Ref to 49 ALJR - 353.
" " 19. ALR. 669.
App. 23. ALR. 69.

Ref to 56 ALJR. 697.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

TAYLOR AND ANOTHER;

EX PARTE PROFESSIONAL OFFICERS' ASSOCIATION—COMMONWEALTH PUBLIC SERVICE.

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MELBOURNE, *Feb.* 19, 20.

Latham C.J., Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Industrial Arbitration (Cth)—Registered organization—Application to have change in conditions of eligibility for membership recorded—Deletion of proviso excluding Commonwealth public servants from membership—Power of Industrial Registrar—Writ of Prohibition—The Constitution (63 & 64 *Vict., c.* 12), *ss.* 51 (*xxxv.*), (*xxxix.*), 52, 75 (*v.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *Part VI.—Arbitration* (*Public Service*) *Act* 1920-1947 (*No.* 28 *of* 1920—*No.* 52 *of* 1947)—*Conciliation and Arbitration Regulations* (*S.R.* 1947 *No.* 142), *regs.* 106, 118, 119.

An organization of persons employed " in or in connection with the industry of engineering " was registered under Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1947. Its rules as to eligibility for membership contained a proviso to the effect that members of the Commonwealth Public Service should not be eligible for membership. The organization, seeking to have recorded under s. 76 of the Act a change in its conditions of eligibility for membership by the deletion of the proviso, applied to the Industrial Registrar for his approval, under reg. 118 of the *Conciliation and Arbitration Regulations*, of the change. Another registered organization opposed the application on the grounds (substantially) that the purpose of the proposed change was to admit to membership of the applicant organization Commonwealth public servants who were not engaged in industry and that such admission would be contrary to the Constitution or to the *Commonwealth Conciliation and Arbitration Act* and the *Arbitration* (*Public Service*) *Act* 1920-1947 if read so as to keep them within the legislative power of the Commonwealth Parliament. The opponent organization sought from the High Court a writ to prohibit the Industrial Registrar from proceeding with the hearing of the application.

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Held that it was within the province of the Industrial Registrar under Part VI. of the *Commonwealth Conciliation and Arbitration Act* and reg. 118 of the *Conciliation and Arbitration Regulations* to determine whether he should approve and record the change and a writ of prohibition would not lie.

Per Latham C.J.: The power of the Commonwealth Parliament under s. 52 and other provisions of the Constitution to legislate with respect to the Commonwealth Public Service includes power to determine the terms and conditions of employment and also to provide a specific manner of determining what those terms and conditions may be. There is no constitutional objection to the use for this purpose to such extent as Parliament thinks proper of the machinery provided by legislation passed under s. 51 (xxxv.) of the Constitution.

ORDER NISI for prohibition.

In 1948 the Association of Professional Engineers was registered as an organization under Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1947. The conditions of eligibility for membership of the organization were defined in rule 3 of its rules substantially as follows: "Any person temporarily permanently or usually employed . . . on a full-time or part-time basis for hire and reward in or in connection with the industry of engineering shall be eligible to be and to become a member provided that he has passed the examination for" any of certain qualifications specified or "any degree fellowship associateship diploma certificate or other educational technical academic or scientific qualification in engineering deemed by the Committee equivalent or superior to any one of the qualifications" theretofore mentioned. "Provided that employees in 'the Public Service' as defined in the *Arbitration (Public Service) Act* 1920-1947 shall not be eligible for membership."

In January 1950 the organization applied to the Industrial Registrar for his approval under reg. 118 of the *Conciliation and Arbitration Regulations* of a change in the conditions of eligibility for membership by the deletion of the proviso to the rule above stated. The Professional Officers' Association—Commonwealth Public Service (hereinafter called the prosecutor), which was also an organization registered under the Act, opposed the application on grounds which, so far as here material, were, substantially, that the Act did not authorize the registration of an organization the members of which included Commonwealth public servants who were not engaged in industry; that the Act, read with the *Arbitration (Public Service) Act* 1920-1947, did not authorize the registration of an organization composed of Commonwealth public servants and other persons; and that, if and in so far as the

legislation authorized such registration, it was invalid. The Registrar referred the matter to the Commonwealth Court of Conciliation and Arbitration under s. 30 of the *Commonwealth Conciliation and Arbitration Act*. That court, by a majority (*Foster* and *Kirby* JJ.) (*Dunphy* J. dissenting), intimated its opinion that the proviso to rule 3 might lawfully be deleted and remitted the matter to the Registrar. It did not appear that any formal order of the court had been drawn up, and it was assumed in the proceedings the subject of this report that the court had acted merely in an advisory capacity.

