[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

HIS HONOUR SYDNEY CHARLES GREVILLE WRIGHT, A JUDGE OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION, AND OTHERS;

Ex parte WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

H. C. of A. 1955.

SYDNEY, *Mar.* 23, 24;

MELBOURNE, *June* 22.

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

Industrial Arbitration (Cth.)—Court of Conciliation and Arbitration—Power to regulate industrial matters in connection with stevedoring operations relating to overseas and inter-State trade—Nature of power—Legislative not judicial—Prohibition—Constitutional validity of power—Stevedoring Industry Commission—Variation of order—"Industrial matters"—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*i.*), 75 (*v.*), 122—*Stevedoring Industry Act* 1949, *ss.* 6, 34.*

Writs of prohibition lie only in respect of acts to be done judicially. Acts which are ministerial in their nature or administrative only or amount to the exercise of a subordinate legislative power are not subject to the writ, even though what is done involves an excess of authority.

The power conferred by s. 34 of the *Stevedoring Industry Act* 1949 upon the Court of Conciliation and Arbitration to regulate industrial matters in connection with stevedoring operations insofar as those operations relate to trade and commerce with other countries or among the States whether or not

*Section 34.—(1) The Court shall have power to regulate industrial matters in connection with stevedoring operations insofar as those operations relate to trade and commerce with other countries or among the States or are performed in a Territory of the Commonwealth, whether or not an industrial dispute extending beyond the limits of any one State exists in relation to those matters. (2) The Court shall have power to determine the terms and conditions in accordance with which, including the rates at which, the Board shall pay attendance money to waterside workers. (3) In the exercise of its powers under this section, the Court shall have power to make orders. (4) The Court may, either generally or in relation to any port, authorize any person to exercise any of the powers of the Court under this section. (5) Every such authority may be revoked by the Court at any time and no such authority shall prevent the exercise of any power by the Court. (6) The provisions of this Act relating to orders made by the Board shall apply to and in relation to orders made under this section.

an industrial dispute extending beyond the limits of any one State exists in relation to those matters is not judicial, but legislative, in character and accordingly prohibition does not lie to restrain an excess of authority.

Section 34 is a valid exercise of the legislative power respecting trade and commerce conferred on Parliament by s. 51 (i.) of the Constitution.

A shipowners' association and a shipping representatives' association sought a variation by the Court of Conciliation and Arbitration of an order made by the Stevedoring Industry Commission to permit of the engagement of the labour of waterside workers for week-end work in the Port of Melbourne by means of press and radio announcements, the existing order requiring such engagement to take place only at a central bureau.

Held, that the variation sought was within the conception of "industrial matters" as defined in the *Stevedoring Industry Act* 1949 and was of the type of industrial matters dealt with by s. 34 of that Act.

The words "who accepts or offers to accept employment" in the definition of "waterside worker" in s. 6 of the *Stevedoring Industry Act* 1949 refer to the course of the calling or occupation and not to the action of the man on a specific occasion. Similarly, the word "employers" in the expression "matters pertaining to the relations of employers and waterside workers" occurring in the leading part of the definition of "industrial matters" in the same section refers to the character of that party to the relationship.

PROHIBITION.

Upon application made on behalf of the Waterside Workers' Federation of Australia, *Webb* J. granted, on 31st March 1954, an order nisi for a writ of prohibition directed to *Wright* J., a judge of the Commonwealth Court of Conciliation and Arbitration, and to the Commonwealth Steamship Owners' Association and the Overseas Shipping Representatives' Association to restrain his Honour on the one hand from hearing and determining an application brought by the respondent associations and to restrain such associations on the other from further proceeding with such application. The application was brought to obtain a variation of an order made by the Stevedoring Industry Commission under the since repealed *Stevedoring Industry Act* 1947-1948 and continued in force by the *Stevedoring Industry Act* 1949 and was entertained by his Honour in the purported exercise of the powers conferred by s. 34 of the last-mentioned Act. The grounds of the order nisi were:—(1) that the application was not for an order regulating industrial matters in connection with stevedoring operations within the meaning of the *Stevedoring Industry Act* 1949; (2) that the proposed order was beyond the power and in excess of the jurisdiction of the Commonwealth Court of Conciliation and Arbitration conferred by such Act; (3) that upon its true construction s. 34 of such Act was

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

ultra vires the legislative power of the Commonwealth Parliament as (a) not being a law with respect to trade and commerce with other countries and among the States, and (b) infringing s. 92 of the Constitution.

The order to show cause came on for hearing before the Full Court of the High Court, when the prosecutor federation argued all the grounds in the order nisi except ground 3 (b).

Further facts and the relevant statutory provisions appear sufficiently in the judgment of the Court hereunder.

