[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE INDUSTRIAL REGISTRAR OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE AUSTRALASIAN COAL AND SHALE EMPLOYEES' FEDERATION.

EX PARTE THE SULPHIDE CORPORATION LIMITED AND OTHERS.

H. C. OF A. 1918.

MELBOURNE, *March* 18, 19, 20, 21; *June* 4, 10.

Barton, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial Arbitration—Organization—Change of name or constitution—Conditions of change—Regulation—Ultra vires—Objections to change—Duty of Industrial Registrar—Costs—Prohibition—Alteration of order—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *sec.* 58A—*Conciliation and Arbitration Regulations* 1913 (*Statutory Rules* 1913, *No.* 331; *Statutory Rules* 1915, *No.* 89), *regs.* 17, 17A.

Sec. 58A of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 provides that "An organization may, in the prescribed manner, and on compliance with the prescribed conditions, change its name or change the constitution of the organization including the description of the industry in connection with which it is registered, and the Registrar shall thereupon record the change in the register and upon the certificate of registration."

Reg. 17A of the *Conciliation and Arbitration Regulations* 1913 provides that "(1) An application for the change of the constitution of an organization . . . may be in accordance with" a certain form, "and shall be made to the Industrial Registrar . . . and shall be signed by two or more officers of the association. (2) Every application shall be in duplicate, and shall be accompanied by the prescribed fee and a statutory declaration setting forth the facts on which the applicant relies. . . . (5) Any organization or person interested may, within twenty-one days after the advertisement of the notice of the receipt of the application, lodge with the Registrar a notice of objection, in accordance

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with " a certain form, " to the change of the constitution of the organization. (6) The objector shall lodge with the notice of objection a statutory declaration in support thereof, and shall serve notice of the objection and of the statutory declaration on the applicants. (7) The Registrar shall fix a day for hearing the application, and shall give notice thereof to the applicants and the objectors. On the hearing the Registrar shall hear the parties or their officers if they are present and desire to be heard, and shall decide the matter." Reg. 17 had made similar provisions with regard to a change of the name of an organization.

Held, by *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ., that regs. 17 and 17A prescribe " conditions " on compliance with which an organization may under sec. 58A change its name or constitutoin, and that, whether clause 7 of those regulations confers ministerial or judicial duties upon the Registrar, those regulations are not *ultra vires*.

Held also, by *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Higgins* J. dissenting), that it is the Registrar's duty under clause 7 to consider all objections that are taken to the change, and, having considered them, to decide whether in his opinion the change ought to be made.

Per Higgins J. :—Regs. 17 and 17A prescribe conditions of the kind contemplated by sec. 58A ; under these regulations the Registrar has no power to entertain grounds of policy or expediency as to the nature of the association in its original constitution or in its constitution as changed ; and as he is not going to entertain such grounds, there is no reason for prohibiting him from proceeding with the inquiry under the regulations. *Obiter* :—The Registrar was right in his view that he has no power under the regulations to approve or disapprove of any form of constitution on grounds of policy or expediency. The words " decide the matter " in the regulations do not give him this power.

An order *nisi* for prohibition to the Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration was discharged by the High Court, both the grounds stated in the order *nisi* being decided against the applicants, but the applicants succeeded on an alternative contention as the Court decided, in the course of the case, that the Registrar should consider all grounds submitted for or against the change, whether they were grounds of policy or expediency or not. A formal intimation having been given that judgment would be given discharging the order *nisi* with costs, and no formal order having been drawn up, the reasons for judgment were subsequently delivered. Application was made by the applicants that no costs should be allowed,

Held, by *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Higgins* J. dissenting), that no costs should be allowed.

PROHIBITIONS.

Applications were made to the Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration by the Australasian

Coal and Shale Employees' Federation, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, one for the change of the name of the organization to the "Australasian Coal, Shale and Metalliferous Employees' Federation," and the other for the change of the constitution of the organization and the description of the industry in connection with which the organization was registered. The last mentioned change was to consist of striking out the words "an unlimited number of employees engaged in or in connection with the coal and shale industry, together with such other persons, whether employees in the industry or not, as have been appointed officers of the Federation and admitted as members thereof registered in connection with the coal mining industry," and substituting the words "an unlimited number of employees engaged in or in connection with the coal, shale, metalliferous, coke making, and coal lumping industries or pursuits or industries or pursuits auxiliary to or complementary of the said industries or pursuits, together with such other persons, whether employed in such industries or pursuits or not, as have been appointed officers of the Federation and admitted as members thereof, registered in connection with the coke making, coal lumping, coal, shale, and metalliferous mining industries." Both the changes were objected to by the Sulphide Corporation Ltd. and a number of other mining companies carrying on business at Broken Hill. The grounds of the application for the change of the constitution were community of interest between metalliferous miners and coal miners, &c., and other such grounds of policy and expediency in favour of the amalgamation of the unions. The grounds of objection made by the companies comprised also grounds of policy and expediency against the amalgamation of the unions. The grounds on both sides are set out in the judgment of *Barton* J. hereunder. As to the change of name, the grounds of the application and of the objection to the change were the same as those with respect to the change of the constitution. The Registrar fixed a day for the hearing of the applications and of the objections. It appeared that, on the hearing of an application by another organization for the change of its name and constitution and of objections thereto, the Industrial Registrar had indicated his intention, following the

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decision of the President in *In re Federated Shipwrights' Ship Constructors and Boat Builders Association of Australia* (1), to entertain only objections based on non-observance of the provisions of the Act and non-compliance with the manner and conditions of the change prescribed by regs. 17 and 17A of the *Conciliation and Arbitration Regulations* 1913.

