[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

WALLIS AND ANOTHER;

Ex parte EMPLOYERS ASSOCIATION OF WOOL SELLING BROKERS AND OTHERS.

THE KING

AGAINST

WALLIS AND ANOTHER;

Ex parte H. V. McKAY MASSEY HARRIS PROPRIETARY LIMITED AND OTHERS.

H. C. OF A. 1949.

MELBOURNE, *May*, 19, 20, 23, 24; SYDNEY, *August* 4.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

Industrial Arbitration (Cth.)—"*Industrial matters*"—*Preference to unionists*—*Monopoly of employment to members of a particular union*—*Power to award*—*Commonwealth Conciliation and Arbitration Act* 1904-1948 (*No.* 13 *of* 1904—*No.* 77 *of* 1948), *ss.* 4, 14, 38, 40, 49, 56.

The *Commonwealth Conciliation and Arbitration Act* 1904-1948 does not authorize an award giving a monopoly of employment in an industry to the members of an organization of employees. Section 56, in particular, does not confer such a power, being limited to the granting of preference in employment, and its terms are inconsistent with the existence of the power under any other provisions of the Act.

ORDERS NISI for prohibition.

Two orders nisi obtained in the High Court by employers bound by awards made under the *Commonwealth Conciliation and Arbitration Act* were heard together. In each case the prosecutors sought

H. C. OF A. 1949. THE KING v. WALLIS.

to prohibit proceedings before Mr. A. R. Wallis, Conciliation Commissioner, by the Federated Clerks Union of Australia (hereinafter called the respondent union) for variation of an award. In one case the award was that called the Clerks (Wool Stores) Award; in the other, the Shipping Clerks Award. The proceedings in relation to the former are hereinafter referred to as the *Wool Stores Case*, and those in relation to the latter as the *Shipping Clerks Case*.

Wool Stores Case.—In this case the respondent union claimed that "the following conditions of employment and continued employment shall apply in respect to each person now or hereafter employed by" the employers bound by the award:—"(1) No such person shall be continued in employment beyond a period of 28 days from the date hereof or the date upon which such person is engaged for employment (whichever be the later) unless such person:—(*a*) is a member of the Federated Clerks Union of Australia or (*b*) within such period of 28 days makes application and otherwise complies with the requirements for admission to membership of the said union in accordance with the rules thereof. (2) No such person shall be continued in employment for a period beyond 28 days after ceasing to be a member of the Federated Clerks Union of Australia."

The prosecutors in this case were the Employers Association of Wool Selling Brokers and the following Victorian companies which carried on business as wool-selling brokers: Australian Estates Co. Ltd.; Dennys Lascelles Ltd.; Goldsbrough Mort & Co. Ltd.; New Zealand Loan and Mercantile Agency Co. Ltd.; Strachan & Co. Ltd.; Victorian Producers Co-operative Co. Ltd.; Younghusband Ltd. Certain New South Wales wool-selling brokers were also represented at the hearing, pursuant to leave granted them by the court to intervene in this case.

Shipping Clerks Case.—In this case the respondent union applied for the insertion of the following clause in the award:—

"23A. *Register of Employees.*

(*a*) A register of all persons entitled to be employed as a permanent wharf clerk or a casual wharf clerk shall be kept by the union. (*b*) No employer shall engage or employ or continue to engage or employ any person as a permanent wharf clerk or casual wharf clerk whose name is not included in such register. (*c*) No employer shall permit any person not so registered to do or continue to do the work of a permanent wharf clerk or casual wharf clerk in connection with any operations over which that employer has the direct or indirect control. (*d*) No person shall be entitled to be

registered or remain on the register unless he is a financial member of the union."

The prosecutors in this case were H. V. McKay Massey Harris Pty. Ltd., Imperial Chemical Industries of Australia and New Zealand Ltd. and I. C. I. Alkali (Aust.) Pty. Ltd.

In each case the employers concerned refused to accede to the claim and, on the matter coming before the commissioner, objected that he had no jurisdiction. The commissioner, however, intimated that he was of opinion that he had jurisdiction and that he proposed to proceed with the hearing of the claim. Thereupon the prosecutors in each case obtained an order nisi calling on the commissioner and the respondent union to show cause why the proceedings should not be prohibited.

Sholl K.C., *S. C. G. Wright* and *Winneke*, for the prosecutors in the *Wool Stores Case*.

Sholl K.C. and *Aird*, for the prosecutors in the *Shipping Clerks Case*.

Sholl K.C. The considerations applying to both these cases are substantially the same. In each application the respondent union asks for a monopoly of the relevant employment for its members; but the proposed new clause in the *Shipping Clerks Case* is open to objection on other grounds, and it is therefore proposed to deal more specifically with that clause. In each case, however, it is submitted that the proposed clause is beyond the powers of the commissioner under the *Commonwealth Conciliation and Arbitration Act* because it claims a monopoly (as distinct from preference) as against (*a*) non-unionists; (*b*) members of other unions. There is a difference between monopoly and preference (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1); *Magner* v. *Gohns* (2); *Butt* v. *Fraser* (3); *Federated Seamen's Union* v. *Sanford Ltd.* (4)). If a monopoly could be ordered under the general powers to settle industrial disputes given by the Act, then, as monopoly is more stringent than preference, and both relate to, and are species of, the subject matter or genus of relative right to employment, s. 56 would be unnecessary and would not be found in the Act: cf. *Industrial Arbitration Act* 1908 (N.Z.),

(1) (1938) 60 C.L.R. 507, at p. 521.
(2) (1916) N.Z.L.R. 529, at p. 551.
(3) (1929) N.Z.L.R. 636, at pp. 646, 656.
(4) (1930) N.Z.L.R. 460, at p. 469.

H. C. OF A. 1949. THE KING v. WALLIS.

s. 2 (1); *Magner's Case* (1); *Butt's Case* (2). Alternatively, if monopoly and preference are completely distinct subject matters, the presence of s. 56, relating to preference, affords the strongest ground for reading the general power as not conferring the more stringent power to confer a monopoly (in destruction of the common-law right to sell one's labour). Section 55 (*a*) is inconsistent with the conception of an award requiring dismissal by reference to membership or non-membership of a union. The Act does not authorize a monopoly against non-unionists (or compulsory unionism) (*Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (3); *Kirsch's Case* (4)). *Federated Clothing Trades Union of the Commonwealth of Australia* v. *Archer* (5) is not an authority to the contrary on the Act as it now stands. Even if the Act authorizes a monopoly against non-unionists, it does not authorize a monopoly against another registered organization (*Oakley & Taylor* v. *Mr. Justice Edwards* (6); *Magner's Case* (7); *Sanford's Case* (8)). In s. 56, the expression "such . . . members" need not be read as giving a power of selection among different unions; it can refer to members, specified by reference to their union, against non-unionists. Preference to "organizations" does not refer to preference of employment as between members of different organizations. If, however, s. 56 does give a power of awarding preference in an industry as between members of two or more organizations, it still does not authorize a monopoly: See the Act, s. 2 (*g*), Part VI., ss. 70, 82, 83 (1), (1A), 89. These provisions show that the Act does not contemplate destruction of registered organizations, or complete exclusion of an organization from the class of industrial work for which it is registered. As to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Paper Mills Employees' Union* (9), if it is right, it imposed no obligation on the employer to dismiss anyone. It imposed no penalty on the employer for employing members of other unions. It excluded only from a particular establishment, not a class of the work of the industry. The decision merely allows a "demarcation" award by reference to a particular employer's establishment in which another union is established. Both unions were parties to the dispute and the proceedings. If inconsistent with the submissions already made, it is not correctly decided. On any view, the Act does not authorize

