[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

Ex parte SEAMEN'S UNION OF AUSTRALIA.

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MELBOURNE, *Feb.* 18, 19, 20, 21;

SYDNEY, *Mar.* 29.

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

Industrial Arbitration (Cth.)—Award—Validity—Powers of Judge sitting under Pt. XA of Navigation Act—Award prohibiting union of employees from being concerned in "any strike ban limitation or restriction upon the performance of work upon or in accordance with the terms and conditions prescribed by this award" or in "any total or partial refusal or failure of any members of the union acting in concert to accept employment or to offer for work or to work upon or in accordance with the terms and conditions prescribed by this award"—Navigation Act 1912-1953 (*No.* 40 *of* 1913—*No.* 96 *of* 1953), *Pt. XA.*

Clause 83 of the *Seamen's Award* 1955 made pursuant to the provisions of Pt. XA of the *Navigation Act* 1912-1953 provides: "83 (*a*) (i) The union shall not in any way, whether directly or indirectly be a party to or concerned in any strike, ban, limitation or restriction upon the performance of work upon or in accordance with the terms and conditions prescribed by this award. (*b*) The union shall not in any way, whether directly or indirectly be a party to or concerned in any total or partial refusal or failure of any members of the union acting in concert to accept employment or to offer for work or to work upon or in accordance with the terms and conditions prescribed by this award."

The prosecutor industrial organisation claimed that the Industrial Court should be prohibited from proceeding with rules nisi calling on it to show cause why an order should not be made that it comply with the provisions of the clause, on the grounds that the clause was invalid because it went beyond the authority conferred by Pt. XA of the *Navigation Act* on the Court of Conciliation and Arbitration which made the award.

Held, by *Dixon* C.J., *Webb*, *Fullagar* and *Taylor* JJ., *McTiernan* J. expressing no opinion:

(i) that the general nature of the clause was not in itself a ground for declaring it invalid; (ii) that, in view of other provisions of the award relating to the position in the industry of the industrial organisation prosecuting, it was open to the Arbitration Court to treat such a clause as reasonably necessary and proper for the effective determination of the dispute and to secure the maintenance of the provisions by the award, and that thus the award was within the authority of the Court.

Per McTiernan J. that, whether or not the remedy in fact lay, the Court should not consider granting prohibition at such an early stage.

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ORDERS NISI FOR PROHIBITION.

On 8th February 1957 *Fullagar* J. on the application of the Seamen's Union of Australia as prosecutor granted an order nisi for a writ of prohibition directed to the Honourable John Armstrong Spicer, the Honourable Edward Arthur Dunphy and the Honourable Sir Edward James Ranembe Morgan, Judges of the Commonwealth Industrial Court and the Commonwealth Steamship Owners' Association prohibiting them from further proceeding with or upon two several orders made by the Honourable Sir Edward James Ranembe Morgan on 25th January 1957 which said orders respectively required the Seamen's Union of Australia to show cause why (1) an order should not be made by the said Commonwealth Industrial Court pursuant to s. 109 (1) (*a*) of the *Conciliation and Arbitration Act* 1904-1956 that the said union comply with sub-cll. (*a*), (*b*) and (*c*) of cl. 83 of the award known as the Seamen's Award 1955 and (2) an order should not be made by the said Commonwealth Industrial Court pursuant to s. 109 (1) (*b*) of the said Act enjoining the said Union from committing or continuing a breach and non-observance of sub-cll. (*a*) and (*b*) of the said cl. 83 of the said award upon the following ground namely "That clause 83 of the Seamen's Award 1955 is invalid and that the Commonwealth Industrial Court has therefore no jurisdiction to entertain the applications made to it to so enforce the said clause".

P. D. Phillips Q.C. (with him *R. K. Fullagar*), for the prosecutor. Clause 83 of the award is so wide in its operation as not to be justifiable as the exercise of an ancillary power to protect the settlement made. There is no decision of this Court which justifies such a wide ban. [He referred to *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1).] The utmost that that case decided was that a bans clause specifically limited to bans for the purpose of enforcing demands as to matters expressly provided in the award was a valid one either because it was the very matter which was the subject of the dispute or if it was not because it was protecting the award. The other cases may be explained on this basis. *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (2) is not authority for the proposition that Parliament had power to prohibit all strikes but only those in relation to an industrial dispute as to which there was jurisdiction. [He referred also to *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (3); *Australian Commonwealth Shipping Board* v. *Federated Seamen's*

(1) (1936) 54 C.L.R. 626, at pp. 635 et seq.
(2) (1917) 23 C.L.R. 226.
(3) (1925) 35 C.L.R. 449.