The Sulphide Corporation Ltd. and the other companies which objected to the changes obtained in respect of each application an order *nisi* calling upon the Industrial Registrar and the organization to show cause why a writ of prohibition should not issue to prohibit the Industrial Registrar from further proceeding with the application on the grounds: (1) that the Industrial Registrar had no jurisdiction to proceed with the matter of the application and objections thereto unless and until the conditions referred to in sec. 58A of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 had been prescribed; (2) that in the one case reg. 17, and in the other reg. 17A, of the *Conciliation and Arbitration Regulations* 1913 was *ultra vires* and invalid.

The prohibition with regard to the change of constitution was argued first, it being admitted that if the prosecutors failed as to the one they failed as to the other.

Mitchell K.C. (with him *Stanley Lewis*), for the prosecutors, moved the order absolute.

Owen Dixon (with him *Dunlop*), for the respondent organization, to show cause. Reg. 17A is not *ultra vires*; for if it is *ultra vires* to give to the Industrial Registrar judicial functions, reg. 17A does not purport to give them; nor does it appear that he intended to consider the grounds of policy or expediency adduced by either side. Under reg. 17A of the *Conciliation and Arbitration Regulations* 1913 the duty of the Industrial Registrar is to see that the application made for a change of the constitution complies with the law, that is to say, that the requirements of the existing constitution have been complied with, that the provisions of the Regulations have been complied with, and that the application is not prohibited by or obnoxious to any statutory provision. His duty

(1) 11 C.A.R.

is purely ministerial, and he has no discretion. His approval either as a judicial officer or as a person administering the Act is not required. If his decision is wrong, the President may, under sec. 17 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, rescind the order, but he should only do so on grounds mentioned in sec. 60. The words " shall decide the matter " in reg. 17A (7) do not give the Registrar any discretion. The Registrar has not yet done anything as to which prohibition will lie. He has begun to comply with the Regulations, and has indicated that if he goes on he will act in a ministerial and not in a judicial manner. The organization also wanted the Registrar to entertain grounds of policy and expediency, but if he cannot do so the organization nevertheless wants the inquiry under reg. 17A to proceed.

Mitchell K.C. Reg. 17A is *ultra vires*, for it purports to confer upon the Registrar judicial functions whereas the intention of sec. 58A is that an organization may change its constitution in a prescribed manner and in accordance with prescribed conditions, and that the only function of the Registrar is to record that change. Under the section he can do nothing until the manner and the conditions of the change have been prescribed, and reg. 17A does not prescribe any conditions. That regulation contemplates the Registrar, and not the organization, making the change. The authority conferred upon the Registrar by reg. 17A (7) to hear the parties and determine the matter cannot be construed as an authority simply to record the change. In order that the principle of interpreting regulations so as to bring them within the Statute under which they purport to be made should apply, the words must be reasonably capable of such a construction. Prohibition will lie because reg. 17A purports to give the Registrar judicial authority, and it will be assumed that he will act in pursuance of the authority conferred. See *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (1); *R.* v. *Edwards*; *Ex parte Howells* (2). If reg. 17A is *intra vires* and if it prescribes conditions, then the Registrar must hear and determine all the objections taken. He is required by reg. 17A (7) to hear the parties and decide the matter,

(1) 15 C.L.R., 576.

(2) 7 Qd. L.J., 25.

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that is, the matter in contest between the parties. No limit is placed by the Act or the Regulations upon the objections that may be taken.

Owen Dixon. The proper construction of reg. 17A (7) is that the Registrar is, as a preliminary to recording the change, to determine whether the conditions and requirements to be found elsewhere in the Act and the Regulations have been complied with. [He referred to *Shackleford, Ford & Co.* v. *Dangerfield* (1).] If that is the proper construction, the regulation is valid. Another possible construction is that the Registrar is to give his approval of the change based on grounds that are material to the carrying out of the Act. Even if that is the proper construction the regulation is valid as being a condition imposed pursuant to sec. 58A. In order that prohibition may lie the Court must be satisfied that the Registrar will, unless restrained, enter on a particular course of action which will be an assumption of his being a judicial tribunal, which judicial tribunal is unauthorized. It is not to be inferred that he will give the regulation such a construction as will involve an exercise by him of judicial functions. On either of the two constructions before mentioned of reg. 17A (7), the Registrar would not be exercising judicial functions. Even if he is required to give a general approval his functions do not become judicial (*Boulter* v. *Justices of Kent* (2)). Assuming a construction of reg. 17A (7) which would give the greatest amount of judicial discretion to the Registrar, he would not be assuming to be a pretended Court within the meaning of the rule which allows prohibition to go. It is not sufficient that he should perform judicial functions, but he must pretend to decide the rights of parties and to give a binding decision on those rights—to impose legal obligations which enforce pre-existing obligations (*Ex parte Simon* (3) ; *Chabot* v. *Lord Morpeth* (4) ; *Halsbury's Laws of England,* vol. x., p. 151 ; *R.* v. *Arndel* (5) ; *R.* v. *Watermen's Co.* (6)).