(1) (1916) N.Z.L.R., at p. 550.
(2) (1929) N.Z.L.R., at p. 641.
(3) (1932) 47 C.L.R. 1.
(4) (1938) 60 C.L.R., at p. 530.
(5) (1919) 27 C.L.R. 207.
(6) (1900) 18 N.Z.L.R. 876, at p. 886.
(7) (1916) N.Z.L.R., at p. 547.
(8) (1930) N.Z.L.R., at p. 467.
(9) (1943) 67 C.L.R. 619.

a monopoly dependent on financial membership of a union or, alternatively, on the arbitrary will of the union. Financial membership of a union is not related to the employer-employee relationship. Alternatively, the commissioner cannot delegate to the union the determination of the criterion of selection under s. 56 even if his order were otherwise within s. 56. Section 56 perhaps may even authorize preference between members of the same union on such a basis; but not if it involves either a discrimen irrelevant to the employer-employee relationship or a delegation to the union of the selection of the discrimen. Relations between a union and its members are otherwise dealt with (Act, ss. 70 (2), 71, 79-81, 84, 88, 89). In any event s. 56 does not authorize a monopoly between members of the same union; and to imply the power elsewhere in the Act would be to make s. 56 unnecessary. The claim in the *Shipping Clerks Case* is outside the Act for the following reasons also:—(1) It is a claim for a clause to operate (in relation to an employer-employee relationship and in an employer-employee dispute) as to matters arising before and independently of the contract of employment (*Trolly, Draymen and Carters Union of Sydney and Suburbs* v. *Master Carriers Association of New South Wales* (1); *Butt's Case* (2)). (2) It claims to bind employers in respect of relations between employees and the union and to put on employers the onus of acting by reference to the contents of a union register (*Butt's Case* (3); *Sanford's Case* (4)). (3) It would not oblige the union to put anyone on the register, or to keep a register at any particular port or ports; or to keep names on the register. It could, consistently with the claim, decide that no-one in Australia, or at a particular port, was (indefinitely or for a defined period) entitled to be on the register. It could thus (quite lawfully) procure the effect of a strike, stop all work, or put an employer or employers out of business. Such a claim is not a claim for an order in relation to settling a dispute. (4) The claim is not an industrial matter within s. 4 of the Act. In that section the definition of "industrial matters" must be read subject to the other sections of the Act which have already been referred to. It is narrower, not wider, than the former definition; it now "means" certain things, and "includes" others, instead of only "including." The expression "pertaining to the relations of employers and employees" governs all the concepts in the definition. None of the lettered paragraphs of the definition covers this claim. As to pars. (*b*) and (*g*), see *Magner's Case* (5). In par. (*g*) the "qualifications"

(1) (1905) 2 C.L.R. 509, at p. 515.
(2) (1929) N.Z.L.R., at p. 645.
(3) (1929) N.Z.L.R., at p. 662.
(4) (1930) N.Z.L.R., at p. 471.
(5) (1916) N.Z.L.R., at pp. 545, 546.

H. C. OF A. 1949. THE KING v. WALLIS.

referred to are industrial; and "status" refers to industrial status, not membership of a union; but, if union membership is now in Australia a matter of industrial status, s. 56 limits the method of determining such a dispute. In par. (*j*) :—I. "Non-employment" refers to failure or refusal to employ, not to a duty not to employ. II. If non-employment means a duty not to employ, the reference to members of an organization should be read as referring to (i) preferential employment of persons being members of an organization; (ii) non-employment of persons not being members of an (i.e., any) organization; and not as including (iii) preferential employment of persons not being members of an organization; (iv) non-employment of persons being members of an (i.e., a particular) organization. III. In the second alternative, if non-employment covers a duty not to employ members of an organization (i.e., a particular organization), s. 56 precludes an award expressing such a duty. Either proposition II. (ii) above is limited to non-unionists, i.e., persons not members of any union at all; or, if it could *per se* cover exclusion of members of one union in favour of another, s. 56 negatives such an interpretation. Pars. (*n*) and (*p*) contemplate both organizations having, and retaining, members employed. They presuppose both sets having "rights" to employment, or "functions." On any view, par. (*n*) only covers a dispute if it has the element of being between organizations. There are none such before the commissioner here. (5) The claim is not a claim for conditions to keep industry operating. It is not even merely a claim to a monopoly of employment. It is a claim to a right to decide that there shall be no employment, or no industry, generally or at any place or places, and for a fixed or an indefinite period. (6) The claim does not create an industrial dispute within s. 51 (xxxv.) of the Constitution. This is so, primarily, for the reason that it is a claim by the union to go beyond co-operation of capital and labour and to enter into control (total or partial) by the union of the supply, engagement and dismissal of labour, in the sense in which these in 1900 were (and still are) the function of capital (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1)). Cf. *R.* v. *Commonwealth Court of Conciliation and Arbitration and the President thereof and the Australian Builders' Labourers' Federation* (2). It amounts to a claim to refuse labour altogether; or to regulate the supply of labour to an employer or all employers, control output, or put him or them wholly or partly out of business. It claims regulation of the employer's business, outside the relation

(1) (1919) 26 C.L.R. 508, at p. 554. (2) (1914) 18 C.L.R. 224.

of employer and employee (*Clancy* v. *Butchers' Shop Employees Union* (1) ; *Trolleymen's Case* (2)). It claims monopoly for persons possessing an arbitrary characteristic (not even limited to union membership), not related to industrial capacity. It is analogous to a personal or political dispute. [He referred to *Metropolitan Coal Co. of Sydney Ltd.* v. *Australian Coal and Shale Employees' Federation* (3).] The foregoing objections numbered 4 and 6 also apply to the claim in the *Wool Stores Case*. There is jurisdiction to issue prohibition to the commissioner (*R.* v. *Galvin* (4)).

Winneke. The *Commonwealth Conciliation and Arbitration Act* confers no power on the commissioner to make an order in the terms sought by the union in the *Wool Stores Case*. The very nature of the claim is that it is for the exclusion of persons from employment. The exclusion of all persons other than members of the respondent union is quite a different matter from the giving of preference to members of the union, and s. 56 confers no power to provide for it. Moreover, the presence in the Act of s. 56 is inconsistent with a power to make an order for exclusion under general provisions such as s. 14 (2) or s. 38. The insertion of s. 56 is an indication that it was thought that the general powers were not, or might not be, sufficient to cover the granting of preference, and, as that is a much narrower power than exclusion, it is *a fortiori* that the general powers do not confer the power of exclusion. If one assumes a general power in the commissioner to grant exclusion, it must cover a power to exclude on terms or conditions. There is no reason—apart from s. 56—why such a power should not include the power to award that only non-members of the particular union should be employed.