Union of Australasia (1); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2).] The vice of cl. 83 is that it covers strikes as to non-industrial matters and strikes as to industrial matters over which the particular arbitrator has no jurisdiction. The clause is not within the jurisdiction of the judge sitting under the *Navigation Act* because it is not in essence as to an industrial matter. The dispute is about a power of the Union which in its nature is not necessarily industrial at all. Further the power under the *Navigation Act* is to deal with matters which can form part of the contract of employment. Matters concerned with its commencement or its termination are not within the meaning of the expressions "salaries and wages" and "terms and conditions of the employment". Industrial arbitration would be turned into a wide legislative power if the argument that the mere fixing of wages contemplated uninterrupted work was acceded to. Parliament can not constitutionally authorise a bans clause used only as a means of supporting whatever decision an arbitrator might arrive at. The judge sitting under the *Navigation Act* would have no power to settle a dispute as to whether a ban should be made part of an award. It would be wrong to hold that he had power to do incidentally what he is forbidden to do directly. By the *Conciliation and Arbitration Act* 1956 orders under the *Navigation Act* are deemed to be awards of the Industrial Commission. It is submitted that the reference is to valid orders within the power of the judge under the *Navigation Act*. The Court is not precluded from examining the validity of cl. 83 of the award by ss. 32 or 60 of the *Conciliation and Arbitration Act*. [He referred to *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (3).]

Gordon Wallace Q.C. (with him *O. J. Gillard* Q.C., *G. H. Lush* and *R. L. Gilbert*), for the respondent, the Commonwealth Steamship Owners' Association. The insertion of a bans clause of the type in cl. 83 relates to an industrial matter under s. 405A of the *Navigation Act* because of the presence of the words "in relation to terms and conditions". [He referred to *Reg.* v. *Tonkin*; *Ex parte Federated Ship Painters' and Dockers' Union of Australia* (4); *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (5); *Reg.* v. *Galvin*; *Ex parte Amalgamated Engineer-*

(1) (1925) 35 C.L.R. 462.
(2) (1951) 82 C.L.R. 208.
(3) (1951) 82 C.L.R. 208, at p. 249.
(4) (1954) 92 C.L.R. 526, at p. 528.
(5) (1936) 54 C.L.R. 626, at pp. 646, 647.

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ing Union, Australian Section (1); *Reg.* v. *Foster*; *Ex parte Commonwealth Steamship Owners' Association* (2).] On its true construction s. 405A of the *Navigation Act* is substantially the equivalent of s. 4 of the *Conciliation and Arbitration Act*. Matters in relation to terms and conditions of employment include matters anterior to the contract of employment. Where there are members of the union employed it is the terms and conditions of their employment that the union shall not impede. [He referred to *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (3); *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (4); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (5).] The legislature has power under s. 51 (xxxv.) of the Constitution with respect to the determination of conditions of industrial employment. That power includes power to make provision for the effective operation of such determination by prohibiting direct action. In its delegation of such powers to the arbitral tribunal there is no fetter manifested or to be implied. [He referred to *Jumbunna Coal Mine, N.L.* v. *Victorian Coal Miners' Association* (6); *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (7).] It is a matter for the decision of the arbitration to decide what protection should be given to an award in order to prevent it being frustrated or destroyed. His decision should not be interfered with unless he has clearly gone beyond his functions. If the settlement is disrupted the purpose of the disrupting organisation is irrelevant. Under the award the Seamen's Union has great power. In effect it is given control of the method of engagement of labour: see cl. 64. It is conceded that s. 60 of the *Conciliation and Arbitration Act* does not prevent a constitutional attack on an award, but it is submitted that it does prevent an attack based on want of jurisdiction of the tribunal. [He referred to *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (8); *Reg.* v. *Kelly*; *Ex parte Berman* (9).]

C. I. Menhennitt, for the respondent Judges of the Commonwealth Industrial Court.

P. D. Phillips Q.C., in reply.

Cur. adv. vult.

(1) (1952) 86 C.L.R. 34, at pp. 44, 45.
(2) (1956) 94 C.L.R. 614, at pp. 618, 619.
(3) (1936) 54 C.L.R. 626, at pp. 643, 644.
(4) (1954) 90 C.L.R. 24, at pp. 40, 41.
(5) (1925) 35 C.L.R. 462, at p. 475.
(6) (1908) 6 C.L.R. 309, at pp. 332 et seq., 342, 350, 358, 359.
(7) (1954) 90 C.L.R. 24, at p. 40.
(8) (1951) 82 C.L.R. 208, at p. 249.
(9) (1953) 89 C.L.R. 608, at p. 631.

