Ref to 19. ALR. 669.
APP. 23. ALR. 69.
636 Cpp 142. CLR 117.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION;

EX PARTE AMALGAMATED ENGINEERING UNION, AUSTRALIAN SECTION AND OTHERS.

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SYDNEY, *Aug.* 11-14; *Sept.* 11.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Industrial arbitration—Industrial organization—Office-bearers—Election—Conduct thereof—Electoral officer appointed by industrial registrar—Necessary information—Directions to office-bearers to furnish—Non-compliance with directions—Offence—Enjoining office-bearers—Application by Attorney-General to Arbitration Court to show cause—Application by office-bearers for prohibition—Refusal—Attorney-General's application granted—Further proceeding therein by Arbitration Court—Prohibition—Grant by High Court—Statutory provisions—Effect—Application for relief—Matters for consideration—Jurisdiction of Court—Conciliation and Arbitration Act 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 29 (*c*), 32, 96M (4) (6).*

Under the powers conferred by s. 51 (xxxv.) and (xxxix.) of the Constitution the Parliament of the Commonwealth may authorize the person conducting an election in an organization under s. 96M of the *Conciliation and Arbitration Act* 1904-1952 to give binding directions as to any matter reasonably incidental to his task of conducting the election.

The power to give directions, which is conferred by s. 96M (6) upon the person conducting an election in an organization, is not limited to the giving of directions in order to overcome some defect in the rules of the organization or to prevent some irregularity which might arise from a strict observance of the rules. The words "notwithstanding anything contained in the rules" in that sub-section have an extending, not a limiting, effect. *Federated Ironworkers' Association of Australia* v. *The Commonwealth* (1951) 84 C.L.R. 265, explained.

If, in proceedings lawfully taken in the Commonwealth Court of Conciliation and Arbitration for refusal or failure to comply with a direction given under

* The provisions of s. 96M (6) are set out hereunder, post p. 643.

s. 96M (6), a question as to the construction of that sub-section arises, that question is one which it is within the jurisdiction of that court to decide. Therefore, an application for a writ of prohibition directed to that court on the mere ground that that court has wrongly construed s. 96M (6) cannot be sustained. *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1938) 59 C.L.R. 369, applied.

The words " contravention of this Act " in s. 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1952 include a disobedience which consists merely in abstaining from doing an act.

Where a direction lawfully given under s. 96M (6) requires the doing of a specified act before a specified time " and on each day thereafter ", and the direction is not obeyed before or after the specified time, there is a " continuing " of a " contravention of the Act " within the meaning of s. 29 (*c*).

ORDER NISI FOR PROHIBITION.

On 22nd June 1953, the Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration informed the Amalgamated Engineering Union, Australian Section, an organization registered under the *Conciliation and Arbitration Act* 1904-1952, that approximately 1,816 persons who claimed to be members of the union had requested him in writing that an election about to be conducted in respect of the positions of Chairman of the Commonwealth Council of the union and of Councillor for No. 2 Division of the union be " conducted under s. 96M of that Act with a view to ensuring that no irregularity occurs in or in connection with such election ", whilst approximately 1,150 of those 1,816 persons had also requested that the election to be conducted during the same period, namely, the months of June, July, August and September 1953, for the office of President of the Sydney District of the organization be similarly conducted. As to the offices of Chairman of the Commonwealth Council and Commonwealth Councillor for the No. 2 Division of the organization the Industrial Registrar decided that the request had been duly made, but as to the position of President of the Sydney District Committee of the organization he decided that it had not been duly made.

The Industrial Registrar arranged with the Chief Electoral Officer for the Commonwealth for the election for the first two offices mentioned to be conducted by the Commonwealth Electoral Officer for the State of New South Wales.