The prosecutor obtained in the High Court an order nisi for a writ to prohibit the Registrar from proceeding further with the application for the amendment of the rule. The respondents to the order nisi were the Industrial Registrar and the applicant organization.

G. Gowans K.C. (with him *S. H. Cohen*), for the prosecutor. The *Commonwealth Conciliation and Arbitration Act*, Part VI., does not contemplate the registration of an organization the members of which are not engaged in industry, and Commonwealth public servants not employed in a government undertaking which is industrial in character (what might be called an "instrumentality" as distinct from a department executing purely governmental functions) are not engaged in industry even though they are engaged in a craft which, in another employment, would be industrial. The definition of "industry" in s. 4 of the Act shows that employees are not engaged in an industry unless their employer is so engaged. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (1); *Federated State School Teachers' Association of Australia* v. *Victoria* (2); *Melbourne & Metropolitan Tramways Board* v. *Municipal Officers' Association of Australia* (3).] The object of the amendment of the rule in question obviously is to attract to the ranks of the respondent organization members of the Commonwealth Public Service who are working as engineers, whether or not they can be regarded as being engaged in industry. It may be that the organization could have been registered in the first instance without the proviso the deletion of which is now sought; but, if the effect of the deletion would be—as it is submitted is the case—to withdraw a qualification which correctly expresses the law as to eligibility for

(1) (1942) 66 C.L.R. 488, at pp. 499-502, 519, 520.

(2) (1929) 41 C.L.R. 569, at pp. 573, 575.

(3) (1944) 68 C.L.R. 628.

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membership, it should not be permitted. The *Arbitration (Public Service) Act* is concerned only with registration of organizations consisting wholly of public servants. It is not likely that Parliament would have been concerned in this Act to enable the registration of organizations consisting in part of public servants and in part of other persons, with the possible result that public servants would become involved in industrial disputes which were no concern of the Public Service and in such matters as would result from the investing of the organizations with juristic capacity. [He referred to the *Commonwealth Conciliation and Arbitration Act*, ss. 46, 59 (2) (*b*), 60, 50, 56, 82, 5, 97, 84 et seq., 80, 81, 96, 88; *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (2).] Each of the Acts which have been referred to is at all events capable of a construction which will leave it free from the objections submitted and should be so read because otherwise there will be a contravention of the Constitution. The legislation, if not so read, is not within the power of the Commonwealth Parliament to legislate with respect to the Public Service, conciliation and arbitration, &c., or incidental matters under ss. 51 (xxxv.), (xxxix.), 52, of the Constitution. As to whether prohibition lies to the Industrial Registrar, it is true that, if his decision is one way, it will be unexceptionable from the prosecutor's point of view. If, however, it goes the other way, it will be unconstitutional, and prohibition will lie just as in the recent cases relating to preference to unionists (*R.* v. *Wallis*; *Ex parte Employers Association of Wool Selling Brokers* (3); *R.* v. *Findlay*; *Ex parte Victorian Chamber of Manufactures* (4)). The functions of the Registrar under s. 76 of the *Commonwealth Conciliation and Arbitration Act* and regs. 118, 119, 130, of the regulations under the Act are judicial in character, and prohibition will go to restrain him from a decision which is in excess of power. [He referred to *R.* v. *Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte Sulphide Corporation Ltd.* (5); *R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (1920) *Ltd.* (6); *R.* v. *Legislative Committee of Church Assembly*; *Ex parte Hynes-Smith* (7); *R.* v. *North Worcestershire Assessment Committee*; *Ex parte Hadley* (8); *R.* v. *Minister of Health*; *Ex parte Villiers* (9); *R.* v. *Commonwealth*

(1) (1908) 6 C.L.R. 309.
(2) (1945) 70 C.L.R. 141.
(3) (1949) 78 C.L.R. 529.
(4) (1950) 81 C.L.R. 537.
(5) (1918) 25 C.L.R. 9, at p. 21.
(6) (1924) 1 K.B. 171, at pp. 194, 205.
(7) (1928) 1 K.B. 411.
(8) (1929) 2 K.B. 397, at p. 405.
(9) (1936) 2 K.B. 29.

