[HIGH COURT OF AUSTRALIA.]

# THE KING

AGAINST

# THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS;

## Ex parte GRANT.

H. C. of A. 1950.

Sydney, *April* 17-19; *May* 11.

Latham C.J., McTiernan, Williams, Webb and Fullagar JJ.

*Industrial Arbitration (Cth.)—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Industrial organization—Disputed election—Irregularities—Application of remedial statute to election commenced prior thereto—"Completion" of election—Inquiry—"Prescribed form"—Application lodged prior to promulgation of regulations—Election declared void and new election ordered—"Necessary safeguards"—Deputy Industrial Registrar appointed returning officer—Prohibition—Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 28 *of* 1949), *ss.* 32, 40 (*m*), 96A, 96B, 96G—*Conciliation and Arbitration Regulations, reg.* 133A (*S.R.* 1947 *No.* 142—1949 *No.* 49).

Section 96A of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 applies to a union election which had not been completed when the *Commonwealth Conciliation and Arbitration Act* 1949 came into operation and in such a case an applicant may rely upon irregularities which took place before the commencement of that Act.

Regulation 133A of the *Conciliation and Arbitration Regulations* came into operation on 5th August 1949 and provided that an application under s. 96A of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 should be substantially in accordance with Form 46, and that the time after the completion of an election within which such an application might be lodged should be six months.

*Held*, that an application lodged after the completion of the election but two days prior to the notification of reg. 133A was properly lodged.

The Commonwealth Court of Conciliation and Arbitration declared a union election void and directed that a new election should be held and that it should be conducted in accordance with the union rules and, where such

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rules were silent, in accordance with any practice which the returning officers, that is, the Deputy Industrial Registrar and the union returning officer, should mutually agree upon as providing all necessary safeguards.

*Held* (1) by *Latham* C.J., *McTiernan*, *Williams* and *Webb* JJ. (*Fullagar* J. dissenting), that the court was not bound under s. 96G (3) (*d*) itself to provide safeguards for the conduct of the new election but could authorize the returning officers to determine those and other pertinent matters; (2) by *Latham* C.J., *McTiernan*, *Williams* and *Webb* JJ., that even if the union rules were defective they were, as shown by ss. 74 and 80 of the Act, in fact the rules of the union and the rules to which the court referred, and the order that the new election should be conducted in accordance therewith was not invalid or ineffective as referring to non-existent rules.

The union returning officer declined to continue to act in conjunction with the Deputy Industrial Registrar, the returning officer appointed by the court, whereupon the court made another order authorizing the Deputy Industrial Registrar to act by himself and not in conjunction with the union returning officer.

*Held*, by the whole Court, that the Commonwealth Conciliation and Arbitration Court was not prevented by par. (*d*) of s. 96G (3) from appointing a person other than the union returning officer to act alone as returning officer, and that the order so made was a supplementary order within the meaning of par. (*e*) of s. 96G (3).

Matters of procedure do not, by reason of s. 40 (*m*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, go to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration.

So *held* by *Latham* C.J., *Webb* and *Fullagar* JJ.

Per *Latham* C.J., *Williams* and *Webb* JJ.: (1) Prohibition will not lie where a question of time merely is involved; and (2) A writ of prohibition should not issue against an officer of the court in relation to any act done by him in pursuance of an order of the court.

PROHIBITION.

John Patrick O'Shea, a member of the Boilermakers' Society of Australia (Sydney Branch No. 1), applied under s. 96A of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, on 3rd August 1949, by written application, to the Industrial Registrar for an inquiry by the Commonwealth Court of Conciliation and Arbitration into irregularities alleged to have occurred with respect to a union election held during the months of June and July 1949.

The grounds of the application and the allegations of irregularities were set forth in two documents signed by O'Shea and dated respectively 3rd August 1949 and 10th August 1949. Each of these documents was annexed to a separate statutory declaration, in

which the contents of the document so annexed were declared to be true, made by O'Shea and lodged with the Industrial Registrar on the said dates respectively.

In the statutory declaration so made and lodged on 10th August 1949, O'Shea craved leave to refer to his statutory declaration made on 3rd August 1949, and declared that the result of the ballot referred to in the annexure to such statutory declaration as declared by the returning officer was as set out thereunder.

Upon consideration of the application the Industrial Registrar found that there were reasonable grounds for an inquiry and referred the matter to the court on 11th August 1949.

The application came on for hearing before *Dunphy* J. whose judgment, delivered on 14th December 1949 and in which appear the relevant facts, was substantially as follows:—" The election was held for the . . . offices " of " President, Vice-President, Secretary-Treasurer, Assistant Secretary, two Organizers, four Trustees " and twenty-one delegates to various organizations and committees " for the year 1949-1950.

This election is provided for in rules 25 and 26 which said rules, together with rule 5 (*j*) (IV.) and rule 42, provide an outline of but not a complete election code. Apparently, existing rules were followed with reasonable exactitude, no breach thereof being a ground of complaint in the present issue.

At a meeting held on 31st May 1949, a returning officer, George McNeill, and three scrutineers, were elected and at the same meeting a motion that the ballot close on 21/6/49 was carried. The returning officer and scrutineers proceeded to have ballot papers posted to financial members and this duty was completed on 15th June 1949. The voting in the main was done by post, the printed ballot paper containing a footnote 'Members who have received their ballot papers by post will please note that they must, after recording their votes, forward them to me so that I will receive them not later than the first post on Tuesday, 21st June, 1949 (Sgd.) G. McNeill, Returning Officer.'

According to the returning officer's report to which I will later refer, 3,461 ballot papers went out by ordinary post, twelve by air mail and thirty-six were given out at the union office upon personal application.

On 21st June, 1949, at 9.30 a.m. the returning officer with his three scrutineers attended at the Haymarket Post Office and picked up 1,619 ballot envelopes for which he paid £20 4s. 9d.

These envelopes were taken back to the union office where the four officers proceeded to open the outer envelopes, to file receipts

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and put the inner envelopes in bundles for subsequent counting. No counting was actually done on 21st June and late in the afternoon the four officers called again at the Haymarket Post Office and as a consequence of what they were told they returned the next morning about 9.30 and picked up 248 ballot envelopes for which a sum of £3 2s. was paid.

On 29th June, 1949, a further 251 ballot envelopes were picked up in a similar way. The ballot papers contained in the envelopes picked up on 21st and 22nd June were counted in the ballot, those picked up on 29th June were not so included.

The count then proceeded and at a specially summoned union meeting held on 16th July, 1949 the returning officer reported the result of the voting and his report was adopted. The report was contained in a five page document written out by McNeill which bears on each page the date '11/7/49' and the signatures of McNeill and his three scrutineers. Under cross-examination the returning officer was unable to explain the item 'Ballot papers returned unclaimed 36' in relation to the item 'ballot papers posted 3,461,' and to the total 3,591 where they appear at the top of the first page of his report.

The applicant now advances as irregularities :—1. The inclusion in the count of the 248 ballot papers collected on 22nd June, 1949. 2. The inclusion on the ballot paper of the note requiring ballot papers to be in the returning officer's hands by the first post on Tuesday, 21st June, 1949, in so far as this might be presumed to have acted as a deterrent on unionists who received their ballot papers very close to the deadline. 3. The incorrect inclusion of the item 'ballot papers returned unclaimed 36' in the total of 3,591 on the first page of the returning officer's report.

These three headings differ from the allegation of irregularity brought to the notice of the registrar by O'Shea but in principle item (1) is substantially the original basis of the application. The applicant asks that the election be set aside and a new ballot be held with the Deputy Industrial Registrar as joint returning officer to act in conjunction with the union returning officer.

In reply the union raises the following points :—1. There has been no irregularity. 2. The election was completed on 11th July, 1949, the date of the preparation of the returning officer's report, and as Act No. 28 of 1949 was not assented to until the 12th July, 1949 and as there is no statutory wording clearly and unequivocally indicating an intention of retrospective application, the provisions of the Act do not apply except to an election which takes place after 12th July, 1949. 3. No regulations had been promulgated by the

Governor in Council prior to this application being lodged with the Registrar, consequently the matter is not properly before the Court.

I propose to deal firstly with the question of when this ballot was concluded.

[His Honour then considered the evidence and held that the counting of the ballot was not concluded until on or about 16th July and that the report was back dated in an abortive attempt to avoid the new legislation. His Honour held that the election was one to which the Act No. 28 of 1949 applied.]

[His Honour having considered the evidence relating to the alleged irregularities found that irregularities did occur and then proceeded.]

I therefore declare the ballot held between 31st May 1949 and 16th July 1949 to be null and void. I order a fresh ballot to be held for all offices, only those candidates whose nominations were accepted by the meeting of 31st May, 1949 to stand. The Deputy Industrial Registrar, Sydney, shall act in conjunction with G. McNeill as returning officers and shall proceed to the new election which shall be conducted in accordance with union rules and where such rules are silent in accordance with any practice which the returning officers shall mutually agree upon as providing all necessary safeguard. Scrutineers may be appointed by candidates but shall not be elected. Only those members eligible to vote at 21st June, 1949 shall participate in the ballot. The election shall be conducted from the office of the Deputy Industrial Registrar and the ballot papers shall be printed by the Government Printer or such other printer as the Deputy Industrial Registrar shall determine. Liberty is reserved to the parties to apply for any consequential order."