R. M. Eggleston Q.C. (with him *E. F. Hill*), for the prosecutor. The power under which the court below proceeded is contained in s. 34 of the *Stevedoring Industry Act* 1949, such power depending upon the existence of an industrial matter. [He referred to the definitions of " employer ", " waterside worker " and " industrial matters " in s. 6, comparing the last definition with that of " industrial matters " in the *Conciliation and Arbitration Act* 1904-1952, s. 4.] The variation sought before *Wright* J. did not relate to any industrial matter within s. 6 and consequently s. 34 could not be brought into operation.

[DIXON C.J. Is it clear that the power which s. 34 purports to give the court is sufficiently judicial in character to make it an appropriate case for prohibition ?]

The section confers a power which must be exercised in a quasi-judicial way. The power is vested in a court which summons parties before it and inquires whether or not it will exercise the power. The remedy of prohibition is appropriate. To prescribe a method of employment which compulsorily creates the relationship of employer and employee is not an industrial matter. To prescribe a method of employment which makes a man not an employee unless he complies with a number of provisions and which requires him, if he is to avoid penalties for non-attendance, to obtain a radio or purchase a newspaper to ascertain whether or not he is employed is so remote from ordinary notions of employment as not to be an industrial matter within the section. A waterside worker must seek leave if he is not to be summoned or subject to summons for week-end work. Order 30 means that if a person is not desirous of being employed for week-end work he must seek leave not later than 3 p.m. on Fridays. If he does not seek leave—and " leave " implies that permission may be refused—he is treated as a person who may be rostered for week-end work. The presence of the word " desirous " in (b) (i), (ii) and (iii) of the amended application and its absence from (c) indicates that persons desirous

and persons not desirous of obtaining employment form a dichotomy, the division being determined by whether or not they have leave. A person not desirous must seek leave and if leave is refused he becomes desirous. The proposed scheme is compulsory and has as its object the creation of an industrial relation between the parties. This cannot be done under the powers conferred which are limited to industrial matters and contemplate a voluntary employer-employee relationship. If the application itself did not raise an industrial matter, that is if the application seeks to bring persons into compulsory relationships when the existence of such relationship is essential to the existence of an industrial matter, the application should be prohibited at least to that extent. The legislation in defining "waterside worker" refers to his acceptance or offer to accept work and concentrates on the voluntary aspect. If a person is compelled to take waterside work under penalty he is not a waterside worker at all and the Act does not apply to him. [He referred to *R.* v. *Wallis* (1); *R.* v. *Findlay*; *Ex parte Victorian Chamber of Manufactures* (2); *R.* v. *Kelly*; *Ex parte State of Victoria* (3).] When the present Act speaks of the relationship of employers and waterside workers it means employers as persons engaging or offering to engage and waterside workers as persons accepting or offering to accept and unless the relationship between them is of that character it is not one between employers as such and waterside workers as such. Even if the variation sought relates to an industrial matter it is not an industrial matter of the type to which s. 34 applies. When s. 34 speaks of an industrial matter in connection with stevedoring operations it contemplates an existing connection between the industrial matter and the stevedoring operations. If an industrial matter arises in relation to stevedoring operations then the court has power to regulate it, but it has no power to create the relationship of employer and employee for the purpose of stevedoring operations relating to trade and commerce with other countries and among the States with consequential penalties for failing to create the relationship as a regulation of industrial matters in connection with stevedoring operations. The regulation of industrial relations of persons who engage either as masters or servants in inter-State commerce is not by that fact alone incidental to the commerce power. The stevedoring operations on ships which will ultimately take part in trade and commerce with other countries or among the States is not in itself part of that trade and commerce at least so far as the

(1) (1949) 78 C.L.R. 529, at pp. 544, 545, 547, 554.
(2) (1950) 81 C.L.R. 537, at p. 550.
(3) (1950) 81 C.L.R. 64, at p. 84.

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

master and servant aspect is concerned. It may be incidental to trade and commerce to regulate that, but it is not in itself part of that trade and commerce and there is no real and substantial nexus between the two. Section 34 which purports to confer power on the court to do these things is consequently ultra vires s. 51 (i.) of the Constitution.

[DIXON C.J. It comes back to what *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) decides and what is its doctrine ?]

In a sense, yes. But in *Dignan's Case* (1) there was a direct regulation of the stevedoring operations and there was a provision capable of application. Here there is no regulation of the stevedoring operations themselves but of something connected with them and it is too vague and insubstantial to provide a justification for the commerce power.

[TAYLOR J. I take it you do not challenge the decision in *Dignan's Case* (1) ?]