On 26th June 1953, there was delivered to George William Deverall, the secretary of the Commonwealth Council of the Amalgamated Engineering Union, Australian Section, and also to each of Joseph Archibald Cranwell, Colin Gerald Hennessy, Alan

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Alfred Wilson and John Edward Burke, all of whom constituted the Commonwealth Council of the organization, a letter signed by the Commonwealth Electoral Officer for New South Wales, H. J. Martin, informing them that he had been informed by the Industrial Registrar that nominations for the two abovementioned offices would close on the respective "June Star Night" meeting of the several branches of the organization, and, further, that such meeting would be held during the period commencing 4th June 1953 and ending 17th June 1953, both dates inclusive; and that he had been further informed by the Industrial Registrar that the nominations lodged with the branches were to be forwarded to the general secretary of the organization, 126-128 Chalmers Street, Sydney, to reach the general secretary not later than 5 o'clock p.m. on 30th June 1953. The addressees were further informed that pursuant to the powers conferred upon him, Martin, by the *Conciliation and Arbitration Act* 1904-1952, he thereby issued to each of them the following directions: he directed and required that they and each of them:—

(1) furnish to him at his office, Commonwealth Electoral Office, Frazer House, 42 Bridge Street, Sydney, not later than 5 o'clock on the afternoon of Wednesday, 1st July 1953, a statement in writing showing (a) the number of branches in each division of the Amalgamated Engineering Union (Australian Section); and (b) the designation and address of each branch in those respective divisions; and the name and address of the secretary of each branch; and in the event of failure by them and each of them to furnish him with the said statement as required by him he directed and required them and each of them to furnish such statement on each day thereafter until the said statement was furnished by them and each of them as directed and required;

(2) should not later than 5 o'clock on the afternoon of Wednesday 1st July 1953 deliver to him at his office situate as above any or all nominations relating to the said election which had been received by them or each of them not later than 5 o'clock on the afternoon of Thursday, 30th June 1953, or which had been received at the Commonwealth General Office, 126-128 Chalmers Street, Sydney, not later than that time and date and in the event of the failure of them and each of them to furnish those nominations as required by him he directed and required that they and each of them to furnish such nominations on each day thereafter until the nominations were furnished by them and each of them as so directed and required;

(3) to furnish him not later than 5 o'clock on the afternoon of Wednesday, 1st July 1953, with a certificate signed by them and each of them that the nominations referred to in Direction (2) were the whole of the nominations which had been received by them or each of them or at the Commonwealth General Office, and in the event of the failure of them or each of them to furnish the said certificate as required by him he directed and required that they and each of them furnish such certificate on each day thereafter until the certificate was furnished by them as so directed and required;

(4) to furnish to him at his office not later than 5 o'clock on the afternoon of Wednesday, 1st July 1953, a copy certified by them and each of them, of any resolution, minute or provision made under the rules of the union prescribing the manner in which the said elections shall be conducted, and he directed them and each of them to furnish the said copy on each day thereafter until the same was furnished by them and each of them as so directed and required; and

(5) not later than 5 o'clock on the afternoon of Wednesday, 1st July 1953, to furnish him in writing with particulars of any determinations made by the Commonwealth Council in respect of the following matters relating to the abovementioned elections, namely (i) date of closure of register of members; (ii) date of opening of ballot; (iii) date of closing of ballot; and (iv) any other material date relating to the said elections, and he directed and required them and each of them to furnish those particulars on each day thereafter until they were furnished by them and each of them as so directed and required.

Martin deposed in an affidavit dated 10th July 1953, filed in support of an application made under s. 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1952, *inter alia*, that on 30th June 1953, the union's solicitor, Mr. E. P. White, and Deverall and Wilson attended at his office and sought information relating to and arising from the directions, including information as to the manner in which it was intended to conduct the election and whether it would be conducted in accordance with union rules, to which Martin replied that those matters would be determined by him when he received a reply to the directions, and that he would conduct the election in accordance with his assignment and in accordance with the law; and that he could not say at that juncture what course he would adopt; he, Martin, rejected a suggestion that branch secretaries should act as hitherto; and that he gave each of the directions in order to ensure that no irregularities occurred in or

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in connection with the election and to remedy procedural defects in the rules of the organization which appeared to him to exist.

On 10th July 1953, upon an application by the Attorney-General for the Commonwealth, *Dunphy* J. granted an order calling on Deverall, Cranwell, Hennessy, Wilson and Burke to show cause before that Court at Melbourne on 13th July 1953, why an order should not be made under s. 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1952 enjoining them and each of them from committing or continuing contraventions of that Act, by refusing or failing to comply with the abovementioned directions given under s. 96M of the Act by Martin the person conducting the election.

A copy of the order having been served on each of the said respondents, the order nisi came on for hearing before the Court of Conciliation and Arbitration consisting of *Kirby*, *McIntyre* and *Morgan* JJ.