The following written judgments were delivered :—

DIXON C.J., WEBB, FULLAGAR AND TAYLOR JJ. On 25th January 1957 rules nisi were granted by the Commonwealth Industrial Court calling upon the prosecutor, an organisation of employees registered under the *Conciliation and Arbitration Act* 1904-1956, to show cause, firstly, why an order should not be made, pursuant to s. 109 (1) (*a*) of the Act, that it comply with sub-cll. (*a*) (i), (*b*) and (*c*) of cl. 83 of the Seamen's Award 1955 and, secondly, why an order should not be made under the authority of the same section enjoining the prosecutor from continuing breaches of the provisions of those sub-clauses.

The material provisions for our consideration are sub-cll. 83 (*a*) (i) and (*b*) of the award which was made pursuant to the provisions of Pt. XA of the *Navigation Act* 1912-1953. Those sub-clauses are in the following terms: "83 (*a*) (i) The Union shall not in any way, whether directly or indirectly be a party to or concerned in any strike, ban, limitation or restriction upon the performance of work upon or in accordance with the terms and conditions prescribed by this award. (*b*) The Union shall not in any way whether directly or indirectly be a party to or concerned in any total or partial refusal or failure of any members of the Union acting in concert to accept employment or to offer for work or to work upon or in accordance with the terms and conditions prescribed by this award."

It appears from the material before us that it is alleged that the prosecutor was directly concerned in an arrangement for withholding a crew for the M.V. *Kumalla*, a new ship which had been constructed in the United Kingdom for the Union Steamship Company of New Zealand Ltd. and brought to Australia by a crew engaged in the United Kingdom. For some time previously to the arrival of the vessel the prosecutor had maintained that where a vessel was purchased overseas by an Australian shipowner for use on the Australian coast an Australian crew should be sent overseas to take delivery and bring it to this country and, in February 1956, the prosecutor obtained a decision from a judge of the Court of Conciliation and Arbitration, exercising authority under Pt. XA of the *Navigation Act*, that this practice should be observed. Thereafter, in August 1956, the Commonwealth Steamship Owners' Association obtained an order from this Court for the issue of a writ of prohibition on the ground that the judge in question had no authority to make such an order since the dispute before him was not a dispute as to an "industrial matter" within the meaning of that Act. In effect the matter in dispute was not one "in relation to the salaries, wages, rates of pay or other terms and

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conditions of service or employment of masters, pilots or seamen" (*Navigation Act*, s. 405A). The decision of this Court upon the point is reported *sub nom. Reg.* v. *Foster*; *Ex parte Commonwealth Steamship Owners' Association* (1).

There is no question in the present proceedings of the authority of the Commonwealth Industrial Court, pursuant to s. 109 of the *Conciliation and Arbitration Act*, to consider whether orders of the general character sought before it should be made and, in appropriate circumstances, to make them; the objection which is taken is that sub-cll. 83 (*a*) (i) and (*b*) of the award are invalid and, that being so, there is no basis for the making of the orders sought. Generally, it is asserted that the power of the court under Pt. XA of the *Navigation Act* does not extend to the insertion of an "anti-ban" clause in an award made thereunder and, alternatively, that the terms of sub-cll. 83 (*a*) (i) and (*b*) are so wide that they cannot be justified on any permissible view of the authority of the Court under that part. Upon these grounds the prosecutor seeks to prohibit the Industrial Court from further proceeding in the matters before it.

The question of the validity of anti-ban clauses in awards made pursuant to the *Conciliation and Arbitration Act*, as it has stood from time to time, has been debated in this Court on a number of occasions. Indeed, more than twenty years ago this Court, by a majority, affirmed the validity of a clause which provided that no employee, acting in combination with any other employee covered by the award in question, should, for the purpose of enforcing any demand concerning any matter which was expressly provided for in the award upon any employer who was party to the award, leave the employment of any such employer or refuse to accept employment with any such employer (*Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (2)) though it must be conceded that it is open to some doubt whether the views of the majority in that case rested precisely upon the same ground. *Latham* C.J. regarded the clause as one "plainly directed to industrial matters which are definitely related to securing the actual and effective operation of the award" (3). We do not understand his Honour to have expressed the view that the substance of the clause in question could, itself, be characterised as an "industrial matter", but, rather, that the clause was plainly directed to matters which were i.e. those "industrial matters" which were the subject of other provisions of the award. Indeed, the paragraph which contains the quoted observation implies a clear distinction, on the

