It was, of course, quite unnecessary that his Honour should have done so; it was quite sufficient if he correctly stated to the jury the principles which they should apply in considering the question which was put to them. We are satisfied upon a consideration of his Honour's summing up that his Honour did correctly state those principles and that the submissions on this point must fail.

For the reasons given the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Cannan & Peterson.*

Solicitors for the respondent, *O'Sullivan, Ruddy & Currie.*

R. A. H.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

FOSTER;

EX PARTE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS.

H. C. OF A. 1956.

MELBOURNE, *May* 25, 28;

SYDNEY, *Aug.* 10.

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

Industrial Arbitration (Cth.)—Court of Conciliation and Arbitration—Jurisdiction under Navigation Act (Cth.)—Necessity for "industrial matter" being involved—"All matters in relation to the salaries, wages, rates of pay or other terms or conditions of service or employment of masters pilots or seamen"—Dispute between shipowners and seamen—Whether overseas or Australian seamen should man ships bought overseas for service in Australian coastal trade on voyage from overseas—Whether involving "industrial matter"—Navigation Act 1912-1953 (*No.* 4 *of* 1913—*No.* 96 *of* 1953), *ss.* 405A, 405D.

Section 405D of the *Navigation Act* 1912-1953 provides that "(1) the court has power to prevent or settle industrial disputes by conciliation or arbitration. (2) The court has power to hear and determine industrial matters submitted to it in so far as those matters relate to trade and commerce with other countries or among the States or in a Territory of the Commonwealth, whether or not an industrial dispute exists in relation to those matters". Section 405A defines "industrial dispute" to mean, unless the contrary intention appears, "(*a*) a dispute (including a threatened, impending or probable dispute) as to industrial matters which extends beyond the limits of any one State; and (*b*) a situation which is likely to give rise to a dispute as to industrial matters which so extends" and "industrial matters" to mean, unless the contrary intention appears, "all matters in relation to the salaries, wages, rates of pay or other terms and conditions of service or employment of masters pilots or seamen."

In 1955 a ship which had been built for the Australian coastal trade in a Scottish shipyard arrived in Australian waters manned by a crew from the United Kingdom. Due to a ban by the Seamen's Union because the ship had not been manned by an Australian crew on her voyage from England it was found impossible to obtain a crew when the ship was ready to go into

service on the coastal trade. When the matter came before the judge of the Court of Conciliation and Arbitration sitting under Pt. XA of the *Navigation Act* he found that the dispute not only affected the ship in question but the principle of who should man ships built or bought overseas on their voyage to Australia and ships sold in Australia for delivery to overseas ports and ordered that in each case ships should be manned by an Australian crew.

Held, that there was no jurisdiction so to order, no industrial matter as defined being involved.

ORDER NISI FOR PROHIBITION.

On 22nd March 1956 *Dixon* C.J., on the application of the Commonwealth Steamship Owners' Association, the Colonial Sugar Refining Company Ltd. and William Holyman & Sons Pty. Ltd., as prosecutors, granted an order nisi for a writ of prohibition directed to the Honourable Alfred William Foster, a judge of the Commonwealth Court of Conciliation and Arbitration, prohibiting him from further proceeding with or upon an order or award made by him on 10th February 1956 and a notification given on 11th October 1955 by the Commonwealth Steamship Owners' Association concerning the ship *Warringa*, which order or award was made with respect to the manning with Australian crews of ships purchased overseas by Australian shipowners for use on the Australian coast and ships sold by shipowners in Australia to overseas buyers for delivery outside Australia on the following grounds: (1) That the said order or award was made without jurisdiction or authority; (2) there was no jurisdiction or authority to make the said order or award under the *Conciliation and Arbitration Act* 1904-1955 or under the *Navigation Act* 1912-1953 in that—(a) there was no industrial dispute extending beyond the limits of any one State: (b) any dispute which existed was not an industrial dispute; (3) that there was no jurisdiction or authority to make the said order or award under the *Navigation Act* 1912-1953 in that it was not made in the course of the determination of an industrial matter as there defined and it did not determine any such industrial matter; (4) that there was no jurisdiction or authority under the *Conciliation and Arbitration Act* 1904-1955 or under the *Navigation Act* 1912-1953 to determine who should be employed as master or seamen of a ship not registered in Australia which is outside Australia and the first port of clearance of which is outside the Commonwealth and it would not be constitutionally competent for the Parliament to confer such jurisdiction or authority; (5) that there was no jurisdiction or authority to make the said order or award in that it did not relate to trade or commerce among the States or with some other country.