No. The present section is ultra vires because any matter pertaining to the employer-employee relationship in connection with stevedoring operations is to be regulated as a regulation of industrial matters not because of any effect it may have one way or the other on inter-State trade or on the stevedoring operations. It is an independent power given to regulate industrial matters provided only that there has to be found some connection between the industrial matters and the stevedoring operations which are themselves only subject to direct regulation in so far as they are incidental to inter-State trade. [He referred to *Federal Amalgamated Government Railway & Tramway Service Association* v. *New South Wales Railway Traffic Employes Association* (*Railway Servants' Case*) (2); *Australian Steamships Ltd.* v. *Malcolm* (3); *Huddart Parker Ltd.* v. *The Commonwealth* (4).] Relying on the *Railway Servants' Case* (5) it cannot be postulated as a general proposition that all the conditions of employment even of persons engaged in inter-State trade and commerce are within the trade and commerce power and accordingly in terms s. 34 is too wide. There can be no severance. If the regulations are to be read distributively it may be that some portion can be said to be connected with trade and commerce and other portions not. But there is no way of notionally severing it except by reading into the

(1) (1931) 46 C.L.R. 73.
(2) (1906) 4 C.L.R. 488, at p. 545.
(3) (1914) 19 C.L.R. 298, at pp. 307, 319, 331, 337.
(4) (1931) 44 C.L.R. 492, at pp. 500, 504, 505, 512-515, 528.
(5) (1906) 4 C.L.R. 488.

section a limitation of the kind which would require the court to become the real arbiter in regard to which regulations should be enforced.

B. P. Macfarlan Q.C. (with him *R. Else-Mitchell*), for the respondent judge of the Commonwealth Court of Conciliation and Arbitration, submitted to such order as the Court should think fit to make.

D. I. Menzies Q.C. (with him *P. H. Opas*), for the respondent associations. The power conferred by s. 34 is legislative not judicial and prohibition does not lie. Whilst in the present case there has been a summons issued and parties have appeared before the judge, the power given by s. 34 could have been exercised by the judge without any proceeding and without there being any parties. The actual form of the inquiry or the manner in which the decision of the judge is expressed does not matter. Section 34 (3) makes it clear that the judge may, if he so desires, express his will in the form of an order, but he is not obliged to do so. A general power to regulate is given by the section in exactly the same way as it was given in *Roche* v. *Kronheimer* (1); *Huddart Parker Ltd.* v. *The Commonwealth* (2) and *Crowe* v. *The Commonwealth* (3) where part of the legislative power of the Commonwealth was given to and exercised by executive organs, but remaining nevertheless part of the legislative power of the Commonwealth. The substitution of the Stevedoring Industry Board or the Governor-General in Council for the court in s. 34 would in no way alter the character of the present legislation. [He referred to ss. 17, 34 (4), (5), and (6).] Whether the grant of legislative power to the court is valid is a question not raised in these proceedings. If the authority granted is legislative, Parliament has given it to the court which has not exercised it and this Court is here invited to prohibit its exercise. This should not be done. The prosecutor here seeks prohibition against making the order in the form set out in the application, but the only prohibition which can be sought is one which would prevent the making of any order at all, and the prosecutor can succeed only if it satisfies the Court that no valid order can be made under s. 34. This position cannot be reached because no matter how narrowly ss. 6 and 34 are construed they must by virtue of s. 15A of the *Acts Interpretation Act* 1901-1950 be construed within power, and some order can thus be made

(1) (1921) 29 C.L.R. 329.
(2) (1931) 44 C.L.R. 492.
(3) (1935) 54 C.L.R. 69.

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

unless s. 34 (1), notwithstanding the application of s. 15A, is totally invalid. This sub-section cannot be regarded as totally invalid by virtue of s. 51 (i.) of the Constitution because s. 15A requires it to be read down to be within power. This was exactly the application of s. 15A made by this Court in *Huddart Parker Ltd.* v. *The Commonwealth* (1) and such application of the section should here be made. On the merits, the definition of "waterside worker" covers those to whom an order made under s. 34 would apply either because they are persons who accept employment or who offer to accept employment. The words "who accepts employment" refer to a person who by his occupation accepts such employment and does not mean, as is submitted by the prosecutor, a person who has already been employed and has accepted employment. The words in question cover two categories: those whose work is that of waterside workers as a particular occupation and those who are offering at that particular time for employment. Once any meaning at all is given to the words "offer for employment" the argument that this Act is directed only to the regulation of an existing master and servant relation is destroyed. [He referred to the definition of "industrial matters" pars. (*a*), (*c*), (*f*), (*g*), (*h*), (*k*) and (*n*).] What can be regulated by s. 34 is any industrial relationship commencing at the latest where there is someone who has work and there are people available for work and the person who accepts or offers to accept is not related to a particular job or the making of an offer to a particular employer. It relates rather to a description of people. The regulation of this particular type of industry does go to the creation, compulsorily if need be, of contractual relationships by the direction of waterside workers to jobs and by the direction of employers to employ the waterside workers offering. There is nothing in the word "regulation" that would prevent the introduction of compulsory provisions in no way consistent with a person being able to do what he liked. [He referred to *Reg.* v. *Findlay*; *Ex parte Commonwealth Steamship Owners' Association* (2).] On the question of the constitutional validity of s. 34 the Court should adopt the same approach as was adopted to the legislation in *Huddart Parker Ltd.* v. *The Commonwealth* (3). The loading and unloading of ships engaged in inter-State or overseas trade is itself part of trade and commerce. The unloading of the vessel which has brought goods to Australia is just as much a part of overseas commerce as the