[HIGGINS J. referred to *R.* v. *Local Government Board* (7).

[RICH J. referred to *R.* (*Wexford County Council*) v. *Local Government Board* (8).]

(1) L.R. 3 C.P., 407.
(2) (1897) A.C., 556.
(3) 4 T.L.R., 754.
(4) 15 Q.B., 446.
(5) 3 C.L.R., 557.
(6) (1897) 1 Q.B., 659.
(7) 10 Q.B.D., 309, at p. 321.
(8) (1902) 2 I.R., 349, at p. 373.

Reg. 17A prescribes conditions within the meaning of sec. 58A. The word " prescribed " in that section includes prescribed by the Act as well as by regulations.

Mitchell K.C. referred to *The Tramways Case* [No. 1] (1); *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.* (2); *Shortt on Informations, Mandamus and Prohibitions*, p. 433.

Cur. adv. vult.

March 21.

BARTON J. We have come to the conclusion that the order *nisi* for prohibition must be discharged with costs. The time at our disposal during these sittings of the Court, which must terminate to-day, is not sufficient to allow us to formulate properly the reasons for our decision. Those reasons, however, will be delivered on a day to be notified. I may intimate, in case the application is proceeded with by the Registrar before reasons are given, that the majority of the Bench are of opinion that the Registrar is required to decide all the objections raised, and not merely objections based on non-compliance with the provisions of the Statute or the Regulations.

June 4.

On a subsequent day the following reasons for judgment were read :—

BARTON J. The Australasian Coal and Shale Employees' Federation is an organization registered under the *Commonwealth Conciliation and Arbitration Act*. It has made two applications to the Industrial Registrar : one is for a change in the name and the other is for a change in the constitution of the Federation. The prosecutors, a number of companies interested in mining at Broken Hill, are opposed to the application before the Registrar. They have filed objections to these applications, and notices of the objections having been served, with the proper statutory declarations, on the Federation, the Registrar originally fixed 4th March for the hearing of the applications and the objections to them, but afterwards fixed the following day, namely, 5th. Orders *nisi* for writs of prohibition were obtained by the prosecutors in

(1) 18 C.L.R., 54, at p. 71. (2) 17 Ch. D., 493.

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respect of each application on 4th March, and the hearing before the Registrar stands over pending the result of a motion to make the orders absolute, which was heard before us on 18th, 19th, and 20th March.

The argument has been confined to the question raised by the application for the change of constitution, it being conceded that the success or failure of the motion to prohibit that proceeding will determine the fate of the other application.

The objecting companies have been and are working under an award made by the Commonwealth Court of Conciliation and Arbitration on 16th June 1916, between these companies together with the Broken Hill Associated Smelters Proprietary Limited, on the one hand, and the Barrier Branch of the Amalgamated Miners Association and its members, employees of the companies, on the other. The dispute had been referred by the President to the Court.

The application for change of constitution is for the purpose of uniting into one organization the employees engaged in the metalliferous, coke making, and coal lumping industries, and the coal and shale employees. The new organization would include the members of the Barrier Branch of the Amalgamated Miners' Association. The grounds of the application and of the objections will be referred to presently.

The *Conciliation and Arbitration Act* 1904-1915 provides in sec. 58A as follows: "An organization may, in the prescribed manner, and on compliance with the prescribed conditions, change its name or change the constitution of the organization including the description of the industry in connection with which it is registered, and the Registrar shall thereupon record the change in the register and upon the certificate of registration."

The Statutory Rules 1913, No. 331, include a regulation numbered 17, which deals with applications by organizations for change of name. Rule No. 89 of 1915 consists of a regulation numbered 17A (to follow reg. 17), dealing with applications by organizations for changes in their constitution. Reg. 17A, so far as it is material, is as follows:—"(1) An application for the change of the constitution

of an organization, including, if necessary, the change of the description of the industry in connection with which it is registered, may be in accordance with Form 11, and shall be made to the Industrial Registrar or to the Deputy Industrial Registrar in charge of the Registry in the State where the office of the association is situated, and shall be signed by two or more of the officers of the association. (2) Every application shall be in duplicate, and shall be accompanied by the prescribed fee and a statutory declaration setting forth the facts on which the applicant relies." "(5) Any organization or person interested may, within twenty-one days after the advertisement of the notice of the receipt of the application, lodge with the Registrar a notice of objection, in accordance with Form 13, to the change of the constitution of the organization. (6) The objector shall lodge with the notice of objection a statutory declaration in support thereof, and shall serve notice of the objection and of the statutory declaration on the applicants. (7) The Registrar shall fix a day for hearing the application, and shall give notice thereof to the applicants and the objectors. On the hearing the Registrar shall hear the parties or their officers if they are present and desire to be heard, and shall decide the matter."

