct of the primary tribunal. It is as wrong to accept jurisdiction without sufficient inquiry as to refuse it with precipitancy. Where the jurisdiction is disputed, adequate and careful inquiry is still the duty of the Court of first instance, just as it may become the duty of the superior Court. On the other hand, where the jurisdiction is not contested by the party defending, very slight inquiry may be adequate, and many cases will to the mind of the tribunal be so plainly within its competence that it will rightly forego inquiry unless the objection is taken, and the objector tenders proof of facts in its support.

(1) 199 U.S., 437.

Question 5 has reference to the construction of sec. 31. The language of that provision does not seem to raise any difficulty. It presupposes the existence of a dispute relating to industrial matters. Given that fact, the certificate is to be *primâ facie* evidence that the dispute extends beyond the limits of a single State. That is the only fact covered by it. Parliament might easily have prescribed that the certificate should also evidence the existence of a dispute relating to industrial matters, but it has not seen fit to do so, for there is no context to alter the otherwise plain meaning of the words used. If, then, question 5 remained a question in the case, I should answer it thus as at present advised: "As to the first branch of the question, No; and as to the remainder of the question, the certificate is *primâ facie* evidence that the dispute, if any exists, is one that extends beyond the limits of one State; and it is not evidence of any other fact."

The final question, numbered 6, places one in a position of some difficulty, as it has become more distinctly hypothetical than number 3, number 4, or number 5. It relates to some provisions which it was proposed to insert in a projected award sought by the claimant association. As there is a fatal objection to the competency of the association as a claimant (see answers to questions 1 and 2) that award cannot now be made, for there is no longer, except in name, any "proceeding before the Court" (see sec. 31 (2)). But in deference to the wish of my learned brother the President I will state my impression.

It is not clear on sec. 4 of the draft award whether recourse to a Board of Reference is intended to be allowed only when both parties agree to it. If it "may" be had at the will of either party, the other not consenting, the provision purports to have compulsory force. But, as his Honour tells us that recourse is to be optional, we may take it that the appointment of a Board is to take place only with the consent of both parties. But even without such provisions as are suggested, the parties would be at liberty to refer any dispute to persons chosen by themselves, and to give those persons, if they thought fit, the name of a Board of Reference. So far there is only an authority to do that which was already lawful and feasible. There are other terms, but of each of these it is equally true that it might be made a term in

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Barton J.

such a reference by the parties themselves, though in such case the Registrar's approval of the manner of choosing referees, his certificate of the proper constitution of the tribunal, his decision in case of an equal division among its members, would all depend on his willingness to undertake the duties mentioned. If, however, sec. 4 of the draft award means that any of the matters it contains are conditions to be complied with by the parties in order to be entitled to refer to a Board or Committee any question or dispute arising between them out of the award, or respecting any other matter of their industrial relations, then I think there is no power to insert such conditions in the making of an award. The authority to make an award does not appear to me to imply a power to impose on the parties such limitations of their liberty to agree among themselves to act in a manner not forbidden by any law, after their rights and duties in respect of the dispute brought before the Court have been defined by the award. The learned President expressly disclaims any intention in the drafting of this part of the document to act under the provisions of sec. 40A, and it is clear that the terms used are not such as to point to any such intention. Some faint suggestion was made that sec. 40A was *ultra vires*, but the question of its validity was not argued, and indeed it cannot arise on an occasion when no attempt is made to apply it.

On the whole, it seems to me that the proper answer to question 6 is, " Yes, if it be clear that none of the provisions referred to are to be conditions of the right of the parties to refer to persons chosen by themselves any questions arising out of the award or affecting their industrial relations. If otherwise, No." The question as stated does not call for the expression of any opinion on the effect of the provisions in the former event.

O'CONNOR J. The first matter on which the learned President has asked the opinion of the Court is whether the claimants can be lawfully registered as an organization under sec. 55 of the *Commonwealth Conciliation and Arbitration Act* 1904. The point raised involves the principle of grouping employés for the purposes of the Act, and if the objection taken by the respondents is good, not only must their claim be dismissed, but the

validity of all organizations whose members are associated on the same basis is brought into question. In the answering of this question I regret that I cannot take the same view as my learned colleagues who have preceded me.

The claimant organization consists of persons following the calling or employment of land engine-drivers and firemen, including also those engaged in the incidental occupation of cleaners and greasers. The engines on which the members are employed are worked in mines, timber yards, tanneries, soap and candle works—indeed in every variety of business or undertaking in which steam power is used. In whatever business or undertaking a steam engine is used, the work of those who drive and attend to it is substantially the same. Having thus their industrial interests in common, the members of the claimant organization associated themselves together, and sought and obtained registration under the Act of 1904. The respondents object to the registration as being illegal and of no effect, alleging that the claimants are not an association of employés "in or in connection with an 'industry,'" within the meaning of sec. 55 (1) (*b*). The contention is that the definition of "industry" in sec. 4 describes the business, undertaking, trade, calling, or employment of the employer only, that registration of employés is permitted only to associations of employés whose employers are engaged in the same class of production, manufacture, construction, or undertaking, and that a group of employés, associated as in the present case merely by reason of their following the same trade or calling, irrespective of the branch of industrial activity to which their labour is applied, cannot be registered as an organization. Upon this objection the claimants naturally ask in what way can persons of their vocation, engaged in driving and firing engines in many different branches of industrial enterprise, be associated so as to entitle them to be registered as an organization—for some meaning must be given to the provisions of sec. 55 which enables employés to be registered as an organization.

The respondents answer that the section, properly construed, enables the members of the claimant organization to be registered, if associated according to the branch of industrial enterprise in which their employers are using their services. For instance,

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

persons driving and firing engines in coal mines may be associated and registered as employés in the coal mining industry, or as drivers and firemen of engines in the coal mining industry. Persons similarly engaged in saw mills may be associated and registered as employés in the saw mills industry or as drivers and firemen in that industry. Those doing like work in engines used in tanneries may be associated and registered as tannery employés or as drivers and firemen of engines in the tanning industry. But they contend that the Act does not enable persons driving and firing the engines used in these different processes of production and manufacture to associate and register themselves as one organization.

The claimants, on the other hand, argue that that interpretation does not give full effect to the language of the legislature; that sec. 4 expressly assigns two alternative meanings to the word "industry"; that it defines "industry" by words which include the trade, calling or employment of the employé, as well as the business or undertaking of the employer; that engine-driving and firing is in that sense an industry within the meaning of sub-sec. (1) (*b*), and that an association of not less than 100 engine-drivers employed in that calling may register as an organization, although they may be driving engines used in different businesses, trades and undertakings.

It is of course open to the legislature to provide for the registration of employers and of employés on any basis they may think fit, and in order to determine whether the claimants are a valid organization under the Act it becomes necessary to learn from the language which the legislature has used what is the basis on which it intended to enable organizations of employés to be registered.

The first rule of all to be applied in construing a Statute is to ascertain the intention of the legislature from the words it has used, reading them in their ordinary natural sense in the context in which they stand, and giving to every word as far as possible its full meaning.