(1) (1931) 44 C.L.R., at p. 512.
(2) (1953) 90 C.L.R. 621, at pp. 631, 633, 634.
(3) (1931) 44 C.L.R., at pp. 513, 514.

bringing of the goods to Australia. The activities of those who engage in loading and unloading ships are just as much subject to control as the activities of those on the ships themselves. There is no difference in the Commonwealth's power if both activities are thus within trade and commerce.

[DIXON C.J. referred to *Ex parte Walsh and Johnson*; *Re Yates* (1).]

The same opinion is to be found in the judgment of *Starke* J. (2) in the same case. But the present legislation is far closer to that considered in *Huddart Parker Ltd.* v. *The Commonwealth* (3). If it be that under s. 34 laws can be made which do relate to trade and commerce, then the section is good at any rate to the extent to which it authorizes such laws. The industrial relationships of those who take a necessary part in overseas or inter-State trade and commerce are just as much subject to the commerce power as are the industrial relationships of those engaged upon necessary work in time of war subject to the defence power. [He referred to the *Railway Servants' Case* (4); *Australian Steamships Ltd.* v. *Malcolm* (5).] The matter is really concluded by *Huddart Parker Ltd.* v. *The Commonwealth* (6); *Dignan* v. *Australian Steamships Pty. Ltd.* (7); *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (8) and *Joyce* v. *Australasian United Steam Navigation Co. Ltd.* (9). These authorities fully bear out the submissions that the trade and commerce power does extend to regulate the industrial relationships of those actually engaged in it, or those about to or intending to engage in it and s. 34 is within the constitutional power of Parliament.

At this stage in the argument *B. P. Macfarlan* Q.C. (with him *R. Else-Mitchell*) sought and were granted leave to intervene on behalf of the Australian Stevedoring Industry Board.

B. P. Macfarlan Q.C. (with him *R. Else-Mitchell*), for the intervener. The board adopts the argument of the respondent associations on the meaning of "industrial matters" but carries it further by saying that registration as a waterside worker is itself the offer for work referred to in the definition of "waterside worker". The offer is constituted by the application for registration, followed by

(1) (1925) 37 C.L.R. 36, at pp. 116, 117.
(2) (1925) 37 C.L.R., at p. 136.
(3) (1931) 44 C.L.R. 492.
(4) (1906) 4 C.L.R., at p. 545.
(5) (1914) 19 C.L.R. 298.
(6) (1931) 44 C.L.R., at pp. 500, 512, 514, 515, 522-529.
(7) (1931) 45 C.L.R. 188, at pp. 198, 200.
(8) (1931) 46 C.L.R. 73.
(9) (1939) 62 C.L.R. 160, at pp. 167, 170, 175, 177.

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

registration. There is no compulsion upon any person to register or to apply for work as a waterside worker. The application for registration is a completely free and voluntary act by the worker. [He referred to ss. 21, 22, 24 (*d*), (*e*) and 27 (1) of the *Stevedoring Industry Act* 1949.] Registration of a waterside worker is conditioned in two ways, by the needs of the particular port and by the willingness and physical and mental ability of the waterside worker to perform his work. The purpose of registration is to serve a particular supply. When a person takes this particular step and voluntarily applies for registration and becomes registered, then he has offered to perform the duties of a registered waterside worker as understood in the industry at the date of the Act, and by registration he becomes a person who offers for such work. The construction of the *Stevedoring Industry Act* 1949 cannot be divorced from the legislative history preceding it as referred to in the *Transport Workers' Cases* (1) and brought up to date in *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (2).

[KITTO J. Does " offer " not mean that he holds himself out as ready to accept work ?]

Yes, and whilst adopting what Mr. *Menzies* has put, we have sought to achieve the same result by submitting another view of the construction. The word " offer " as used in the definition of " waterside worker " is satisfied by a person being registered as a waterside worker.

R. M. Eggleston Q.C., in reply.

Cur. adv. vult.

June 22.