The matter again came before *Dunphy* J. on 28th March 1950 by way of notice of motion when his Honour was informed by the affidavit of Matthew John O'Neill, solicitor and a member of the firm of solicitors acting on behalf of O'Shea, that he, O'Neill, had been informed by the Deputy Industrial Registrar, Sydney, that pursuant to the orders made on 14th December 1949, arrangements had been made by him, the Deputy Industrial Registrar, and McNeill for the holding of the fresh election between 6th and 20th March 1950, and that the time for closing the ballot was fixed as 2.30 o'clock p.m. on Monday, 20th March 1950; that he, the Deputy Industrial Registrar, and McNeill jointly lodged with the head office of the Commonwealth Bank at Sydney, the key to a Post Office box at the General Post Office, Sydney, which Post Office box they mutually agreed would be used as a ballot box; that an

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arrangement had been made for McNeill to call at the office of the Deputy Industrial Registrar at 2 o'clock p.m. on Monday, 20th March 1950, so that they might together proceed to the Commonwealth Bank, Sydney, obtain the key of the Post Office box and proceed to the General Post Office to clear the box and then proceed with the counting of the votes; that McNeill did not attend at the Deputy Industrial Registrar's office as arranged, but, a few minutes after the appointed time, on the ground floor of the building in which that office was situate, he informed the Deputy Industrial Registrar that he, McNeill, did not intend to proceed with the arrangement to uplift the Post Office box key, or to clear the box, or to count the ballot; that upon being asked by the Deputy Industrial Registrar as to his intentions with regard to the completion of the ballot McNeill replied that "he was acting on instructions from the union and would not carry on his duties as joint returning officer as a summons had been issued against the returning officers and he would not act pending the determination of such summons."

*Dunphy* J. ordered as follows:—

1. That McNeill on or before 30th March 1950 do all things that might be necessary to enable the prompt completion by himself and his joint returning officer, the Deputy Industrial Registrar, Sydney, of the ballot, the counting of the votes and the declaration of the result, and, in particular, he should on or before 30th March 1950: (*a*) attend with the Deputy Industrial Registrar at the office of the Commonwealth Bank, Sydney, and there sign all necessary documents required to uplift the key to the Post Office box at the General Post Office, Sydney, used as a ballot box; attend with the Deputy Industrial Registrar at the General Post Office, Sydney, and there with the Deputy Industrial Registrar arrange for the clearing of the Post Office box and with the Deputy Industrial Registrar take delivery of all ballot papers certified by an official of the Postmaster-General's Department as having been received for deposit in such box prior to 2.30 o'clock p.m. on Monday, 20th March 1950; and (*c*) take all such ballot papers with the Deputy Industrial Registrar to the latter's office and proceed with the counting of the ballot.

2. That McNeill refrain from any further interference with the proper conduct of the ballot and refrain during the conduct of that ballot from accepting from the union or the branch orders as to his conduct as joint returning officer.

3. That immediately upon the completion of the count the returning officers join in certifying and declaring the result of the ballot.

4. That in the event of McNeill failing to perform or complete any duty prescribed as above on or by the time appointed or failing to attend at any place as so prescribed or otherwise failing to comply with the terms of this order or the order made on 14th December 1949, performance, completion, attendance or compliance by the Deputy Industrial Registrar, Sydney, should be deemed to be and should have the effect of performance, completion, attendance or compliance by or of both returning officers.

5. That the manager of the head office in Sydney of the Commonwealth Bank of Australia deliver to the Deputy Industrial Registrar on demand made by him at any time after 30th March 1950, the key of the Post Office box used as a ballot box which key had been lodged with that bank for safe custody.

6. That the Deputy Director of Posts and Telegraphs, Sydney, deliver to the Deputy Industrial Registrar on demand made by him at any time after 30th March 1950, all mail addressed to that Post Office box used as a ballot box, and

7. That the costs of the applicant of and incidental to the application be paid by McNeill.

On 30th March 1950, upon an application made on behalf of Hugh Grant, secretary of the Sydney Branch No. 1 of the Boilermakers' Society of Australia, as a person aggrieved, *Fullagar* J. ordered the Commonwealth Court of Conciliation and Arbitration, *Dunphy* J., John Cyril Welbourn, the Deputy Industrial Registrar of the said court at Sydney, George McNeill and John Patrick O'Shea to show cause why a writ of prohibition should not issue directing them and each of them from further proceeding in respect of or under the orders made by *Dunphy* J., on the following grounds :—

As to the order made 14th December 1949 :—

(1) that the *Commonwealth Conciliation and Arbitration Act* 1949 (No. 28 of 1949) had no application to the election in question inasmuch as upon its true construction it applied only to elections commenced after it received the Royal assent or, alternatively, only to elections in which irregularities had occurred after it received the Royal assent ;

(2) that if that Act on its true construction applied in respect of elections not completed before it received the Royal assent, the election in question had been completed before it received the Royal assent ;

(3) that the application under s. 96A of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 was not lodged with the Industrial Registrar before the completion of the election and at

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the time of its lodgment no time had been fixed by or under regulations within which such an application might be lodged; and

(4) that there was no power under that Act to order that where the rules of the organization were silent the new election should be conducted in accordance with any practice which the returning officers should agree upon as providing all necessary safeguards.

As to the order made 28th March 1950:—

(5) that the provision in that order that in the event of George McNeill failing to perform or complete any duty therein prescribed on or by the time appointed or failing to attend at any places therein prescribed or otherwise failing to comply with the terms of that order or the order made on 14th December 1949, performance, completion, attendance or compliance by the Deputy Industrial Registrar, Sydney, should be deemed to be and should have the effect of performance, completion, attendance or compliance by or of both returning officers, was not authorized by the *Commonwealth Conciliation and Arbitration Act* 1949 (No. 28 of 1949) or otherwise by law and was invalid and void.

All proceedings in respect of or under those orders were stayed until the order *nisi* had been determined or the further order of the Court.

Upon the return of the order *nisi* leave was given to the Attorney-General of the Commonwealth to intervene.

There was no appearance by or on behalf of the respondent McNeill.

Relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

*S. Isaacs*, for the prosecutor. With regard to the order made on 14th December 1949, the Act of 1949, on its true construction, is not retrospective and applies only to elections commenced after the Royal assent or, alternatively, to elections in respect of which irregularities occurred after the Royal assent. The cardinal rule in interpretation and construction is that an Act must be prospective and not retrospective. Unless the language is expressly to the contrary an Act is to be taken as intended to apply to a state of things coming into force after it commenced (*R.* v. *Ipswich Union* (1), *Re Athlumney*; *Ex parte Wilson* (2)). The observation made in *Re Athlumney*; *Ex parte Wilson* (3) applies *mutatis mutandis* to s. 96A and particularly to sub-s. (1). The language used in that sub-section might be said to be past, but it is past by anticipation

(1) (1876) 2 Q.B.D. 269, at p. 270.
(2) (1898) 2 Q.B. 547, at pp. 551, 552.
(3) (1898) 2 Q.B., at p. 553.

only, that is having reference to a set of facts which would be past at the time the application was made. Members of the union had rights prior to 16th July 1949, e.g. to be nominated as candidates for election to various offices; to be candidates by virtue of their nominations having been accepted; and to hold an election. It may be that the members had substantive rights as well as procedural rights. Each candidate, for instance, would be entitled under s. 81 to apply to the Court for orders that the rules of the union with respect to the conduct of ballots be complied with.

[LATHAM C.J. referred to *Abbott* v. *Minister for Lands* (1).]

In that case the question was whether there was a right accrued within the meaning of the repealing statute, and that might be something different from saying that the particular member did have a substantive right, not necessarily an accrued right within the meaning of the Act. The common law relating to elections was dealt with in *Hay* v. *Australian Workers' Union* (2) and *Woodward* v. *Sarsons* (3). At 31st May 1949, the members had the right to participate in an election conducted by the union in accordance with its rules, unrestricted and unsupervised by the court. The Act of 1949 was not merely an Act which was procedural in the sense that it regulated the procedure that was applicable to pre-existing rights: it created new and substantive rights, and the powers of the court under s. 81 were very much more limited in scope and in content than the powers under this Act: see *Jacka* v. *Lewis* (4) and *Barrett* v. *Opitz* (5). In the last-mentioned case the Court did not say, nor did it intend to say, that the Arbitration Court under s. 58E, as it then was, or s. 81, as it now is, had the power to declare elections void, to declare elected persons who were not elected, or to order new elections. The court can only make wide orders to ensure that the rules pertaining to the conduct of elections are observed. The powers conferred by ss. 96H and 96J are completely new powers which the court did not possess prior to the commencement of the Act of 1949. The Act is not merely declaratory. It is new legislation creating new substantive rights. Existing rights and procedure are left untouched by amending legislation (*In re Hales Patent* (6)). The statement of the law in *Hutchinson* v. *Jauncey* (7) is equally applicable to pending elections as to pending actions. The definition of "irregularity" is not limited. An irregularity could be something less than or something other than the breach of a rule and upon the finding of such

(1) (1895) A.C. 425.
(2) (1944) 53 C.A.R. 108.
(3) (1875) L.R. 10 C.P. 733.
(4) (1944) 68 C.L.R. 455.
(5) (1945) 70 C.L.R. 141.
(6) (1920) 2 Ch. 377, at pp. 386, 387.
(7) (1950) 1 K.B. 574, at pp. 578, 579.