Before applying the rule to any particular section, it is necessary to understand clearly the subject matter with which it is concerned. The scheme of the *Commonwealth Conciliation and Arbitration*

Act is to settle industrial disputes by bringing to bear the powers of the Arbitration Court on employers singly or organized, and on employés associated and registered under the Act. Sec. 55 dealing with the registration of organizations provides in one and the same section for registering associations of employers and associations of employés. It will be noted throughout the Act that the words "employer" and "employé" are not always used to describe an existing relationship of employment. They are sometimes used merely as words of classification, to describe the *genus* employer and the *genus* employé. The sense in which the terms are to be understood in each section depends upon the context and the subject matter. Turning to sec. 55, it is obvious that it cannot be construed without knowing the meaning in which the words "industry" and "employer," and "employé," are therein used. It is necessary therefore to examine the definition of these terms in sec. 4. The paragraph interpreting "industry" is as follows:—

"'Industry' means business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

Each word of description must be taken in connection with the qualifying words "in which persons are employed for pay," &c. The definition therefore reads:—"'Industry' means 'business' in which persons are employed for pay, trade in which persons are employed for pay, manufacture in which persons are employed for pay," &c. The first four words to which I have referred, grouped together as they are, may be regarded as specially applicable to "industry" from the employer's point of view. They describe the particular branch of industrial activity in which the employer is using the labour of his workmen.

Taking the remaining words of description with the same qualifying words, the definition reads:—"'Industry' means 'calling' in which persons are employed for pay, hire, etc., 'service' in which persons are employed for pay, hire, etc., 'employment' in which persons are employed for pay, hire, etc." The latter words are especially appropriate to describe the

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

employé's occupation. It may be conceded, for the purposes of argument, that the words "calling" and "service" are capable of being used to describe the employer's business, trade, or undertaking also; whether that is so or not, it is to my mind clear that the words "calling . . . in which persons are employed for . . . hire," taken in their natural meaning, describe in ordinary language the occupation by which an employé earns his living. If it became necessary to describe in a few words a land engine-driver's daily occupation, I do not know words in which it could be more fittingly described than to say "he is employed in the calling or in the employment of a land engine-driver." The respondents' contention is that the words "calling, service, or employment" standing in their context cannot be read otherwise than as describing the employer's side of industry only. The same view is put by my brother *Isaacs* in some observations of his with reference to the same words in the same section, in the *Jumbunna Case* (1), he says:—"... all of these expressions so far indicating the occupation in which the principal, as I may call him, is engaged whether on land or water." This view, which my learned brother then referred to as the "narrower view," was not the ground on which his judgment in that case proceeded. The observations are merely *obiter dicta*, and I have quoted them merely as expressing concisely the respondents' contention in the present case. In construing a Statute it must be conceded that, *primâ facie*, full value, as far as possible, should be given to every word the legislature has used, and that where it is sought in an enabling and remedial Act, such as that now under consideration, to give to its words a meaning more restricted than that which they ordinarily bear, thereby narrowing the operation of the enactment, some good ground must be shown for such an interpretation. In my opinion no ground has been put forward which could justify the narrow interpretation upon which the respondents in this case are insisting. One argument very much pressed was that, in every other part of the Act except sub-sec. (1) (*b*) of sec. 55, the word "industry" was used in the sense of industry from the employer's point of view. Where we are dealing with a section

(1) 6 C.L.R., 309, at p. 370.

in which the legislature itself explains by definition the sense in which a particular word is used, that argument is of little value even if well founded with regard to other sections. But it is not well founded, and with respect to several sections it amounts to a begging of the question. Take, first, the definitions of "employer" and "employé." If the claimants' interpretation of the definition of "industry" is adopted, both aspects of industry are there referred to. The same may be said of the first paragraph of sec. 38 and of sec. 41. In each of the other sections in which the word is used it is clear that "industry" from the employer's point of view is the subject matter of the section. In no part of the Statute is there the least indication that the words defining "industry," the words which to a large extent fix the limits of the Statute's operation, have been used by the legislature in any other than their ordinary meaning.

These considerations lead me to the conclusion that the definition of "industry," taken as a whole, recognizes the difference which exists in fact between the relation of the employer and the relation of the employé to all industrial operations, and in clear language declares that for the purposes of the Act the word "industry" is used to describe both the industrial enterprise in which an employer is employing labour, and the vocation which an employé follows for a living.

Turning now to sec. 55, it is obvious that in paragragh (1) (*a*) "industry" means the class of industrial enterprise to which the employer's business belongs. The common interest, for the protection of which the associated employers combine, is that which arises from their employing labour in carrying on the same class of industrial enterprise. "Employés" in that paragraph necessarily means persons between whom and the employers, seeking to be registered, the relationship of employer and employé has existed. Those are the meanings which the context makes it necessary in that paragraph to give to the words "industry" and "employé" respectively. It is clear to my mind that in the succeeding paragraph "industry" is not used in the same sense. In that context "employé" describes a class—the class of persons following a vocation. It is not used to indicate any existing relation of employment with any employer. The industrial

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

interests, for the purpose of protecting and advancing which an association of employés combines, are the common interests of the workers in the same vocation. Whether workers in the same vocation follow it in one or in many different phases of industrial enterprise their common interests are the same. The subject matter of that paragraph indicates therefore that the meaning of "industry" applicable in that connection is industry from the employé's point of view—that is, the vocation by which the employé earns his living. Thus interpreted the paragraph enables employés in the same vocation to associate and register themselves as organizations in such groupings as they may deem best for the advancement and protection of their common interests.

I have therefore come to the conclusion, without the aid of any extraneous considerations, that the words of the sections to which I have referred, read in their plain, ordinary meaning, permitted the registration of the claimants as an organization.

But let me try the soundness of the respondents' contention by another test. I shall assume for the purpose of argument that the words of the enactment are not clear, that there is an ambiguity in the definition of "industry" which makes that word capable of being read either in the wider sense which justifies the claimants' registration, or in the narrower sense which makes the registration invalid, and I proceed to inquire which of these meanings will best effect the purpose of the legislature.

In order to ascertain in such cases the real intention of the legislature from the language it has used the rule of construction laid down by the Barons of the Exchequer as far back as 1584 in *Heydon's Case* (1), and since followed in innumerable cases, may well be applied. The rule is stated as follows:—

"That for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: —(1st) What was the common law before the making of the Act? (2nd) What was the mischief and defect for which the common law did not provide? (3rd) What remedy the Parlia-

(1) 3 Rep. 7*a*, at p. 7*b*.

ment hath resolved and appointed to cure the disease of the Commonwealth. And (4th) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

The Statute now under consideration was passed in 1904 in pursuance of the authority, conferred by the Constitution, to make laws for the prevention and settlement, by conciliation and arbitration, of industrial disputes extending beyond the limits of any one State. At that time, in some of the Australian States, laws were in actual operation for the prevention and settlement of State industrial disputes. Between those industrial disputes and the industrial disputes with respect to which the Commonwealth Parliament has power to make laws there is substantially no difference, except in the extent of the industrial disturbance. The State had jurisdiction to deal only with industrial disputes within its boundaries. But industrial disputes of grave moment to employer and employé extended sometimes beyond a State boundary, and there was no power other than the Commonwealth that had authority to deal adequately with them The Commonwealth Act was passed for the purpose of constituting an arbitral tribunal for the exercise of that power. The reports of the various State Arbitration Courts will show, indeed it is common knowledge, that in practically all State industrial disputes the employés were combined in trades unions or other forms of organization allowed by the law.