THE COURT delivered the following written judgment:—

This is an order nisi for a writ of prohibition directed to a judge of the Commonwealth Court of Conciliation and Arbitration. The purpose of the writ sought is to prohibit further proceedings with respect to an application made by the respondents the Commonwealth Steamship Owners' Association and the Overseas Shipping Representatives' Association for a variation of an order made under the now repealed *Stevedoring Industry Act* 1947-1948 by the Stevedoring Industry Commission. The operation of the order is continued by the *Stevedoring Industry Act* 1949, s. 5 (3) (*g*). By that provision orders so made are to continue or be in force as if made under the *Stevedoring Industry Act* 1949 and the provisions of that Act relating to orders made by the Australian Stevedoring Industry

(1) (1931) 44 C.L.R. 492; (1931) 45 C.L.R. 188; (1931) 46 C.L.R. 73.

(2) (1952) 85 C.L.R. 601.

Board apply to and in relation to them. The Court of Conciliation and Arbitration entertained the application in the purported exercise of a power conferred on the court by s. 34 of the *Stevedoring Industry Act* 1949.

The order of which a variation is sought is Order No. 30 of 1948 made by the Stevedoring Industry Commission on 29th September 1948; cl. 1 provides that it is to be known as the Rules of Engagement and Organization Order for the Port of Melbourne. The order applies to all waterside workers, except coal workers, and all employers registered for the Port of Melbourne. Apparently the order was made by the commission in the exercise of the powers conferred upon it by ss. 12 (1) (*b*) and 14 of the *Stevedoring Industry Act* 1947-1948. As its title implies, the order regulated the procedure for engaging the labour of waterside workers and many matters relating to the organization of such labour. The order provided for the gang system and specified times within which employers desiring to engage labour should notify the bureau of the requirement, but it made it necessary that registered waterside workers should be engaged only at the bureau in Piggot Street, Melbourne. Subsequently, however, a practice was established of despatching labour directly to vessels by means of advertisement in the morning newspapers and in a radio broadcast. By this means labour was despatched to a vessel to commence work at 8 a.m. The scheme, which came into operation on 20th April 1949, applied only to work from Monday to Friday. It does not appear upon what authority it rested, but probably it was that of a waterside employment committee acting as a delegate of the commission under s. 38 of the Act of 1947. The scheme of what is called a "press and radio pick-up" was extended to the engagement for labour for week-end work as from 10th November 1950. The extension depended apparently upon the agreement of the Waterside Workers' Federation and that agreement was terminated as from 5th December 1952. The amendment sought by the application would have the effect of reintroducing the extension of the system to the engagement of week-end labour. It means the replacement of the pick-up of gangs at the bureau in Melbourne by the press and radio pick-up. Though that system operates during the other days of the week, the text of Order No. 30 of 1948, so far as appears from the material before this Court, has not been amended to provide for it. Sub-clause (2) of cl. 7 of that order provides specifically for the engagement of labour required to commence work between 8 a.m. on Saturday and 8 a.m. on Monday

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

Dixon C.J. McTiernan J. Williams J. Webb J. Fullagar J. Kitto J. Taylor J.

and it is an amendment of that claim that is sought by the application. During the hearing of the application by the learned judge against whom the writ of prohibition is sought his Honour suggested reasons for changing the form of the amendments for which the respondent associations applied. For the purpose of the order nisi it is this amended application alone which need be considered. It is enough to state shortly the effect it would produce without setting out its text.

If it were made the provision in the original order which requires that all registered waterside workers shall be engaged only at the bureau would operate subject to an exception, namely except where the waterside workers are notified of their employment by press advertisement or radio announcement. In the case of wharf labourers required to commence work between 8 a.m. on Saturday and 8 a.m. on Monday, the requisition of labour would have to be lodged with the representative of the Stevedoring Industry Board on Friday at or before 10.30 a.m. and might not be altered or cancelled after 4 p.m. on that day. If a waterside worker did not desire to work during the week-end he would have to apply to the bureau superintendent for leave of absence not later than 3 p.m. on Friday. Otherwise waterside workers "desirous (*sic*) of accepting employment for week-end work" would be required to ascertain if they had been employed for such work. The proposed amendment provides that notice should be given by press advertisement and radio announcement of their employment for week-end work to waterside workers who are desirous of accepting such employment and are employed for such work. Apparently whether a waterside worker is "desirous" or not of accepting employment for week-end work is a matter to be somewhat artificially determined by his failure to apply for and obtain leave of absence. For the proposed amendment provides that any waterside worker notified by press advertisement or radio announcement or otherwise of his employment for week-end work is subject to disciplinary action if he fails to report for work on the job for which he is employed. He is to be subject to disciplinary action in the same manner as if he had failed to report to a job to which he was despatched from the bureau.