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It was directed that copies of the order nisi be served on the following organizations of employees, namely the Seamen's Union of Australia, the Australian Institute of Marine and Power Engineers, the Marine Stewards Association, the Marine Cooks', Bakers' and Butchers' Association of Australia, the Professional Radio Employees' Union and the Merchant Service Guild of Australasia.

The argument of counsel is sufficiently set out in the judgment hereunder.

Dr. *E. G. Coppel* Q.C. and *K. A. Aickin*, for the prosecutors.

Murray V. McInerney, for the respondent judge of the Court of Conciliation and Arbitration.

P. D. Phillips Q.C. and *R. K. Fullagar*, for the organizations of employees directed to be served.

Cur. adv. vult.

Aug. 10.

THE COURT delivered the following written judgment:—

A writ of prohibition is sought in respect of an order which the learned judge of the Court of Conciliation and Arbitration sitting under Pt. XA of the *Navigation Act* 1912-1953 has made or proposes to make.

The order in question, when drawn up, will give formal expression to a decision which his Honour pronounced on 10th February 1956. The decision concerned the manning of ships which Australian shipowners might acquire abroad for employment on the Australian coast and of ships which Australian shipowners might dispose of from the Australian coast on terms requiring their delivery at some foreign port. His Honour decided that the shipowner must, when he so acquired a ship abroad, send an Australian crew to man the ship for its voyage to Australian waters and, when he so disposed of a ship, man it with an Australian crew for the voyage to the foreign port of delivery, of course then bringing the crew back to Australia. His Honour desired the shipowners and the industrial organizations concerned to attempt to agree upon the terms and conditions of a contract into which a crew sent abroad should enter and in default of their doing so directed that the terms and conditions should be settled by a board of reference.

No order has been drawn up and perhaps it is proper to regard its tenor as not yet completely decided upon. It should be added that a direction was given that the order should take effect forthwith (see s. 405P) and that its fixed term is one year.

The events which led to the decision begin with the arrival in Australian waters of M.V. *Warringa* manned with a crew from the United Kingdom which was paid off in Melbourne on 5th October 1955. The ship had been obtained by Huddart Parker Ltd. from a Scottish shipyard and had been built for the Australian coastal trade. She was to be employed on the Tasmanian run and she was to sail from Melbourne for Hobart with general cargo on 25th October 1955. It was, however, found impossible to obtain a full crew, although on 5th October 1955 the notification, prescribed by the Seamen's Award, stating the ratings required, was given at the office of the Seamen's Union and at that of the Shipping Master. After some six days, the Commonwealth Steamship Owners' Association, an organization of employers, informed the learned judge by telegram that seamen would not offer for *Warringa*, adding that there were indications that the union had banned the ship because on her voyage to Australia she had been manned by a crew from Great Britain. The telegram requested the judge to order the union to man the ship. The award contains a provision forbidding the union in any way, whether directly or indirectly, to be a party to or concerned in any strike ban or limitation or restriction upon the performance of work upon or in accordance with the terms and conditions prescribed by the award. The learned judge treated the telegram as a notification of the existence of an industrial dispute, or of an industrial situation likely to give rise to an industrial dispute, given in pursuance of s. 14 (3) of the *Conciliation and Arbitration Act* 1904-1955, apparently regarding that section as incorporated so to speak in Pt. XA of the *Navigation Act* 1912-1953 by the operation of s. 405M of the latter Act. As a result of the steps which accordingly his Honour took a board of reference sat on 12th and 19th October to deal with the matter and the learned judge himself on 28th October presided over a conference to which he had summoned representatives of a number of unions concerned.