Leave was given to the union to intervene and it intervened accordingly.

Upon the conclusion of the hearing the decision of the Court was announced by *Kirby* J. as follows :—

" The Court has considered the evidence and submissions placed before it and has come to an unanimous conclusion. In view of the nature of the application and the surrounding circumstances, we have decided to announce our decision at once rather than to delay whilst our reasons are reduced to writing. It is our intention to publish written reasons later.

The Court makes an order against the respondents, and each of them, in the form set out in the order to show cause, with the exceptions that the words ' committing or ' and the words ' refusing or ' wherever they appear on the first page of the order to show cause are omitted—liberty to apply. The form of the order is to be settled by the Registrar ". An order for costs as taxed by the registrar was made against the respondents and each of them. The order was to date from 24th July 1953.

In an affidavit by Deverall made in support of an application made to the High Court by the union, Burke, Cranwell, Deverall, Hennessy and Wilson for a writ of prohibition, the abovementioned union officials claimed (1) that as appeared from the evidence given in the proceedings no arrangement had been made by the Industrial Registrar with the Chief Electoral Officer for the Commonwealth for the conduct of the election by the electoral officer for New South Wales in accordance with the requirements of s. 96M (5) of the Act; that it appeared upon the clear and uncontradicted evidence that what was claimed to be an arrangement

was in fact made prior to the making of the decision under s. 96M (4); that the sole evidence of that decision in the proceedings was in an affidavit wherein the Industrial Registrar said "I now decide that the request in so far as it relates to this office (Chairman of the Commonwealth Council) has been duly made . . . The next position covered by the request is that of Commonwealth Councillor for No. 2 Division of the organization . . . I now decide that the request in so far as it relates to this office (Councillor for No. 2 Division) has been duly made and concluded . . . I have arranged with the Chief Electoral Officer for the Commonwealth for the election for the said offices for the State of New South Wales"; and evidence of conversation per telephone between the Industrial Registrar and the Chief Electoral Officer for the Commonwealth; (2) that a purported arrangement made prior to that decision was not a valid or effective arrangement and that thereby the said purported directions were invalid and inoperative and no foundation therefore existed for the exercise of jurisdiction by the Court; (3) that the said purported directions were not of their nature directions within the meaning of s. 96M (6) and were therefore invalid and inoperative and no foundation therefore existed for the exercise of jurisdiction by the Court; (4) that, as appeared from the evidence of Martin in the proceedings, the directions were not given in accordance with the requirements of s. 96M (6) in that Martin did not give these directions because he considered them "necessary in order to ensure that no irregularities occur in or in connection with the election or to remedy any procedural defects in the rules of the union which appear to him to exist".

The union officials submitted (i) that accordingly those directions were invalid and inoperative and no foundation therefore existed for the exercise of jurisdiction by the Arbitration Court; (ii) that there was not any jurisdiction in that Court to make the order or proposed order under s. 29 (*c*) and that that order or proposed order was *ultra vires* the Act and the Constitution and was void; (iii) that compliance with those purported directions would require the respondents to perform personal work in the extraction, compilation, recording and delivery of information as requested by the Commonwealth Electoral Officer under the guise of giving directions which work the respondents submitted they were not compellable to do or perform; and (iv) they claimed that there was not any jurisdiction in the Arbitration Court to make either the order or the proposed order or to enforce the purported directions or order or proposed order.

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Fullagar J., on 29th July 1953, ordered the abovementioned respondents to show cause before the Full Court of the High Court on 11th August 1953 why a writ of prohibition should not issue directed to those respondents prohibiting them from further proceeding with or upon the order made by the Commonwealth Court of Conciliation and Arbitration on 24th July 1953, upon the grounds, as amended at the hearing: "(1) That if sub-section (6) of Section 96M of the Conciliation and Arbitration Act 1904-1952 bears the construction placed upon it by the Commonwealth Court of Conciliation and Arbitration then it is to that extent in excess of the constitutional powers of the Parliament of the Commonwealth and invalid and void. (2) That the order by the Commonwealth Court of Conciliation and Arbitration on the 24th day of July 1953 is not authorised by Section 29 (c) or any other provision of the said Act".

Upon the return of the order this matter and the matter above referred to were heard together (1).

The relevant statutory provisions are sufficiently set out in the majority judgment hereunder.