The power of the court to make such a provision depends on s. 34 of the *Stevedoring Industry Act* 1949. Sub-section (1) of that section provides that the court shall have power to regulate industrial matters in connection with stevedoring operations in so far as those operations relate to trade and commerce with other countries

and among the States or are performed in a Territory of the Commonwealth, whether or not an industrial dispute extending beyond the limits of any one State exists in relation to those matters. This provision is, of course, enacted as an exercise of the legislative power conferred on the Parliament by s. 51 (i.) of the Constitution to make laws with respect to trade and commerce with other countries and among the States. Sub-section (3) of s. 34 provides that in the exercise of its powers under the section the court shall have power to make orders. Sub-section (6) provides that the provisions of the Act relating to orders made by the board shall apply to and in relation to orders made under that section. By s. 17 (1) (*c*) and (2) orders made by the board have the force of law and it is an offence to contravene them. Section 40 provides that an order or award made by the court under the Part containing s. 34 shall have effect notwithstanding anything inconsistent therewith contained in an order or direction of the Australian Stevedoring Industry Board, whether made before or after the making of the order or award by the court and the order or direction of the board shall, to the extent of the inconsistency, be inoperative. As has already been said, s. 5 (3) (*g*) gives Order No. 30 of 1948 the same force as if made or given under the *Stevedoring Industry Act* 1949 and provides that the provisions of the Act relating to orders made and directions given by the board shall apply to and in relation to such orders and directions. It is in virtue of the combined operation of these provisions that the Arbitration Court is asked to make the amendments to which the prosecutor federation objects.

The first ground upon which it is contended on the part of the prosecutor federation that the Arbitration Court has no power to make the order sought is that it would not relate to any industrial matter within the meaning of s. 34. The expression "industrial matters" is defined by s. 6. It is a long definition. It begins by providing that the expression shall mean all matters pertaining to the relations of employers and waterside workers. The words "waterside worker" are defined to mean a person who accepts or offers to accept employment for work in the loading or unloading of cargo into or from ships. The definition goes on to include a member of the prosecutor federation and certain other persons registered as waterside workers who accept or offer to accept employment of specified kinds that are ancillary to stevedoring. The definition of "industrial matters" then goes on to enact that without limiting the generality of the foregoing it shall include a number of matters that are set out in separate lettered paragraphs. Paragraph (*a*) comprises all matters or things affecting or relating

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

Dixon C.J. McTiernan J. Williams J. Webb J. Fullagar J. Kitto J. Taylor J.

to work done or to be done ; par. (*g*) refers to the hours of employment, (*h*) to the mode, terms and conditions of employment, and (*i*) to the employment of any waterside worker or class of waterside worker. The contention of the prosecutor federation is that the proposed amendments prescribe a method of employment which compulsorily creates the relationship of employer and employee and that to do this does not fall within any part of the definition of " industrial matter ". In the same way it is said that the method of engagement which the amendment seeks to extend to week-end work prevents a man becoming employed unless he complies with the requirements which in effect mean that he must obtain a radio set or buy a newspaper and find out therefrom whether or not he is being employed. This, it is said, is outside the conception of " industrial matter ". Reliance is placed upon the fact that unless he applies for leave and obtains it, a waterside worker is subject to a penalty or what is equivalent to a penalty if he does not respond to a summons for work during the week-end. In the second place, it is contended for the prosecutor federation that even if the proposed amendment involves an industrial matter, it is not an industrial matter in connection with stevedoring operations relating to trade commerce and intercourse with other countries or among the States within the meaning of s. 34. This contention is based upon the view that the method of summoning labour is too far removed from the control of loading or discharging an inter-State or overseas ship which s. 51 (i.) of the Constitution may suffice to place within the legislative power of the Parliament. Thirdly, it is contended that s. 34 (1) itself is beyond the legislative power conferred by s. 51 (i.) of the Constitution and is ultra vires and void.

On the part of the respondent associations it was objected that even if any of the foregoing contentions prevailed, the case was not one for prohibition because the power which s. 34 purported to confer is of a legislative and not of a judicial nature and it is that power only that the judge of the Arbitration Court has been asked to exercise.

This objection appears to be well-founded. Section 33 empowers the Arbitration Court to prevent and settle industrial disputes in connection with stevedoring operations. After that exercise of the legislative power conferred by s. 51 (xxxv.) of the Constitution the Act proceeds in s. 34 to give another power expressed to be quite independent of the existence of any dispute. It is given in the exercise of the legislative powers conferred by s. 51 (i.) and s. 122 of the Constitution. Section 13 of the Act confers upon the

Australian Stevedoring Industry Board a parallel power to regulate and control the performance of stevedoring operations in so far as those operations are performed in the course of trade and commerce with other countries or among the States. For the purposes of its power and the performance of its functions the board may make such orders as it thinks fit: s. 16. They have the force of law: s. 17.