Associations of workmen combined as trades unions have long been established in Australia, and for many years their existence and operation have been recognized and legalized in all the States by Statutes. Under these Statutes, of which the New South Wales *Trades Union Act* 1881 and the Victorian *Trade Unions Act* 1890 are examples, the system of association of workmen then existing is adopted and recognized. Trade unions were then, as they still are, associations of workmen following the same vocation, associated on the ground of common industrial

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVER'S AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

interests. There was not in force in 1904, nor is there now, any State law which would refuse registration to a trade union merely because its basis of association was the common interest of persons following the same vocation, without regard to the several branches of industrial enterprise to which their labour was applied. Carpenters, for instance, are, it is well known, employed in a vast variety of industrial operations, yet in all the States they were free under State laws to combine in single trade union. The vocation of engineer affords an equally good illustration.

These were the industrial conditions existing when the Commonwealth Parliament passed the *Commonwealth Conciliation and Arbitration Act* 1904. In the forefront of the Statute (sec. 2) is the following declaration:—"The chief objects of this Act are:—" Then follows a formal statement of its purposes of which I shall quote two paragraphs:—

"V. To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;

"VI. To facilitate and encourage the organization of representative bodies of employers and of employés and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employés to be declared organizations for the purposes of this Act:"

The first definition in sec. 4 is as follows:—

"'Association' means any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés."

This definition, applied to sec. 55, on the face of it enables trade unions, on complying with the conditions prescribed, to register as organizations. The Act in its form and provisions is substantially a copy of the State Act in New South Wales. Taking all these provisions into consideration, one intention stands out prominently in the enactment, that is, the intention to apply its machinery to industrial conditions as it finds them —to recognize and adopt as industrial units the trade unions and other combinations, founded on the trade union principle, which

had come to be regarded in the several States as of sufficient authority both to represent and control their members in the conduct of industrial disputes.

I turn now to the respective contention of the claimants and the respondents in order to determine which will best give effect to this intention of the legislature, or, to adopt the expression of the rule in *Heydon's Case* (1), which will be the more effective to suppress the mischief at which the Statute was aimed and to advance the remedy it has provided. But let me first point out by two illustrations the consequences which must follow from the respondents' interpretation.

I assume a land engine-driver in a coal mine to be a member of an organization duly registered in accordance with the respondents' view as an organization of engine-drivers and firemen in connection with coal mining. He leaves the coal mine and is employed to do precisely the same work in driving an engine in a saw mill. If he wishes to have his interests in his new employment protected he must join another organization—an organization of engine-drivers and firemen in connection with saw milling. If he afterwards passes on to drive an engine in an iron foundry, still doing precisely the same work, he must join another organization—the organization of engine-drivers and firemen in that industry. Let me illustrate another consequence of the respondents' interpretation: The members of that long established and well known trade union the Amalgamated Society of Engineers in following their vocation are employed in almost every variety of industrial enterprise. On the respondents' interpretation that trade union could not be registered as an organization. It could obtain the benefit of the Act for its members only by splitting itself into as many unions or organizations as there are branches of industry in which its members are employed—and this in face of the definition to which I have called attention, which includes trade unions amongst the associations which may be registered as organizations under the Act.

It is impossible, in my opinion, to hold on any ground of reason that an interpretation which would lead to so restricted an operation of the Act could carry out the will of the legislature,

(1) 3 Rep., 7*a*.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

as it is expressed on the face of the enactment, or that the intention, apparent in the provisions to which I have called attention, to recognize and adopt existing conditions of industrial combinations could be made effectual by a construction which would cut down the right of the employés to effective representation of industrial interests in the Federal Arbitration Court to something so much less free and less effective than that which they have enjoyed in the industrial arbitration systems of the States.

Thus the same conclusion as to the meaning of sec. 55 is to my mind irresistible whether the intention of the legislature is ascertained from the words of the Act taken in their ordinary meaning, or on the assumption that its language is ambiguous, and that its intention is to be ascertained by a consideration of the purpose of the Act in relation to the circumstances existing at the time it was passed into law. I am therefore of opinion that sub-sec. (1) (*b*) enabled the claimants to register as they have done, and that the answer to the first question submitted by the learned President should be that an association of land engine-drivers and firemen such as the claimant organization can be legally registered as an organization under sec. 55 of the Act.

The second question assumes the registration of the claimants to be invalid on the ground of the respondents' objection, and the learned President asks whether the objection is fatal to the claim when the case comes on for hearing. It is I think quite clear that the Arbitration Court can have no cognizance of a claim by employés unless at the suit of a duly registered association of employés. Failure to prove due registration puts a claimant organization in the same position as a plaintiff company in a Court of law that had failed in proof of registration. The President can do nothing to overcome the difficulty. If the claimants can cure the objection by registering anew, they must initiate their proceedings anew.

The Registrar's certificate under sec. 57 cannot cure the defect. The certificate is conclusive evidence of the fact of registration, and of compliance with what are called in sec. 55 the prescribed conditions, but it affords no evidence that the association is an association entitled to be registered under the Act. *In re*

National Debenture and Assets Corporation (1) is a clear authority in support of that view. The effect of a certificate of registration when put in evidence must depend upon the language which the legislature has used in giving it efficacy. The effect of the section now under consideration may well be described by the words of my learned colleague the Chief Justice in *Carroll* v. *Shillinglaw* (2):—". . . . the acknowledgment of registration is only conclusive that the things which could lawfully be done have been done, and that it cannot have the effect of declaring that a thing which could not be lawfully done has been lawfully done."

An amendment made during the argument limits the third question to the case of two respondents, The Board of Water Supply and Sewerage, Sydney, and the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne. The former of these bodies, constituted by the New South Wales Statutes 43 Vict. No. 32, 51 Vict. No. 28, and 53 Vict. No. 16, is in everything but name a Department of the New South Wales Government. It carries on public services which have always been regarded in Australia as governmental functions, it accounts directly to the State Treasury, and is in all important respects under government control. Under these circumstances it is clearly an instrumentality of the State Government, and is therefore, in accordance with the principle laid down in the *Railway Servants' Case* (3), outside the control of the Commonwealth Arbitration Court. The other corporate body, which I shall describe as the City of Melbourne, is incorporated by Victorian State Statutes, to which it is unnecessary to refer in detail. It is empowered to carry on, out of municipal funds, the services for the benefit of the citizens and the public which are usually undertaken by municipalities in Australia. Amongst these is the lighting of the streets and public places of the city. The *Electric Light and Power Act* 1896 adds new powers, and enables the City of Melbourne to light the city by electricity and to supply electricity not only for that purpose, but for the purpose of carrying on the business of electrical supply for house lighting and all other purposes for which

(1) (1891) 2 Ch., 505. (2) 3 C.L.R., 1099, at p. 1108.
(3) 4 C.L.R., 488.