M. Ashkanasy Q.C. (with him Sir *Garfield Barwick* Q.C. and *C. Turnbull*), for the prosecutors.

P. D. Phillips Q.C. (with him *B. P. Macfarlan* Q.C. and *J. R. Kerr*), for the respondents.

J. R. Kerr, for the judges of the Court of Conciliation and Arbitration to admit service and to submit to any order the High Court might make.

For notes of the argument see (1).

Cur. adv. vult.

Sept. 11.

The following written judgments were delivered:—

DIXON C.J., WEBB, FULLAGAR AND KITTO JJ. This is the return of an order nisi for a writ of prohibition addressed to judges of the Court of Conciliation and Arbitration to prohibit them from further proceeding with or upon an order made by that Court on 24th July 1953.

The Amalgamated Engineering Union (Australian Section) is an organization registered under the *Conciliation and Arbitration Act* 1904-1952. The union had proposed, in pursuance of its rules, to conduct an election in September 1953, for the offices of

(1) See *ante*, p. 613.

" Chairman of the Commonwealth Council " and " Councillor for No. 2 Division ". In June 1953 a request was made to the Industrial Registrar by the prescribed number of members of the union that the election be conducted under s. 96M of the Act. On 19th June the Industrial Registrar decided that the request had been duly made, and in accordance with s. 96M (5) he informed the union of his decision and made arrangements with the Chief Electoral Officer for the Commonwealth for the election for the two offices to be conducted by the electoral officer for the State of New South Wales.

It would appear, from what was said by the Industrial Registrar in announcing his decision, that nominations for the two offices in question had been receivable under the rules of the union between 4th and 17th June. It would seem clear enough that the electoral officer could not " conduct " the election unless he were made aware of the nominations received and had in his possession certain other information. In order to obtain such information the electoral officer had recourse to s. 96M (6) of the Act, which provides that: " Notwithstanding anything contained in the rules of the organization or branch, the person conducting the election may take such action and give such directions as he considers necessary in order to ensure that no irregularities occur in or in connexion with the election or to remedy any procedural defects in those rules which appear to him to exist ". Purporting to act under this provision, he issued a series of " directions " to the five members of the Commonwealth Council of the union. These directions were contained in a letter dated 26th June 1953, which was delivered on that date to each of those five persons. It is not necessary to set out the directions in full. The letter required the five persons and each of them to furnish to the electoral officer at his office at 42 Bridge Street, Sydney, not later than 5 p.m. on 1st July 1953 (1) A statement in writing showing the number of branches in each division of the union, the designation and address of each branch and the name and address of the secretary of each branch; (2) A list of nominations for the offices in question received at the central office of the union up to 5 p.m. on 30th June 1953; (3) A signed certificate that the list furnished comprised the whole of the nominations received; (4) A certified copy of any resolution, minute or provision, made under the rules of the union prescribing the manner in which the elections were to be conducted; (5) Particulars in writing of any determinations made by the Commonwealth Council in respect of (a) date of closure of register of members, (b) date of opening of ballot, (c) date of closing

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of ballot, (d) " any other material date relating to the said elections ". Each of the five " directions " concluded with a statement that, if what was required was not furnished by 5 p.m. on 1st July, the addressees and each of them were " directed and required " to furnish it " on each day thereafter " until the primary direction was complied with. Presumably this secondary direction was added because it was thought desirable to create a continuing duty to comply with the primary direction and believed that the words used were necessary and sufficient to create such a duty. In any case the substance of the matter seems clear enough. The addressees are directed to do the thing within the time specified, but at all events to do it.

