[HIGH COURT OF AUSTRALIA.]

CONSOLIDATED PRESS LIMITED . . . APPELLANT;
APPLICANT,

AND

THE AUSTRALIAN JOURNALISTS' ASSOCIATION . . . . . } RESPONDENT.
RESPONDENT,

PENTON . . . . . APPELLANT;
APPLICANT,

AND

THE AUSTRALIAN JOURNALISTS' ASSOCIATION . . . . . } RESPONDENT.
RESPONDENT,

High Court—Appeal—Jurisdiction—Commonwealth Court of Conciliation and Arbitration—Registered organization—Rules—"Tyrannical or oppressive"—Disallowance—De-registration of organization—Refusal to make order—Judicial order—The Constitution (63 & 64 *Vict. c.* 12), *s.* 73—*Commonwealth Conciliation and Arbitration Act* 1904-1946 (*No.* 13 *of* 1904—*No.* 30 *of* 1946), *ss.* 31 (1), 58A, 58C, 58D, 60.

Orders made under s. 58D or s. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946, and refusals to make such orders, are not an exercise of judicial power and therefore no appeal lies from them to the High Court under s. 73 of the Constitution and s. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946.

So *held* by *Latham* C.J., *Starke* and *McTiernan* JJ., *Rich* and *Williams* JJ. dissenting as to s. 58D.

H. C. OF A. 1947.

SYDNEY, *April* 14, 16; *May* 8.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

APPEALS from the Commonwealth Court of Conciliation and Arbitration.

These were appeals from two orders of the Commonwealth Court of Conciliation and Arbitration (Judge *Foster*) dismissing two applications made by Consolidated Press Ltd. and Brian Con Penton respectively by way of summons, each dated 13th September 1946.

H. C. OF A. 1947.

CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

The respondent to each summons was the Australian Journalists' Association, an association registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1946.

The application by the company was for the cancellation of the registration of the association because of its inclusion among its rules of rules numbered 52 (m), 52 (n), 53 (a), 53 (b), 53 (d), 54 (a), (10) and 54 (h) which were alleged to be " tyrannical or oppressive."

The application by Penton was made under s. 58D (1) (*b*) of the Act for the disallowance of the same rules upon the same allegation.

In an affidavit made on behalf of the company its managing-director deposed, *inter alia*, that the company printed and published the Sydney *Daily Telegraph* newspaper; that the company was bound by the " Metropolitan Dailies Award " made under the Act and that under that award members of the association have preference in employment; that the company had recently become aware of certain rules of the association which in the company's opinion imposed unreasonable conditions upon the continuance of membership of the association and were tyrannical and oppressive and, in particular, submitted that the rules referred to in its application could operate so as to hinder and deter employees in the proper performance of their contracts of employment and so as improperly to interfere with their employers in the conduct of their business. It was further submitted that the rules referred to were improper for an organization whose members were entitled to preference in employment. The deponent stated that the company did not wish to continue its application for cancellation of the association's registration if it would rescind or modify the rules referred to.

Penton deposed in an affidavit that he was the editor of the Sydney *Daily Telegraph*; that he was and had been for approximately twenty years a member of the association; that the relevant award was made on 16th November 1945; that his attention had recently been directed to the provisions of certain rules of the association and to the manner in which they could operate as the result of certain happenings in which the Federal executive of the association had purported to exercise power under those rules and had imposed on him a fine of £50; that the rules referred to were tyrannical and oppressive and prevented or hindered members of the association from observing the law and imposed unreasonable conditions upon membership of the association; and that members of the association who objected to those rules were not in a position freely to resign from the association as the award contained a provision for preference in employment for members of the association.

The deponents were cross-examined and examined on their affidavits.

The association adopted a recommendation made by one of its committees and on 30th June 1946 imposed upon Penton a fine of £50 for an alleged breach by him of rule 52 of the association's rules.

On 19th July 1946 registration was effected of an alteration, made in accordance with the association's rules, to rule 2. This alteration provided that "Persons not elegible for membership" were, *inter alios*, "the Editor of a metropolitan daily newspaper."