H. C OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

electrical power may be used, authorizing the city to defray the costs of the business out of the municipal funds, and pay its receipts into the municipal funds. In its electrical supply department the city therefore carries on two operations, the one generally regarded in Australia as a public service, the other being clearly a private business. We are informed that the machinery which supplies electricity for all these purposes is the same and their engine-drivers employed on this work are therefore engaged in both these operations at the same time. The question submitted is whether the Commonwealth Arbitration Court has jurisdiction to make the city a party to the dispute in respect of such employés. In the *Railway Servants' Case* (1) this Court adopted the principle laid down by the Supreme Court of the United States in many cases, and comprehensively stated by Mr. Justice *Nelson* in *Collector* v. *Day* (2), that there must be implied in the Constitution a prohibition against the exercise by the Commonwealth of control in any form over an instrumentality of a State Government. The *Railway Servants' Case* (1) involved the right of the Commonwealth Arbitration Court to make an award respecting the wages of employés in the Government railways of New South Wales. State railways in Australia have ever been regarded as Government instrumentalities, and have been as such expressly recognized in the Constitution. The Court held that Government railway servants could not be brought under the control of the Commonwealth Arbitration Court. In the American Courts municipalities, speaking generally, have been treated as carrying on their public services as instrumentalities of the State which gives them their corporate existence. *Meriwether* v. *Garrett* (3) and *United States* v. *Railroad Co.* (4), broadly lay down the principle that a municipal corporation is a portion of the governing power of the State, and that any attempt to control or interfere with its functions is an attempt to interfere and control the State itself. The whole basis of the doctrine that there is an implied prohibition against the Commonwealth exercising control over an instrumentality of a State Government, or a State exercising control over an instrumentality of the Common-

(1) 4 C.L.R., 488.
(2) 11 Wall., 113, at p. 127.
(3) 102 U.S., 472.
(4) 17 Wall., 322.

wealth Government, is founded on an implication necessary for the preservation of the rights of Commonwealth and State within the ambit of their respective powers. The implication is not to be carried beyond the limits of the necessity. Having regard to the very great difference between the public services undertaken by municipalities in the United States, and those undertaken by municipalities in Australia, this Court might well hesitate to adopt the principles laid down in those cases in their entirety, especially having regard to the form in which the question has been brought before it. It is not, however, necessary for the advising of the learned President to express any opinion upon the broad question to which I have referred. The principle which frees State government instrumentalities from federal control or interference has never been applied in America for the protection of ordinary businesses carried on for profit even by the State itself. In the case of *South Carolina* v. *United States* (1) the Court held that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those employed by a State in carrying on an ordinary private business. In that case the sale of intoxicating liquor was the business of which the State in the exercise of its governing power had taken charge. Following that principle, as I think we should, there would appear to be no reason why the employés of the City of Melbourne, engaged in the operations of the electrical supply business, should not come under the control of the Commonwealth Arbitration Court just as the employés in any private business would come under its control, if they were members of an organization engaged in an industrial dispute extending beyond the limits of Victoria. The fact that the employés, in carrying out that work, are also engaged in the supply of electricity for the public purposes of the city cannot remove their employers, the City of Melbourne, from the jurisdiction of that Court. In the case of employés engaged exclusively in the public services carried on by the city a different position may arise, and one which I do not think it necessary to consider at the present time.

(1) 199 U.S., 437.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

As to the fourth question, it is quite clear that the learned President, in inquiring into the existence of such an industrial dispute as is necessary to give him jurisdiction, is no more bound by the ordinary rules of evidence than he is in hearing the merits of the dispute.

Sec. 25 of the original Act as amended applies to one part of the case as much as to the other. The question in the form in which it is stated should therefore be answered in the negative. But the real point upon which, as I understand him, the learned President requires the opinion of the Court is this:—If on such an inquiry he finds upon evidence taken in accordance with sec. 25 that he has jurisdiction, and the question of his jurisdiction is afterwards brought before the High Court for consideration, is that Court, in inquiring into the foundation of his jurisdiction, bound by the ordinary rules of evidence, or may it come to a conclusion upon evidence admitted by him under sec. 25, though not otherwise legally admissible? In the determination of any question of fact this Court, in the absence of statutory provision to the contrary, is bound, just as every Court is bound, by the ordinary rules of evidence. Whether there is or is not a dispute extending beyond the limits of any one State is a fact which must be established at the hearing as the foundation of the learned President's jurisdiction. If his jurisdiction is questioned in this Court on the ground that there is in fact no such dispute, the Court must determine that fact upon evidence brought before it in accordance with the ordinary rules of evidence, irrespective of what the learned President may have decided, and without considering whether the evidence before him was or was not admissible according to the ordinary rules of evidence. In proceedings on prohibition the evidence taken before the Arbitration Court may, of course, be brought before this Court on affidavit in the ordinary way, but the Court could not act upon any evidence which would be inadmissible under the ordinary law of evidence.

The answer to the fifth question depends upon the construction of sec. 21 applying the principles of interpreting such section adverted to in my answer to the second question. The Registrar's certificate is, in my opinion, *primâ facie* evidence of one fact and

one fact only, that is, that the controversy which the party claimant alleges to be an industrial dispute does extend beyond the limits of any one State. It affords no evidence that the dispute is an industrial dispute within the meaning of the Act, or that the claimant organization is legally constituted or entitled to bring the claim under the cognizance of the Court. As to the President's proposal to create a Board of Reference with the powers set forth in the proposed fourth clause of the award, I am of opinion that he has no jurisdiction. These are, no doubt, questions of fact which must be settled between the parties in working out of the award. It is competent to the President to constitute a body empowered to determine such matters. The provisions of sec. 40A of the Act of 1910 would seem to indicate fairly the nature of the authority which could for this purpose be legally conferred on a Board of Reference even under the Act of 1904. I do not know of any ground, nor have I heard any suggested, upon which it could be fairly contended that it was not within the power of the Commonwealth to enact that section. I do not think it necessary to express any opinion as to what alterations in the form of proposed clause 4 of the proposed award might make it valid. I agree with my learned brother the Chief Justice, and for the reasons he has given, that the duty of this Court under sec. 31 of the Act of 1904 extends only to answering questions of law arising out of concrete matters in actual controversy in the dispute.

ISAACS J. With regard to the first question, I am clear, as may be gathered from what I said in the *Jumbunna Case* (1), that the Constitution by sec. 51 (XXXV.) enables the Parliament, if it so desires, to empower the registration of organizations such as the claimants in this case. That is to say, it may empower workmen to associate and register as organizations having regard only to the nature of the work they personally do, and entirely disregarding the class of industrial operations in which they and their employers are mutually engaged. But while entertaining no doubt that Parliament possesses that power, the only question here is whether in fact it did so by the Act of 1904. That

(1) 6 C.L.R., 309.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Isaacs J.

depends on what is meant by "an industry" in that Statute. I shall presently indicate why I prefix the article to the word "industry."

In the *Jumbunna Case* (1) I expressed an opinion—though not a final one—that the Parliamentary use of "industry" in the Commonwealth Act was narrower than the Constitution required, and I there stated that it had reference to the business in which the employer was engaged as well as the employé.

Fuller consideration, now that the point has become essential, has confirmed me in my former opinion, and I shall more explicitly state the reasons for my conclusions.

The keynote of the Act is the prevention or the quelling of industrial strife which threatens or produces an interruption of industrial operations by which the wants of the community are satisfied. The public welfare is always the end in view. If the industrial operations, necessary, for instance, to produce or distribute the means of satisfying the requirements of the people of Australia, are in fact, or are likely to be, interrupted by a dispute between those who are co-operators in those industrial operations—that is both employers and employés—then that dispute—with a certain qualification which is material—is in obedience to the Statute to be prevented or settled. These industrial operations are in common parlance called "industries," and each of them is an "industry," and the Act when it speaks of "any industry" uses the term in this concrete sense and not in the larger and general abstract sense.