At this conference there was a discussion of the course or courses taken by shipowners in manning ships which of late years they had brought from abroad to the Australian coast. His Honour gave a direction that *Warringa* should be manned and a full crew was obtained for her about 3rd November. The conference was resumed on 17th November when a number of persons were heard. His Honour said that he had found that the dispute not only affected *Warringa* but affected a principle, namely who shall man ships built or bought overseas on their voyage to Australia and that it extended to the problem who shall man ships sold for delivery

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to overseas ports. As the parties had failed to settle the dispute, it fell to the court to deal with it. The learned judge accordingly referred the matter to the court. At the conclusion of the hearing his Honour reserved his decision and on 19th February 1956 he pronounced the decision which is the subject of the order nisi for a writ of prohibition. The power of the Court of Conciliation and Arbitration to make any such order as that intended must be found, if at all, in ss. 405D, E and M of the *Navigation Act* and of these ss. 405E and M are no more than ancillary to s. 405D. That section consists of two sub-sections which are as follows :—" (1) the Court has power to prevent or settle industrial disputes by conciliation or arbitration. (2) The Court has power to hear and determine industrial matters submitted to it in so far as those matters relate to trade and commerce with other countries or among the States or in a Territory of the Commonwealth, whether or not an industrial dispute exists in relation to those matters." The expression " industrial dispute " is defined by s. 405A to mean : " (*a*) a dispute (including a threatened, impending or probable dispute) as to industrial matters which extends beyond the limits of any one State ; and (*b*) a situation which is likely to give rise to a dispute as to industrial matters which so extends ". When these definitions are read into s. 405D and that section, thus amplified, is applied to the facts, which have been summarized in the foregoing, it will be found that the power will not cover the order his Honour intends unless an " industrial matter " is involved. But the expression " industrial matter " is itself defined by s. 405A. Unless the contrary intention appears then in Pt. XA " industrial matters " means all matters in relation to the salaries wages rates of pay or other terms or conditions of service or employment of masters pilots or seamen. No limitation is involved in the word " seaman ". It covers every person employed or engaged in any capacity on board a ship except masters, pilots and apprentices and persons temporarily employed on the ship in port : s. 6. But how can his Honour's order or the subject matter with which it deals be brought within the operative words of the definition of " industrial matters "? Certainly there is no question of " salary, wages, rates of pay ". Can it possibly be said that other terms or conditions of service or employment are drawn in question ? These expressions should no doubt be given a wide and general and not a limited or very specific meaning and application. But the subject under his Honour's consideration was not what terms and conditions should govern the employment or service of seamen, but whether the shipowner should be at liberty to sign on an overseas crew in a

newly acquired ship or in an old one disposed of to a foreign owner. It seems therefore, at all events on the surface, to be undeniable that an order imposing an obligation of such a kind is outside the words.

Mr. *Phillips*, however, for the unions concerned, puts forward an answer to this position which depends upon par. (*b*) of the definition of " industrial dispute " in s. 405A and goes to the nature and cause of the refusal of the seamen to man *Warringa* and the likelihood of the same thing occurring again. Paragraph (*b*) of s. 405A includes in the conception of industrial dispute any situation which is likely to give rise to a dispute as to industrial matters which extends (that is would extend) beyond the limits of any one State. The refusal to man *Warringa* arose, it was said, out of a " situation ", namely the possibility of shipowners bringing a new ship from abroad manned by a crew from the country where it was acquired or whence it sailed, and the fact that shipowners in the given case had actually done so. It was a situation, so it was argued, that was likely to give rise in the future to another or other refusals to man ships or to some kindred industrial action. Indeed it was likely to do so again very soon ; for there was another ship arriving in similar circumstances. A refusal to man a ship, it was said, is an industrial dispute. In the case of *Warringa* it was a refusal to provide men which was maintained in Melbourne, Sydney and Adelaide and therefore it was a dispute extending beyond the limits of one State. It had relation to terms and conditions of employment and in particular it involved a ban of the kind dealt with by the Seamen's Award, cl. 83.

There are many difficulties about the foregoing argument, but it is enough to point out that it treats the measures taken to enforce the express or implied demand that Australian shipowners shall not use crews from abroad to bring new ships into the coastal trade or send old ships out of it as if the measures in themselves formed the dispute or disagreement or provided its subject matter. In other words it confuses with the demand itself the industrial action taken to enforce the demand. The measures taken may include bans and refusals to offer for employment, but these do not constitute a disagreement or dispute ; they are but the consequences of the real dispute which affords the subject matter of the order. They imply no actual threatened, impending or probable disagreement about salaries, wages, rates of pay or other terms or conditions of employment. The conflict, disagreement or want of accord is about the course the shipowners have taken and may again take in manning newly acquired or newly disposed of ships.