The forms referred to do not, any more than the body of the regulation, set any limits to the grounds on which an application may be based, or to those on which objections may be made.

The grounds of the application are in the main as follows:— "(1) A community of interest between the whole of the employees in the said industries or pursuits. (2) That it is the constant practice of employees in any one of the said industries or pursuits to obtain employment from time to time in any other of the said industries or pursuits. (3) That any cessation of work, unrest or industrial dislocation taking place in any one of the said industries or pursuits immediately affects, or is likely to affect, the members of the other industries or pursuits mentioned in the proposed change of constitution. (4) That it is to the advantage of the employees and employers in all the said industries or pursuits and of the public generally that one organization should be registered under the *Commonwealth Conciliation and Arbitration Act* which would be fairly representative of the employees in the whole of such industries

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or pursuits. (5) That the proposed change of name and constitution will have the effect of assisting to prevent industrial dislocation in all or some of the said industries or pursuits."

The grounds of objection are as follows :—" (1) (*a*) They " (the objectors) " deny that any of the grounds upon which the application for such change is founded being the grounds numbered 1 to 5 inclusive in such application are true in substance or in fact ; (*b*) the industries or pursuits set out in the change of constitution now applied for do not form an 'industry' or 'a group of industries' within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1915. (2) That with respect to the majority of the employees who will have the right to belong to the applicant organization by reason of the change of constitution now sought, if such change be granted, there are organizations to which they might conveniently belong which have already been registered, namely, the Barrier Branch of the Amalgamated Miners' Association, the Waterside Workers' Federation, the Australian Workers' Union, the Federated Mining Employees' Association, the Federated Seamen's Union of Australasia, the Federated Engine Drivers' and Firemen's Association of Australasia, the Amalgamated Society of Engineers, the Australasian Society of Engineers, and the Australasian Institute of Marine Engineers. (3) The majority of the employees of the objectors . . . affected by the change of constitution now applied for are or have until recently (when they or some of them purported to become members of the applicant organization) been members of the Barrier Branch of the Amalgamated Miners' Association at Broken Hill, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, and such organization is and its members are now and have since the 16th day of June 1916 been working under an award of this Honourable Court made on that date, whereby certain minimum rates of wages and conditions of employment were prescribed, and certain duties and obligations were imposed on the said organization and its members and also on the respondents pursuant to undertakings therein set forth. The change of constitution now sought (if granted) and the results which will follow therefrom will have the effect of rendering the said award difficult to enforce and may also

have the effect of rendering the undertakings upon which it was based absolutely ineffectual, and of leading to other disputes and difficulties. (4) That the prescribed conditions for a change of constitution have not been complied with. (5) (*a*) The original registration of the applicant as an organization was invalid and ineffective for that Condition I. (*m*) of Schedule B of the *Commonwealth Conciliation and Arbitration Act* was not complied with; (*b*) the applicant is not an organization within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1915. (6) (*a*) The change of the constitution applied for is not in accordance with the law and/or is not authorized by the original constitution and rules of the applicant organization or any valid amendment of such constitution or rules; (*b*) no valid amendment of the original constitution has been made or is permissible under such constitution or original rules. (7) (*a*) No manner of or condition for an organization changing its constitution has been validly prescribed within the meaning of sec. 58A of the *Commonwealth Conciliation and Arbitration Act* 1904-1915; (*b*) reg. 17A set out in Statutory Rules 1915, No. 89, is *ultra vires* or alternatively is *ultra vires* in so far as it purports to provide for or permit the Registrar to do anything further than to record a valid change in the name or constitution of an organization; (*c*) that the said reg. 17A is *ultra vires* in so far as it purports to confer jurisdiction on the Registrar to decide whether a change in the constitution of an organization shall be made; (*d*) if the said reg. 17A be *intra vires* the rules of the organization are in conflict therewith and the organization has purported to change its constitution in manner inconsistent with such regulation. (8) The objectors will also contend that the Registrar should decide not to grant the application for that (*inter alia*): (*a*) the application is opposed to the scheme of the *Commonwealth Conciliation and Arbitration Act* 1904-1915; (*b*) to grant the application would not be in the interests of the public of Australia or of industrial peace and would tend to enlarge the area of many disputes."

The application and the objections are supported respectively by the prescribed statutory declarations.

The first ground of the order *nisi* is that the Registrar has no jurisdiction to proceed with the matter of the application and

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objections unless and until the conditions referred to in sec. 58A have been prescribed. The second ground is that reg. 17A is *ultra vires* and invalid.