The board's power seems plainly enough not to be of a judicial nature, even in the extended sense in which now that term is employed to describe the kind of authority for an excess of which prohibition lies. Conceivably the power might be described as administrative, but it is rather one of subordinate legislation. It can hardly be doubted that s. 34 means to give to the Arbitration Court a paramount power of the same nature. It was conceded that when sub-s. (3) of s. 34 speaks of a power to make orders it does not mean curial orders. Orders made under s. 13 or s. 34 are or at all events may be general so that they govern the conduct to which they apply of persons at large. No restriction in this respect of the operation of either power is brought about by the circumstance that in the definition of "stevedoring operations" or, in the case of s. 34, in the definition of "industrial matters", the expression "waterside workers" occurs. For if the definitions of the three expressions are examined in combination it will be found that it is only in respect of very limited classes of work that they result in a restriction upon the application of s. 34. The limitation is to the doing of that work by members of the federation and by waterside workers registered immediately before the commencement on 22nd December 1947 of the Act of that year. The Arbitration Court might competently make a regulation under s. 34 of industrial matters without any parties before it. It might act of its own mere motion. There is no issue to decide. No existing right need be in question. All that is to be considered is what in point of policy ought to be done by way of regulating stevedoring operations. It is to be noticed that under sub-s. (2) the power extends to determining the terms and conditions and the rates in accordance with which the board shall pay attendance money. Writs of prohibition lie only in respect of acts to be done judicially. Acts which are ministerial in their nature or administrative only or amount to the exercise of a subordinative legislative power are not subject to the writ, even though what is done involves an excess of authority. No doubt of late years there has been an extension of the conception of what is judicial as a test of when

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

Dixon C.J. McTiernan J. Williams J. Webb J. Fullagar J. Kitto J. Taylor J.

prohibition is a proper remedy to restrain a body or functionary that acts or is about to act beyond power. But where there is no determination affecting existing rights, no question of fact or law submitted for decision, no exercise of a discretionary authority to the prejudice of person or property, nothing sought or proposed but the promulgation of a set of provisions regulating the future conduct of persons when they engage in defined activities, in such a case there is no element or consideration present giving colour to the notion that the function is performed judicially so that an excess of authority may be restrained by a writ of prohibition.

It follows that the case is not one for the exercise of the jurisdiction conferred upon this Court by s. 75 (v.) of the Constitution to award a writ of prohibition against an officer of the Commonwealth.

This conclusion is enough to dispose of the order nisi. But as an attack has been made upon the validity of s. 34 of the Act, it might lead to much inconvenience if we left the case without any expression of opinion upon that question. The attack is based entirely upon the ground that no positive legislative power exists in the Parliament which would support the provisions, that is to say that it goes beyond s. 51 (i.) of the Constitution and that there is no other relevant power. The implications of the conclusion that in no sense is the power given by s. 34 to the Arbitration Court judicial, but that it is legislative in its nature, were most carefully avoided in the argument made on the part of the prosecutor federation. In a constitution which separates judicial from legislative and executive power and places the respective powers in organs of government sharply distinguished and elaborately constituted, those implications are sufficiently apparent. But if the question of the effect of the separation of powers, which thus again comes to our notice in a case where no one wishes to pursue it, fell to be examined and if in the course of that examination a question of severability arose, it may be conjectured that great importance would attach to the history of the legislation combining judicial powers with the industrial functions of the Arbitration Court and to the dominating place in that legislation of the industrial functions. In other words the assumption is by no means warranted that if it were true that the separation of powers makes the combination of the two unconstitutional it would be the industrial, and not the judicial, powers that would be regarded as invalidly conferred. And if this conjecture be well-founded, it would apply to such a provision as s. 34. We are therefore justified in neglecting the question which the argument for the prosecutor federation avoided and in dealing only with the challenge

to the validity of s. 34 as going beyond s. 51 (i.) and s. 122 of the Constitution.