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an irregularity the court may exercise any of the powers conferred by s. 96G, including the wide power as to directing a new election to be held, &c., conferred by par. (*c*) of s. 96G (3). The words of the Act are uncertain and ambiguous, therefore, prima facie, it should be construed in the light of the principle that it was not intended to affect existing rights unless the provisions were quite clear. A retrospective operation of the Act would interfere with the vested rights of candidates whose nominations had been approved at the union meeting held on 31st May 1949, to have the election restricted to those persons who had been so nominated. Concomitant rights were a right to prevent persons not nominated from competing as candidates in the election; a right to have the preferences distributed limited to those persons who were candidates as at 31st May; and a right to have the returning officer make his count and declare the result limited to the candidates so nominated and competing. Any such right was capable of being enforced by any candidate under former s. 51E, now s. 81 (*Jacka* v. *Lewis* (1)). All members had a general right, and all duly nominated candidates had a specific right to have elections conducted in accordance with the rules of the union. The Act provides for the making of an order which would provide for the conduct of elections otherwise than in accordance with those rules if it seemed proper to the Court to make such an order, therefore the Act does interfere with existing rights. The rights are rights which are not merely inchoate rights but rights which are crystallized. The effect of new legislation coming into force at a stage when proceedings are pending under the old legislation was discussed in *Kraljevich* v. *Lake View and Star Ltd.* (2). There is nothing in the language of s. 96A to suggest that it was to be applied to irregularities occurring before the commencement of the Act in relation to an election pending at the commencement of the Act but completed subsequently by a declaration of the result. Although the power to legislate with regard to the internal working of industrial organizations and to the members thereof is derived from the incidental power conferred by s. 51 (xxxix.) of the Constitution having regard to its relation to the arbitral power in par. (xxxv.) in s. 51, to legislate in respect of persons who are not members of such organizations, e.g. persons who during the preceding twelve months have ceased to be members, is outside the incidental power. The words which follow the word "claims" in s. 96A (1) are not made retrospective merely because there is a qualification of twelve months' residence or membership in the preceding words of that

(1) (1944) 68 C.L.R., at p. 460.

(2) (1945) 70 C.L.R. 647, at pp. 650, 651, 653.

sub-section. That " claim " or allegation refers to a past irregularity (*Re Athlumney*; *Ex parte Wilson* (1)). Sub-section (2) of s. 96A supports the view that the irregularities referred to in sub-s. (1) were to be irregularities which came into existence after the commencement of the Act. Section 96L only applies to elections completed after the commencement of the Act, and similarly with regard to offences dealt with under s. 96N. An election is completed at the time when the count is completed, or the presentation of the report to the appropriate body within a reasonable time after the completion of the count. There was not any power under the Act to order that where the rules of the union were silent the new election should be conducted in accordance with any practice which the returning officers should agree upon as providing all necessary safeguards. The judge did not himself make an order determining how the election was to be conducted but left it to be determined by other people. Under s. 96G (3) (*d*) the duty was upon the court to prescribe the safeguards. To direct the registrar and the union's returning officer to apply whatever practice they thought fit as being safeguards was not within the power so conferred or the incidental power conferred by s. 96G (3) (*e*). The union's rules did not comply with the provisions of the Act, therefore the judge had no power to direct that the election be conducted in accordance with those rules. Those rules do not contain adequate provision for absent voting, including postal voting, as required by the Act: see *McWilliam & Boyt's Commonwealth Conciliation and Industrial Arbitration Law* (1946—Supp. 1948), pp. 36, 52, 74. Section 74 does not cure this defect. It is not a safeguard within the meaning of s. 96G (3) (*d*) for the court to prescribe the conduct of an election in a manner that was not authorized by the Act. The provision in par. (*d*) relating to safeguards meant the taking of some precautions which were sufficient in the view of the court. The portion of the order now under consideration is not severable from the other portions because to sever it would create a result different from that intended by the judge. The Act authorized the court and not other people to determine what safeguards there should be. The provision in the order as to additional safeguards was entirely nugatory. Prescription by regulation is the essential condition which gives life to the whole of s. 96A and without which the section is inert. In the absence of the " prescribed form " or the fixing of " time by or under the regulations " the section does not operate. The prescribing is a condition precedent (*Browne* v. *Commissioner*

(1) (1898) 2 Q.B., at p. 553.

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*for Railways* (1); *Gramaphone Co. Ltd.* v. *Leo Feist Incorporated* (2)). An application under s. 96A (2) should be lodged either before the completion of the election—which was not done in this case—or within such time after the completion of the election as was fixed by the regulations. The application was lodged at a time when there were no regulations. As a result no regulation was satisfied, therefore the application was not properly before the court and an order should not have been made upon it. The cases show that where the power is given to a court to hear and determine a matter and the court is given power to prescribe, then that is regarded as a duty upon the court to prescribe the appropriate procedure if there be none, or to so mould its own procedure to accord with the appropriate procedure (*Browne* v. *Commissioner for Railways* (3); *Sharp* v. *Glasser* (4)). That is limited to cases where the duty is cast upon the court. Where the statute fixes the duty upon somebody else the court cannot usurp that duty. The court has no legislative power and cannot usurp the legislative power of the Governor-General to make regulations. The operation of the Act depended entirely upon the making of the regulations. It was an essential pre-requisite. The fact that the Act came into operation on the day on which it received the Royal assent did not have the effect of making the regulations prescribed under s. 96A (2) (*b*) retrospective to the date of the assent. The *Acts Interpretation Act*, by s. 48 (2), required that the regulations were not to come into operation so as prejudicially to affect rights—the date must be stated, otherwise they were invalid.

[LATHAM C.J. referred to *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (5); *Australian Coal and Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (6).

FULLAGAR J. referred to *Re Ovens and King Traders Pty. Ltd.* (7).]

Whatever was done before the prescribing of the regulations was not of any effect. The proper way to read the regulations is: "Applications hereafter to be made shall be made within six months of the completion of the election." The subject application having been made when there were not any regulations it would have been in order then to have applied to strike out the application as irregular. The application was not validated by the subsequent making of the regulations. The submissions made with regard to

(1) (1935) 36 S.R. (N.S.W.) 21, at pp. 28, 29; 52 W.N. 102, at p. 103.
(2) (1928) 41 C.L.R. 1.
(3) (1935) 36 S.R. (N.S.W.), at p. 29; 52 W.N., at p. 103.
(4) (1946) 46 S.R. (N.S.W.) 379, at pp. 383, 384; 63 W.N. 207, at p. 209.
(5) (1945) 71 C.L.R. 545, at p. 568.
(6) (1942) 66 C.L.R. 161.
(7) (1949) V.L.R. 16.

the first order apply also to the second order as being part of the set up of the new election. The power conferred by s. 96G (3) (*d*) was to appoint a person to act in conjunction with the returning officer, if any, of the union. In the circumstances the court had no power to appoint as sole returning officer a person other than the union's returning officer. The union's returning officer did, as ordered, act in conjunction with the registrar and the fact that he subsequently refused to so act did not empower the court to alter or vary its original order. The court cannot alter orders that it has made. The general power of the court in relation to varying and discharging orders does not apply. If it so applied there would not be any need for the express provision in s. 96E (1) (*f*). An intention of putting a superfluous provision into the Act should not be attributed to the legislature.

*H. Maguire* (with him *D. G. McGregor*), for the respondent O'Shea. A retrospective operation is not given to a statute merely because it is said to be applicable to a set of facts some of which may have occurred before the statute came into operation (*R.* v. *St. Mary Whitechapel* (1)). Although the election had commenced it was not completed until after the Act had come into operation, not only the counting and the declaration of the ballot but also the irregularities were subsequent to the coming into operation of the Act. One of the irregularities consisted not of the receiving of the ballot papers on the day after the poll had closed or of the decision to include them in the count, but of the arriving at a result brought about by, and the computation of figures based on, the inclusion of those ballot papers. That irregularity could not appear until the count was finalized, and it was found as a fact that it did not occur until on or about 16th July 1949. The other irregularity refers to a parcel of thirty-six ballot papers. The union's returning officer's report shows conclusively that the report relating to that parcel was quite inaccurate and was open to the construction that it was deliberately false. The erroneous computation could only have been made after the count had in fact been finalized. Having regard particularly to the events which had taken place subsequent to its operation the application of the Act to this election did not give it a retrospective effect (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (2); *West* v. *Gwynne* (3)). If it were necessary to give it a retrospective effect the Court would do so

(1) (1848) 12 Q.B. 120, at p. 127 [116 E.R. 811, at p. 814].

(2) (1923) 32 C.L.R. 413, at p. 433; (1922) 22 S.R. (N.S.W.) 534, at p. 539; 39 W.N. 181, at p. 182.

(3) (1911) 2 Ch. 1, at pp. 11, 12.