None of the directions was complied with within the time specified or thereafter. Sub-section (7) of s. 96M, which follows immediately on sub-s. (6), provides (so far as material) that "A person shall not (*a*) refuse or fail to comply with a direction given under the last preceding subsection . . . Penalty One hundred pounds or imprisonment for twelve months, or both ". This provision clearly makes non-compliance with a direction an offence against the Act, and s. 119 provides that a person who has committed an offence against the Act may be charged accordingly before the Court, and the Court may impose the penalty provided by the Act in respect of that offence. The electoral officer, however, did not proceed under s. 119. Nor did he proceed by way of prosecution in any of the ordinary courts. He had recourse to s. 29 (*c*) of the Act, which, as amended by s. 6 of Act No. 18 of 1951, provides that the Court shall have power " by order, to enjoin an organization or person from committing or continuing a contravention of this Act or a breach or non-observance of an order or award ". On 10th July 1953 the Attorney-General for the Commonwealth obtained from the Court an order nisi calling upon the five persons to whom the directions had been addressed to show cause why an order should not be made enjoining them and each of them from " committing or continuing contraventions of the Act, namely refusing or failing to comply with " the directions given. At this stage an application was made to a justice of this Court in chambers for an order nisi for a writ of prohibition directed to the Arbitration Court and restraining it from dealing with the Attorney-General's application. The application for an order nisi for prohibition was refused. The Attorney-General's application under s. 29 (*c*) came on for hearing before the Arbitration Court on 20th July and concluded on 24th July, when the Court announced that it would make an order in the terms of the order to show cause with the

exception that the words "committing or" and "refusing or" would be omitted. On 29th July an order nisi was granted for a writ of prohibition issuing out of this Court prohibiting the Arbitration Court from further proceeding with or upon the order of 24th July. It is this order nisi which is now before us. It may be assumed that, if the order nisi is discharged, and the order of the Arbitration Court of 29th July is not obeyed, the next step will be by way of a proceeding as for contempt under s. 29A.

The argument for the prosecutors was divided into two branches, the first branch being concerned with s. 96M (6), and the second with s. 29 (*c*).

With regard to s. 96M (6), the ground on which the order nisi for prohibition was originally granted was that, if that sub-section bears the construction placed upon it by the Arbitration Court, then it is to that extent in excess of the constitutional powers of the Parliament of the Commonwealth and invalid and void. The order of the Arbitration Court could not, of course, have been made unless that Court was of opinion that the directions given by the electoral officer on 26th June were authorized by s. 96M (6). That Court must, therefore, be taken to have held that, on its true construction, that sub-section did authorize the giving of those directions, and the point raised by the ground stated in the order nisi appears to be that, because the sub-section so construed would be beyond power, it must be "read down" in accordance with s. 15A of the *Acts Interpretation Act* 1901-1950 and held not to extend to authorize the directions in question. The argument cannot, in our opinion, be maintained. In *Federated Ironworkers' Association of Australia* v. *The Commonwealth* (1) the provisions of s. 96M, up to and including sub-s. (6) were held to be a valid exercise by the Parliament of the legislative powers conferred by s. 51 (xxxv.) and (xxxix.) of the Constitution. That case came before the Court on a demurrer to a statement of claim in an action in which the plaintiff claimed a declaration that s. 96M was invalid. The conclusion that s. 96M was valid was held to follow from the decision in *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (2). That case established the validity of the provisions of the Act relating to the registration and incorporation of organizations, and the question in the *Ironworkers' Case* (3) was treated as being "whether the incidental power also includes legislative authority to take measures directed to ensuring that the officers of an organization so registered and incorporated shall be

(1) (1951) 84 C.L.R. 265.
(2) (1908) 6 C.L.R. 309.
(3) (1951) 84 C.L.R. 265.

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elected in a manner calculated to ascertain the authentic will of the members" (1). It would be inconsistent with the decision in the *Ironworkers' Case* (2) to hold that the Parliament could not validly authorize the person conducting an election in an organization to give binding directions to officers of the organization as to any matter reasonably incidental to his task of "conducting" the election. And, whatever may be thought of counsel's contention that the directions given by the electoral officer in the present case were "oppressive", it could not be suggested that they were not reasonably incidental to his task. Probably the giving of the directions was preliminary to the taking of a postal ballot, a course which it would be within the power of the electoral officer to adopt under s. 96M (6).