Section 122 may be neglected because so far as s. 34 relates to territories there can be little doubt of its validity and it is clearly severable. No attempt was made to ask the Court to reconsider the decision in *Huddart Parker Ltd.* v. *The Commonwealth* (1) and *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). In those cases the validity was upheld of a law empowering the Governor-General in Council to make regulations with respect to the employment of transport workers and in particular regulating the engagement, service and discharge of transport workers and the licensing of persons as transport workers, to the extent at all events to which it authorized a regulation made thereunder requiring that in the engagement of waterside workers for overseas or inter-State vessels priority should be given to such workers available for employment or engagement who should be members of the Waterside Workers' Federation. The ground of the decision was that the provision contained in the regulation was an exercise of legislative power directed to the determination of the question who should be preferred for the purpose of doing such work and that the determination of the persons who should take part in work forming part of inter-State and external commerce was directly within the subject matter of s. 51 (i.) of the Constitution: see *Huddart Parker Ltd.* v. *The Commonwealth* (3); *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4). At that time *James* v. *Commonwealth* (5) had not been decided and no question as to s. 92 of the Constitution could arise. Nor is any such question raised in the present case. The contention for the prosecutor federation assigns a different character to the power conferred by s. 34 and a much wider ambit. In the first place, so it is argued, it is a power to regulate industrial matters and that expression covers all matters pertaining to the relations of employers and waterside workers, and more besides. You start therefore with the idea of an employment, something unrelated to the commerce power, and go further to what pertains to such employment. Next you find that the inadmissible generality of this conception is limited by the words " in connection with stevedoring operations ". By this, so the argument continues, the generality may be reduced, but subject matter relevant to the power is not supplied. In any case the expression " stevedoring operations " is so widely defined

(1) (1931) 44 C.L.R. 492.
(2) (1931) 46 C.L.R. 73.
(3) (1931) 44 C.L.R., at pp. 515, 516.
(4) (1931) 46 C.L.R., at p. 103.
(5) (1936) A.C. 578; 55 C.L.R. 1.

H. C. OF A. 1955.

THE QUEEN v. WRIGHT; EX PARTE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

Dixon C.J. McTiernan J. Williams J. Webb J. Fullagar J. Kitto J. Taylor J.

as to include a number of things which, it is said, must lie outside the commerce power. But, it is argued, it is only when in s. 34 you get to the words " in so far as those operations relate to trade and commerce with other countries or among the States " that you reach any connection with the subject of the legislative power. All this is too remote from the purpose of the commerce power, too tenuous and vague a nexus, to amount to an exercise of that power. Further, it is said that the words " in so far as those operations relate to trade and commerce " express simply a limitation upon the industrial regulation which the court is empowered to make and do not denote any actual purpose in relation to the subject matter of the legislative power conferred by s. 51 (i.).

The last argument is in effect an application of the view adopted by the members of the Court who dissented in the first of the two cases mentioned. It is answered by the consideration that stevedoring operations, at all events the operations comprised in the natural meaning of those words apart from the extended definition, refer to a physical operation essential to the importation or exportation by sea of goods in the course of inter-State or overseas trade and commerce. It is the operation of putting goods aboard a ship to be carried overseas or to other States or discharging them from a ship which has carried them from a port in another State or overseas. The words " in so far as those operations relate to trade and commerce with other countries and among the States " may be limiting but all they do is to exclude the carriage of goods by sea from one port to another in the same State. Stevedoring in the case of overseas or inter-State ships must fall within the commerce power. The engagement of labour for the purpose, the terms of employment, the relations between the stevedore and the waterside worker, these and the like are matters incidental to the subject. It is true that the words " in connection " are indefinite. But that is a ground which, like other points made on the terms of s. 34 and the definitions in s. 6 (1), does not call for consideration, for the simple reason that even if it were conceded that in some respects s. 34, interpreted by the definitions of the terms mentioned, travels outside s. 51 (i.) of the Constitution, it is subject to s. 15A of the *Acts Interpretation Act* 1901-1950. In the same way Order No. 30 of 1948 and any amendment that may be made therein is governed by s. 46 (*b*) of that Act.

All that need be added is that it is an unsound contention that a provision in an order requiring that a waterside worker who has not obtained leave and who is notified by advertisement and radio announcement must under pain of disciplinary measures attend

and report for work is outside the power contained in s. 34. The words in the definition of " waterside worker ", " who accepts or offers to accept employment " refer to the course of the calling, not to the action of the man on the specific occasion. He remains a waterside worker between jobs. In the same way the word " employers " in the expression " matters pertaining to the relations of employers and waterside workers " which occurs in the leading part of the definition of " industrial matters " refers to the character of that party to the relationship. A person, firm or company that ordinarily employs men for stevedoring remains a stevedore between ships. A provision of the kind in question therefore does relate to an industrial matter. If the remedy of prohibition did lie in respect of an excess of the power reposed in the Arbitration Court by s. 34, no substantial ground for awarding the writ is disclosed. But the remedy does not lie and the order nisi should for that reason be discharged.

Order nisi discharged with costs.

Solicitors for the prosecutor, *C. Jollie Smith & Co.*

Solicitor for the respondent judge of the Commonwealth Court of Conciliation and Arbitration and for the Australian Stevedoring Industry Board intervening by leave, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondents Commonwealth Steamship Owners' Association and the Overseas Shipping Representatives' Association, *Malleson, Stewart & Co.*

R. A. H.