Holmes K.C. (with him *Cook*), for the interveners. We adopt the argument of the prosecutors in so far as it bears on the *Wool Stores Case*. As to the definition of " industrial matters " in s. 4 of the Act, the present definition is narrower than the old one. The observations of *Isaacs* and *Rich* JJ. in *Federated Clothing Trades Union* v. *Archer* (5) were based on the popular concept of an industrial matter which was open under the old definition. Now the matter is no longer at large ; the question is one of the intention of the definition in the present Act. Not all disputes that may possibly occur as between employers and employees are " matters

(1) (1904) 1 C.L.R. 181.
(2) (1905) 2 C.L.R. 509.
(3) (1918) 24 C.L.R. 85.
(4) (1949) 77 C.L.R. 432.
(5) (1919) 27 C.L.R., at pp. 213, 214.

H. C. OF A. 1949. THE KING v. WALLIS.

pertaining to the relations of employers and employees" within the definition. That expression cannot mean "all matters, whether industrial or not"; the matter must pertain to the industry, to the employment. A dispute, for example, between employer and employees as to the price at which the commodity they produced should be sold would not be an "industrial matter"; it would not in any relevant sense pertain to the relationship of employers and employees. This qualification of the opening words, "all matters" &c., of necessity affects each of the lettered paragraphs which follow.

[DIXON J. referred to *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1).]

[Counsel referred to *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 2] (2); *Butt's Case* (3); *Magner's Case* (4); *Sanford's Case* (5); *United Grocers, Tea and Dairy Produce Employees' Union of Victoria* v. *Linaker* (6); the Act, ss. 84, 89, 93.] As to par. (*j*) of the definition, preference does not mean compulsory unionism (*Butt's Case* (7)). What this paragraph seems to refer to is the preferential employment of persons being members of an organization and the consequent non-employment of persons not being members of any organization.

The respondent commissioner did not appear.

Simon Isaacs (with him *J. B. Sweeney*), for the respondent union. The present proceedings are premature. The commissioner has not yet proceeded to deal with the union's applications; that being so, he has done nothing which is in excess of power even on the narrow construction put on the Act by the prosecutors. In the ultimate result he may do no more than the prosecutors concede him the power to do under s. 56. As to the substance of the matter, the New Zealand cases which have been cited are inapplicable because our legislation is quite different from that of New Zealand, the relevant provisions of which are set out in *Magner's Case* (8). The New Zealand court has said that the decisions of the High Court of Australia are of no assistance on the New Zealand Act (*Sanford's Case* (9)). [He also referred to *Mazengarb, Industrial Laws of New Zealand*, 2nd ed., pp. 8, 9; *Waterside Workers' Federation*

(1) (1930) 42 C.L.R. 527, at p. 552.
(2) (1930) 42 C.L.R. 558.
(3) (1929) N.Z.L.R., at pp. 662 et seq.
(4) (1916) N.Z.L.R., at p. 561.
(5) (1930) N.Z.L.R., at pp. 470, 471.
(6) (1916) 22 C.L.R. 176.
(7) (1929) N.Z.L.R., at pp. 646, 647, 649.
(8) (1916) N.Z.L.R., at p. 539.
(9) (1930) N.Z.L.R., at p. 466.

of Australia v. *Gilchrist, Watt and Sanderson Ltd.* (1).] The constitutional question is concluded against the prosecutors (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (2); *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (3)). *The Builders Labourers' Case* (4) does not support their argument. The prosecutors' argument would mean that every subtraction from the power of the employer and the giving of a right to employees cannot be an industrial dispute, but that is the way a dispute is always settled. The matter in question is one of the commonest causes of disputes in industry. It is a dispute as to an "industrial matter" within the meaning of s. 4 of the Act, and there is both a power and a duty to settle it (Act, ss. 14, 38). [He referred to the *Metal Trades Case* (5); *Long* v. *Chubbs Australian Co. Ltd.* (6); *Burwood Cinema Case* (7); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (8).] In the definition of "industrial matters" in s. 4 of the Act the opening words to the effect that the phrase "means all matters pertaining" &c. are very wide, and are sufficient in themselves to cover the present cases. "Pertaining" here merely means "touching or concerning," and the phrase must be construed as covering a very wide range of relations between employer and employee. Further, the definition goes on to say that "industrial matters" *includes* the matters in the lettered paragraphs. Each of these paragraphs must, therefore, be given its full meaning, and pars. (*h*), (*i*), (*j*) and (*k*) are each of them wide enough for present purposes. The expression "employment or . . . non-employment" in par. (*j*) is particularly relied upon; it is submitted that these words are conclusive. They go far beyond the matter merely of preference to members of an organization and extend to a claim for exclusion of any person or persons, whether or not by reference to the fact of their being unionists or non-unionists. The dispute might be about the employment or non-employment of a particular individual or employment or non-employment by an individual employer. [He referred to par. (*m*) of the definition of "industrial matters" in s. 4 and also to s. 80 of the Act.] As to s. 56, it is in much wider terms than the former section and permits preference to the extent of exclusion: *Anthony Hordern*

(1) (1924) 34 C.L.R. 482, at p. 536.
(2) (1925) 35 C.L.R. 528, at pp. 539, 547, 548.
(3) (1936) 54 C.L.R. 387, at pp. 403, 404.
(4) (1914) 18 C.L.R. 224: see pp. 230, 231.
(5) (1936) 54 C.L.R., at pp. 402, 425, 434, 442, 443.
(6) (1935) 53 C.L.R. 143, at p. 150.
(7) (1925) 35 C.L.R., at pp. 535, 536, 538, 539, 544, 545, 548.
(8) (1923) 32 C.L.R. 413, at pp. 432, 438-441, 453-455.

H. C. OF A. 1949. THE KING v. WALLIS.

and Sons Ltd.'s Case (1) no longer applies. At all events, on the Act as it now stands, s. 56 is not the limit of jurisdiction in this regard.

Sholl K.C., in reply.

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered:—

LATHAM C.J. Return of two orders nisi directed to Alfred Russell Wallis a Conciliation Commissioner appointed pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1948, and the Federated Clerks' Union of Australia. The High Court has jurisdiction to grant a writ of prohibition for the purpose of preventing proceedings by a conciliation commissioner in a matter beyond his jurisdiction: *R.* v. *Galvin*; *Ex parte Metal Trades Employees' Association* (2).