Counsel, however, obtained leave at the hearing to amend the grounds of his order nisi so as to enable him to contend that, as a matter of construction simply and apart altogether from any constitutional question, s. 96M (6) did not authorize the giving of the directions actually given. It was contended, in effect, that the sub-section authorized the giving of directions only in order to overcome some defect in the rules of the organization or to prevent some irregularity which might be thought likely to arise from a strict observance of the rules. In support of this argument reference was made to what was said in the judgment of the Court in the *Ironworkers' Case* (3). The Court there said:—"The point was taken that under sub-s. (6) it is possible for the officer conducting the election to ignore, at all events to some extent, the provisions of the rules of the organization or branch. Sub-section (6) does not authorize him to ignore the substantive rules which govern the constitution of the offices and the requirement that the occupants should be elected. It is carefully guarded, and doubtless only authorizes departures from particular rules for the avoidance of irregularities in the defined sense and for remedying what it describes as procedural defects. That is to say, the sub-section is directed to overcoming subsidiary impediments to the proper execution of the main provisions of the rules, sanctioned under ss. 70 and 71, which govern the election of office-bearers" (4). The argument, in our opinion, unduly limits the operation of sub-s. (6), and misunderstands the passage quoted. The true effect of the sub-section is to authorize the person conducting the election to give all such directions as he considers necessary in order to ensure that no irregularities occur, *and* to do this notwithstanding anything contained in the

(1) (1951) 84 C.L.R., at p. 280.
(2) (1951) 84 C.L.R. 265.
(3) (1951) 84 C.L.R. 265.
(4) (1951) 84 C.L.R., at p. 283.

rules of the organization. The words " notwithstanding anything contained in the rules " have an extending, not a limiting, effect. And there is nothing in the passage quoted from the *Ironworkers' Case* (1) that really suggests anything to the contrary. The Court was there dealing with an argument that sub-s. (6) enabled the person conducting the election to ignore and override the rules of an organization at will, and that the giving of so extensive a power went altogether beyond what was reasonably incidental to the purpose in hand. The Court was concerned to point out that the power to override the rules was strictly limited so as not to exceed what was incidental to the purpose. It was not concerned in any way with the scope of the power in cases where no question of overriding rules arose.

What has been said does not, of course, dispose of the question of construction raised. It does not follow that the directions given in the present case were authorized by s. 96M (6). And it was argued that the sub-section authorized the giving of directions only in connection with the actual process of ascertaining the will of members, and that the power did not extend to the obtaining of information—still less to requiring officers of an organization, subject to the sanctions provided by sub-s. (7), to do positive acts or render services in or about the election. The point is, of course, fairly arguable, although s. 96M (6) should, having regard to its context and its purpose, receive a liberal interpretation. But it is not, in our opinion, a point which this Court is called upon to determine or consider.

The proceeding before us is not an appeal, and no appeal lies to this Court in respect of the order made by the Arbitration Court. The proceeding is an application for a writ of prohibition, and " the law is well settled that superior Courts will not interfere by way of prohibition with the decisions of inferior Courts of limited jurisdiction unless want of jurisdiction is clearly established "—per *O'Connor* J. in *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (2). It is true that want of jurisdiction may be shown in a variety of ways: *Colonial Bank of Australasia* v. *Willan* (3). It is true also that " the question as to the limits between what would be properly matter for prohibition, and what would be matter of appeal only " may be a very difficult question: *Mackonochie* v. *Lord Penzance* (4), per Lord *Blackburn*. But, in that class of case to which the present case belongs, the question

(1) (1951) 84 C.L.R. 265.
(2) (1907) 5 C.L.R. 33, at p. 49.
(3) (1874) L.R. 5 P.C. 417, at pp. 442 et seq.
(4) (1881) 6 App. Cas. 424, at p. 445.

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always is " whether the inferior Court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry " : *Colonial Bank of Australasia* v. *Willan* (1). And in this case it seems clear enough that the Arbitration Court, whether or not it had power to grant the relief sought (which is a separate and distinct question) had jurisdiction to enter upon the inquiry. It is not necessary at this stage to have recourse to s. 32 of the Act. There was a proceeding regularly before it, an application for relief which it was authorized by the Act to entertain. In the course of entertaining that application, it had of necessity to consider the question of the construction and effect of s. 96M (6). The determination of that question was a matter within its jurisdiction, and, where the remedy sought is prohibition, it is not to the point to say that it determined that question wrongly. There may or may not have been " miscarriage in the course of the inquiry ". There was " jurisdiction to enter upon the inquiry ". Cf. generally *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (2).

It remains to consider whether the Arbitration Court, having performed its function of construing s. 96M (6), had power under s. 29 (*c*) to make the order which it did make. Section 29 is a section which confers a jurisdiction. It defines and limits a power which is given to the Court, and which the Court would not otherwise possess. Accordingly—putting s. 32 of the Act on one side for the moment—the construction and effect of s. 29 (*c*) are matters appropriate to be considered by this Court on an application for prohibition.