(1) (1956) 94 C.L.R. 614.
(2) (1936) 54 C.L.R. 626.
(3) (1936) 54 C.L.R., at p. 640.

one hand, between " industrial matters " which may be the subject of an industrial dispute and, on the other, the substance of provisions which may be thought necessary or desirable to determine such a dispute and render the settlement effective. *Starke* J. expressly held the clause valid as a provision " reasonably necessary or proper " for the purpose of settling a dispute as to industrial matters. He said: " Further, it was argued that the clauses are beyond the ambit of the industrial dispute the subject matter of the award. The Arbitration Court, however, has jurisdiction to prevent and settle disputes, and may include in the award or order any matter or thing which the Court thinks necessary for the purpose of preventing or settling the dispute or preventing further industrial disputes (Act, secs. 16, 38B). In this provision ample authority is conferred upon the Court to make its awards effective, and to do all things incident thereto or reasonably necessary or proper for that purpose. The jurisdiction to prohibit acts frustrating an award or rendering or tending to render it ineffective cannot therefore be denied to the Arbitration Court. The Court in the present case has prohibited the doing or omitting of anything which tends to prevent or delay or hinder the departing or running or working or using of any ships for the purpose of enforcing demands concerning any matter expressly provided for in the award. Some difficulties may arise in construing the words 'any matter expressly provided for in the award,' but those difficulties do not in this case require discussion or determination. The prohibitions are simply as to matters expressly provided for in the award; they have relation to the award and nothing but the award; they operate to protect the award, make it effective, and prevent its frustration. Such prohibitions are within the jurisdiction of the Arbitration Court " (1). *Dixon* J. (as he then was) referred to *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2) and *Walsh* v. *Sainsbury* (3) and, after observing that those cases impliedly recognised the validity of such clauses, added that it was " too late to deny the possibility of an industrial dispute arising in the settlement of which the Court might validly award such terms " (4) as that in question.

Much more recently the matter received further consideration in *R.* v. *Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (5). In that case the Court was concerned with a clause in an award which provided that no organisation, party to the award, should in any way whether directly or indirectly be a party to or concerned in any

(1) (1936) 54 C.L.R., at pp. 643, 644.
(2) (1925) 35 C.L.R. 462.
(3) (1925) 36 C.L.R. 464.
(4) (1936) 54 C.L.R., at p. 647.
(5) (1951) 82 C.L.R. 208.

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ban, limitation or restriction upon the working of overtime in accordance with the requirements of the award. The Court was unanimously of the opinion that the clause was valid. After pointing out that it was competent for the Arbitration Court to insist on overtime being worked as a compensatory condition of granting a reduction in the standard hours of work *Dixon* J. (as he then was) went on to say: "As an incident of providing for the performance of such overtime work, I think the Arbitration Court might lawfully bind the organization making the demand to have no part in any restriction upon overtime work which might be practised in disobedience of the principal provision. How far the Arbitration Court should go in framing the prohibition against the organization having any complicity in a ban or limitation or restriction on working overtime as required by the compensatory condition imposed appears to me to be a matter for the judgment and discretion of that court. No doubt the prohibition must be fairly incidental to the principal provision requiring the working of overtime. But it is difficult to see why it is not fairly incidental to such a requirement to insist that the organization shall not be concerned in a restriction calculated to defeat the obligation of the principal provision whether the concern in the restriction is direct or indirect" (1).

It will be observed that the anti-ban clause under consideration in the *Seamen's Union Case* (2) was directed to concerted action for a specified purpose whilst, in the *Metal Trades Case* (3), the award, itself, provided that an employer might require any employee to work reasonable overtime and that such employee should work overtime in accordance with such requirement. These were, it was submitted, features of a special character which precludes the use of those cases as authority for the proposition that a general anti-ban clause of the type under consideration in this case may, properly, be included in an award even if it be made pursuant to the *Conciliation and Arbitration Act*.

At this stage it should be pointed out, as was stressed in argument, that sub-cll. 83 (*a*) (i) and (*b*) are couched in quite general terms. They relate to bans or strikes upon the performance of work in accordance with the terms and conditions prescribed by the award irrespective of the purpose sought to be achieved by any such ban or strike. That is to say, they will be infringed by any ban to which the prosecutor is a party whether its purpose is to support a demand with respect to industrial matters already covered by the award, with respect to other industrial matters or with respect to matters which are not industrial matters at all and, therefore, with which the

(1) (1951) 82 C.L.R., at pp. 245, 246.
(2) (1936) 54 C.L.R. 626.
(3) (1951) 82 C.L.R. 208.