The rules referred to in the application provide as follows:— "52 (m) The Ethics Committee shall have authority:—(1) To communicate by letter with any member or persons to obtain any information which it considers necessary to ensure ethical standards in journalism and broadcasting. (2) To require by letter . . . any member to attend a meeting of the Ethics Committee—(1) to give any information required for the investigation; (2) to answer any questions which the Committee considers necessary, and/or (3) to answer any complaint made against him. The summons shall inform the member of the purpose of the summons and of the information required from him . . . (n) Should a member fail in answer to a written summons to appear before the Ethics Committee and has not furnished the Ethics Committee with a reasonable explanation of his failure to attend, the Ethics Committee is empowered to recommend to the District Committee that action be taken against that member under Rule 54 . . . 53 (a) A district Committee shall have authority—1. To communicate by letter with any person or member of the District to obtain information which it considers necessary for an investigation into a complaint under Rule 54 (Discipline). 2. To require by letter . . . any member to attend a meeting of the District Committee (1) to give any information required for an investigation into a complaint under Rule 54, (2) To answer any questions which the Committee considers necessary and/or (3) to answer any complaint made against him under Rule 54. The summons shall inform the member of the purpose of the summons and also of the information required from him. (b) Should a member fail to answer a written summons to appear before the District Committee and has not furnished the Committee with a reasonable explanation of his failure to attend, the District Committee shall have power to impose a fine not exceeding £2 on that member . . . (d) The District Committee shall have authority by a majority vote of its members assembled to recommend to Federal Council or Federal Executive that the member be suspended from office or expelled from membership or fined on the grounds that he has been

H. C. OF A. 1947. CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION. PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

adjudged guilty of a breach (to be specified) of Rule 45 (*sic.*) . . . 54—Discipline. (a) Federal Council or Federal Executive is empowered to deal with any complaint against an officer or member accusing him of . . . (10) Taking legal action against the Association before exhausting all remedies provided in the Rules. (11) Violation of or refusal to abide by the Association's Code of Ethics . . . (h) If a complaint is proved to the satisfaction of a majority of the members assembled at the meeting of Federal Council or Federal Executive dealing with the case, a fine not exceeding £50 may be imposed, a member may be expelled from membership and an officer may be suspended or removed from office and/or expelled from membership."

The applications were dismissed.

As regards Penton's application Judge *Foster* said that proceedings contemplated by s. 58D (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 must be brought, amongst other people, by a member. In point of law Penton became ineligible for membership of the association when he became an editor of a metropolitan daily newspaper. Being ineligible in point of law he was not a member, therefore he was not a member within s. 58D (2) and it followed that he could not make an application under s. 58D.

His Honour said that he did not propose to deal with the application by Consolidated Press Ltd. " in any other way but this : this is an application made by Consolidated Press Ltd. . . . that . . . calls upon the respondent to show cause why registration under the . . . Act of the Australian Journalists' Association should not be cancelled because of its inclusion, among its rules, of rules set out in the summons. That application is dismissed. I do not feel that I am called upon to give any elaborate reasons for that course. I am not very satisfied that these proceedings are a genuine desire on the part of the applicants to protect themselves or the community and . . . it does not encourage me to exercise in favour of the applicants any discretion that I might have in the alternative. I had the opportunity of . . . having a look at " the rules " and without making any final decision about the matter . . . I am not at all impressed with any of the reasons why a discretion which is given by section 60 (1A) should be exercised in their favour."

The applicants respectively appealed to the High Court from " the whole of the judgment and order of " Judge *Foster*.

Kitto K.C. (with him *Windeyer*), for the appellants. The judge in the court below should have adjudicated as to whether the rules

were tyrannical or oppressive within the meaning of s. 58D (1) (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1946. Any rule or rules found to be tyrannical or oppressive may under s. 58D be disallowed. Although under s. 60 (1A) the Commonwealth Court of Conciliation and Arbitration may, in its discretion, afford an offending organization an opportunity of amending its rules, the court also has power under s. 60 (1) to de-register the organization. The applicant Penton became a member of the respondent association when he was eligible for membership, therefore he did not substantially cease to be a member thereof, nor was he automatically expelled therefrom, upon his appointment as the editor of a metropolitan daily newspaper. The rules of the association, particularly rule 2, do not provide that a member who becomes such an editor shall cease to be a member. The purpose of rule 2 (c) is restricted in its operation to the initial qualification of a person to become a member. The view that rule 2 (c) relates only to eligibility to become a member is supported by rules 2 (b), 41 (c), 41 (e) and 49 of the respondent association's rules. The question before the court below was a question relating to its judicial powers and although the order was made under a jurisdiction which is expressed to be discretionary or on the formation of a particular opinion, an appeal against that order can be entertained by this Court. Neither s. 58D nor s. 60 of the Act contains by express provision or any necessary implication an exception within the meaning of s. 73 of the Constitution. There is nothing in the Act, viewed as a whole, to cut down the jurisdiction of this Court to entertain an appeal from the order made by the court below. The language used is not inconsistent with the existence of an appeal which normally does exist under s. 73 of the Constitution. Appeals to this Court in respect of matters arising under s. 58D and s. 60 are not prohibited by s. 31 of the Act. The mere fact that the decision of the court below depended upon the formation of an opinion or the exercising of a discretionary power does not preclude an appeal therefrom to this Court (*Ormerod* v. *Todmorden Joint-Stock Mill Co. (Ltd.)* (1); *Bosch* v. *Perpetual Trustee Co. Ltd.* (2); *Sampson* v. *Sampson* (3)).