Two reasons were suggested in argument for saying that the order exceeded the power given by s. 29 (*c*). It was said, first, that the words " committing or continuing a contravention of this Act " did not apply to a case in which the contravention was of a negative character and consisted not in doing something but in omitting to do something. It was said that par. (*b*) and par. (*c*) of s. 29 were complementary and mutually exclusive, that par. (*b*) enabled the Court, in cases to which it applied, to order affirmatively that something be done, while par. (*c*) enabled it to enjoin against the doing of something—to forbid the doing of an act as distinct from abstaining from doing an act. If this view were correct, the order in question could not be supported either under par. (*b*) or under par. (*c*). It would not be covered by par. (*b*) because that paragraph enables the Court only to " order compliance with an order or award ", and it would not be covered by par. (*c*) because it enjoins against abstaining from doing acts. But it appears to us

(1) (1874) L.R. 5 P.C., at p. 444. (2) (1938) 59 C.L.R. 369.

that it is authorized by par. (*c*) on its true construction. Before the passing of Act No. 18 of 1951 par. (*c*) authorized the Court only "to enjoin any organization or person from committing or continuing any contravention of this Act". It was amended to its present form in consequence of the decision of this Court in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (1). It is on the original words of par. (*c*) that those who support the order now in question must rely, but the paragraph must be read as a whole as it now stands. The word "contravention" is quite apt to include a disobedience which consists merely in abstaining from doing an act, and the use of the words "breach or non-observance" in the part which was added in 1951 indicate strongly that it was intended to cover a failure to perform a positive requirement as well as disobedience of a negative command. The first argument, in our opinion, fails.

The second argument was that there was not here a "continuing" disobedience. The "directions" here, it was said, were to do certain things before a specified time. When that time had passed, the directions had been disobeyed once and for all: it became physically impossible thereafter to obey them, and the words which purported to require obedience thereafter could not be given any real effect. There is, of course, a real distinction between a contravention "once and for all" and a continuing contravention (cf. *Larking* v. *Great Western (Nepean) Gravel Ltd. (In Liquidation)* (2) and *Carr* v. *J. A. Berriman Pty. Ltd* (3)). A failure to comply with the directions before the expiration of the time specified constituted no doubt a single and final breach of the primary duty created by the directions. But the words which follow the primary direction in each case cannot be ignored, and effect should be given to the substance of them. It has already been said that the substance of them is that the electoral officer is saying to the addressees: "Do these things by 5 p.m. on 1st July, but anyhow do them". So understood, it seems quite proper to regard them as involving a command which continues in force after the expiration of the specified time, so that, unless and until the command is obeyed, the addressees are in breach of s. 96M (7) and are "continuing a contravention of the Act". Assuming, therefore, without deciding, that the existence or threat of a "continuing contravention" is a condition of jurisdiction, as distinct from a matter

(1) (1951) 82 C.L.R. 208.
(2) (1940) 64 C.L.R. 221, esp. at pp. 236-237.
(3) (1953) 89 C.L.R. 327.

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which it was for the Arbitration Court finally to decide, we are of opinion that the condition was fulfilled.

It is unnecessary to consider whether, if this Court were of opinion that either of the arguments of the prosecutors on s. 29 (*c*) was sound, s. 32 would nevertheless preclude it from ordering that a writ of prohibition should issue.

The order nisi should be discharged.

TAYLOR J. I agree with the views expressed in the joint judgment subject to a few observations which I wish to make concerning the jurisdiction conferred upon the Commonwealth Court of Conciliation and Arbitration by s. 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1952. In terms the Court is empowered, by order, to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award. Essentially the authority so given is an authority to restrain conduct and the problem which immediately arises is whether the Court is thereby empowered to make an order restraining any conduct which *in its opinion* constitutes an offence against the Act or whether the power is limited to restraining conduct which in fact and in law is of such a character.

In the present case the conduct which is prescribed by the order of the Court depends for its characterization as a contravention of the Act upon the validity of the directions given by the Commonwealth electoral officer who was appointed to conduct the union election. In these circumstances the problem to which I have referred may, in relation to this case, be stated in a narrower form by asking whether it was for the Arbitration Court to determine conclusively whether these directions were validly given and, if not, whether it is open to this Court in prohibition proceedings to re-examine all matters of fact and law which touch the question of their validity.