The question which is raised in each case is whether a conciliation commissioner can make an award for what is called compulsory unionism—not in the sense that the effect of the award would be to make it a criminal offence for a man to fail or to refuse to become a member of a trade union, but in the sense that it would be an offence for an employer bound by the award to employ any person who was not a member of a particular union, with the result that the members of that union would have a monopoly of work in any industry which, so far as employers and employees in that industry were concerned, was subject to the terms of the award. Such a monopoly would prevail not only against non-unionists, but also against unionists members of other unions than that to which the award required persons to belong in order to obtain employment.

In one case the prosecutors are companies carrying on the business of wool-selling brokers. The Federated Clerks' Union seeks the inclusion in an award of clauses providing that the following conditions of "employment and continued employment" shall apply in respect to each person now or hereafter employed by the employers bound by the award, namely:—"(1) No such person shall be continued in employment beyond a period of 28 days from the date hereof or the date upon which such person is engaged for employment (whichever be the later) unless such person:—(*a*) is a member of the Federated Clerks' Union of Australia or (*b*) within such period of 28 days makes application and otherwise complies with the requirements for admission to Membership of the said Union in accordance with the Rules thereof. (2) No such person

(1) (1932) 47 C.L.R. 1.

(2) (1949) 77 C.L.R. 432.

shall be continued in employment for a period beyond 28 days after ceasing to be a member of the Federated Clerks' Union of Australia."

If these clauses were inserted in the award only members of the Federated Clerks' Union could be employed by the wool-selling brokers bound by the award. The claim is not limited to clerical employment, but it would be a matter for the conciliation commissioner, if he had power to grant the claim made and was prepared to do so, to limit the claim in such a way as to restrict its application to relevant employment.

In the other case the question arises as to shipping clerks. In that case the union has made a claim for the inclusion of the following terms in an award:—

"23A. *Register of Employees.*

(*a*) A register of all persons entitled to be employed as a Permanent Wharf Clerk or a Casual Wharf Clerk shall be kept by the Union. (*b*) No employer shall engage or employ or continue to engage or employ any person as a Permanent Wharf Clerk or Casual Wharf Clerk whose name is not included in such register. (*c*) No employer shall permit any person not so registered to do or continue to do the work of a Permanent Wharf Clerk or Casual Wharf Clerk in connection with any operations over which that employer has the direct or indirect control. (*d*) No person shall be entitled to be registered or remain on the register unless he is a financial member of the Union."

In this case also it is proposed that no person who is not a member of the Federated Clerks' Union should be allowed to enter into the employment to which the proposed clause refers. Further, not all members would, if the clause were adopted, be entitled to be so employed. It would be necessary for them to be financial members. Further, even if they were financial members they would not be eligible for employment unless their names were placed, presumably by some officer of the union, upon a register. It would be an offence for an employer to employ a person whose name was not on the register kept by the union.

The argument for the respondent union is to the effect that a conciliation commissioner has the power and is charged with the duty of preventing and settling industrial disputes by an award in the absence of an agreement for settlement: *Commonwealth Conciliation and Arbitration Act* 1904-1948, ss. 14 and 38. An "industrial dispute" is defined (s. 4) as meaning "(*a*) a dispute . . . as to industrial matters which extends beyond the limits of any one State." Section 4 also provides that "'Industrial

H. C. OF A. 1949.

THE KING v. WALLIS.

Latham C.J.

matters' means all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes—' (*h*) the mode, terms and conditions of employment; (*i*) the employment of children or young persons, or of any persons or class of persons; (*j*) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organization; (*k*) the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons'."

It is argued that a claim that employers shall be bound to employ only members of a particular union is an industrial matter within the meaning of pars. (*h*), (*i*), (*j*) and (*k*) and also that such a claim is a matter " pertaining to the relations of employers and employees " and accordingly falls within the initial words of the definition of " industrial matters."

The argument on the other side is that a claim for exclusion from work of all persons who are not members of a particular union is not an industrial matter within the definition of that term, and that, even if it should be held to be such a matter, other provisions of the Act, particularly s. 56, operate to limit the jurisdiction of a commissioner in dealing with this particular industrial matter, so that the jurisdiction does not extend to making such a provision in any award.

Paragraph (*h*)—" the mode, terms and conditions of employment "—refers to the conditions upon which persons are employed and is not apt to include matters relating to the prohibition of the employment of other persons. Accordingly, this paragraph will not support the claim of the respondent union. So also par. (*i*) refers to the terms upon which employed persons shall be employed, and not to the prohibition of employment of other persons. As to par. (*k*), it was argued that the claims made by the union in the present cases were claims relating to a right to dismiss or to refuse to employ persons who were not members of the union. But there is a difference between a right and a duty, and what the union seeks to obtain is a provision in an award imposing a *duty* to dismiss or refuse to employ persons who are not members of the union. It is clear in my opinion that such a claim does not fall within the words of par. (*k*).

Paragraph (*j*), it is contended, operates to bring within the definition of " industrial matters " what is described as a claim for the non-employment of persons not being members of an organization; that is, a claim that an employer should not be at liberty to employ persons who are not members of an organization.

Paragraph (*j*) deals with preferential employment or non-employment. Such employment or non-employment may be of any particular person or class of persons or of persons as being or not being members of an organization. According to the argument submitted for the respondent union, this paragraph would include a claim that an employer should be debarred from employing a particular person or a particular class of persons or members of a union or non-unionists. In order to justify such an interpretation, a very extensive meaning must be given to the term " non-employment." One meaning of this term is failure or refusal to employ, with the result that a commissioner could in an award deal with cases where an employer declined to employ particular individuals or a class of individuals, or discriminated between them according to whether or not they were members of an organization. Upon this interpretation the term " non-employment " finds a natural place in a provision relating to preferential employment.

If " non-employment " is given the wider meaning for which the respondent union contends, one result would be to include in " industrial matters " a claim that employers falling within a particular description, e.g. employers not being members of a particular employers' association, should not employ any persons—with the result that they would have to go out of business. This would be a provision relating to " non-employment " in the wide sense and it would be included within the power of the court if the construction contended for by the respondent union were adopted. Mere exclusion of employees from work in an industry is on the same footing as mere exclusion of employers from the industry. If a class of employees, however described, can be entirely excluded from work in an industry by reason of the presence of the word " non-employment " in par. (*j*), then the same reasoning leads to the result that employers can, by a term in an award directing that they shall not employ any persons, be excluded from work in the industry. It is prima facie unlikely that Parliament intended by the use of the term " non-employment " to give, or to endeavour to give, a power of so far-reaching a character to arbitration authorities.

That Parliament did not so intend is in my opinion shown by other provisions of the Act, particularly by s. 56. The definitions of " industrial dispute " and " industrial matters " show only the possible scope of action by the court or a conciliation commissioner. Actual jurisdiction with respect to these matters is conferred by other sections, such as ss. 14 and 38, in conjunction with these definitions. In relation to preferential employment s. 56 contains the following

H. C. OF A. 1949.

THE KING v. WALLIS.