That is distinctly shown by the language of sec. 7 under the head of a lock-out or strike. It says that where persons, with a view to being associated as employers and employés respectively in *any industry*, have entered into an industrial agreement with respect to employment in *that industry*, a refusal or neglect to comply with the agreement, without reasonable cause or excuse, amounts to a lock-out or strike.

This section indicates what the legislature meant by "any industry" and also by "employment in" that industry, and also the object of an "industrial agreement," that is, an agreement respecting employment in the "industry," the term necessarily

(1) 6 C.L.R., 309, at p. 370.

implying one in which both employers and employés are engaged.

The same intention is preserved in sec. 38, which in paragraph (*f*) speaks of "a common rule of any industry"; and of the "industries . . . affected" entering into competition with each other, and it requires the President before making a common rule to publish a notification "specifying the industry." By paragraph (*g*) the section declares the common rule binding upon "the persons engaged in *the industry* whether as employers or employés." Sec. 40 dealing with "preference" again requires the President to specify "the industry"; and this is an illuminative section, because the industry in which an employer is required to give preference must be that in which he as well as the employés are engaged. Any other view would be meaningless.

Then in sec. 41 a marked distinction is drawn between "an industry carried on" upon premises, and "the work done" there. So far no doubt can possibly arise.

Before, however, examining sec. 55 on which the present contention arises, one observation is necessary. It has reference to the qualification to which I adverted. It is not every industrial dispute which the legislature has made the subject of Commonwealth interposition. A dispute may be so small as to cause no real or important disturbance of industrial functions, and a general line has been drawn by requiring it to possibly affect at least one hundred employés. Exceptional cases are provided for; but the general rule is fixed in the following way. An industrial dispute is the foundation of all jurisdiction; but the only industrial dispute which the Act of 1904 recognized was one to which an organization of employés was a necessary party, or else was certified by the Registrar as proper in the public interest to be dealt with by the Court. This last provision shows clearly that the public standpoint was the dominant consideration, and indicates why "industry" was used in the sense of the combined operation supplying the public.

But as to the first case we have to see what it meant by an "organization." It is not simply an association, because that term, by the interpretation section, includes very much more

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Isaacs J.

than "organization." "Association" means practically any association, great or small, of employers or employés, with or without regard to any particular industries.

An "organization" is confined to a registered or proclaimed organization. That compels us to turn to Part V. which relates to organizations. There we find them divided into "registered" (secs. 55 to 61) and "proclaimed" (secs. 62 to 64). The registrable organizations are those associations which are considered by the legislature as always sufficiently large and representative to invoke the application of the Act. Associations not attaining to that standard may, if special circumstances render it desirable, obtain the President's recommendation, and then the Governor-General proclaims them as organizations, so that the standing exceptional nature of some industries, and of employers and employés in other industries, is thus provided for. Special individual instances were also provided for in the Act of 1904 by the second case in the definition of "industrial dispute." Thus no possible requirement of registration or curial interposition went unregarded. This particular association could have been, and still can be, created an organization by proclamation on the President's recommendation.

The true meaning, then, of sec. 55 is not, I think, difficult to grasp. First, it dealt with employers' associations by allowing any association of employers in any industry to be registered, provided that during the preceding six months the employers associated employed on an average per month not less than one hundred employés in *that industry*.

The next paragraph gave the corresponding right to the employés by permitting that same hundred employés—or more—to register also as an organization, and so protect the right of the workers in the industry, as against the employers.

In other words, where the employers were allowed to register, so were the employés. If the employers had only 99 employés they could not possibly register as an organization; and it would be strange if, on the wording of the section, drawing no distinction between the industries referred to, those 99 employés could, by combining with another employé outside that industry, and having nothing whatever to do with it, register themselves as an

organization for the purpose of raising an industrial dispute in the employers' industry within the meaning of the Act, although the same employers in precisely the same circumstances could not. Such unequal treatment is opposed to the reciprocal aspect of the whole Statute. I feel no doubt that the industry referred to in sec. 55 is the same in both cases, and intended to be the connecting link between the two sets of co-operators, employers and employed. Sec. 60 (*h*) bears out this construction very forcibly by placing both employers and employés on the same footing as to cancellation for insufficiency of numbers.

If, then, there were no special interpretation in sec. 40 of the word "industry," there could hardly be any doubt that "industry," whatever occupation it included, at all events meant the industrial operation contributed to both by the capital of the employer and the labour of the employés, united together in the work of supplying the needs of society. But some special interpretation was essential to make clear which of the possible industries—or industrial operations so jointly contributed to and existing in the community—were included in the combined expression "industry." To answer that question the definition of industry was framed to embrace practically all such operations except those expressly reserved. Whatever business, or trade, or manufacture, or undertaking, or calling, or service, or employment a man or set of men engage in, to supply the public demands, is to be included as "an industry," provided in it persons are employed for pay, hire, advantage or reward. In other words, every industrial operation whatever in which the public are interested, and which by reason of disputes between those whose united efforts as employers and employés may be retarded or stopped, is an industry in the sense intended by Parliament. The special definition was not to discriminate between employers' industries on the one hand and employés' industries on the other, leaving the public out of consideration, but it was to embrace all industries in which both could be said to participate in meeting the demands of the people of the Commonwealth. "Calling," and "service," and "employment" are terms which could, of course, be used to define either, and the primary meaning of words is a good starting point. But the question always is as to the meaning of the words as used in

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Isaacs J.

the connection in which they are found, and their primary meaning is only one factor in determining their real signification. It was said by Lord *Romilly*, speaking for the Privy Council in the case of *The "Lion"* (1):—"The meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J. in *Rex* v. *Hall* (2), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.'" Here they are found linked with a phrase from which they cannot be separated, and which imparts a specific character to them. The calling, or service, or employment must be one "in which persons are employed for pay," that is, in which there are paid employés, so as to be a calling, service, or employment in which the possibility of a dispute can exist. In other words, the calling, &c., must be one which embraces the two sets of contributors—employers and employed. The disjointed meaning relied on by the claimants is consequently not reasonably open.

Reliance was placed also on the exception as to domestic service. But that is not, in my opinion, in any case sufficient to destroy what is otherwise plain. Not only may the reference have been merely used to indicate a negative, so as to allay fears, or prevent a possible argument as to constitutionality, but it is clear to my mind that, quite consistently with the interpretation I have given, some domestic servants would, but for the exception, be included in the arbitration provisions of the Act. They may possibly be so under the present form of the legislation. A very large number of persons are engaged as principals in the occupation of supplying public requirements, such as boarding-house keepers, and their industrial operations—that is, their "calling"—indispensably involves the employment of a vast number of domestic servants. Similarly with hotels. These are quite possible, and indeed probable, instances that may have occurred to the mind of the legislature, of businesses or undertakings or callings that in their operations directly connect the public, the employers, and the employés; and as that is so, the separate signification of "industry, as applying only to the employé, derives no support from the exception of domestic

(1) L.R. 2 P.C., 525, at p. 530. (2) 1 B. & C., 136.

service. Therefore, while feeling the deepest respect for the contrary view, and regretting the loss of time and trouble to the parties in the present case, I am personally unable to experience the least hesitation in answering the first question in the negative.