Rent Controller; *Ex parte National Mutual Life Association of A/asia Ltd.* (1); *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (2); *R.* v. *Woodhouse* (3); *R.* v. *London County Council*; *Ex parte Entertainments Protection Association Ltd.* (4)].

The respondent Registrar did not appear.

R. M. Eggleston K.C. and *B. L. Murray*, for the respondent organization, were not called upon.

The following judgments were delivered :—

LATHAM C.J. This is the return of an order nisi for prohibition directed to James Edward Taylor, the Industrial Registrar appointed under the *Commonwealth Conciliation and Arbitration Act* 1904-1949. There is an application before the Registrar for approval to the amendment of the rules of the respondent, the Association of Professional Officers. The rules of that association, which is an association registered under the *Commonwealth Conciliation and Arbitration Act*, provide in rule 3 that certain persons shall be eligible for membership of the organization. There follow provisions relating to what has been referred to as the " engineering industry ". The rules require certain qualifications as engineers before persons can become members. After the definition of " eligibility " there is a proviso in rule 3 that " employees in the Public Service as defined in the Arbitration (Public Service) Act 1920-1947 shall not be eligible for membership." The basis of all the argument on behalf of the prosecutor, which is the Professional Officers' Association—Commonwealth Public Service (that is, consisting entirely of employees in the Commonwealth Public Service) is that there is a distinction between classes of such employees which is of a fundamental and radical nature in the industrial law of the Commonwealth, which makes a distinction between persons engaged in industry and persons engaged in non-industrial governmental services. It is pointed out on behalf of the prosecutor that the deletion of the proviso would bring about the result that the exclusion of employees in the Public Service would be removed from the rules and that the result would be, upon the contentions of the respondent organization, that any employees in the Public Service who fell within the other conditions of eligibility which would remain in the rules might become members of the respondent association, even though they were not employees in any industry.

(1) (1947) 75 C.L.R. 361, at p. 367.
(2) (1939) 61 C.L.R. 240, at pp. 251, 255, 258, 262.
(3) (1906) 2 K.B. 501, at pp. 511, 513, 536.
(4) (1931) 2 K.B. 215, at p. 233.

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The order nisi is directed to the Industrial Registrar and by that order nisi it is sought to prohibit the Industrial Registrar from proceeding with the hearing of the application for the amendment of the rules of the respondent association by striking out the proviso. The Registrar referred to the Arbitration Court under s. 30 of the *Arbitration Act* the question whether he had power to approve this suggested change. By a majority decision the Court held that he had such power. This is not a proceeding upon appeal from that decision. It is an independent proceeding concerned with the jurisdiction of the Registrar, and not with the merits of the application.

The grounds of the order nisi are :—" 1. That the *Commonwealth Conciliation and Arbitration Act* 1904-1947 as amended does not authorize the registration of an organization the members of which include employees in the Commonwealth Public Service not engaged in industry." (The foundation for the distinction between persons engaged in industry and governmental employees not engaged in industry may be found in the decision of this Court in *Federated State School Teachers' Association of Australia* v. *Victoria* (1)). " 2. That the *Commonwealth Conciliation and Arbitration Act* 1904-1947 as amended and the *Arbitration (Public Service) Act* 1920-1924 do not authorize the registration of an organization the members of which are employees in the Commonwealth Public Service and others. 3. That if on their proper construction the said Acts do authorize such registration they are to that extent beyond the powers of the Parliament of the Commonwealth ".

Section 70 of what I have called the *Arbitration Act* provides that an association of employees may be registered as an organization under the Act if it is (s. 70 (*b*)) an association of " not less than one hundred employees in or in connexion with any industry, together with such other persons, whether employees in the industry or not, as have been appointed officers of the association and admitted as members thereof."

The other Act which has required consideration in this case is the *Arbitration (Public Service) Act* 1920-1947. Under that Act a Public Service Arbitrator is appointed for the purpose of dealing with terms and conditions of employment in the Public Service. Section 4 provides that :—" Employees in the Public Service, or in any division, class, grade or branch thereof, or in any calling, service, handicraft, occupation, or avocation in the Public Service, or in any division, class, grade or branch thereof, shall be deemed

(1) (1929) 41 C.L.R. 569.

to be employees in an industry within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1918."