Latham C.J.

provisions :—" (1) A Conciliation Commissioner may, by an award, or by an order made on the application of any organization or person bound by an award, direct that preference shall, in relation to such matters, in such manner and subject to such conditions as are specified in the order or award, be given to such organizations or members thereof as are specified in the order or award. (2) Whenever, in the opinion of a Conciliation Commissioner, it is necessary, for the prevention or settlement of an industrial dispute, or for the maintenance of industrial peace, or for the welfare of society, to direct that preference shall be given to members of organizations as provided by the last preceding sub-section, the Commissioner shall so direct."

It will be observed that s. 56 (1) authorizes a conciliation commissioner to direct that preference shall be given to organizations or members of organizations. Paragraph (*j*) in the definition of " industrial matters " refers both to preferential employment of persons being members of an organization and to preferential employment of persons not being members of an organization. Accordingly, if par. (*j*) were regarded as authorizing the making of an award with respect to either form of preferential employment, an award could, under ss. 14 and 38, be made giving preference to persons who were not members of an organization, that is to say to non-unionists. But it would be most unreasonable to give such an operation to the provisions mentioned in view of the specific provision of s. 56, namely, that a conciliation commissioner might exercise the power of preference by giving preference to organizations or members thereof. There would be no object whatever in including such a provision as s. 56 (1) in the Act unless it were intended thereby to define and so to limit the power of a commissioner in relation to an award of preference.

Section 56 has much legislative and political history behind it. Section 40 of the *Commonwealth Conciliation and Arbitration Act* 1904 gave power to the court to direct that as between members of organizations of employers or employees offering or desiring service or employment at the same time, preference should be given to such members, other things being equal. Provision, however, was made for a notification in the *Gazette* before such preference was given and for any interested person to be heard before the court, and there was a further condition that the application for preference should in the opinion of the court be approved by a majority of those affected by the award who had interests in common with the applicant. There was also a provision that in any case where the court directed preference it could suspend or qualify the direction

if in the opinion of the court the rules of the organization were burdensome or oppressive or did not provide reasonable conditions for admission to or continuance in membership or that the organization had acted unfairly or unjustly to any of its members in the matter of preference.

The provision which is now contained in par. (*j*) of the definition of " industrial dispute " in the 1904-1948 Act has been in the Act ever since it was enacted in 1904.

In 1910 s. 40 of the 1904 Act was repealed and a new section was substituted which provided that the court might direct preference in employment as between members of organizations of employers or employees and other persons (not being sons or daughters of employers) offering or desirous of service or employment at the same time. It was also provided that preference might be given to such members in such manner as should be specified in the award " other things being equal." In 1947 s. 40 was repealed and s. 56 was substituted.

This legislative history of s. 56 shows that Parliament has devoted careful and particular attention to the subject of preference in employment, and particularly of preference to unionists as against non-unionists. Some conditions were always imposed upon the power of the court to grant preference in employment. As already stated, the power to deal with this subject is now derived from the joint operation of the inclusion within " industrial matters " of the subject of preference in employment and the specific provisions contained in what is now s. 56. In *Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1) it was held that the power of the court to grant preference to unionists was limited by s. 40 of the Act 1904-1930 and that an award of preference not complying with the provisions of s. 40 was invalid. The reasoning upon which this decision was based applies in my opinion to the present Act, with the result that the power of a commissioner with respect to preference in employment is limited by s. 56 to the power therein specified, i.e. a power to give preference to unionists, although the provision in s. 4 would, if regarded in itself as the whole source of power, authorize preference to non-unionists. These considerations apply with equal force to limit the power of a commissioner as to awarding preference in any case, whether such preference be claimed by reference to pars. (*h*), (*i*), (*j*) or (*k*) of the definition of " industrial matters " contained in s. 4.

A monopoly of work for unionists, and *a fortiori* for members of one particular union, and the consequent exclusion of non-unionists

(1) (1932) 47 C.L.R. 1.

H. C. OF A. 1949.

THE KING v. WALLIS.

Latham C.J.

or of members of other unions from work in accordance with the terms of an award goes beyond preference to unionists. The provisions of s. 56 do not authorize more than preference to unionists. They do not enable a commissioner to declare non-unionists black so that they cannot get work in the industry to which they belong. If there is, however, power to exclude non-unionists, the exclusion may be partial or complete. Partial exclusion is preference to others. There would be no rational reason for Parliament carefully prescribing conditions in relation to preference, i.e. partial exclusion, if it were intended that there should be an unlimited power to order complete exclusion in any case. Accordingly, in my opinion, the definition of " industrial matters " should not be so interpreted and applied as to authorize the making of an award for complete exclusion.

Section 55 of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 provides as follows :—" The Court or a Conciliation commissioner shall not include in an order or award a provision— (*a*) requiring a person claiming the benefit of an award to notify his employer that he is a member of an organization bound by the award."

This provision shows that it was intended by Parliament that an employer should not be placed in a position to differentiate between unionists and non-unionists. There are difficulties in applying such a provision in a case where preference is ordered, but in such a case the mere employment of a non-unionist would not be an offence on the part of an employer because it would have to be shown, in order to justify a conviction, that unionists were available at the time when the employer employed the non-unionist. If, however, such provisions as those now asked for were included in an award, the difficulties of applying s. 55 would be aggravated, because the commissioner would not be able to require a person seeking employment to tell the employer whether or not he was a member of the union. The employer would have no right to inspect the books of the union to find out whether a person was a member. A registered organization is required to keep a list of its members, showing their names and, so far as is known to their secretary, their postal address (s. 91). Section 91 (2) provides that the organization and every branch of an organization shall file a copy of the records required to be kept " excepting the list of its members." The section further provides in sub-s. (4) that the list of members of an organization shall be open to inspection at the office of the organization during the usual office hours " by any person authorised by the Registrar." These provisions show that it was intended by

Parliament that workers should not be compelled to disclose to an employer whether or not they are members of a union and that an employer should have no right as of course to find out (even by inspecting a list which might or might not be up to date) whether they were members of a union or not. These provisions show that, in practice, it would be difficult, and almost impossible, to give effective operation to provisions for the exclusion of non-unionists.

It was argued for the respondent that, apart altogether from the specific provisions of pars. (*h*), (*i*), (*j*) and (*k*), the initial words of the definition of " industrial matters " were sufficiently wide to cover a dispute between employers and employees as to whether the employer should be at liberty to employ persons who were not members of a claimant union. Section 4 provides that " industrial matters " means " all matters pertaining to the relations of employers and employees." It is contended that a claim that only unionists and, more particularly, that only members of a certain union, should be allowed to be employed by an employer is a matter pertaining to the relations of employers and employees. Such a claim relates directly rather to the prevention of the establishment of the relation of employer and employee in certain cases, namely, where a proposing employee is not a member of a particular union. But it is argued that a claim that non-unionists should not be employed is a matter which pertains to the relations between employers and unionists who are their employees because it is a matter which, as is well known, is frequently demanded on behalf of unionists. In the first place, what has already been said about the specific provisions of s. 56, limiting as they do the power to make an award giving persons a preference in employment, shows that it was not intended by Parliament that this part of the definition of " industrial matters," any more than pars. (*h*), (*i*), (*j*) and (*k*) of the definition, should create a power to make an award excluding non-unionists from the possibility of employment. Further, the mere fact that a claim is made by employees upon employers is not sufficient to show that the claim is or relates to an industrial matter. Any subject whatever may become a matter of dispute between any persons or between employers and employees. The subject may be personal, domestic, economic, financial, political, social—indeed there is no subject at all which cannot be made the subject of a dispute. But it does not follow that, because employers and employees happen to be the persons involved in a dispute, there is power to prescribe in an award a rule governing the cause of the dispute. The right of voluntary association for religious, political and industrial purposes has been the subject of much controversy

H. C. OF A. 1949.

THE KING v. WALLIS.