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having regard to the clear object of the Act, which was to overcome and put an end to abuses in union elections. The presumptive rule of construction against the retrospective operation rests only upon the considerations of justice (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (1)). The primary presumption against it being just to give a statute retrospective operation can be overcome by a consideration of all the facts of the case A remedial statute should be construed generously. The Act is not a statute which interferes with rights in the sense in which that should be understood. Members of the union who had been nominated did no have an absolute right under the union's rules to be elected or to proceed to election against only those members who had been nominated, and to have preferences allotted in accordance with the list of nominations which had closed. The Act is a law relating to the mode in which rights and liabilities of the whole body of members are to be enforced and realized. All the members had a right previously to be protected against malpractices. Certain remedies were provided. But the Act was an additional remedy and there was not any reason why a retrospective operation should not be given to that type of legislation (*Kraljevich* v. *Lake View and Star Ltd.* (2)). The language of the Act is prospective in its operation. It was not limited to elections which were to take place in the future, but was equally applicable to elections in the course of being conducted at the date of the commencement of the Act. The legislature did not intend that the operation of the Act should be dependent or conditional upon the Executive making regulations. Section 96A (2) (*b*) is not directory. It empowers the Executive to make regulations if the Executive sees fit to prevent people acquiescing for unduly long periods in the making of applications. An application lodged within any time subsequently prescribed by regulations was lodged within the statutory time. An application lodged prior to the regulations could not be struck out because the right to make the application was given by s. 96A (1) in clear and absolute terms, that right was not given contingently upon the Executive having made regulations. So far as pars. (*a*) and (*b*) of s. 96A (2) are concerned the Act means only that when a time was fixed by regulation it would have to be complied with (*Inland Revenue Commissioners* v. *Joicey* (*No.* 1) (3)). Paragraphs (*c*) and (*d*) have been complied with. A distinction was not drawn between rules on the one hand and regulations by the Executive on the other hand in *Commonwealth* v. *Huon Transport Pty. Ltd.* (4). It

(1) (1923) 32 C.L.R., at pp. 434, 435.
(2) (1945) 70 C.L.R., at p. 652.
(3) (1913) 1 K.B. 445, at pp. 453-456.
(4) (1945) 70 C.L.R. 293, at pp. 316, 317.

must be presumed that the legislature intended that the remedy provided by the Act should be available immediately upon the Royal assent thereto, and should not be deferred until such time as provision for procedural matters or time limitation had been implemented.

[LATHAM C.J. As at present advised the Court is of opinion that s. 96A applies in the case of an election which is in process but has not been completed at the time when an application under the section is made and, further, the Court is of opinion that s. 96A applies in the case of such an election certainly to any irregularity that takes place after the Act came into force. At present the Court is disposed to the opinion that an irregularity occurred on 16th July in the counting of votes in relation to the two hundred and forty-nine votes which were received by the returning officer on the day after the day fixed as the polling day. But on that question the Court would hear Mr. *Isaacs* if he desires to submit that the irregularity did not occur on or about 16th July. On those points the Court does not at present desire to hear further argument from those who are opposing the order nisi being made absolute.]

The legislation considered in *Browne* v. *Commissioner for Railways* (1) which conferred the power contained its own limitation and it differed in that respect from the Act now under consideration, which, in s. 96A (1), grants a power or confers a jurisdiction and does not itself contain any limitation as did the *Government Railways Act* 1912 (N.S.W.). Where there was in a separate sub-section a provision referring to the manner in which power was to be exercised, it was easier to come to the conclusion that the legislature intended that the power should exist even though the procedure or the method of exercising the power had not been laid down. Sub-section (1) of s. 96A gave the right to go to the court, and sub-s. (2) is merely a piece of machinery specified for getting it before the court. The argument addressed to the Court, on behalf of the prosecutor, that the rules were invalid was outside ground four as appearing in the order nisi.

[LATHAM C.J. There not being any opposition thereto the Court on the application of the prosecutor amends the order nisi by adding a ground that the order of 14th December 1949 was beyond the jurisdiction of the court because it directed the election to be conducted in accordance with the union's rules, and the said rules were invalid in that they made no adequate provision for absent voting.]

(1) (1935) 36 S.R. (N.S.W.) 21; 52 W.N. 102.

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The first answer to the argument adduced on behalf of the prosecutor is that that part of the order meant only that the election was to be conducted in accordance with the various provisions which appeared in the union's rules then, and now, before the Court. Even if there were an invalid rule in them and the judge adopted it he would be at liberty to incorporate it as one of the controlling elements of the inquiry under the provisions of the Act. The second answer is that the matter was concluded by s. 74. It was conclusively proved on the issue of the union's certificate of registration that the requirements of the Act had been complied with, including the requirement as to what the union rules should contain. It follows, then, that it was conclusively proved that the rules were valid. It was basically unsound to assume that the only power to make the order empowering the returning officers to mutually agree upon any practice for the purpose of providing all necessary safeguards was the power contained in par. (*d*) of s. 96G (3). The order so made by the judge was a supplementary order within the meaning of par. (*e*) to an order made under par. (*c*). The presence of the word " safeguards " in par. (*d*) does not preclude the provision of safeguards by an exercise of the powers conferred upon the court by pars. (*c*) and (*e*). An agreement by the two returning officers would in itself be a safeguard. If the order referred to in ground five of the order nisi had not been made the original order would have become completely futile. The order so referred to was a supplementary provision made under s. 96G (3) (*e*). It must be presumed that the legislature anticipated, and meant to provide for, possible difficulties, if not deliberate obstruction, in ballots conducted by the court, and that it intended to cover that situation when it enacted par. (*e*) of s. 96G (3). Where the Act conferred power to make supplementary orders it intended to confer power to make orders filling in deficiencies in original orders. The grounds other than the first ground, taken in the order nisi were not matters in respect of which prohibition would lie. The constitutional power vested in this Court to grant a prohibition in a proper case is not affected. This was not a proper case. The matters raised were all matters of law which are not reviewable in this Court (*R.* v. *Hickman*: *Ex parte Fox and Clinton* (1)).

[McTIERNAN J. referred to *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (2).]

The court had jurisdiction to inquire into the irregularities of the ballot and to make orders for the holding of a fresh election,

(1) (1945) 70 C.L.R. 598, at pp. 614-617. (2) (1949) 78 C.L.R. 177, at p. 192.

also orders under s. 96G and incidental and supplementary orders. It was for the court to say whether a particular order sought was within the incidental and supplementary power. It was not a matter of jurisdiction.

[LATHAM C.J. referred to *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (1).]

*E. J. Hooke*, for the Deputy Industrial Registrar. It is not proposed to debate the question of the construction of the Act, because the Deputy Industrial Registrar, acting as an officer of the court, simply carried out the orders and directions of the judge and, in the circumstances, prohibition does not lie against him. He did not exercise any judicial or quasi-judicial function (*R.* v. *Hickman*; *Ex parte Fox and Clinton* (2)). Prohibition would not lie against a person who was carrying out an order of the judge—whether that order be valid or invalid—particularly having regard to s. 96H (2).

*W. J. V. Windeyer* K.C. (with him *B. P. Macfarlan*), for the Attorney-General of the Commonwealth, intervening by leave. Upon the proper construction of the Act of 1949, the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make all the challenged orders, and in reference to all, except perhaps one of the particular orders challenged, there was not any excess of jurisdiction such that prohibition would lie, having regard to s. 32. The Act of 1949 applied in respect of elections which, at the date of the Royal assent, were either past or pending or future. It was not limited to elections in progress at that date but would extend to any past election. It was immaterial when the irregularity or irregularities occurred. The correct approach was not to ascertain whether the Act was retrospective, but simply what was its ambit and scope (*West* v. *Gwynne* (3)). There was not any vested right in any irregularity or illegality except, perhaps, in general legal theory. The Act did not make anything irregular which was not irregular before. The Act was a remedial Act. It provided a new remedy for irregularities. The major irregularity was the incorrect declaration of the results of the voting. This occurred after the Act came into force. The attempt to explain it was obviously false and obviously ineffective. A statement of what has been called the common law relating to elections was quoted in *Chanter* v. *Blackwood* (4). On the facts, there was an irregularity

(1) (1947) 75 C.L.R. 361, at p. 369.
(2) (1945) 70 C.L.R., at pp. 614-616.
(3) (1911) 2 Ch., at pp. 11, 12.
(4) (1904) 1 C.L.R. 39, at pp. 58, 59.

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after the date on which the Act came into force, but the Act being a remedial statute it would not be of any importance whether the irregularity occurred before or after the Act came into force. A remedial statute should be construed liberally and should be given a retrospective operation (*Worrall* v. *Commercial Banking Co. of Sydney Ltd.* (1); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (2)). Section 96A covers all matters which were irregularities in accordance with the law at the time they occurred. There is not anything in the terms of the Act to restrict it to irregularities occurring after it came into operation, or to elections that were held after it came into operation. It should be construed to apply to all the irregularities and all elections. It was intended to prevent dishonest elections and it was not intended to prevent honest elections. The right of the nominated candidates was to contest the election in accordance with the union's rules and in accordance with the law. Candidates for the election did not have a vested right to contest the election on the terms that the people who were their opponents would be the only opponents they would have to contend with. The time during which an application should be lodged was enlarged by the regulation, therefore the subject application was within time. The days between the day of lodgment and the day on which the regulations were made were *dies non*. The application was in fact lodged within six months of the completion of the election as required by reg. 133A. The provisions of that regulation are purely procedural, and procedural provisions are read retrospectively. It is procedural in the sense that an enactment which is procedural prima facie has a retrospective operation, and it was made in pursuance of s. 96A (2) the whole of which is primarily procedural. The proper meaning of "retrospective" is that when the enactment provides that certain things may be done within six months from the completion of the election it looks back to the completion of the election, and it is intended to give it the whole six months. It was not intended that it should give that period less three weeks. The period commenced on the completion of the election. Rules relating to time and times within which applications are to be made are procedural (*Re Ovens and King Traders Pty. Ltd.* (3); *Coleman* v. *Shell Oil Co. of Australia Ltd.* (4)). The regulations are not in any way governed by s. 48 (2) of the *Acts Interpretation Act* because they are not expressed to take effect from a date earlier than the date of notification, therefore s. 48 (2) does not apply (*Toowoomba Foundry Pty.*

(1) (1917) 24 C.L.R. 28, at p. 31.
(2) (1923) 32 C.L.R., at pp. 434-436.
(3) (1949) V.L.R. 16.
(4) (1943) 45 S.R. (N.S.W.) 27; 62 W.N. 21.