[STARKE J. referred to *Moses* v. *Parker*; *Ex parte Moses* (4).]

That case is not applicable. If the provision now under consideration were similar to the provisions there under consideration it would have to be conceded that that principle precluded an appeal,

(1) (1882) 8 Q.B.D. 664, at pp. 675, 676, 678.
(2) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176; 55 W.N. 42.
(3) (1945) 70 C.L.R. 576.
(4) (1896) A.C. 245.

H. C. OF A. 1947. CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION. PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

as was recognized in *Jacka* v. *Lewis* (1). The question before the Court involves the true meaning of s. 58D and s. 60 and the rules upon ordinary principles of construction and does not involve an "arbitral interpretation" (*Harrison* v. *Goodland* (2)). The right of appeal under s. 73 of the Constitution lies where the particular order made by the Commonwealth Court of Conciliation and Arbitration was in exercise of judicial power (*Jacka* v. *Lewis* (3)). In every case under s. 58D and s. 60 the Commonwealth Court of Conciliation and Arbitration is called upon to ascertain the true construction of existing rules; to adjudicate upon that and to determine whether certain relief should or should not be granted. That satisfies the test of judicial power. In an application under s. 58D the court has to determine existing civil rights because it has to determine the meaning of certain rules by which many persons are bound.

[McTIERNAN J. referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (4).]

There is no general provision in the Act, or in the rules of the respondent association, to the effect that a person must be employed in a particular industry before he may join the organization relating to that industry. That matter is controlled by the provision that an industrial union must be controlled by rules. So, if a union is able to secure approval to such a rule or rules, there may not and need not be any limitation as to the classes or occupations of the persons who may become and continue to be members: See rule 51 (4). In both applications the court below should have adjudicated upon the question whether the rules were tyrannical or oppressive. Under rules 52 and 53 of the respondent association's rules a member is required to answer without warning any question or questions put to him by the committee appointed under the rules. Such question or questions may be tyrannical or oppressive. Failure or refusal on the part of a member to answer such question or questions renders him liable under rule 54 to a fine of £50 or to be expelled from membership. The relevant industrial award provides for preference in employment for members of the respondent association, thus it follows that a member so expelled would virtually lose his occupation and his opportunity of occupation because, for example, he declined to disclose matters which the law provides he should keep confidential because he learned them in his capacity of employee; or he declined to answer questions which would incriminate him in the criminal jurisdiction of the courts. Merely to observe that an application

(1) (1944) 68 C.L.R. 455.
(2) (1944) 69 C.L.R. 509, at p. 516.
(3) (1944) 68 C.L.R., at p. 462.
(4) (1945) 70 C.L.R. 141, at p. 169.

should not have been made and then to reject it is not an exercise of jurisdiction. In those circumstances this Court should make the order which the court below should have made. Rules 52 (m), 53 (a) 2, and 54 (a) 10, could be used tyrannically and oppressively to the prejudice of members and either should be accompanied by adequate safeguards or disallowed.