Latham C.J.

for many centuries. The controversy has been equally active whenever it has been urged that any person should be compelled to join a body which is described as a voluntary association. In the Universal Declaration of Human Rights adopted by the United Nations Assembly at Paris on 10th December 1948 the signatory nations specified certain human rights and fundamental freedoms. Article 20 was in the following terms :—" (1) Everyone has the right to freedom of peaceable assembly and association. (2) No-one may be compelled to belong to an association." The declaration is not part of the law of Australia, and I refer to it only for the purpose of showing the nature of the question involved in a claim that persons shall be required to join a particular organization before they can lawfully be employed in an industry. Such a claim has more than an industrial significance. It involves many considerations which go beyond employer-employee relations. It may be compared with other possible cases of dispute between employers and employees, e.g. a claim that employers should transfer their assets and business to their employees, or that they should pay the income tax of their employees. An award could not be made granting such claims in order to settle such a dispute, because the dispute could not properly be described as a dispute with respect to " industrial matters." There is something to be said for the proposition that a claim that some members of the community should be excluded from working in an industry because they are not members of a particular organization is similarly a matter which, though obviously a possible source of dispute between employers and employees, is prima facie not an " industrial " matter affecting their relations *inter se*. The relations between an employer and his employee as such remain the same whatever may be the relation of the employer to other persons not employed by him. But, upon the interpretation of the provisions of the Act which I think to be correct, it is not necessary to consider in this case whether Parliament could validly give authority to the court or to a commissioner to disqualify from working persons who did not belong to some particular union or to any union. These cases can in my opinion be determined entirely on the construction of the Act, without consideration of any questions as to constitutional power which might have been raised if Parliament had purported to give power to make an award to give a monopoly of work to a selected union.

Other arguments which were submitted to the Court appear to me to be relevant rather to the propriety and fairness of making an award in the terms sought in either case than to the question of

jurisdiction to make it. It is true that no person has a right to join a union, and that the claims made contain no safeguard against a union refusing on unreasonable grounds to allow an application for membership, or to accept a subscription from a member, or to place the name of a member on the list to which the claim in the *Shipping Clerks' Case* refers. These matters, however, are not matters which go to jurisdiction. They are points which would be considered by the conciliation commissioner in determining whether, and if so upon what terms, he would make an award of the character sought.

In my opinion, for the reasons stated, the order nisi should be made absolute in each case.

RICH J. Prohibitions to Alfred Russell Wallis and the Federated Clerks Union of Australia. Alfred Russell Wallis is a Conciliation Commissioner appointed to act as such under the recent amendment to the *Commonwealth Conciliation and Arbitration Act.* Each order nisi raises the substantial question whether a conciliation commissioner can by his award provide for compulsory unionism.

In each case it is in effect provided by the award of the conciliation commissioner that only members of the Federated Clerks' Union can be employed by employers bound by the award. The Act was obviously intended to prevent or settle industrial disputes and s. 4 of the Act 1904-1948 makes this clear. By s. 4 thereof it is provided that "'Industrial matters' means all matters pertaining to the relations of employers and employees and without limiting the generality of the foregoing, includes" the following matters:— "(*h*) the mode, terms and conditions of employment; (*j*) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organisation."

The proposed awards do not deal with the relations of employers and employees and they do not deal with the mode, terms and conditions of employment. In my opinion the only difficulty arising in these matters is whether the proposed awards can be justified under s. 4 (*j*), i.e., whether what has been done by the conciliation commissioner is not the granting of preferential employment of any particular person or class of persons or of persons being or not being members of an organization. The "non-employment" referred to in s. 4 (*j*) does not mean a non-employment of employees enforced upon employers. This is, I think, clear from the context "the non-employment of any particular person or class of persons being or not being members of an organisation."

H. C. OF A. 1949.

THE KING v. WALLIS.

Rich J.

The provision challenged in the proposed awards provides for a monopoly in favour of the Federated Clerks' Union and a wholesale exclusion of other persons whether or not members of an organization from a wide sphere of employment and a corresponding obligation on employers to employ only members of the union.

In my opinion there is no statutory justification for the provision in question.

In each case the rule nisi should be made absolute.

DIXON J. These are two cases heard together in which employers seek writs of prohibition directed to a conciliation commissioner to restrain him from proceeding with the hearing of matters depending before him on the ground that the award or order claimed is beyond his jurisdiction. One matter is an application for the variation of an award; the other is a claim for an award in an alleged industrial dispute.

In each case the substance of the claim is for an arbitral provision forbidding the employment in given descriptions of work of anybody but a member of the claimant union. The claimant union is the Federated Clerks' Union of Australia. In one case the work specified is that of a permanent, or of a casual, wharf clerk. In the other case it is clerical work in the employment of certain firms or companies who are wool-selling brokers. Although the substance of what is sought by the Federated Clerks' Union of Australia in both cases is as I have stated, the detailed nature of the precise provisions claimed is not the same.

In the former case the union claims a variation directing that no employer shall employ or continue to employ any person as a permanent, or as a casual, wharf clerk unless his name is included in a list of persons entitled so to be employed kept by the union, a list upon which no person shall be entitled to be registered unless he is and remains a financial member of the union.

In the second case the claim is that no person shall be employed as a clerk under a certain standard of salary for more than twenty-eight days unless he is or, within that period, applies to become, a member of the Federated Clerks' Union of Australia and that no such person shall be so employed for more than twenty-eight days after ceasing to be a member of the union.

If the conciliation commissioner had power to make an award or order in the terms of these demands and he made such an award or such an order it would go much further than insuring that where members of the Federated Clerks' Union of Australia are available for employment they shall be employed in preference to persons

who are not members of that organization and are not members of any other organization of employees that includes clerks serving in the industry. Such an order or award would prohibit the employment of anyone who, in the one case, is not a financial member of the Federated Clerks' Union and named in the list kept by the union, or who, in the other case, is not a member and does not become a member of the union. It would prohibit the employment of members of some other union. It would prohibit the employment of anyone else even when no member of the Federated Clerks' Union was available for employment. It would do so when, though members of that union were available for employment, none offered. Indeed, in one of the two cases it would prohibit the employment even of members of the Federated Clerks' Union, financial members, if their names were removed from the list or were never placed upon the list.