*Ltd.* v. *Commonwealth* (1)). They took effect from that date and *mutatis mutandis* the observations in *Australian Coal & Shale Employees' Federation* v. *Aberfield Coal Mining Co. Ltd.* (2) are applicable. When the Act came into operation there was one time only and that was up till the date of the completion of the election. When the regulations came into force that time had been enlarged. The nature of the enlargement was such that it operated according to its terms from the date of completion of the election. It was a special provision and, therefore, did not come within the terms of the *Acts Interpretation Act*. Prohibition would not lie because the matter was within the general jurisdiction of the Commonwealth Court of Conciliation and Arbitration.

[LATHAM C.J. referred to *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (3).]

The Arbitration Court itself under s. 40 (*m*) of the *Commonwealth Conciliation and Arbitration Act* has a complete power over time. It can enlarge time even though that time be prescribed by a statute. By that section power is given to the court to correct, amend or waive any error, defect or irregularity whether in substance or in form. Rule 34 of the *Conciliation and Arbitration Regulations* empowers a judge, in relation to any matter before the court, to extend any prescribed time, whether or not the prescribed time has already expired: see also reg. 145 (2). Even though the application was lodged prior to the promulgation of the regulations, it was in fact lodged within the time prescribed by them. Further, a second statutory declaration which was necessary to complete the application was filed after the regulations came into operation. This, by reference, incorporated the application and first declaration. Ground three in the order nisi is not a ground for prohibition for the reasons stated above; because it clearly relates to a matter which was within the general jurisdiction of the court, and is protected by s. 32. The union's rules are defective only in the sense that they do not make adequate provision for absentee voting, but there is not any prohibition of absentee voting. On the contrary, absentee voting is contemplated: see union rules 26 (*b*) and 42 (*d*). The "rules of the organization" referred to in s. 96G (3) are the rules registered in compliance with the *Commonwealth Conciliation and Arbitration Act* and are the rules referred to in the order and s. 83 (1) (*c*). The whole of the provisions of s. 96G are of an administrative character and are, prima facie, the arbitral rather than the judicial functions of the court. The use of the word "safeguards" does not mean that the order has been neces-

(1) (1945) 71 C.L.R., at p. 565.
(2) (1942) 66 C.L.R., at p. 176.
(3) (1938) 59 C.L.R. 369.

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sarily made pursuant to s. 96G (3) (*d*). It is a word not uncommonly used in connection with elections. The order made in March 1950 was a supplementary order. The court was not *functus officio* when it had made the first order. The powers conferred upon the court by s. 96G (3) included a power to appoint a person to act as returning officer in conjunction with the returning officer, *if any*, acting under the union's rules, and to exercise such powers as the court directed. It would not be necessary that the two persons acting in conjunction should have co-equal powers. The order was reasonably incidental and supplementary. It enabled the union's returning officer to take part if he so wished but it prevented him stultifying the effect of the earlier order by simply declining to act for a period, whether short or long. The arguments adduced on behalf of the respondent O'Shea on the question of jurisdiction and the restriction of the right of appeal and of prohibition given by s. 32, are adopted on behalf of the Attorney-General. Having regard to the decisions in *R.* v. *Murray*; *Ex parte Proctor* (1); *R.* v. *Central Reference Board*; *Ex parte Thiess (Repairs) Pty. Ltd.* (2); *R.* v. *Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australasia Ltd.* (3); *R.* v. *Hickman*; *Ex parte Fox and Clinton* (4); *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (5); and *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (6) these orders, which were made in a field which was primarily administrative, primarily arbitral and which relate to the supervisory jurisdiction of the Arbitration Court over registered organizations, are within the general scope of the Arbitration Court and they are not made so erroneously that it could be suggested there has been an excess of jurisdiction warranting the intervention of this Court by prohibition under s. 75 of the Constitution.

*B. P. Macfarlan*, for the Commonwealth Court of Conciliation and Arbitration and Judge *Dunphy*, submitted to any order the Court might see fit to make.

*S. Isaacs*, in reply. It is not disputed that prohibition does not go to the officers of the Court.

[WILLIAMS J. referred to *Ex parte Fontaine*; *Re Althouse* (7).]

*Cur. adv. vult.*

(1) (1949) 77 C.L.R. 387, particularly at pp. 398, 399.
(2) (1948) 77 C.L.R. 123, particularly at p. 130.
(3) (1947) 75 C.L.R. 361, particularly at pp. 368, 369.
(4) (1945) 70 C.L.R. 598, particularly at pp. 615-617.
(5) (1942) 66 C.L.R. 161, particularly at pp. 170-177, 186-196.
(6) (1949) 78 C.L.R. 177.
(7) (1927) 27 S.R. (N.S.W.) 396; 44 W.N. 144.

The following written judgments were delivered:—

LATHAM C.J. Return of an order nisi directed to *Dunphy* J., a judge of the Commonwealth Court of Conciliation and Arbitration, J. C. Welbourn, Deputy Industrial Registrar of the court, and George McNeill and John Patrick O'Shea, members of the Boilermakers' Society of Australia (an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1949), for the issue of a writ of prohibition in relation to orders made by *Dunphy* J. The prosecutor, Hugh Grant, was elected as secretary of the New South Wales Branch of the Society at an election which on 31st May 1949 was authorized by a meeting of the branch—the ballot to close on 21st June 1949. The respondent J. P. O'Shea was a defeated candidate at the said election. He applied under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 for an inquiry into the election on the ground that there had been irregularities in or in connection with the election. The inquiry was made and the learned judge made an order on 14th December 1949 declaring the election void and directing a new election to be held. The prosecutor alleges that the order made was beyond the jurisdiction of the court, and seeks a writ of prohibition to restrain any further proceeding thereunder.

The *Commonwealth Conciliation and Arbitration Act* 1904-1949 provides in s. 96A that "Where a member of an organization, or a person who, within the preceding period of twelve months, has been a member of an organization, claims that there has been an irregularity in or in connection with an election for an office in the organization . . . he may lodge an application for an inquiry by the court into the matter." The application is to be lodged with the Industrial Registrar (s. 96A (2) (*b*) ) who, if he is satisfied that there are reasonable grounds for an inquiry into the question whether there has been an irregularity which may have affected or may affect the result of the election, shall grant the application and refer the matter to the court—s. 96B (1). Under s. 96G the court has power to inquire into and determine the questions whether any irregularity has occurred and such further questions concerning the conduct and results of the election as the court thinks necessary. Section 96G (3) provides that if the court finds that an irregularity has occurred the court may, in accordance with the section, make an order declaring the election to be void, an order declaring a person purporting to have been elected not to have been elected, and declaring another person to have been elected, and an order directing a new election to be held.

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The election which was declared void was directed by the branch to be held on 21st June 1949. Ballot papers were sent out bearing an intimation that they must be returned by the first post on 21st June. Four thousand ballot papers were printed and, according to the report of the returning officer, McNeill, and three scrutineers, 3,509 were sent or delivered to members. On 21st June, 1,619 papers were collected by the returning officer at the Haymarket Post Office, Sydney. On 22nd June, that is a day after the day fixed for the return of ballot papers, 248 ballot papers were collected. These latter papers were included in the count. On 29th June 251 ballot papers were collected. They were not included in the count. The counting of the ballot papers took place during the period 22nd June to 16th July. On the latter date the result of the ballot was announced. *Dunphy* J. found that the election was not completed until 16th July, rejecting evidence which was directed to showing that the report of the returning officer was signed on 11th July. There was, however, no declaration of the result of the election until 16th July and it is clear that his Honour was right in holding that the election was not completed until 16th July.

On 12th July the 1949 Act came into operation: see s. 2. On 3rd August O'Shea lodged with the Industrial Registrar an application in writing under s. 96A for an inquiry. This application specified the election in respect of which the inquiry was sought and alleged certain irregularities. The application was supported by a statutory declaration declaring the facts stated in the application to be true. Section 96A (2) (*a*) provides that an application under the section shall "(*a*) be in writing in accordance with the prescribed form; (*b*) be lodged with the Industrial Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations." Section 124 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 provides that the Governor-General may make regulations prescribing matters which by the Act are required or permitted to be prescribed. Regulations made in pursuance of s. 96A (2) came into operation on 5th August. Thus on 3rd August, when the application was lodged, there were no regulations prescribing a form of application or fixing any time after the completion of the election for the purpose of defining the period within which an application could be made.

It is contended on behalf of the prosecutor, first, that the Act applies only to elections which commenced after the Act came into operation. The words of s. 96A are quite capable of being applied to an election which is proceeding at the time when the section came

into operation. The Act is remedial in its objective. It applies only in cases where the court is satisfied that there have been irregularities which might affect the result of the election: see definition of "irregularity" in s. 74, s. 96B (1) (*a*) and s. 96G (4). It cannot be said that a person who has been elected at an election affected by such irregularities has a vested right which prima facie should be protected against the operation of a general legislative enactment designed to remedy the consequences of irregularities. The order for a further election in this case, it may be observed, provides that the persons nominated at the voided election shall be the candidates at that further election. In my opinion s. 96A applies to an election which had not been completed at the time when the Act came into operation. It is unnecessary in this case to determine whether or not the Act applies to elections which had been completed when the Act came into operation. It is further contended on behalf of the prosecutor that even if the Act applies to elections which are actually proceeding at the time when the Act came into operation, an applicant under s. 96A cannot rely upon any irregularities which took place before the Act came into operation. The subject matter to which the Act applies is the election. The Act provides a remedy for the purpose of dealing with irregularities affecting that election. An irregularity which took place before the Act may obviously affect the election in the same way as an irregularity which takes place after the Act has come into force. There is no reason in the nature of the subject matter for limiting the application of the section to the case of irregularities happening after the Act has come into operation. The words of s. 96A—where a member of an organization claims "that there has been an irregularity in or in connection with an election"—are apt to apply to any irregularities that have taken place in relation to an election to which s. 96A applies. As already stated, the Act is remedial in its intention and objective and, as the words are capable of the construction mentioned, that construction should be adopted and it should be held that an applicant can rely, in the case of a pending election, upon irregularities which took place before the Act came into operation.