Barwick K.C. (with him *Murphy*), for the respondent. The provision in rule 2 that the editor of a metropolitan daily newspaper should not be eligible for membership did not, by reason of s. 58C (1) of the Act, become effective until after the occurrence of the matters complained of by the respondent against the appellant Penton, and after the decision to impose a fine upon him had been made. The respondent association was entitled to impose a fine upon Penton because he was a member of the association when he committed the alleged offence, but, having ceased to be a member under the rules as altered, he had no right to apply to the court in respect of the rules under which he had been so fined. The court below did not make any order under s. 58D of the Act. The applications were dismissed because the court declined jursidiction, thus there is no right of appeal. There is no judgment, or decree, or order, or sentence within the meaning of s. 73 of the Constitution. The appellants' only remedy is mandamus. Assuming, but not admitting, that an appeal will lie from the order declining jurisdiction, the result is that before this Court there is an appeal which is said to be a complete appeal and yet the Court cannot dispose of the appeal because to do so would be to substitute the opinion of this Court for the opinion which is prescribed in the Act. It is not simply a matter of the court below doing nothing. It is true that s. 58D is in aid of the general arbitral control (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (1)), but it does enable the court to render a rule or rules void for all purposes. The association has rules some of which are under the Act, and those rules are rules under which the members have rights and the association as such has rights. Section 58D empowers the court to avoid those rules, or some of them, for all purposes. So, even if a rule is not a rule in itself connected with the purposes of the Act, but is thought by the court to be tyrannical or oppressive, the court can avoid it altogether. Section 60 of the Act is purely an arbitral provision and does not affect civil rights. Alternatively, the submission is that the Court should not inquire into the merits of the complaints made against the rules, but, at most, should refer them back for consideration by the court below. In any event, the appellant Penton had no standing and was not a

(1) (1945) 70 C.L.R., at pp. 163-169.

H. C. OF A. 1947. CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION. PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

competent applicant. A person can only become a member of the association strictly in accordance with its rules ; there is no estoppel (*United Grocers, Tea and Dairy Produce Employees' Union of Victoria* v. *Linaker* (1)). The word " member " as used in rule 53 (a) 2 should be construed as meaning a person who is eligible and is a member. The association has power to change the conditions of eligibility for membership. Section 58D (2) only makes competent a person who is so eligible. Rule 51 is opposed to the view that a person continues to be a member until the council or executive of the association terminates his membership. Rule 51 (4) is not appropriate in the case of a person who is ineligible by virtue of rule 2 (c). The words " eligibility for membership " in rule 41 (c) are used in a perfectly neutral way.

LATHAM C.J. The Court is at present disposed, if the appeals be allowed, to make an order remitting the cases to his Honour Judge *Foster* or to the Commonwealth Court of Conciliation and Arbitration, and therefore this Court does not desire to hear you on what might be called the substance of the applications.

Barwick K.C. There are no merits in the appeals, therefore there is nothing to warrant the matters being referred back to the court below. It is wrong ex facie to suggest that rule 52 (m) (2) enables the committee of the respondent association to require a member against whom a complaint has been made to come before it and to incriminate him. Where there is a complaint the member concerned must be summoned to attend before the committee and when he so attends he must be warned that any evidence may be used against him. There is no compulsion to give evidence nor is there any power to punish for failure to answer any question addressed to him. The discretion conferred upon the Commonwealth Court of Conciliation and Arbitration by s. 60 (1) of the Act is a discretion which is related to the purposes and objects of the Act. The chief object of the Act is to secure, broadly, industrial peace. What an applicant sets out to do under s. 60 is to advance reasons why in the interests of industrial peace an organization should be de-registered. Simply because the rules of an organization are tyrannical or oppressive affords no reason, industrially, why the organization should be de-registered, particularly having regard to the provisions of s. 58D. It is not enough to find merely the grounds that are set out in the Act, there must be found some industrial reason why it is in the public interest, or in the interests of industrial peace, that the organization should be de-registered. It is for the Court to consider not particularly

(1) (1916) 22 C.L.R. 176.

the existence of the tyrannical rule but whether there is such an insistence on it by the organization as to show that that organization is not proper to be allowed to retain these industrial workers (*Re Waterside Workers' Federation of Australia*; *Ex parte Attorney-General (Cth)* (1); *Re Waterside Workers' Federation of Australia*; *Ex parte Commonwealth Steam-ship Owners' Association* (2)). There was nothing touching industrial peace in the breach of the rules charged against the appellant Penton. If the rules were working disadvantageously to the members any member or the Court could have dealt with the matter under s. 58D. The discretion of the Court should be exercised only if some reason over and above the nature of the rule is shown; some reason which is in some sense a public reason or connected with the working of the Act. It should be shown that de-registration is necessary in the interests of the objects with which the Court is charged under the Act (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (3)). In refusing to exercise his discretion the judge below did not go wrong in any principle. On the matters before him he was not afforded any reasons which would have warranted the exercise by him of his discretion. There was nothing obviously tyrannical or oppressive in the rules. The function under s. 60 (1) of de-registering is not a judicial function; the function is mentioned as a mere incident of the arbitral purpose of the Act; de-registration does not impinge upon any rights; the organization remains; all its members remain members; all members have their rights *inter se*. The view is adopted that as the result of *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) the decision in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (5) would not now be followed. A distinction can be drawn between s. 55 and s. 60 of the Act. Section 55 does not confer any right. A decision to register or not to register is not a decision upon a matter of right. Such a decision is part of the administrative function and does not involve a judicial function. Section 60 gives to the Court what is no more than administrative control over organizations, that is to say power to cancel the registration of an organization for any reason and enables the Court to act under s. 25 upon an opinion based upon information derived anywhere. If de-registration were to be regarded as a judicial act and susceptible of appeal the almost impossible position would arise that when the matter came to this Court the Court would have no legal norm by which to measure the request. The decision in *Jacka* v. *Lewis* (6) that the order there in