The prosecutors argued that even if the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 are wide enough to empower a conciliation commissioner to make such an award or order, they could not constitutionally so operate. It was said that a claim by an organization that no-one should be employed in a particular pursuit or calling except its members, or its members whom it chose to place upon a list, went outside the conception of industrial dispute to which s. 51 (xxxv.) of the Constitution is confined and invaded the realm of the political and economic organization of society. I do not think that the occasion arises for considering the constitutional power of the Parliament to authorize a conciliation commissioner to make an award or order having such an operation. For I am clearly of opinion that the Parliament has not purported to confer upon him an authority which would extend so far.

The powers of a conciliation commissioner to make a binding award or order with respect to a question how far employment is to be available to persons who are not members of a particular organization are, as I think, conferred by s. 56 of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 and do not go beyond the order or direction for preference which that section authorizes. That appears to me to be the true intention of the Act. The general power of a conciliation commissioner to make an order or award determining a dispute is to be found in s. 38. The power is expressed in abstract terms without specifying or indicating what the determination may cover or what the award or order shall or may provide. Upon matters with reference to which the Act does not elsewhere specify or indicate what may or shall be done by an

H. C. OF A. 1949.

THE KING v. WALLIS.

Dixon J.

award or order, this general power is properly interpreted as enabling the arbitrator to make any provision he thinks fit that is relevant, appropriate or reasonably incidental to the settlement of the real dispute before him.

But upon some matters the Act does speak with more particularity. If it confers a specific power with respect to a limited subject or specifies a manner of dealing with it or otherwise provides what the duty or authority of the arbitrator shall be, then upon ordinary principles of interpretation the provision in which that is done should be treated as the source of his authority over the matter, notwithstanding that otherwise the same or a wider power over the same matter might have been implied in or covered by the general authority given by s. 38. This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.

This applies especially when the power or duty affirmatively conferred or imposed is qualified by some condition, limitation or direction. In *North Stafford Steel, Iron and Coal Co. (Burslem), Ltd.* v. *Ward* (1), *Willes* J. refers to "the ordinary rule, that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the Act authorized under other circumstances than those defined."

In s. 40 (*c*) and (*d*) and s. 56 (3) will be found examples of the manner in which the Act deals specifically with matters that otherwise might be considered as implied by or contained in s. 38 and does so in such a way as to exclude resort to the general power with respect to the same matters. Section 56 (1) and (2) deals specifically with the power and duty of a conciliation commissioner to direct that preference shall be given to organizations or members of organizations. Sub-section (1) provides that he may do it by an order or award on the application of an organization or person bound by an award. The commissioner may so direct in relation to such matters, in such manner and subject to such conditions as are specified in the order or award. Preference cannot be given except to organizations or members of organizations and they must be specified in the order or award. The word "organizations" is used in the plural. Sub-section (2) imposes upon the commissioner a duty to give members of organizations preference as provided

(1) (1868) L.R. 3 Ex. 172, at p. 177.

in sub-s. (1) if he forms the opinion that it is necessary for the prevention or settlement of an industrial dispute or for maintenance of industrial peace or for the welfare of society. Sub-sections (1) and (2) of s. 56 of the Act of 1904-1948 are a recast of sub-ss. (1) (*a*) and (2) of s. 40 of the Act of 1904-1946. The differences between the provisions in effect lie in the inclusion in the earlier provision, (1) of organizations of employers as well as of employees, (2) of a condition expressed by the words " other things being equal," (3) of an exception in favour of sons and daughters of employers. In *Anthony Hordern* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1) this Court, by a majority, decided that in view of s. 40, the general power of the court to hear and determine disputes, that is to say the power which the conciliation commissioners now derive from s. 38 of the Act of 1904-1948, would not support an award of preference to unionists. To be valid such an award must be made in the exercise of the power conferred by s. 40 and in conformity with that section. In the reasons of *Gavan Duffy* C.J. and myself it was said :—" Extensive and unfettered as the authority of the Court of Conciliation and Arbitration to award preference in settlement of a dispute might have been in virtue of its general power, yet, when s. 40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing. When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power " (2).

McTiernan J. said :—" In my opinion, no latent power to award preference can be discovered in the Act, which is wider and more drastic than the power which the Legislature has taken care specially to create. I think that s. 40 is the expression of the intention of the Legislature with respect to the jurisdiction of the Court to award preference to unionists. *Expressio unius est exclusio alterius* (*Harcourt* v. *Fox* (3)) " (4). In my opinion this decision applies to the Act of 1904-1948. The three points of difference I have mentioned between sub-ss. (1) (*a*) and (2) of the former s. 40 and sub-ss. (1) and (2) of the present s. 56 provide no sufficient distinction. The disappearance of two of the qualifications can

(1) (1932) 47 C.L.R. 1.
(2) (1932) 47 C.L.R., at p. 7.
(3) (1693) 1 Show K.B. 506, at p. 520; 82 E.R. 720, at p. 726.
(4) (1932) 47 C.L.R., at p. 20.

H. C. OF A. 1949.

THE KING v. WALLIS.

Dixon J.

make no difference in the significance of the positive grant of a particular power in a guarded form. On the other hand, there is room for the application of the doctrine that the legislature by recasting the provisions material to this question in much the same mould has confirmed the interpretation placed upon them. That however is a somewhat artificial doctrine and the mechanics of law-making no longer provide it with the foundation of probability which it is supposed once to have possessed.

The decision dealt only with an award of preference which fell outside the statutory provision on that subject. In the present case the claim is for exclusion, the exclusion from employment of all who do not belong to the Federated Clerks' Union of Australia. This goes far beyond preference. But it cannot in my opinion be maintained that it is outside the general subject with which s. 56 (1) and (2) deal. Section 56 contains a specific power, of a limited nature, enabling the arbitrator to deprive persons who are not members of organizations of an opportunity of employment in the interests of organizations and their members. That is the subject. Upon that subject the legislature granted a limited power, a power confined to preference. Such a provision I regard as quite inconsistent with the view that under the general power to determine disputes the arbitrator is authorized to make an award absolutely depriving persons who are not members of one organization of all opportunity of employment in the particular pursuit or calling and that whether they are or are not members of other registered organizations. An argument to the contrary was advanced which rested upon the definitions of " industrial dispute " and of " industrial matter " contained in s. 4. The argument is that the subjects of industrial dispute as defined embrace disputes as to the exclusion from employment of persons who are not members of an organization, and that therefore it must be concluded that the power to determine disputes is wide enough to enable the making of an award excluding such persons from employment absolutely.

The definition of " industrial dispute " is to the effect that it includes a two state dispute as to industrial matters. The definition of " industrial matters " on which the definition of " industrial dispute " thus depends contains a lengthy list of possible subjects of controversy between employers and employees. Among the list are—(*i*) the employment of children or young persons or of any persons or class of persons ; (*j*) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organization. Two other paragraphs, (*m*) and (*p*), refer to disputes between or within

organizations as to the rights and functions of their members and to questions of demarcation of functions of classes of employees. But they seem less material.