The next objection of the prosecutor depends upon s. 96A (2) (*b*) and (*c*), the provisions of which have already been stated. Regulations under the Act came into operation on 5th August 1949. A new regulation 133A was in the following terms:—"(1) An application under section 96A of the Act shall be substantially in accordance with Form 46, and lodged in duplicate. (2) The time after the completion of an election within which an application under section 96A of the Act in respect of the election may be

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lodged shall be six months." The application in fact came before the court. The argument for the prosecutor is that the application was initiated two days too soon. The learned judge held that the application which had been made on 3rd August was in fact substantially in accordance with the prescribed form and, further, that that application was lodged within six months after the completion of the election, and that therefore the application was within time. It is contended that this decision was wrong and that, at the time when the application was actually lodged, the only provision of the law which was applicable is to be found in the first part of par. (*b*) of s. 96A (2) which required that the application should be lodged with the Industrial Registrar before the completion of the election. The application was not so lodged and therefore, it is contended, was out of time and the court had no jurisdiction to deal with it. In *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1), this Court considered the effect of a section which required that an information in respect of certain offences should be laid within two months after the commission thereof. It was contended that the justices who convicted persons of such an offence had wrongly decided that the information was laid within the specified time and it was argued that therefore the justices had no jurisdiction to deal with the charges. It was held that the justices had jurisdiction to determine whether the information was laid within the statutory period or not and that if they made an erroneous decision in such determination they were nevertheless acting within the limits of their jurisdiction, so that prohibition would not lie. In the case cited the crucial time was the time of issue of the information by an officer of the court. In this case the crucial date is the time of lodgment with an officer of the Arbitration Court. As in the former case the court of petty sessions had jurisdiction to determine whether the information was in due time, so in this case the Arbitration Court had jurisdiction to determine whether the application was in due time. Even if that decision be wrong it does not afford any ground for prohibition. But, further, I am of opinion that the decision of the learned judge upon this point was right. The application was lodged in fact with the Industrial Registrar on 3rd August. It continued to be so lodged on 5th August and thereafter. Also, there is a provision in the *Commonwealth Conciliation and Arbitration Act* 1904-1949 which in my opinion shows that matters of procedure do not go to the jurisdiction of the court. Section 40 (*m*) provides, *inter alia*, that the court may, in relation to any proceedings before it, " correct, amend or waive any error, defect or irregularity whether

(1) (1938) 59 C.L.R. 369.

in substance or in form." This power was not exercised by the court in the present case, because the learned judge was of opinion that the application complied with the regulations, but this provision shows that an error, defect or irregularity, whether in substance or in form, does not affect the jurisdiction of the court, and that the court may exercise its jurisdiction, notwithstanding any such error &c. Finally, prohibition will not lie " where a question of time merely was involved. All the practice has been to the contrary " (*Barker* v. *Palmer* (1); *Backhouse* v. *Moderana* (2)). Accordingly in my opinion this ground of the order nisi fails.

The learned judge declared the election which had taken place to be void and directed that a new election should be held. It was ordered that the new election should be conducted in accordance with union rules and " where such rules are silent in accordance with any practice which the Returning Officers shall mutually agree upon as providing all necessary safeguard." The returning officers specified in the order were J. C. Welbourn, Deputy Industrial Registrar, and the respondent George McNeill, who was the returning officer appointed under the rules of the organization. It is contended on behalf of the prosecutor that in making this provision in the order the court did not itself provide safeguards for the conduct of the new election as it was empowered to do under s. 96G (3) (*d*), but left it to the returning officers to determine what safeguards should be adopted. In my opinion this objection fails because any returning officer appointed to conduct an election must make decisions and exercise his discretion in relation to various matters arising in the course of the election. If the order had simply appointed a returning officer for the election without any reference to safeguards, that returning officer would nevertheless have had the authority to make decisions as to various details in the conduct of the election. That being so, there can be no objection to a provision that the joint returning officers should together have authority to make such decisions.

It is contended for the prosecutor that the part of the order requiring the ballot to be conducted in accordance with the union rules is invalid because the union rules are themselves invalid. The rules are said to be invalid because they do not make adequate provision for absent voting—the Act, s. 70 (2), Schedule B and Statutory Rules 1947 No. 142, reg. 106 (*a*) (i). The evidence before the Court includes a copy of a certificate of the Industrial Registrar of the registration of the organization which, under s. 74 of the Act is, until proof of cancellation, conclusive evidence of the registration

(1) (1881) 8 Q.B.D. 9.

(2) (1904) 1 C.L.R. 675.

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of the organization therein mentioned " and that it has complied with the prescribed conditions to entitle it to be registered." Section 80 empowers the court to disallow rules which are contrary to law and to direct the alteration of rules to bring them " into conformity with the requirements of the Act." This provision shows that rules of an organization which are not in conformity with the Act are nevertheless rules of the organization. Thus, even if the rules of the organization are defective, they are in fact the rules of the union and those rules are the rules to which the order of the learned judge refers. Thus the order that the fresh election shall be conducted in accordance with the union rules is not invalid or ineffective as referring to non-existent rules.

George McNeill, after acting in accordance with the order for a period, refused to act further and the court made another order on 28th March 1950. By this order it was provided, *inter alia*, that if McNeill failed to perform or complete any duty prescribed by the order made on 14th December 1949 " performance completion attendance or compliance " by the Deputy Industrial Registrar, Sydney, " shall be deemed to be and shall have the effect of performance, completion, attendance or compliance by or of both returning officers."

The objection to this part of the order is particularly founded upon the provisions of s. 96G (3) (*d*), which is in the following terms :—" If the court finds that an irregularity has occurred, the court may, in its discretion, but subject to sub-s. (4) of this section make one or more of the following orders :— . . . ' (*d*) an order directing, notwithstanding anything contained in the rules of the organization or branch, the taking of such safeguards as the court thinks necessary against irregularities in or in connection with—(i) any such new election ; (ii) any such step so ordered to be taken again ; or (iii) any uncompleted steps in the election, and, for the purposes of any such order, an order appointing and authorizing a person to act as a returning officer in conjunction with the returning officer (if any) acting under the rules of the organization or branch in connection with the election, and to exercise such powers as the court directs ' " (Sub-section (4) provides that the court shall not declare an election to be void unless the irregularities have affected or may affect the result of the election.).

The prosecutor contends that par. (*d*) means that, when the court makes an order providing for safeguards and authorizes a person other than the returning officer acting under the rules of the organization to act as returning officer, the court must appoint him

to act in conjunction with the returning officer of the organization. The order of 28th March 1950 purports to authorize the Deputy Industrial Registrar to act by himself and not in conjunction with McNeill, the returning officer of the organization. In my opinion there are two answers to this objection. In the first place, the provision relating to returning officers refers to a person acting as returning officer in conjunction with " the returning officer (*if any*) acting under the rules of the organization or branch in connection with the election." In this case McNeill has refused to act under the rules of the branch or otherwise in connection with the new election. Accordingly there is no returning officer so acting. Thus the court is not prevented by par. (*d*) from appointing another person to act alone as returning officer. Further, s. 96G (3) (*e*) authorizes the court to make an order incidental or supplementary to any order made under the section. In the event which has happened, namely the refusal of McNeill to act under the first order, the further order that the Deputy Industrial Registrar should act alone is in my opinion supplementary to the order made under the section. If McNeill had continued to act under the order the order made in March 1950 would have been merely a variation of the original order, but his refusal to act created a new situation which required a further order if the order of December 1949 was to have any operation and effect. In these circumstances in my opinion the order of March 1950 was supplementary to the order of December 1949 and therefore was authorized by s. 96G (3) (*e*).

For these reasons I am of opinion that the order nisi should be discharged and that no writ of prohibition should issue. It is, however, desirable to deal with a particular objection taken on behalf of the Deputy Industrial Registrar who has been made one of the respondents to the order nisi. I agree that if the order nisi had been made absolute it should not have been made absolute against the officer of the court in relation to any action by him in pursuance of an order of the court (*Ex parte Fontaine*; *Re Althouse* (1) ).

McTIERNAN J. In my opinion the order nisi should be discharged. This is an application for a constitutional writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration. The writ is sought in respect of orders made by the court under the *Commonwealth Conciliation and Arbitration Act* 1904-1949.

The legislature declared in the long title of this Act that it was passed to prevent irregularities in connection with elections for

(1) (1927) 27 S.R. (N.S.W.) 396; 44 W.N. 144.

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offices in organizations registered pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1948, to vest in the Commonwealth Court of Conciliation and Arbitration additional powers for the prevention of such irregularities and to amend the Act in order to effectuate these purposes. The grounds upon which the writ of prohibition is sought do not raise any question whether the legislative power of the Commonwealth has been exceeded: they raise only the question whether there is statutory authority for the orders made by the court.