(1) (1917) 11 C.A.R. 600, at p. 603.
(2) (1917) 11 C.A.R. 821, at p. 822.
(3) (1945) 70 C.L.R., at p. 163.
(4) (1918) 25 C.L.R. 434.
(5) (1908) 6 C.L.R. 309.
(6) (1944) 68 C.L.R. 455.

H. C. OF A. 1947.

CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

question made under s. 58E was judicial in character was commented upon, with doubt, in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (1). Section 60 may be described as a discretionary authority ancillary to the settlement of industrial disputes by arbitration and conciliation, and without penal sanction. Unlike s. 58E, s. 60 does not involve the making of an order by the Court directing the doing of something by a person or persons. There is no appeal from an order made under s. 58D. The granting of status and the taking away of status are not judicial acts. A decision upon conditions precedent is examinable as a true collateral fact (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (2)).

Kitto K.C., in reply. The making of an award which does not determine or enforce any existing rights creates, for the first time, rights. Upon an application made to it under s. 60 the Court does not lay down for the future new rules of conduct between the parties; it first of all adjudicates upon certain rights; it takes the rules as it finds them, decides what they mean, their scope, effect and nature. That having been decided, the Court's jurisdiction then under the section is to affect existing rights in the sense that it proceeds to cancel the registration, thus bringing to an end not only existing rights but the actual corporate existence of the organization. That is a close analogy and is brought under notice because of the reference to s. 55 and *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (3) which, taken in the light of *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4), may be taken as deciding that so far as registration is concerned no judicial function is involved. Neither is there a judicial function involved in the act of the Registrar-General in registering a new company but that does not mean that when upon application the Equity Court orders the winding-up of a company that court is not exercising a judicial function. The Court deals with an existing corporation and with existing rights and deciding what they are, and if there be a certain conclusion concerning them the corporation is de-registered. That is a typical judicial function. The nature of what is required to be done under s. 60 is comparable with the function which in *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (5) was held to be a judicial function. Section 58D is clearly covered by that decision and similar reasons should lead to a similar conclusion in respect of s. 60.

(1) (1945) 70 C.L.R., at p. 164.
(2) (1945) 70 C.L.R., at p. 173.
(3) (1908) 6 C.L.R. 309.
(4) (1918) 25 C.L.R. 434.
(5) (1943) 67 C.L.R. 25, at pp. 35, 36, 46, 52 et seq.

[STARKE J. referred to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1).]

To determine whether or not applicants for registration or de-registration have satisfied the requirements of the Act is a judicial function.

[STARKE J. referred to *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (2).]

The case of *Moses* v. *Parker* ; *Ex parte Moses* (3) is distinguishable. In that case, unlike this case, the tribunal concerned was expressly relieved from all rules of law, and all technicalities and legal forms, nor was the Governor bound by the reports of that tribunal. Where there is a discretion in a court of first instance not upon a matter of practice or procedure but upon a matter determining substantial rights, then an appellate court is not bound by strict rules in substituting its own discretion for that of the court of first instance (*Re the Will of Gilbert* (4)).

Cur. adv. vult.

May 8.

The following written judgments were delivered :—

LATHAM C.J. AND MCTIERNAN J. These are appeals from two orders of the Commonwealth Court of Conciliation and Arbitration (his Honour Judge *Foster*) dismissing applications made by the appellants. The application by the appellant company was an application under s. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 for the de-registration of the respondent association, which is registered as an organization under Part V. of the Act. The application by the appellant B.C. Penton was for the disallowance of certain rules of the respondent association on the ground that they were tyrannical or oppressive—s. 58D (1) (*b*).