The first ground must, I think, fail because reg. 17A is not confined to rules as to the manner in which a constitution is to be changed. It embodies conditions to be complied with before the change can take place. An application is to be made to the Industrial Registrar or his deputy, according to place, a fee must be paid, and the approval of the Registrar must be obtained as the result of his considering the application. He is to hear the parties or their officers if they so desire, and is to decide "the matter," whether they are so heard or do not wish to be heard. "The matter" is obviously the matter of the application, whether there be objections or not. That, I think, is clearly another and a most important condition to be complied with before the constitution can be changed.

Some misapprehension appears to have arisen from the concluding sentence of sec. 58A, viz., "the Registrar shall thereupon record the change in the register and upon the certificate of registration." The Registrar's duty there is purely ministerial, but it does not arise until the conditions on which the constitution may be changed are complied with. Those conditions include the prior obtainment of the favourable decision of the Registrar, as provided for in clause 7 of the regulation.

If, therefore, the regulation is *intra vires* the first ground of the order *nisi* fails.

The second ground of the order *nisi*, namely, that the regulation is *ultra vires*, was supported by many arguments which, in view of what I have to say, need not be the subject of detail.

The regulation is made under the authority of sec. 92. A regulation, then, must not be inconsistent with the Act. If it can stand with the Act it may prescribe not only anything the Act requires or permits to be prescribed (and the word "permitted" may be read as "expressly or impliedly allowed") but also anything "necessary or convenient" to be prescribed for giving effect to the Act. The authorization is very large, and includes regulations such as sec. 58A

requires or permits, the only restriction being consistency with the Act.

Now, I fail to find anything in the Act with which this regulation at all conflicts. It is true that for many purposes the functions of the Registrar are ministerial. Such, for instance, is his duty to record a change in the constitution of the applicant organization when the change has been made upon compliance with the prescribed conditions. The functions given to him by this regulation may be only ministerial, or they may be judicial. If he has not been given authority to act in a judicial (or, as it has been termed, a quasi-judicial capacity)—or, in other words, if his inquiry is ministerial or administrative—it is clear, and indeed Mr. *Mitchell* conceded, that prohibition to him would not lie. The prosecutors sought to prohibit the Registrar from going on to hear a matter which they contend the regulation gives him power to determine judicially. It was argued by Mr. *Dixon* for the respondents that the Registrar is not given any judicial authority, and that the 7th paragraph of reg. 17A resembles the requirement by which under the *Companies (Consolidation) Act* 1908 (8 Edw. VII., c. 69), sec. 8, the change of name by a company necessitates the written approval of the Board of Trade. See that section, sub-secs. 3 and 4. There the Board of Trade will, of course, not give its approval unless and until it has satisfied itself of the preliminary facts. But that does not make its function judicial in nature. Or it may possibly be that the position is similar to that of the Licensing Court in *Boulter* v. *Justices of Kent* (1), where Lord *Herschell's* remarks at p. 569 may afford some warrant for Mr. *Dixon's* argument, except that in the regulation now in question it is not open to every member of the public to object on public grounds, although it is open to "any organization or person interested" to do so.

I do not, however, think that it is necessary to determine that point, because even if the proper construction of the regulation is that the Registrar is to make a judicial inquiry, I cannot see that such a construction renders the regulation *ultra vires*. It would have been consistent with the remainder of the Act if the Legislature had in sec. 58A required expressly a judicial inquiry as a condition

(1) (1897) A.C., 556.

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precedent to the change of constitution. It did not do so, but it had power to give, and it gave, so wide a regulative authority to the Governor-General in Council as not to preclude him from prescribing an application to the Registrar and a judicial inquiry by him as a condition to be observed before an organization can change its constitution, and that quite apart from the Registrar's subsequent duty, purely ministerial, to record the change if he decided in favour of the application. We have nothing to do in this Court with the propriety of the regulation. And it must not be forgotten that the President has by sec. 17 of the Statute, power to "review annul rescind or vary any act or decision of the Registrar in any manner which he thinks fit." The regulation can scarcely be thought to have been framed without regard to this provision. Cases are frequent in which the requirements or permissions of Statutes or regulations strike an objector as so out of reason that he thinks there can be no constitutional or statutory warrant for them. It is not because laws are considered by a party or even by a Court as unjust or absurd that the Court would attempt to interfere with them. True, there are cases in which an ambiguous expression is open to either a reasonable or a manifestly absurd construction, and in such cases the Court will adopt that which is reasonable. But that is a totally different class of cases, resting on a principle that does not arise in this instance.

Finally, I see no reason to conclude that the Registrar has exercised or is about to exercise any jurisdiction which is not conferred on him. Of course, something may be stated as a ground of objection which is no ground at all in the acceptation of any man of common sense. But that is an occurrence to which every tribunal is subject, and I fear not uncommonly.

For the above reasons I think these orders *nisi* must be discharged.