As to the second question, the objection is in my opinion fatal to the case. Parliament has permitted the Court to have cognizance, not of every industrial dispute, but only of such as are brought before it in one of three prescribed ways—namely, (*a*) by Registrar's certificate, (*b*) by submission by an organization, and (*c*) by a State authority. The second was the only mode attempted; and if there was no legal organization to submit the dispute, it necessarily follows the Court can have no cognizance of the matter.

Sec. 57 does not get over the difficulty. It makes the Registrar's certificate conclusive evidence of two facts in connection with the association, namely, registration and compliance with the prescribed conditions preliminary to registration. But that leaves untouched the question of whether the association prior to registration was one of the description required by sec. 55. That is at the root of the matter, and if the foundation goes, the edifice cannot stand.

The third question is of much importance, and though not strictly necessary to be answered in this case, having regard to the answers already given, yet it has been argued, and for the guidance of the learned President, and indeed of all concerned, the opinion of the Court may advantageously be expressed.

As to the Sydney Board of Water Supply and Sewerage, the matter seems clear enough.

The position it holds under the Statutes (No. 32 of 1880 and No. 28 of 1888) is one which, for all practical purposes, identifies it with the central Government, that is the Crown; and the only purposes of the Act are strictly governmental.

That Board, therefore, would not in my opinion be subject to the jurisdiction of the Commonwealth Arbitration Court.

The Melbourne City Council stands in a different position. It is primarily constituted for the purposes of municipal government, and in respect of its functions of legislation and administration may be said to be a subordinate local agent for the

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Isaacs J.

purposes of government. With this aspect we have no direct concern here; these functions are not under consideration except in one way. Mr. *Starke* argued that whatever other powers or authorities were granted to a municipal authority became *ipso facto* governmental powers and authorities, and he relied on some American authorities. As I read those authorities they look the other way, and tell against his argument. I need not refer further to the American cases cited during the argument, but would add to them a useful case, *Lloyd* v. *City of New York* (1); cited approvingly in *O'Donnell* v. *City of Sycrause* (2). But dealing with the question on reason and the recognized principles of British law and precedent, it is difficult to see how the contention will hold. The mere fact that a corporation is constituted a regulating agent for certain purposes, and for those purposes is entrusted with governmental powers, cannot alter the nature of added capacities which are inherently different. There is a manifest distinction between governing and trading. Regulating, in the character of lawgiver, the industrial operations of others, cannot be classed as one with personally engaging in such operations in competition with others. The two things may simultaneously reside in the same structure, but they are not therefore related.

Local government is true government; it is as much a subordinate branch of the Sovereign legislative power to make a by-law or declare a rate as the order of a local justice of the peace is a subordinate branch of the Sovereign judicial power. For the purpose of non-interference with their governmental functions, a municipal corporation might fairly claim to stand as *Blackburn* J. described it in *Mersey Docks* v. *Cameron* (3) *in consimili casu* with Crown servants; and to rely on the position, to borrow Lord *Cranworth's* phrase in the same case (4) as "extending . . . . the shield of the Crown to what might more fitly be described as the public government of the country." But, on the other hand, corporate trading is none the less trading, and is on a wholly different plane. The difference is ineradicable. *Sir Lloyd Kenyon* pointed this out in *Moodalay* v. *Morton* (5),

(1) 5 N.Y., 369.
(2) 112 Am. St. Rep., 558, at p, 562.
(3) 11 H.L.C., 443, at p. 464.
(4) 11 H.L.C., 443, at p. 508.
(5) 1 Bro. C.C., 469, at p. 471.

where he said of the East India Company :—"They have rights as a sovereign power, they have also duties as individuals; . . . . As a private company, they have entered into a private contract, to which they must be liable."

Apart from the doctrine of exemption of the Sovereign and of foreign independent Sovereigns and their representatives from jurisdiction, *The "Charkieh"* (1) contains useful reasoning and authorities in this connection. And that doctrine is the only possible ground on which the municipality could claim exclusion from the jurisdiction of the Arbitration Court in respect of its commercial operations. My opinion, stated not as a final decision, but as a strong impression after argument and careful consideration, is that municipalities engaging in what is simply trading for profit, just like other traders, must, in Lord *Stowell's* words in *The "Swift"* (2), quoted on the page above referred to, "traffick on the common principles that other traders traffick." And the destination of the proceeds does not affect the character of the operation from which they are derived. It would, of course, be monstrously unfair to the general body of traders if the competing municipalities were not so obliged, though this is not in itself a sufficient legal reason. I offer no opinion whatever as to whether, under our Constitution, a State, by first exercising sovereign legislative power, authorizes itself to embark, and does embark, in ordinary industrial enterprises, would be *pro tanto* subject to this branch of federal jurisdiction.

The fourth question cannot be answered by a simple "yes" or "no." To do so would leave the matter open to some misunderstanding. The Act, by sec. 25, frees the Court and the learned President from all rules of evidence in order to decide any question whatever which comes before the tribunal for decision under the provisions of the Act. But the same Act makes the existence of a dispute an essential preliminary to any jurisdiction at all. Consequently, before sec. 25 can apply, we have to assume the existence of a dispute; and its application must therefore be limited to facts, other than the existence of the dispute.

The jurisdiction of the Court to deal with the matter before it depends on the actual existence of the dispute, and not on what

(1) L.R. 4 A. & E., 59, at p. 99. (2) 1 Dods, 320, at p. 339.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Isaacs J.

material its existence or non-existence is made to appear to the Court itself. The Court may, in order to ascertain the facts as to its existence, proceed, without being open to legal challenge on that account, either by rigid adherence to the ordinary rules of evidence, or by accepting any information it thinks proper or convenient in the circumstances. What it has to do at the outset is to satisfy its mind that it is not overstepping the bounds which Parliament has laid down for it.

The learned President is then, so far as the ascertainment of the dispute is concerned, at least so long as the Act remains in its present form, in precisely the same situation as every other Judge whose jurisdiction depends upon the existence of some extraneous circumstance. What is he to do? The situation is described by *Coleridge* J. in *Bunbury* v. *Fuller* (1) thus:— "Suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; and on its being presented, the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not proceed with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake." My answer then is, that the obligation to inquire as to the existence of the dispute arises as an incident to the functions of determining the issues before the Court, and for the purpose of seeing that every essential condition of jurisdiction laid down by the law is observed. As the presence or absence of that condition, if contested, must eventually depend upon ascertainment in the way provided by the rules of evidence applicable to such an inquiry, that is, the rules of common law so far as no statutory provision exists, and according to statutory methods so far as any are provided, I can only suggest that the safer way would be to deal with this preliminary inquiry according to the rules which would

(1) 9 Ex., 111, at p. 140.

have to be followed by any Court which might subsequently have to reconsider it.

As to the fifth question, the certificate is not evidence of the existence of an industrial dispute as the law regards it, but is *primâ facie* evidence that the relations between the parties, assuming them to amount to an industrial dispute, extend beyond the limits of one State.

With regard to the sixth question: Apart from express provision on the subject, the implied power to refer any matter to a Board or any other person or persons stood as it has already been expressed by me in the *Bootmakers' Case* (1). Since that judgment was pronounced, the legislature has, in my opinion, no longer left the matter to implication so far as a Board of Reference is concerned. I say nothing about purely ministerial references to a Court officer for the purpose of working out details of directions. But with regard to a Board of Reference Parliament has, as it appears to me, stated precisely what it requires, and the power, whatever it may be, to refer matters to a Board must now be sought in sec. 40 (*a*) of the Act 1904-1910.