The appellants rely for their right of appeal upon the decision of this Court in *Jacka* v. *Lewis* (5) where it was held that the High Court has jurisdiction to hear and determine an appeal from an order of the Commonwealth Arbitration Court, where the order was made in the exercise of its judicial power. It is objected for the respondents that the orders dismissing the applications were not orders of a judicial character and that therefore no appeal lies.

It was decided in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (6) that s. 60 did not purport to confer and did not confer any part of the judicial power of the Commonwealth upon the Commonwealth Court of Conciliation and

(1) (1918) 25 C.L.R., at pp. 466, 467.
(2) (1944) 69 C.L.R. 185.
(3) (1896) A.C. 245.
(4) (1946) 46 S.R. (N.S.W.) 318, at pp. 324-326 ; 63 W.N. 176.
(5) (1944) 68 C.L.R. 455.
(6) (1925) 36 C.L.R. 442.

H. C. OF A. 1947.

CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

Latham C.J. McTiernan J.

Arbitration. Accordingly, an order made under s. 60 and a refusal to make such an order are not judicial orders. The appeal of the company is therefore incompetent and should be struck out.

The reasoning in the case cited shows that an order made under s. 58D for the disallowance of a rule is not a judicial order. *Isaacs* J. said :—" It was argued for the organization that s. 60 of the *Arbitration Act* purported to confer strictly judicial power. But that cannot be sustained. The creation and equipment of representative organizations both of employers and employees is an incident to the power in s. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power (*Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1)). Parliament may adopt them as part of its mechanism. That mechanism can be made and unmade at the will of Parliament. It may be moulded, refashioned, or abolished in any manner indicated. The step of establishing an organization may be retraced at any point and, for any reason declared by the Act, by any officer in whom Parliament places confidence for the purpose and to whom it gives the necessary discretion. The function created by s. 60 is not judicial in the constitutional sense " (2).

The disallowance of a rule of an organization is a moulding or refashioning of the organization. This procedure is part of the procedure which is described as not judicial in the constitutional sense. An order under s. 58D disallowing a rule, or a refusal to make such an order, is therefore not a judicial order. Penton's appeal therefore is also incompetent and should be struck out.

RICH J. AND WILLIAMS J. These are appeals against an order of the Commonwealth Court of Conciliation and Arbitration dismissing two summons, each dated 13th September 1946 ; the appellant in the first summons being the applicant Consolidated Press Ltd., and the appellant in the second, the applicant B. C. Penton. The respondent to each summons was the Australian Journalists' Association, an association registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1946.

The first summons was an application under s. 60 of the Act calling upon the respondent to show cause why its registration should not be cancelled because of the inclusion amongst its rules of rules numbered 52 (m), 52 (n), 53 (a), 53 (b), 53 (d), 54 (a) (10) and 54 (h). The second summons was an application under s. 58D of the Act calling upon the respondent to show cause why the same rules should not be disallowed.

(1) (1908) 6 C.L.R. 309.

(2) (1925) 36 C.L.R., at pp. 453, 454.

In *Jacka* v. *Lewis* (1), it was held that the jurisdiction of this Court under s. 73 (ii.) of the Constitution to hear and determine an appeal from an order of the Commonwealth Court of Conciliation and Arbitration made in the exercise of its judicial power is not excluded by s. 31 (1) of the *Commonwealth Conciliation and Arbitration Act*. In *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2), this Court held that s. 60 of the *Commonwealth Conciliation and Arbitration Act* does not purport to confer part of the judicial power of the Commonwealth upon the Commonwealth Court of Conciliation and Arbitration. We are bound by this decision, and must therefore hold that the first appeal should be dismissed for want of jurisdiction.

Section 58D was inserted in the *Commonwealth Conciliation and Arbitration Act* by the *Commonwealth Conciliation and Arbitration Act* 1928, s. 48. Section 58C and s. 58E were inserted in the principal Act by the same section. Section 58D gives a member of an organization a statutory right to apply to the Commonwealth Court of Conciliation and Arbitration to disallow any rule of that organization on the grounds mentioned. A controversy between a person and an organization whether he is a member of an organization and therefore entitled to apply to the court under the section, and a controversy between a member and an organization whether a rule should be disallowed, relate to the interpretation and enforcement of existing rights. Such controversies fall within the well-known definition of judicial power given by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3), adopted by the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4). This definition and other definitions of judicial power are set out in the judgments of this Court in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (5). We are therefore of opinion that this Court has jurisdiction to hear the second appeal.