In s. 4 of the last-mentioned Act there is a definition of "industry". Section 4 of the *Arbitration (Public Service) Act* provides that, notwithstanding that definition in the *Commonwealth Conciliation and Arbitration Act*, employees of the Commonwealth shall be deemed to be employees in an industry. Section 5 of the *Arbitration (Public Service) Act* provides that an association of less than one hundred employees in an industry in the Public Service may be registered under the *Commonwealth Conciliation and Arbitration Act* as an organization if its membership comprises at least three-fifths of all the persons who are employees in that industry in the Public Service. Therefore that Act permits the registration as an organization under the *Arbitration Act* of a body of Commonwealth employees even though they are not engaged in industry in the ordinary sense. If the application to strike out the proviso should be granted, then the rules would stand with employment in the engineering industry of a person with certain professional qualifications as described in the rules as the sole condition of eligibility and there would be no express exclusion of employees of the Commonwealth.

The Industrial Registrar was performing the function assigned to him under s. 76 of the *Arbitration Act*. That section provides that :—"An organization may, in the prescribed manner, and on compliance with the prescribed conditions, change its name or the conditions of eligibility for membership or the description of the industry in connexion with which it is registered, and the Registrar shall thereupon record the change in the register and upon the certificate of registration."

Regulations have been made prescribing the manner in which a change referred to in s. 76 is to be made and prescribing the conditions which have to be complied with. Regulation 118 of the regulations made under the Act provides :—"The manner in which an organization may change its name or the conditions of eligibility for membership or the description of the industry in connexion with which it is registered shall be by complying with any relevant rules of the organization, but no such change shall become effective unless and until the approval of the Registrar to the change has been given."

The matter under consideration in these proceedings is an application for approval under reg. 118. Regulation 119 provides for the form of application and other associated matters.

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The Registrar, therefore, is proposing to proceed with the hearing of an application with which he is directed to deal under this regulation.

The Registrar may give a wrong decision or a right decision. There is no appeal to this Court from his decision. The Commonwealth Court of Conciliation and Arbitration may give leave to appeal to it under s. 29 (*e*) of the Act. In my opinion it is plainly within the jurisdiction of the Registrar under the regulations to deal with the application. The objection of the prosecutor is based upon the contention that by no means, including a combination of the powers to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State under s. 51 (xxxv.) and the provisions of s. 52 of the Constitution which, with other provisions, give complete power to the Commonwealth Parliament to make laws with respect to the Public Service of the Commonwealth, is it possible to allow by law the combination in one organization of Commonwealth Public Servants not in industry together with persons not being members of such service who are employed in industry. If upon the true construction of the Act and the regulations to which I have referred such a combination is made possible it should then be held (it is argued) that some of the provisions of the *Arbitration (Public Service) Act* are beyond power. I see no foundation for such a contention. The Commonwealth Parliament has a power to legislate with respect to the Commonwealth Public Service which certainly includes power to determine the terms and conditions of employment and also to provide a specific manner of determining what those terms and conditions may be. There can be in my opinion no constitutional objection to the use for this purpose to such extent as Parliament thinks proper of the machinery which has been provided by legislation passed under s. 51 (xxxv.) of the Constitution.

I am therefore of opinion that it has not been shown that the Industrial Registrar in dealing with this application would be acting beyond the jurisdiction conferred upon him and in my opinion, therefore, the order nisi should be discharged.

Dixon J. I agree that the order nisi should be discharged. I think that the case is outside the scope of a writ of prohibition. Prohibition is sought against the Industrial Registrar. The purpose of the prohibition is to restrain him from exercising the jurisdiction or power which is conferred upon him under the *Conciliation and Arbitration Regulations*. Section 70 (2) of the