The prosecutors, at least, went as far as to contend that prohibition would lie if the directions were not of such a nature or character as could, upon the true construction of s. 96M (6) of the Act, properly be given and it is this contention, as I understand it, which has led me to make these separate observations. No doubt the Arbitration Court concluded that the directions were of such a nature and character and was satisfied of the existence of the facts which constituted a prerequisite to their validity, i.e., a decision under sub-s. (4) by the Industrial Registrar, the due appointment of a Commonwealth electoral officer to conduct the election and the due formation of an opinion on his part that the giving of such directions

was necessary in order to ensure that no irregularities should occur in or in connection with the election. I should have thought that it was not open to us on an application for prohibition to receive evidence for the purpose of showing that there had been no proper decision of the Industrial Registrar, or that arrangements had not been made by him with the Chief Electoral Officer for the Commonwealth for the conduct of the election by a Commonwealth electoral officer, or that such an officer had not formed the necessary opinion under sub-s. (6). Although it would be necessary to establish each of these matters to prove the commission of an offence against sub-s. (7), it is, I think, impossible to conclude that the legislature intended that the jurisdiction of the Arbitration Court under s. 29 (*c*) should depend for its proper exercise upon anything, in relation to these matters, other than a finding by that Court that these events had taken place; or that it was intended that that Court should be subject to prohibition if, upon a review of the facts, this Court should come to a contrary conclusion. As *Jordan* C.J. said in *Ex parte Mullen*; *Re Hood* (1):—"When the jurisdiction of a court is limited, the question whether a particular matter is one the actual existence of which, notwithstanding any decision of that court, is a condition of its having jurisdiction to proceed to determine the matters which lie within its general jurisdiction, or is merely one of the matters which arise for its decision in the exercise of its general jurisdiction, is frequently one of considerable difficulty. It commonly arises in relation to a statute conferring jurisdiction in which the legislature has made no express pronouncement on the subject, and in which its intention has therefore to be extracted from implications to be found in or inferences to be drawn from the language which it has used. The matter was discussed by the Privy Council in *Colonial Bank of Australasia* v. *Willan* (2), where a distinction was drawn between conditions of right to exercise jurisdiction founded, on the one hand, on the character and constitution of the tribunal or the nature of the subject matter of the inquiry or upon proceedings which have been made essential preliminaries to the inquiry, and, on the other hand, upon a fact or facts to be adjudicated upon in the course of the inquiry. It is pointed out that conditions of the last mentioned type differ materially from the others, and that 'an objection that a judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter, he properly entered

(1) (1935) 35 S.R. (N.S.W.) 289; 52 W.N. 84.

(2) (1874) L.R. 5 P.C. 417, at pp. 442-445.

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upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to retry a question which the judge was competent to decide' " (1).

I am of opinion that the language of s. 29 (*c*) does not require us to hold that the facts involved in the matters above referred to are "jurisdictional" as distinct from facts to be adjudicated upon in the course of proceedings under the sub-section. These observations bring me to the question whether it is open to this Court in these proceedings to consider the argument that the directions given were of such a nature or character as, assuming all collateral matters in favour of their validity, could properly be given under sub-s. (6). While I have no doubt that prohibition would lie where directions purporting to have been given under the authority of that sub-section could not, on any hypothesis, properly be given, this is not, in my opinion, such a case. In this case the question whether the directions were authorized by sub-s. (6) depend upon considerations of fact and cannot be determined as a pure question of law. The examination of these facts was clearly a matter for the Arbitration Court in the exercise of its jurisdiction and, equally, so was the question whether, *in those circumstances*, the directions given were authorized by sub-s. (6). It was appropriate for that Court to consider those circumstances as part of its general inquiry into the matter under s. 29 (*c*) and both the questions of fact and law involved were matters arising to be disposed of in the course of the hearing. Accordingly I am of opinion that it is not open to this Court upon this application for prohibition to consider whether the directions which were given were not such as might, in the circumstances, properly have been given pursuant to sub-s. (6).

Order nisi discharged.

Solicitors for the prosecutors, *Sullivan Bros.*

Solicitor for the respondents, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1935) 35 S.R. (N.S.W.), at p. 298; 52 W.N. 84.