The proposed clause was not intended to be made in exercise of the powers given by that section, but in any view it must, I think, in several particulars unnecessary now to state, be considered as conferring too much power on the Board.

I would only add that nothing was suggested which would cast doubt on the validity of sec. 40 (*a*).

HIGGINS J. My answer to the first question is "Yes." The Act does not refuse to recognize, as an organization for its purposes, great unions such as the Amalgamated Society of Engineers, having members who get employment in all kind of employers' undertakings throughout the world. Nor does the Act refuse the boon of arbitration in cases where the employers, in dispute with employés of a certain craft, do not happen to be carrying on undertakings of the same character.

The answer depends on the meaning of the Act: there is no difficulty under the Constitution. Parliament could, indeed, at

(3) 11 C.L.R., 1, at p. 62.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Higgins J.

any time put its intention beyond all doubt; but we have to deal with the Act as it stands. I am not surprised that the words used have created a difference of opinion in this Court, for the draftsman has had occasion to use the word "industry" much more frequently in the sense of the undertaking of the employer than in the sense of the calling or occupation of the employé. The circumstances in each case dealt with in the sections happened to require the former sense; and the difficulty arises from the effort of the framers of the Act to make the one word "industry" carry the burden of two very distinct meanings.

The word "industry," in relation to employers in sec. 55 (1) (*a*), and elsewhere, I shall assume for the present to mean their industry in the sense of business or undertaking, But what is the meaning of the words in sec. 55 (1) (*b*), "any association of not less than one hundred employés in or in connexion with any industry"? It is said that this means that the association must be confined to men, often of very diverse callings, engaged in some kind of (employer's) undertaking. That is to say, the engine-drivers of a big undertaking, such as the Broken Hill Proprietary, must, if they want the benefit of the Act, join an association in which miners, truckers, timbermen, wheelwrights, smelters, plumbers, carpenters, &c., are members, and cannot join with other engine-drivers, doing the same kind of work in timber yards or mills. Being few in number, the engine-drivers would be lost in the crowd of members of other occupations, and would probably find their interests ignored. "Birds of a feather flock together"; but it is not to be so with unions under this Act, according to the argument of the respondents. It is not engine-drivers only who will suffer if the respondents succeed, but societies such as the Amalgamated Society of Engineers, the Federated Carters and Drivers, the Federated Wood Workers, the Shop Assistants' Federation, the Sewerage and General Labourers' Association, the Amalgamated Society of Carpenters and Joiners, the Australasian Society of Engineers, the Federated Clerks' Union—all already registered under the Act. In Great Britain such unions are well recognized; and also such unions as the Associated Blacksmiths, the United Patternmakers, &c.; but it is urged the federal Act is to be treated as excluding them. There is certainly no indica-

tion in the Act of any intention to cut so violently into trade union practice, to interfere with the freedom of voluntary association for the betterment of industrial conditions. According to sec. 2 one object of the Act is "to facilitate and encourage the organization of representative bodies of employers and of employés . . . . . and to permit representative bodies of employers and of employés to be declared organizations for the purposes of this Act." *Primâ facie*, this includes any kind of representative body of employés, includes "craft unions," and the burden of proof lies on those who assert that there is any exclusion of craft unions under the other provisions of the Act.

I concur with my learned brother O'Connor in his opinion that under the word "industry," in the interpretation section, are included not only undertakings (of the employers) but also callings or occupations (of the employés). We ought to give the words "trade," "calling," "service," "employment," their full meaning unless there is something in the context which prevents us; and we ought to assume that Parliament had, at the least, such knowledge as is common property as to the modes of unionism. It is quite true that we should correctly speak of a master cutler's "trade;" but we also speak of a journeyman cutler's "trade." We may speak of an engineer's "calling"; but equally of a journeyman engineer's "calling." We speak, it is true, of a postal service, or a carrying service; but much more frequently of a labourer's service, a waiter's service. We may say that a man has employment as a builder; but it is, at the very least, equally appropriate to speak of a clerk's employment. The rest of the words in the clause are also appropriate, for in the "trade" of journeyman plumber, in the "calling" of moulder, in the "service" of waiter or labourer, in the "employment" of clerk, "persons are employed for pay." Then the exception comes which proves the rule; "excepting only persons engaged in domestic service," &c. There is no force in this exception unless Parliament meant to exclude from "service" domestic service; the exception implies that under the earlier part of the clause ordinary domestic servants, whose employers may have no business undertakings of any kind, could be treated as constituting an industry.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Higgins J.

I take it that the Act meant industrial workers on both sides to associate themselves as they thought best; subject, however, to the power of the Registrar to refuse to register an association if there is already an organization to which members might conveniently belong (sec. 59); and subject to the Court's power to cancel the registration "for any reasons," as well as for certain specified reasons (sec. 60). The draftsman had in his mind the wide definition of "association" in sec. 4—"any trade or other union . . . . or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés." He had to limit the class of associations to be registered so as to exclude, for instance, an association so vague as the Friends of Humanity, or the Workers of the World, and so as to confine registration to associations connected with some definite industrial operations. Moreover, I do not think that sufficient attention has been given during the argument to the words "*in or in connection with*" any industry. Even assuming that "industry" is to have the narrow meaning of an employer's undertaking only, so that it refers only to some undertaking of one employer, or common to several employers, it does not follow that this association cannot be registered. An association of miners is "in" the mining industry; but an association of engine-drivers, or of fitters, is "in connection with" the mining industry, as well as "in connection with" other industries. The object of the words was, to my mind, obviously to provide that the association must have some definite connection with some concrete industrial operations in which are to be found the relations of employer and employed. If the contrary view is correct, an engine-driver who happens to get employment for a short time in a pickle factory cannot be in the same organization as an engine-driver in a jam factory, though they are doing precisely similar work.

Perhaps I ought to add that, in my opinion, the words added by amendment in the Act of 1910—"and includes a branch of an industry"—do not affect the question. If "industry" meant only an employer's business, it means so still. The amendment would probably allow the engine-drivers who happen to be for a time in flour mills to form a separate organization of their own;

but it would not allow the engine-drivers who happen to be in a soap factory to join in an organization with engine-drivers who are temporarily next door in a candle factory.

As to the second question: Assuming that sec. 55 does not allow of the registration of this association, I concur with my learned brothers, but with doubt, in the opinion that the objection is fatal, even when the case comes on for hearing. The Court has no cognizance of the dispute unless an "organization" submit it, under sec. 19 (*b*); and although the association has been in fact registered in this case, it is an association which—if the respondents' contention is right—is incapable of being an organization. At the same time it must be admitted that the result is very unfair to the claimant union. This union simply followed the practice of the Registrar, who admitted many other such craft unions. It was registered more than three years ago; and none of the respondents applied to the Registrar, or to the Arbitration Court, although they could have so applied, to have the registration cancelled. On the faith of the registration the union has spent much money and great labour with the view of keeping the men working and of having the disputes settled by the Court; and now, when an award is ready, it is told that the Registrar should not have registered. However, my answer to question two must be "Yes."

The questions which are put actually arose in the course of the concrete case before me, and are, in my opinion, questions of law (see sec. 31); and as such they ought, I think, to be answered by the High Court judicially. The consequences of the answers will be for me, as President of the Court of Arbitration, to determine —subject, of course, to the Constitution and the Act, and to such controlling power as is vested in the High Court.