The orders were made upon an application lodged by the respondent, J. P. O'Shea, under s. 96A (1). The first question is whether s. 96A (1) authorizes the making of an application for an inquiry by the court into an election irregularity which occurred before the Act came into operation. This sub-section gives this remedy to a member or ex-member who claims that there has been an irregularity of that kind.

The irregularity is necessarily anterior to the fact upon which the remedy arises. The fact is that a member or ex-member claims that there has been an irregularity. The remedy is available from the time the Act comes into operation. It necessarily follows that an irregularity before the commencement of the Act is within the scope of the remedy. In order to exclude such an irregularity it would be necessary to supply words limiting the operation of the Act to future irregularities. The result would be to postpone the remedy given by s. 96A (1) until an irregularity occurred. But the manifest intention of the provision is that from the time the Act comes into operation a member or ex-member who claims that there has been an irregularity may lodge an application for an inquiry by the court into the matter.

Further, the Act authorizes the court to intervene before the completion of an election. This authority is given by s. 96A (2) (*b*), and s. 96G (3) (*b*). These provisions apply in terms to any election which is not completed when the Act comes into operation. They do not draw any line between incomplete elections commenced before the Act comes into operation and incomplete elections commenced afterwards. The express terms of the Act do not allow of any presumption that the legislature did not intend that the Act should apply to election irregularities which occurred before it came into operation or to elections which were then not complete. It would, I think, need express words to prevent the Court inquiring into an irregularity occurring before the Act came into force when exercising its jurisdiction in respect of an election which is within its jurisdiction. An election which is not completed before the Act

came into operation is at any rate such an election. The election in respect of which the court made the orders which are now in question was not completed before the Act came into operation. Any irregularity whether before or after the Act was a permissible matter of inquiry by the court. The meaning of the word " election " is not confined to the acts whereby the members of the organization exercise their right to choose the candidates whom they wish to hold office. An election is not completed before a binding and definitive declaration is made in accordance with the rules of the organization of the names of the persons chosen by the members.

In the present case the application for an inquiry was not made before the completion of the challenged election, but it was made before the regulations made under s. 96A (1) (*b*) were promulgated. The point is made that it is a condition precedent to the right to make an application under s. 96A (1) that regulations are made under s. 96A (2). This is not a tenable view. The Act does not manifest any intention to postpone the operation of s. 96A (1) until regulations are made. Regulations were promulgated after the application was lodged and before it came on for hearing. Section 96A (2) (*b*) provides that an application shall be lodged within such time after the completion of an election as is fixed by or under the regulations. Reading the regulations literally, this condition as to the time of lodging the application was fulfilled. The point that the lodging of the application was premature and beyond the powers of the court depends upon the rule against retrospective interpretation. This rule does not apply to the construction of these regulations because they do not interfere with any vested right; they are procedural only: they prescribe the procedure for the enforcement of the remedy given by s. 96A (1).

There are numerous other questions raised upon the terms of the orders made by the court. In the course of argument Mr. *Maguire* and Mr. *Windeyer* carefully checked the orders with the powers expressly given by the Act to the court. Having made this comparison again for myself, I am satisfied that the orders fall within the powers conferred upon the court by the terms of the Act. However, in relation to the attack which was made upon the orders, I am not satisfied that there was any substantial departure from the forms or principles within which the Act confines the court in proceedings instituted by such an application as that upon which the orders were made. I think that such an attack is of the kind which s. 32 is competent to meet (*R.* v. *Hickman*; *Ex parte Fox and*

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*Clinton* (1); *R.* v. *Central Reference Board*; *Ex parte Thiess (Repairs) Pty. Ltd.* (2)).

WILLIAMS J. I agree with the reasons of the Chief Justice. In my opinion the rule nisi should be discharged.

WEBB J. I agree that the order nisi should be discharged for the reasons given by the Chief Justice. A ground strongly relied upon by counsel for the prosecutor was the provision in s. 96G (3) (*c*) for the submission of nominations in the event of a fresh election being ordered. He submitted that this provision indicated that the amending legislation was intended to be prospective in the sense that it would not apply to any election commenced before it came into operation; that a candidate nominated in the election declared void would have an accrued right, enforcible in the Federal Arbitration Court, to have the election restricted to those nominated; and that it should be assumed that Parliament did not intend to interfere with accrued rights. However, as the Chief Justice points out, the legislation is remedial, and further an irregularity could consist firstly of the nomination of a person ineligible for election, and again in the declaration of his election. In such circumstances there is no reason why the amending Act, as a remedial measure, should not be held to apply at least to elections not completed, although commenced, before the legislation comes into operation. It may be unnecessary to order that fresh nominations be submitted where none of those received at the election declared void is of an unqualified person; but no question of jurisdiction to do so arises.

FULLAGAR J. This is the return of an order nisi for prohibition. The facts of the case have already been fully stated.

The first two grounds of the order nisi are as follows:—" (1) That the *Commonwealth Conciliation and Arbitration Act* 1949 (No. 28 of 1949) had no application to the election in question inasmuch as upon its true construction it applies only to elections commenced after it received the Royal Assent or, alternatively, only to elections in which irregularities had occurred after it received the Royal Assent. (2) That if the said Act on its true construction applied in respect of elections not completed before it received the Royal Assent, the election in question had been completed before it received the Royal Assent."

The second ground was not pressed before us. With regard to the first ground, I agree with the judgment of the Chief Justice, and I have nothing to add.

(1) (1945) 70 C.L.R., at p. 616.

(2) (1948) 77 C.L.R., at p. 140.

The third ground of the order nisi is as follows :—" (3) That the application under Section 96A of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 was not lodged with the Industrial Registrar before the completion of the election and at the time of its lodgment no time had been fixed by or under regulations within which such an application might be lodged."

Section 96A (1) of the Act of 1949 provides that a member of an organization who claims that there has been an " irregularity " may lodge an application for an inquiry by the court into an election for any office in the organization. Sub-section (2) of the section provides that " an application under this section shall—(*a*) be in writing in accordance with the prescribed form ; (*b*) be lodged with the Industrial Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations." By s. 96B the Industrial Registrar, if he is satisfied as to certain matters, is required to refer the matter to the court. The court then inquires into the irregularity or irregularities alleged, and is empowered by ss. 96E and 96G to make certain orders. The jurisdiction of the court appears to depend on a " reference " of a " matter " by the Industrial Registrar. Ground 3 of the order nisi alleges that a condition precedent to the power of the Registrar to refer the matter was not fulfilled. It is said that, the " reference " being invalid and void, the court had no jurisdiction in the " matter."

At the time when the application in the present case was lodged with the Industrial Registrar no regulations had been made. It was argued, therefore, in the first place (although this point was not really covered by ground 3) that sub-s. (2) (*a*) of s. 96A required the application not only to be in writing but to be in the prescribed form, and, since no form had been prescribed, no such application was made or could be made as would support a reference by the registrar to the court.

It has been said that " enactments regulating the procedure in courts seem usually to be imperative and not merely directory " (*Maxwell* on *Interpretation of Statutes*, 9th ed. (1948), p. 377), and it may be assumed (though I do not decide) that, when once a form had been prescribed, it would be a condition precedent to the registrar's power to refer that there should be an application in writing, and that it should be, at least substantially, in accordance with the prescribed form. But, at the time of the application in the present case, no form had been prescribed, and yet it seems clear that the legislature intended by sub-s. (1) of s. 96A to give an

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immediate right to make an application. If the case were one of an application to a court exercising judicial power, it would appear to be covered by the rule that, where a jurisdiction is given to a court and no procedure is prescribed, the court will accept or adopt such procedure as seems to it fit and proper: it can and should make or mould its own procedure. It was argued, however, that this principle applied only to courts which had power to make rules governing their own procedure, and had no application to a case where the power given was not judicial and the procedure was to be prescribed by an outside authority—as here, where the "prescribing" authority is the Governor-General (s. 124). Reliance was placed upon *Browne* v. *Commissioner for Railways* (1). In that case the statute provided that the head of a branch of the railway service might "in the prescribed manner dismiss or suspend" an officer in that branch of the service. It was held that, no "manner" having been prescribed, there was no power to dismiss or suspend. The relevant principles of law and the reasons for the decision are very clearly stated by *Jordan* C.J. (2). That case does not, in my opinion, govern the present. It must be in every case a matter of construction of the particular relevant statute. Here the power in question is not judicial and it is not given to the court: it is given to the registrar, and sub-s. (6) of s. 96B provides that no act or decision of the registrar under that section shall be subject to appeal to the court. But the registrar is an officer of the court, and the power is given to him in his capacity of officer of the court: he may be said to represent the court for the purposes of a preliminary investigation. The court, although it is not, in inquiring into an election, exercising judicial power, is a court which possesses certain judicial power, and it is a court which is expressly given power to "correct amend or waive any error defect or irregularity whether in substance or in form" (s. 40 (*m*)). Nor, in my opinion, is s. 39, although it does not in terms apply to a proceeding under s. 96A, irrelevant. I think that the power is given to such a person and found in such a context that the legislature must be taken to have intended that, unless and until a form is prescribed, the application, though it *must* be in writing, may be in any form which the registrar considers appropriate. He is, in my opinion, in the same position as a court would be if the power had been given to a court. "If jurisdiction is conferred upon a court, it may and should exercise that jurisdic-

(1) (1935) 36 S.R. (N.S.W.) 21; 52 W.N. 102.