HIGGINS J. I concur in the view that both the rules *nisi* should be discharged, as to both the grounds taken by the companies.

As to the first ground, I consider that conditions of the kind contemplated in sec. 58A have been in fact prescribed in regs. 17 and 17A. But I do not want to be understood as deciding that, if no such conditions had been prescribed, it would be the duty

of the Registrar to refuse to record the change in the name or in the constitution. For if the public are allowed to enter a park "upon compliance with all the conditions posted at the entrance," and if there are none posted, it does not necessarily follow that the public become trespassers on entering. Nor is it to be taken for granted that prohibition would lie in this case in respect of the ministerial act of recording the change.

The second ground urged is that the regs. 17 and 17A are *ultra vires*. The argument is that the application and the objections raise grounds of policy or expediency for and against the changes being made in the register; that the regulation means that the Registrar is to entertain, and decide on, such grounds; that the regulation is therefore invalid, inasmuch as the Act (sec. 58A) commits to the Governor-General and not to the Registrar the function of determining what shall be the conditions precedent to registration; and that the Registrar should be prohibited from entertaining these grounds of policy or expediency, and from proceeding further with the application.

There would be much force in this argument if it were true that the regulation meant that the Registrar is to entertain grounds of policy or expediency. For instance, one ground in the objections is that the proposed change of constitution on the register will render the existing award "difficult to enforce." It is not one of the conditions prescribed by the Governor-General or by the Act that the change must not be such as to render any award "difficult to enforce;" and under sec. 58A the Registrar *must* register the change if the conditions prescribed are satisfied: "on compliance with the prescribed conditions . . . the Registrar *shall* thereupon record the change." It is not for the Registrar to impose a new condition that any award must not be made by the change "difficult to enforce."

But the simple answer to the argument is that there is no evidence that the Registrar is going to entertain such grounds. On the contrary, if we are to read his mind from what he said in the case of the Liquor Trades (what he said is in evidence), he will not entertain those grounds at all. You cannot prohibit a man from doing what he is not going to do. The curious feature of the position

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is that the companies who seek the prohibition actually invite the Registrar to consider grounds which, they urge, he ought not to consider.

For these reasons, in my opinion, the second ground for the rule fails, and there is no need for us to pronounce our opinion as to the meaning of the rule 17A. What we say on that subject is really said *obiter*. But as my colleagues think well to deal with it, I propose to express my opinion.

My opinion is that reg. 17A does not mean that the Registrar is to have any discretion as to registering a change, or any right to say whether he approves of the change or not. The word "approve" or "approval," or its equivalent, does not appear in the regulation anywhere; the word "discretion," or the words "if he think fit," or their equivalent, do not appear. We must not be misled by the analogy of the practice under the British *Companies (Consolidation) Act* of 1908 (sec. 8 (3)), under which the Board of Trade has to give its "approval" to changes in a company. There the words are express: "Any company may by special resolution and *with the approval of the Board of Trade* signified in writing change its name" &c. The only word relevant here is the word "decide": "the Registrar . . . shall decide the matter." But this word is amply satisfied by treating it as referring to a decision that the change should be registered because the Act and Regulations have been observed. The Registrar has to see to it that under the new constitution the association is still "in or in connection with an industry" (sec. 55). He has to see to it that it is the *organization* that makes the change, and therefore he must be satisfied that the necessary resolution has been passed by the organization under its existing constitution. He has to see that the application is in duplicate, that it has been signed by two officers, that a statutory declaration sets out the necessary facts, that the proper fee has been paid, that the application has been duly advertised, that twenty-one days have been allowed for notices of objection, that the notices of objection follow the form prescribed, &c. What the Registrar "decides"—to register or not to register—depends on his findings on these matters.

My difficulty, indeed, is to find any words in reg. 17A that can

possibly be construed as making the registration of change dependent on approval of the change on the part of the Registrar—or, for that matter, on the part of the Court. The primary function of the Registrar is to keep a register and a list (sec. 54). The whole scheme of Part V. is inconsistent with either the Registrar or the Court having any such discretion or power of disapproval. On an original application for registration of an association the Registrar has not—nor has the Court—power to approve of the constitution or name of the association. Under sec. 55 "*any*" association may be registered on compliance with the prescribed conditions; and the conditions appear in sec. 55 and reg. 5 of Statutory Rule No. 331. On compliance with the conditions, the association—"any association"—has a right to be registered. There is no condition involving the expediency of registering such an association. The grounds of objection to registration are, under the Regulations, "confined" to the following (reg. 9): (*a*) that the association is not an association capable of registration (for instance, that it does not contain 100 employees, or that it is not "in or in connection with an industry"); (*b*) that the prescribed conditions for registration have not been complied with (for instance, that two copies of the resolution in favour of registration have not been supplied); (*c*) that an organization to which the members of the association might conveniently belong has already been registered (this allows the objector to appeal to sec. 59). These are the only grounds that the objector can raise on the original application to register. There are, indeed, certain other matters which the Registrar has to consider, though they cannot be the subject of objection. For under reg. 15 of No. 331, he has to satisfy himself that the association is genuine, that it is not, *e.g.*, what men call an "employers' union"—a union provided by employers to defeat the employees' union. But he has to satisfy himself of this fact apart from any objections taken; and nowhere is he directed to inquire as to the wisdom or policy of putting on the register an association having such a constitution as the applicant's. Indeed, the fact that the Registrar is expressly given power to refuse to register an association if there be already an organization to which the members might conveniently belong,