His Honour dismissed the second summons because he was of opinion that Penton was not a member of the organization at the time the summons was filed. He did not deal with the merits. Admittedly Penton was a member of the respondent until 19th July 1946. On that date an alteration of rule 2, made in accordance with the rules of the respondent, provided that the editor of a metropolitan daily newspaper could not be eligible for membership. The amendment was registered with the Industrial Registrar, and thereupon became effective under s. 58C of the *Commonwealth*

(1) (1944) 68 C.L.R. 455.
(2) (1925) 36 C.L.R. 442.
(3) (1909) 8 C.L.R. 330, at p. 357.
(4) (1931) A.C. 275, at pp. 295, 296.
(5) (1944) 69 C.L.R. 185.

H. C. OF A. 1947. CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION. PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION. Rich J. Williams J.

Conciliation and Arbitration Act. The alteration was authorized by s. 58A of that Act which provides that an organization may, as therein mentioned, change the conditions of eligibility for membership. But such a change would not automatically terminate an existing membership unless the rules of the organization so provided. There is no such rule in the rules of the respondent, so that the change would only affect future applications for membership. Members of the respondent on 19th July 1946 who became ineligible under the alteration would still continue to be members until their membership was terminated in accordance with the rules. Rule 51 (4) provides that the Federal council, or Federal executive of the respondent may terminate the membership of a member who is not employed on work which is provided for in rule 2. Penton's membership could be terminated under this provision. But in the meantime he would continue to be a member. His Honour was therefore in error in dismissing the second summons without considering the merits.

On an appeal, this Court has jurisdiction under s. 37 of the *Judiciary Act* to give such judgment as ought to have been given in the first instance. But s. 58D refers to the opinion of the Commonwealth Court of Conciliation and Arbitration. It would be preferable therefore that the court below should give its opinion on the merits in the first instance.

We would therefore allow the second appeal, and remit the second application to the Commonwealth Court of Conciliation and Arbitration for hearing.

STARKE J. These are two appeals from an order of the Commonwealth Court of Conciliation and Arbitration dismissing applications made by the appellants to that Court, the one an application on the part of the Consolidated Press Ltd. by summons to the Australian Journalists' Association to show cause why the registration of the Association should not be cancelled and the other an application on the part of Penton by summons to the Association to show cause why certain rules of the Association should not be disallowed.

The former application was based upon s. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 and the latter upon s. 58D of the same Act. And it is contended that the order of the Commonwealth Court of Conciliation and Arbitration is not a judgment or order which is the subject of appeal to this Court. The appellants rely upon the provisions of the *Commonwealth of Australia Constitution Act* s. 73, the *Commonwealth Conciliation and Arbitration Act* 1904-1946, s. 31 and the decision of this Court in *Jacka* v. *Lewis* (1).

(1) (1944) 68 C.L.R. 455.

In that case it was held that an order made pursuant to s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was the order of a Federal Court exercising judicial power vested in the High Court and other Courts mentioned in the Constitution s. 71. The order, it was said, determined the rights and obligations of parties under the rules of an organization registered under the Act and was subject to the sanction provided by the Act.

Here we have applications for cancellation of the registration of an organization and the disallowance of certain rules. In a sense, associations of persons have a right to be registered as organizations if certain rules are complied with and a right also to maintain their registration and their rules subject to the discretion and opinion of the Court in certain cases. But, as I have said before, " the limits of the legislative, the executive and judicial powers of the Commonwealth are nowhere defined " (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1)). It is the nature of the function that determines its character (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2) ; *R.* v. *Commissioner of Patents* ; *Ex parte Weiss* (3)). And, as *Isaacs* J. said, in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4), " The creation and equipment of representative organizations both of employers and employees is an incident to the power in s. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power . . . The function created by s. 60 is not judicial in the constitutional sense " (see also *In re Judiciary Act* 1903-1920 *and Navigation Act* 1912-1920 (5)). It is true that in the *Jumbunna Case* (6) this Court entertained an appeal from a decision of the Arbitration Court dismissing an appeal from a decision of the Industrial Registrar disallowing objections to the registration of an association under the *Commonwealth Conciliation and Arbitration Act* 1904. *Griffith* C.J. said " We all think there is nothing in the objection " (that is an objection that an appeal did not lie from the decision of the Arbitration Court). " Section 73 of the Constitution gives an appeal to this Court from orders of any other federal Court, and the Court appealed from is such a Court. Section 31 of the Act has no application to the order now in question." (7) And see also *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Brisbane Tramways Co. Ltd.* ; *Ex parte Municipal Tramways Trust, Adelaide Tramways Case* (*No.* 1) (8). But this view " was dissipated "