The third question compels the consideration of all that difficult doctrine, propounded by *Marshall* C.J. in the United States, as to the implied exemption of federal and of State "instrumentalities." In a former case I have ventured to express my scepticism as to the soundness of the doctrine; for I think that in *M'Culloch* v. *Maryland* (1) the principle of necessary implication has been extended far beyond logical limits, at all events beyond the limits

(1) 4 Wheat., 316.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Higgins J.

set by British law (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (1)). The whole doctrine of exemption of "instrumentalities" rests on inference; and the inference becomes more and more difficult as the activities of the State increase. How can one say that business undertakings of the State were meant to be exempted by a Constitution framed in 1789, at a time when no one dreamt of such undertakings? In the *South Carolina Case* (2) the Supreme Court of the United States seems at last to have found the necessity for some limitation of the doctrine; and probably some such line of demarcation as was found in that case will have to be adopted in Australia. But, although this question was submitted by me to the Court, I admit that it would be better not to answer it at present—not to answer it unless we can answer it fully. It would be well, first, to give an opportunity to the States and to the Commonwealth to be heard; and to have the facts more precisely set forth as to the undertakings of the several respondents affected. I am all the more inclined to this course, as the answer to the question may involve the validity of certain amendments made by the Act of 1910 in the interpretation section.

My answer to the fourth question is, "No." The questions, Is there a dispute? and Does it extend beyond one State? have been raised in nearly every case that has come before me in the Arbitration Court, and from the first. I quite recognize that the existence of the dispute, and its extension, are conditions precedent to the exercise of the jurisdiction of the Court, and I have hitherto spent much time and care in taking full evidence from all sides on the issue. But the position becomes different, now that I understand from my learned brothers that my findings on the issue must be regarded as irrelevant on prohibition or mandamus proceedings, and that even the evidence taken by me cannot be used except by consent. I shall, of course, regard it as my duty not to proceed with an arbitration if it is clear from the first that the conditions as to jurisdiction are not fulfilled; and also to demand some evidence showing a *primâ facie* case of jurisdiction. But, as to such evidence as I take, I am of the opinion that sec. 25 applies, and that by virtue of the amend-

(1) 4 C.L.R., 1087, at p. 1164. (2) 199 U.S., 437.

ment, if not of the original section, I am not bound by any rules of evidence.

My answer to the fifth question is, "No." The Act seems to have been drawn under the idea that the existence of a dispute was a matter easy to be proved; but the fact of its extension beyond one State would need some inquiry, and might be left to the Registrar, for a *primâ facie* finding. In my opinion, the certificate of the Registrar under sec. 21 is merely evidence that, assuming a dispute to exist as to industrial matters, it extends beyond one State.

The sixth question, unfortunately, has not been argued as it deserves to be argued—probably because the claimants rely on sec. 40 (A). In the *Bootmakers' Case* (1) I inserted certain provisions as to a Board of Reference. The provision which was attacked by the respondents in that case was a provision exempting certain employers from complying with the provisions of my award as to the contents of apprenticeship deeds. My award dealt with boys employed and to be employed, the dispute being as to "the regulation of boy labour," without any qualification. No one urged before me that existing apprentices were not to be dealt with, that their grossly unfair position was not to be rectified; but it was held by the Full Court that I had no power to deal with existing apprentices, as they were not within the ambit of the dispute if properly construed. It was also held, however, that even assuming that I had power to deal with existing apprentices, I had no power to delegate power to a Board of Reference to "annul" an existing indenture. Now, what I provided was that full adult wages were to be paid to all except (*inter alios*) those lads who were indentured as I prescribed, or who were indentured in a manner approved by a Board of Reference. I did not create, or "appoint" any Board of Reference, but I stated what kind of Board of Reference, voluntarily appointed by the parties, could give the approval on which exemption would follow. It is obvious that the Board of Reference was not given power to "annul" any indenture, but was enabled to exempt indentures from annulment—if "annulment" is the proper term. It was a provision purely in the interests of

(1) 11 C.L.R., 1.

H. C. OF A. 1911.

FEDERATED ENGINE DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. BROKEN HILL PROPRIETARY CO. LTD.

Griffith C.J.

the employers, allowing a dispensation in certain cases from the general rule. It was as if I gave a direction that all lads who passed a certain examination at a university were to be excepted from the rule. In such a case, there would obviously be no delegation of discretion; the direction would be mine, and the discretion exercised would be mine. Under the Act, the Court of Arbitration has power (sec. 38 (*b*)) "to make any order or award or *give any direction* in pursuance of the hearing or determination;" and (sec. 38 (*u*)) "generally to give all such *directions* and do all such things as it deems necessary or expedient in the premises." The *direction* contained in my proposed clause is that any decision of a question arising *out of* the award, if given by a Board of Reference, voluntarily constituted by both parties, should be binding on the parties by virtue of my award; as if a committee, empowered to settle the conditions of racing, were to prescribe that the decision of the judges is to be final. The truth is that the duty of the Court "to settle a dispute" resembles far more the duty of a Court of Chancery to "settle a scheme" for the conduct of a charity, than the duty of a Court of common law in an action for debt or damages. The Court of Arbitration does not award payment for violation of existing or past rights, but prescribes a system of relationship for the future. It has never been suggested, so far as I know, that a Court of Chancery, in committing to a board of trustees of a charity the function of selecting boys for a school, or inmates for a benevolent institution, is thereby delegating its powers. The doubt which occasioned question 6 was occasioned by the language of the majority of the Court in the *Bootmakers' Case* (1) as to delegation of authority to a Board of Reference. I did not think it was delegation; but, if it is—and the Full Court held it to be a delegation—how can Parliament, when creating a tribunal in pursuance of its power under the Constitution, enable the tribunal to delegate any authority to another body? As I have said, this question has not been argued. My duty is to express my opinion in the affirmative as to question 6, except that the words "or respecting any other matter of their industrial relations" must be excised. I inserted these words in the proposed

(1) 11 C.L.R., 1, at pp. 32, 46.

award—words which are often, and wisely, put in agreements and State awards—merely in the hope of eliciting the opinion of the Full Court on the whole subject, and of finding the precise limits of my power.

I do not think that the express power to "appoint" a Board for all Australia, now contained in sec. 40A, operates to withdraw such powers as were already contained in the original Act, under provisions which have not been repealed.

Questions answered accordingly.

Solicitors, for the respondents, *Derham & Derham.*

B. L.

H. C. OF A. 1911.

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA *v.* BROKEN HILL PROPRIETARY CO. LTD.

Higgins J.

[HIGH COURT OF AUSTRALIA.]

RICHARDSON . . . . . APPELLANT;
DEFENDANT,

AND

AUSTIN . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *June* 13, 14, 15.

Griffith C.J., Barton and O'Connor JJ.

Markets—Sale of marketable goods in places other than markets—"Places," meaning of—Public places—"Shop," meaning of—Disturbance of market—Markets Act 1890 (*Vict.*), (*No.* 1115), *sec.* 25.

Sec. 25 of the *Markets Act* 1890 (Vict.) provides that the commissioners of markets "may fix the places within such town or portion of a town for the holding of markets, and may there erect and build or cause to be erected or built market houses with shambles stalls and other convenient buildings.