Upon the foregoing the contention is founded that the employment of a class of persons and the non-employment of persons not being members of an organization are contemplated as subjects of dispute and that they are distinguished from preferential employment. Therefore it is said the power to determine the dispute must include making an award or order that there shall be " non-employment " of all persons who are not members of a particular organization, that is to say forbidding employers to employ them. There are in my opinion two answers to the contention. The first is that the question what may be the subject of an industrial dispute and the question what powers will be conferred upon the conciliation commissioners to deal with industrial disputes were two distinct matters for legislative consideration. To take a very obvious example, s. 55 forbids the inclusion in an award of provisions requiring a person claiming the benefit of an award to notify his employer that he belongs to an organization or enabling the employer to forfeit any part of an employee's wages. Section 56 deals with a form of remedy or relief that the arbitrator may apply. However widely the definition of " industrial dispute " may be interpreted it appears to me still to remain true that the specific grant of power made by s. 56 (1) and (2) is inconsistent with an inference that under the general power conferred by s. 38 the conciliation commissioner or arbitrator may wield a much more comprehensive and drastic power upon the same matter or upon matters *ejusdem generis*.

But in the second place I think the argument pushes the words of the particular paragraphs of the definition of " industrial matter " altogether too far and discovers in them a specific intention the legislature never possessed. I think that the reference to " non-employment " contemplates the possibility of the failure or refusal of an employer to employ, among other persons, members of a particular union or anybody other than members of a particular union. " The non-employment " is hardly the expression to use if it was meant to refer to a demand that persons employed should be no longer employed. It is more natural to use it of an existing failure or omission to employ. It must be remembered that the more material words relied upon form part of the original definition in the Act of 1904 (No. 13 of 1904). It is rather unreal to attribute to the Parliament of that year an intention that the Court of Conciliation and Arbitration should determine a dispute by ordering

H. C. OF A. 1949.

THE KING v. WALLIS.

Dixon J.

that no-one should be employed in an industry except the members of a particular organization.

For the reasons I have given I am of opinion that the authority conferred upon the conciliation commissioner by the Act does not extend to making an order or award of the description sought by the Federated Clerks' Union of Australia.

It was urged, however, that even on this footing the facts did not disclose a proper ground for prohibition. Stated very compendiously the argument is that it does not appear that the commissioner will deal with the two matters otherwise than pursuant to s. 56 (1) and (2). But an order under s. 56 (1) or (2) is not what the union seeks. The objection was taken to the jurisdiction of the commissioner to make any award or order falling at all within the description claimed. The commissioner has nevertheless accepted jurisdiction over the application and the claim or demand. These facts in my opinion form a sufficient foundation for the remedy of prohibition. I think that the orders should be made absolute. An order should be made that the respondent, the Federated Clerks' Union of Australia, pay the costs of the prosecutors but not of the intervenants.

McTIERNAN J. I agree that upon the proper interpretation of the Act (*Commonwealth Conciliation and Arbitration Act* 1904-1948) s. 56 is the only source of the powers of a conciliation commissioner to award preference. If the union's demand in each of the present cases is for preference, a direction by the conciliation commissioner to the employers purporting to enforce it would be beyond his powers. But neither demand is, in my opinion, for preference. It is a demand that the employers should not engage or retain in employment any person who is not a member of the union. That is different from a demand for preference. The gist of the demand is not preference to members of the union but exclusion of persons who are not members of it as a sanction to ensure that all employees are members of the union. If that is the correct view of each demand, I think that it is necessary to decide each case in accordance with the statutory definition of "industrial matters." Section 4 of the Act says that this expression means "all matters pertaining to the relations of employers and employees." These are specific relations resulting from the employment. The subject of a demand does not become an industrial matter merely because it is made by employees on employers or by employers on employees. The essential characteristic of an industrial matter is that it is a matter pertaining to those relations which the employment creates between the employers and the employees. A worker's membership of a

union is not one of those relations; and there is no such relation as to which it would be appropriate to say that membership of a union is a matter pertaining to it. Of course, the question of preference to unionists or discrimination against them are matters pertaining to the relations of employers and employees and these matters are included in the list of industrial matters specified in s. 4: see clause (*j*). An award granting preference to unionists or preventing discrimination would be made in respect of an industrial matter. But an award purporting merely to impose compulsory membership of the union on employees would not be an award in respect of any industrial matter.

It is a necessary ingredient of an industrial dispute which a conciliation commissioner has jurisdiction to settle that it is a dispute as to an industrial matter. This ingredient is missing in each of the present cases. The conciliation commissioner has no jurisdiction in either matter. Both matters had advanced to such a stage towards a hearing by the conciliation commissioner that it is proper to grant prohibition and the orders nisi should therefore be made absolute.

WEBB J. As s. 51 (xxxv.) of the Constitution is intended to ensure that industrial operations should continue without interruption due to inter-State disputes capable of being prevented or settled by conciliation or arbitration or both, so the *Commonwealth Conciliation and Arbitration Act* should be assumed to have the same purpose, until the contrary appears. The inter-State disputes which the Arbitration Court and the conciliation commissioners have jurisdiction to deal with are specified in the definition of "industrial matters" in s. 4; and the authority of the court and commissioners must be taken to be commensurate with the ambit of the particular dispute, unless the Act indicates otherwise.

Nowhere in the Act can I find any authority to exclude persons from employment because they are not members of a particular organization, or of a class within that organization, when such members are not available and willing to undertake the particular employment. There is in my opinion authority in s. 4 (*i*) to exclude children from occupations where only persons with a full sense of responsibility can safely be employed, although that should result in a shortage of labour and the termination of operations. Considerations of the safety of all employees could justify that.

Section 56 of the Act limits the authority to award preference otherwise given by s. 4 (*j*), as it limits preference to organizations

H. C. OF A. 1949. THE KING v. WALLIS. Webb J.

and members of organizations. It indicates the intention of Parliament that preference should be so limited, notwithstanding the earlier provision in s. 4 (*j*). But preference does not require the exclusion of non-preferred persons from employment when the preferred class are not available and willing to do the work. That is not the meaning of preference. Whether s. 4 (*j*) because of the word " non-employment " includes a claim to have persons employed or to have them dismissed it is not necessary to decide. At all events it does not in my opinion give authority for the exclusion of persons from employment when no question like that of danger arises, and others do not want the work.

The orders nisi for prohibition should be made absolute.

Order absolute in each case. Federated Clerks' Union to pay costs of prosecutors.

Solicitors for the prosecutors: in the *Wool Stores' Case, Whiting & Byrne*; in the *Shipping Clerks' Case, Moule, Hamilton & Derham.*

Solicitors for the interveners: *Minter, Simpson & Co.*, Sydney.

Solicitors for the respondent union: *C. Jollie Smith & Co.*, Sydney, by *J. Lazarus.*

E. F. H.