(2) (1935) 36 S.R. (N.S.W.), at pp. 28, 29; 52 W.N., at p. 103.

tion: and, if no procedural machinery has been provided, it is for the court to provide such machinery as best it can" (per *Jordan* C.J. in *Browne's Case* (1)).

The next argument of the applicant (which is the point really raised by ground 3) was based on sub-s. (2) (*b*) of s. 96A. It was said that, at the time when the application to the registrar was made, there was no regulation prescribing a time after the completion of the election within which the application might be made. The first part of sub-s. (2) (*b*) was, therefore, the governing provision, and the application was not in fact made before the completion of the election.

I am very far from being satisfied that the line of cases exemplified by *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (2) has any application to sub-s. (2) (*b*). Indeed it is, I think, more or less clearly implicit in what I have already said that I am disposed to regard sub-s. (2) of s. 96A as laying down conditions precedent to the registrar's jurisdiction, so that it is not within his power to decide finally whether they have been fulfilled or not. On this view, of course, this Court could grant mandamus if it found the conditions fulfilled, and prohibition if it found any of them not fulfilled. It is a matter of construction, and the whole framework of ss. 96A and 96B, the nature of the conditions themselves and the inherent probabilities, all incline me strongly towards this view. Nor do I think that s. 32 of the Act, read in the light of what was said by *Dixon* J. in *R.* v. *Hickman*; *Ex parte Fox and Clinton* (3), can properly be applied here as a ground for refusing prohibition. I can see no room in this case for its application. If sub-s. (2) (*b*) enacts a condition precedent to the jurisdiction of the registrar, and it has not been complied with, I have difficulty in seeing how prohibition can lawfully be refused. The power to grant prohibition is given by the Constitution and cannot be taken away by Act of Parliament (*R.* v. *Hickman*; *Ex parte Fox and Clinton*, per *Latham* C.J. (4)).

I am of opinion, however, that ground 3 of the order nisi fails, because it proceeds upon a wrong construction of s. 96A (2) (*b*). The applicant construes sub-s. (2) (*b*) as meaning that the application must be lodged before the completion of the election unless regulations are in existence which permit it to be lodged after the completion of the election and then within the time prescribed by those regulations. I do not think that this is the meaning of

(1) (1935) 36 S.R. (N.S.W.), at p. 29; 52 W.N., at p. 103.
(2) (1938) 59 C.L.R. 369.
(3) (1945) 70 C.L.R., at pp. 616, 617.
(4) (1945) 70 C.L.R., at p. 606.

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sub-s. (2) (*b*). I do not think that the two limbs of the paragraph present strict alternatives. I think that the first limb is intended to be rather a qualification of the second, being inserted because, in its absence, the prescription of a period *after* completion within which the application is to be lodged might be thought to preclude the lodging of an application *before* completion. The meaning is, therefore, in my opinion, that the application shall be lodged within a period after completion prescribed by or under regulations but may in any case be lodged before completion. On this view, the application may be lodged at any time after completion of the election unless and until a time limit is prescribed. There was, therefore, in this case, no failure to comply with sub-s. (2) (*b*).

In fact a regulation fixing the time after completion within which an application must be lodged came into force after the lodging of the application in this case, and in fact the application had been lodged within that period. It is unnecessary, in the view which I take, to consider whether this regulation applied retrospectively so as to produce the result that the application, though out of time when lodged, became lodged within time. I will only say that I think that this question if it arose, would be a very difficult question, and that I am not at all sure that this particular provision for a time limit ought to be classed as a merely "procedural" provision.

Ground 4 of the order nisi is in the following terms:—"(4) That there was no power under the said Act to order that where the rules of the organization were silent the new election should be conducted in accordance with any practice which the Returning Officers should agree upon as providing all necessary safeguards." I have felt much difficulty over this ground. It differs radically in character from grounds 1, 2 and 3. Those grounds rest on the view (with which I am disposed to agree) that the jurisdiction of the court does not arise except upon a reference by the registrar, and that the "jurisdiction" of the registrar to "refer" is subject to conditions precedent which are set out in s. 96A (2). No jurisdiction can be derived by the court from an invalid reference, and a reference is unauthorized and invalid unless s. 96A (2) is complied with. Ground 4 assumes that jurisdiction has been acquired by the court over the subject matter, but asserts that an actual order made in purported exercise of the jurisdiction is not authorized by the Act and is therefore in excess of jurisdiction. The question depends upon s. 96G (3) (*c*) and (*d*) of the Act.

Section 96G (3) provides that, if the court finds that an irregularity has occurred in connection with the election, it may make "(*c*) an

order directing a new election to be held, or any step in or in connection with the election (including the submission of nominations) to be taken again, in accordance (subject to any order under the next succeeding paragraph) with the rules of the organization or branch"; and/or "(*d*) an order directing, notwithstanding anything contained in the rules of the organization or branch, the taking of such safeguards as the court thinks necessary against irregularities in or in connection with—(i) any such new election; (ii) any such step so ordered to be taken again; or (iii) any uncompleted steps in the election, and, for the purposes of any such order, an order appointing and authorizing a person to act as a returning officer in conjunction with the returning officer (if any) acting under the rules of the organization or branch in connection with the election, and to exercise such powers as the court directs." The argument under ground 4 is that the court has power to direct the taking of such safeguards as it, the court, thinks necessary, but that the order actually made does not direct safeguards at all, but, in effect, merely delegates to the returning officers the power of deciding what safeguards are necessary or desirable.

Considering the question merely as a matter of the interpretation of s. 96A (3) (*d*), I am of opinion that there is no answer to the argument presented. I do not think that the order made is authorized by the terms of that paragraph. I think that what that paragraph means and intends is that detailed directions as to the safeguards to be taken shall be given by the court and not left to the discretion of the returning officers. It does not, however, follow that prohibition should go on this ground. By the time that s. 96G becomes material the matter has reached the court. It has, *ex hypothesi*, been duly "referred" by the registrar, and the court is seized of the matter: it has jurisdiction over the subject matter. And it is, in my opinion, within the scope of that jurisdiction to decide finally such questions as the question whether s. 96G authorizes a particular form of order. A wrong decision might be the subject of an appeal, if an appeal lay, but it cannot properly be made the subject of a writ of prohibition (cf. *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1)). The view that the jurisdiction given includes, as a matter of construction of the Act, the power to decide such questions is, I think, supported—although the jurisdiction given to this Court by s. 75 (v.) of the Constitution cannot be taken away from it—by the presence in the Act of s. 32 (cf. *R.* v. *Hickman*; *Ex parte Fox and Clinton*, per *Dixon* J. (2)). Although I think

(1) (1938) 59 C.L.R. 369.

(2) (1945) 70 C.L.R., at pp. 614-617.

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that ground 4 asserts a proposition which is sound in itself, I do not think that it entitles the applicant to a writ of prohibition.

Ground 5 of the order nisi is concerned with the later order made by *Dunphy* J. on 28th March 1950. It is in the following terms :— " (5) That the provision in the said order that in the event of the said George McNeill failing to perform or complete any duty therein prescribed on or by the time appointed or failing to attend at any places therein prescribed or otherwise failing to comply with the terms of the said order or the order made on the 14th day of December 1949 performance, completion, attendance or compliance by the Deputy Industrial Registrar, Sydney, shall be deemed to be and shall have the effect of performance, completion, attendance or compliance by or of both Returning Officers was not authorized by the *Commonwealth Conciliation and Arbitration Act* 1949 (No. 28 of 1949) or otherwise by law and is invalid and void."

I regard the question raised by this ground as a question of great practical importance, but I do not regard it as presenting any real difficulty. Even if the point raised were sound in itself, again I do not think that it would afford a basis for a writ of prohibition. But I think it reasonably clear that such an order as was made is " incidental " or " supplementary," within the meaning of s. 96G (3) (*e*), to the order already made. Having regard to the nature of the jurisdiction given, I think that a very liberal construction indeed ought to be accorded to s. 96G (3) (*e*). But, apart altogether from this, it seems to me that a power to make some such order as was in fact made is practically necessary if the general powers given to the court are not to be in danger of being frustrated by wilful acts or omissions of interested parties. In my opinion, ground 5 also fails.

I would add one brief observation—at the risk of being thought to exceed my function. The jurisdiction given by the Act of 1949 is a novel and difficult jurisdiction. Its difficulty is greatly increased by the fact that the rules of many registered organizations with regard to elections are extremely defective—in some cases almost incredibly defective. Section 96G (3) (*d*) provides a means of overcoming the difficulty thus occasioned, and, in my opinion, par. (*d*) should, like par. (*e*), receive a very liberal construction. Doubtless before long something in the nature of a standard order, capable of variation to meet each individual case, will be worked out. If my view that an order leaving " safeguards " to be determined *ad hoc* by the returning officers is not authorized by the Act is accepted, it means that the order must often condescend to very

considerable detail. But I should imagine that this is likely to render it not less practically effective but more practically effective.

In my opinion, the order nisi should be discharged.

*Order nisi discharged. Prosecutor to pay the costs of respondents. Costs of Dunphy J. to be as of a submitting respondent.*

Solicitor for the prosecutor, *Harold Rich.*

Solicitors for the respondent O'Shea, *Murphy & Moloney.*

Solicitor for the respondents Commonwealth Court of Conciliation and Arbitration, *Dunphy* J., Deputy Industrial Registrar, and the Attorney-General of the Commonwealth, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

J. B.