(1) (1944) 69 C.L.R., at p. 210.
(2) (1931) A.C., at pp. 296, 297.
(3) (1939) 61 C.L.R. 240, at p. 255.
(4) (1925) 36 C.L.R., at pp. 453, 454.
(5) (1921) 29 C.L.R. 257, at p. 268.
(6) (1908) 6 C L.R. 309.
(7) (1908) 6 C.L.R., at p. 324.
(8) (1914) 18 C.L.R. 54, at p. 72.

H. C. OF A. 1947.

CONSOLIDATED PRESS LTD. v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

PENTON v. AUSTRALIAN JOURNALISTS' ASSOCIATION.

Starke J.

in the case of *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) because s. 72 of the Constitution required that every justice, whether called by that or any other name, of any court created by Parliament should, subject to the power of removal, be appointed for life (see *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2)). And the judges of the Arbitration Court were not, at that time, so appointed.

And it was held that the Court had two functions, arbitral and judicial, which were distinct and severable. The provisions of the Act conferring judicial functions upon the Court (the provisions of the Act relating to the enforcement of orders and awards) were therefore invalid whilst those relating to the arbitral functions were valid. And in the *Jumbunna Case* (3) the validity of Part V. of the Act relating to the registration and cancellation of the registration of organizations was declared valid. The Act No. 39 of 1918 vested the enforcement of orders and awards of the Arbitration Court in courts strictly so called. Various amendments and additions have been made from time to time in Part V. of the *Arbitration Act* relating to organizations but the substance of the legislative provisions has remained. And in 1925 this Court held (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4)) that s. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 did not confer judicial power upon the Arbitration Court and was therefore valid. The section has been amended from time to time since that date but the substance of its provisions is the same (see e.g. No. 18 of 1928, s. 49). Section 58D was inserted in the *Arbitration Act* in Part V. " Organizations " by the Act No. 18 of 1928, s. 48 as was s. 58E, the subject of the decision of this Court in *Jacka* v. *Lewis* (5).

The Act No. 22 of 1926 created the Arbitration Court a Federal Court in the strict sense. It conferred upon the judges of that Court the tenure required by s. 72 of the Constitution. By this means the Court acquired judicial functions in addition to the arbitral function already conferred upon it. But this did not convert the arbitral functions of the Court and the provisions of the Act relating to the registration and cancellation of organizations and the disallowance of their rules into judicial functions. Such provisions, as I said in the *Shipping Board Case* (6), were " in no sense an exercise of the judicial power of the Commonwealth."

Consequently, in my opinion, these appeals are incompetent.

(1) (1918) 25 C.L.R. 434.
(2) (1924) 34 C.L.R. 482, at pp. 506, 507.
(3) (1908) 6 C.L.R. 309.
(4) (1925) 36 C.L.R. 442.
(5) (1944) 68 C.L.R. 455.
(6) (1925) 36 C.L.R., at p. 463.

The order appealed from is not an exercise of any judicial power of the Commonwealth on the part of the Arbitration Court and the judicial power conferred upon this Court, by s. 73 of the Constitution, to hear and determine appeals does not extend to such an order.

And I would add that cases in which prohibition has issued to the Arbitration Court pursuant to s. 75 (v.) of the Constitution do not conflict with this conclusion. Prohibition issues to restrain tribunals exercising judicial or quasi-judicial functions from exceeding their authority (see *R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (1920) *Ltd.* (1); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2); *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (3); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (4)). And keeping tribunals exercising judicial or quasi-judicial functions within their lawful authority is an exercise of the judicial power of the Commonwealth conferred upon this Court.

These appeals should be dismissed.

Appeals dismissed for want of jurisdiction with costs.

Solicitors for the appellants, *Allen, Allen & Hemsley.*
Solicitors for the respondent, *Frank Brennan & Co.*

J. B.

(1) (1924) 1 K.B. 171.
(2) (1924) 34 C.L.R., at p. 552.
(3) (1939) 61 C.L.R., at p. 258.
(4) (1944) 69 C.L.R. 407, at pp. 428, 429.