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implies that other questions of policy are not for him to entertain: *Expressio unius exclusio alterius.*

In short, in my opinion, most of the so-called "grounds" stated in the application and in the objections are not proper grounds to be entertained by the Registrar under sec. 58A or reg. 17A. Under the existing law, there seems to be no remedy for an unwise association, or for an unwise amalgamation of unions, except by application under sec. 60 (1) (*a*)—an application for deregistration of an organization on the ground that "for any reason" the registration ought to be cancelled. It seems to me that there ought to be some remedy before registration as well as after—that the Court should be given a power—carefully guarded—to forbid registration when registration would be against the public interest. When the Act and its amendments were framed, the question as to the policy of having big unions had not arisen, and employees and employers were allowed full freedom to associate as they thought fit. It is for Parliament to say whether the Court is to be given the power of imposing any veto on freedom of association for the purposes of the Act; but it would be lamentable if the duty of hearing evidence and arguments as to the expediency of a proposed constitution—the duty of deciding most difficult questions of industrial policy—were to be imposed upon the administrative office of the Registrar.

GAVAN DUFFY AND POWERS JJ. It is unnecessary for us to express any opinion as to whether prohibition will lie in this case, as we are satisfied on the facts that the order should be discharged. A writ of prohibition is sought against the Industrial Registrar in order to prevent him from proceeding with an application under reg. 17A of the amended *Conciliation and Arbitration Regulations* 1913. The question for our consideration is whether the application is authorized by the provisions of sec. 58A of the *Commonwealth Conciliation and Arbitration Act.* That section provides that an organization may, in the prescribed manner and on compliance with the prescribed conditions, change the name or change the constitution of the organization, and that the Registrar shall thereupon record the change in the register and upon the certificate of registration.

The regulation directs that an application for the change of the constitution of an organization shall be in a prescribed form, and shall be made to the Industrial Registrar or Deputy Industrial Registrar. It prescribes the fees to be paid and the procedure to be adopted by the applicant, and provides that an objection may be taken by an organization or person interested and prescribes the procedure to be adopted by the objector. Finally it enacts:— "(7) The Registrar shall fix a day for hearing the application, and shall give notice thereof to the applicants and the objectors. On the hearing the Registrar shall hear the parties or their officers if they are present and desire to be heard, and shall decide the matter." It is said that the regulation does not prescribe any condition within the meaning of sec. 58A and that until conditions are prescribed there can be no change of constitution. In our opinion the regulation does all that is necessary to comply with the provisions of sec. 58A. It does not purport to affect the ministerial duty of recording the change which is imposed on the Registrar, but it prescribes the manner in which the change shall be made, namely, by means of an application to the Registrar, and the condition on which it shall be made, namely, the obtaining in the prescribed manner his approval of or assent to the proposed change. The regulation directs him to decide whether the change shall be made or not, the section compels him to record the change if, and only if, he decides that it shall be made. Much argument was addressed to us as to the nature of the objections which might be taken to the change of constitution, and many ingenious limitations were suggested. In our opinion the objector is at liberty to take any objection that he thinks fit to take, and the Registrar must consider every objection so taken. Having considered all objections, his duty is to determine whether in his opinion it is desirable that the change should be made or not. We do not think that any fetter is imposed on his discretion beyond this, that he should honestly give to every objection the weight to which he thinks it is entitled. The object of the regulation is to interpose the discretion of the Registrar between the desire of the organization to change its constitution and the ministerial act of recording the desired change.

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RICH J. I agree that the rule *nisi* for prohibition should be discharged.

Implicit in sec. 58A is the condition that the change is to be made after a decision has been arrived at by the Registrar. Even if this be not so, reg. 17A duly carries out what is enacted by the section and prescribes, as it may properly do, as a condition precedent that "the Registrar shall hear the parties and decide the matter." No limit is placed to the objections that may be taken, and the duty of the Registrar is to consider such objections before deciding whether it is expedient that any change should be made. If, and only if, in his discretion he thinks fit, is he obliged to record it.

Stanley Lewis. No order as to costs should be made. In only three cases in which industrial matters have come into this Court have orders for costs been made. In no case in which employers have been successful have they been awarded costs. No distinction should be made between one side and the other. It is contrary to the spirit of the *Commonwealth Conciliation and Arbitration Act* that costs should be given. The prosecutors have succeeded in a substantial part of their claim, and the relief they have obtained could not have been obtained without these proceedings.