Commonwealth Conciliation and Arbitration Act provides that the conditions to be complied with by associations applying for registration and by organizations shall be, in effect, as prescribed. Regulation 106 prescribes as a condition that the affairs of the association shall be regulated by rules specifying the industry in connection with which the association is formed, the purposes for which it is formed and the conditions of eligibility for membership. It is thus clear that the conditions of eligibility for membership are governed by the rules of an organization. The application in the present case is to amend such a rule affecting the conditions of the eligibility for membership. That application is governed, so far as the Act is concerned, by s. 76, and I think by s. 79. Section 76 provides that an organization may, in the prescribed manner and on compliance with the prescribed conditions, change its name or the conditions of eligibility for membership or the description of the industry in connection with which it is registered, and the Registrar shall thereupon record the change in the register and upon the certificate of registration. Regulation 118 of the regulations and reg. 119 provide for applications of that description. They are, as I have said, necessarily regulations for the alteration of the rules. The case of *R.* v. *Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte Sulphide Corporation Ltd.* (1) shows that regs. 118 and 119 are validly made and that among other things they operate to prescribe conditions within the meaning of s. 76. The conditions are consequently contained in rules. Section 79 (1) provides that no alteration of a rule of an organization shall be valid until registered and sub-s. (3) of the section provides that it shall be the duty of the Registrar, before registering any alteration, to satisfy himself that the alteration is not in conflict with the Act or the regulations or with any order or award.

The Registrar had presented to him, as I have said, an application for the alteration of the conditions of eligibility. It was for the striking out of the provision which prevented members of the Public Service who are not engaged in an industry conducted by the Commonwealth from being members of the association. To strike it out merely removed a negative prohibition and left the general positive words of the condition of eligibility to speak for themselves and to operate as they might under the law. The Industrial Registrar, having considered this application, referred it under s. 30 to the court for decision. The court informed him by its reasons that he might proceed as asked but no formal order

(1) (1918) 25 C.L.R. 9.

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has been drawn up. It is not clear to me how the formal order of the court would have been drawn up and whether it would amount to a judicial decision. It has in this argument been treated as advisory only. In my opinion the Industrial Registrar in proceeding under regs. 118 and 119 was exercising the power reposed in him. He was considering an application for his approval and the registration of an alteration of the rules. This power enabled him to approve and required him before doing so to satisfy himself of the matters specified in s. 79 (3). He is engaged upon the very function assigned to him and none the less so because he may arrive at an erroneous conclusion. An officer may decide a matter before him wrongly without exceeding his power.

I think that the policy of the Act is that matters of this description should be dealt with by the Court of Conciliation and Arbitration and by its officers and that we should be very careful in maintaining the distinction between error in deciding a matter and excess of power so that we do not award a writ of prohibition in matters which are within the province of the court and of the Registrar to decide. We should be careful to exclude from our consideration matters which go to the correctness or incorrectness of the decisions of the Registrar or of the court when we are called upon to decide whether they have exceeded power. In the present case I do not think an erroneous determination of the Registrar would amount to an excess of power if he makes an erroneous determination, and on that ground I think that there is no room for a writ of prohibition. I shall say nothing about the appropriateness of the writ to the function of the Registrar in cases where he does exceed his powers.

The order nisi should be discharged.

McTIERNAN J. I agree that the order nisi should be discharged for the reason that this is not a case for prohibition. It does not appear upon the materials that are before us that the Registrar exceeded the powers granted to him by the Act. He proposes to delete the proviso which has been mentioned from the constitution of the respondent organization. Taking the constitution as it would appear after this proviso has been deleted, on its face it would not be in conflict with any section of the Act (for example, s. 70); and it cannot be said that upon its proper construction it would, as amended, necessarily be in conflict with the Act; for this reason it cannot be said that the Registrar exceeded the jurisdiction that is granted to him. I refer especially to s. 79 (3) of the

Commonwealth Conciliation and Arbitration Act. On that short ground I do not think that the case is one for prohibition.

WEBB J. I think the order nisi should be discharged solely because I am not satisfied that if the rules of the union had originally been presented without the proviso they should have been rejected, or should have led to the refusal of the registration of the union. I do not think then that the approval of the Registrar of the deletion of the proviso can be a ground for prohibition. I say nothing as to the constitutional ground. It may be, of course, that considerations of validity would lead to the rules of the association being read down so as to exclude public servants not in industry. However, no order can be based on that view in these proceedings.

FULLAGAR J. I agree that the order nisi should be discharged. I am of opinion that the case lies altogether outside the scope of the writ of prohibition.

KITTO J. I am of that opinion also.

Order nisi discharged. Prosecutor to pay costs of respondent association.

Solicitor for the prosecutor, *Lewis Wilks.*
Solicitors for the respondent organization, *Rylah & Rylah.*

E. F. H.