Owen Dixon. The formal judgment given on 21st March was that the orders *nisi* should be discharged with costs, and no alteration should now be made. This case does not involve any constitutional matter, and it is only in cases where such a matter has been involved that no costs have been awarded. Where the case, as here, turns on the construction of the Act or Regulations costs should be awarded, as was done in *R.* v. *President of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Agricultural Co.* (1). There is no rule of practice as to costs in these matters. The prohibitions have been discharged on all the grounds taken.

Stanley Lewis. The Court may alter its order at any time before the order is drawn up.

Cur. adv. vult.

(1) 22 C.L.R., 261.

The following judgments as to costs were read :—

BARTON, GAVAN DUFFY, POWERS AND RICH JJ. (read by GAVAN DUFFY J.). My brothers *Barton*, *Powers* and *Rich* and I are of opinion that no costs should be allowed in this case. The applicants have failed on both of the grounds stated in their order *nisi*, but they have established one of the alternative positions on which they relied. They contended that the Registrar was not at liberty to proceed with the hearing of the respondent's application, or that if he proceeded with it he was bound to hear and determine the matters raised by their objections. The respondent Federation contended that the Registrar was bound to proceed with the application but was not at liberty to listen to the objections. The Registrar was convinced that this contention accurately defined his duty; indeed, no other course was open to him unless he chose to disregard the reported judgment of the President of the Court in the case of the Federated Shipwrights of Australia. Had the applicants not taken these proceedings, the Registrar would have registered the change of constitution without considering the applicants' objections, and by these proceedings such a miscarriage has been prevented. The issue of the order *nisi* was necessary for the purpose of adjusting the rights of the parties, and was the simplest and most effective way of adjusting them.

HIGGINS J. In these two matters the Court intimated on 21st March last that the rules *nisi* for prohibition taken out by the Sulphide Corporation and other companies would be discharged with costs. Our reasons were postponed for full statement; and we stated them on Tuesday last. But counsel for the companies then urged that costs should not be given against his clients. As our brother *Barton* was then absent through illness we have taken the opportunity of consulting him in his rooms. I assume that we have power to vary our order before it has been drawn up. But I regret to find that I am unable to concur with my learned colleagues in altering the order as to costs. The more I consider the matter, the more clearly I see injustice to the Federation if we make it bear the costs of its successful opposition to the attempt to prevent the application to the Registrar from being even considered by him.

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The rules *nisi* were expressly to prohibit the Registrar from further proceeding with the applications at all. The companies relied on two grounds for the rules, and both grounds have been found, unanimously, to be wrong. The first ground is that no conditions have been prescribed as to the registration of changes of name or of constitution under sec. 58A. We have all held that such conditions have been prescribed. The second ground is that the regulations prescribed by the Governor-General are *ultra vires* and invalid. We have all held that they are *intra vires* and valid. There is, therefore, ample ground for making the companies pay the costs incurred by the organization (and by the Registrar if he had appeared) in opposing the rule *nisi*. I have ascertained that in every case up to the present in which this Court has discharged a rule for prohibition on all grounds it has given costs against the applicant for prohibition. But further, not only are the grounds of the rules wrong, but the whole object of the companies has failed. The companies did not seek a *mandamus* to compel the Registrar to hear and determine certain objections, but sought prohibition against further proceeding with the applications at all. It is true that as the result of the reasoning of the Court it appears incidentally that the Registrar is under a duty to entertain grounds of policy and expediency as to the constitution of organizations; and that he had previously been acting on the view that it was not for him to entertain such grounds—either those brought forward by the organization or those brought forward by the companies. But the fact that a sidelight is obtained from the Court by a wrong application should not, in my opinion, save the applicant from the ordinary consequences. The object of the applicants was, as expressed in their affidavit, to stop the application for registration altogether: "The said objecting companies are advised by counsel that the said Industrial Registrar has no jurisdiction to decide *the matters raised by the said applications*" (that is, the applications of the organization) "and the said objecting companies desire that a writ of prohibition be issued by this Honourable Court to restrain the said Industrial Registrar *from proceeding with the said hearing*." This advice of counsel for the companies has turned out to be wrong, and the Registrar is under a duty to proceed with the hearing.

The organization as well as the companies wanted the Registrar to entertain grounds of policy, &c., as well as the companies'—grounds such as community of interest, tendency of the amalgamated association to prevent dislocations of industry, &c. ; and it opposed the rules *nisi*, not because it did not want such grounds entertained, but because it wanted the application to proceed whether such grounds were to be entertained or not. The attempt of the companies to paralyse wholly the proceedings has wholly failed, and in my opinion the costs should be given against the companies. But as my learned colleagues are of a different opinion, the order is to be drawn up discharging the rules, but without costs.

Orders nisi discharged.

Solicitors for the prosecutors, *Blake & Riggall.*

Solicitors for the respondent organization, *C. A. Coghlan & Co.*, Sydney, by *A. J. O'Dwyer.*

B. L.