Arbitration Court is incompetent to deal. Indeed, if such a case can be imagined, the sub-clause will apply even if the ban is purposeless. With some force the prosecutor then contends that, even if the *Seamen's Union Case* (1) concludes against it the validity of an anti-ban clause of the character under consideration in that case, the present clause is far too wide to be justified as a provision incidental to the determination of the industrial dispute effected by the award or as a provision reasonably necessary or proper to be made in such determination. Moreover, it is pointed out that the decision in the *Metal Trades Case* (2) carries the matter no further for the anti-ban clause which was the subject of consideration in that case was capable of being regarded as merely complementary to the provisions of the award which authorised employers to require reasonable overtime to be worked.

Whilst there is considerable force in the argument advanced on this aspect of the case there are, however, cogent reasons why it should be rejected. First of all the clauses which were before the Court in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3) and *Walsh* v. *Sainsbury* (4) were of a general character and did not depend for their validity upon particular considerations such as were present in the two later cases referred to. Secondly, in the recent case of *Reg.* v. *Galvin*; *Ex parte Amalgamated Engineering Union, Australian Section* (5) this Court upheld as valid an anti-ban clause in the same form as that now under consideration and this conclusion was reached in spite of the fact that the log of claims which led to the dispute sought the insertion of a clause limited by the words " for the purpose of enforcing any demand concerning any matter expressly provided for in this log ". It is true that the arguments now advanced for the prosecutor were not then advanced but it was contended that the clause which found its way into the award was substantially different from that which the log claimed. On this point the reasons of the majority of the Court are of considerable importance and should be set out in full: " This claim is directed against the use by the organization of its authority or influence to stop or hinder work by its members. It brings into the ambit of the dispute the question of the course to be taken on that subject. But the prosecutor says that it does so only in a limited way. It is limited to cases where the order, incitement or encouragement of the organization is actuated by the purpose of enforcing on an employer any demand concerning any matter expressly provided for in the log. The contention is that the provision contained in par. (ba)

(1) (1936) 54 C.L.R. 626.
(2) (1951) 82 C.L.R. 208.
(3) (1925) 35 C.L.R. 462.
(4) (1925) 36 C.L.R. 464.
(5) (1952) 86 C.L.R. 34.

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of cl. 19 of the award disregards this limitation and therefore deals with something different in kind.

"An award cannot give a form of relief that is not relevant to a matter in dispute, that is not reasonably incidential or appropriate to the settlement of that part of the dispute and that has no natural or rational tendency to settle the particular question in dispute. But the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated.

"The principle is formulated by s. 42 of the *Conciliation and Arbitration Act* 1904-1951, although in language which may possibly be read too widely because of the words 'which the court or commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further . . . disputes'. These words might be taken to allow a more remote or tenuous connection with the dispute than is requisite as a matter of objective fact.

"But in the present case the question is whether by dropping the expression of purpose the commissioner has given relief of a kind different in substance from that claimed. To drop the reference to purpose was no doubt wise, because an issue as to the purpose of a corporate body is one which ought not to be set as a criterion of liability, so troublesome and uncertain is the ascertainment of the fact likely to be.

"The substantial grievance forming the basis of the claim in the log was the incitement or encouragement by an organization of conduct prejudicial to regular work in accordance with the terms and conditions sought.

"The clause in the log described in terms chosen by the claimants the precise relief considered sufficient to deal with the grievance. The award chooses another form of relief in some ways wider, in some ways narrower. But when the matter is examined and the distinction is observed between the substantive question and the precise form of relief, what the award does appears sufficiently relevant to the dispute arising from the claim, and to be reasonably incidential to its settlement" (1).

These observations are, it seems to us, conclusive against the prosecutor on this branch of the case. But even if it were still open to argue that, in general, the Arbitration Court has no power to prescribe, by award, a general anti-ban clause of this character there are, in the present case, special reasons why such a general proposition could not govern the decision in this case.

(1) (1952) 86 C.L.R., at pp. 40, 41.

A perusal of the provisions of the award is sufficient to indicate that the prosecutor occupies a very special position in the industry with which it is concerned and in relation to employers and employees in the industry. In particular, cl. 63 of the award, which deals with the method of engagement of employees, recognises the unusual position which the organisation occupies in the industry. It is desirable to set out the provisions of this clause in full: "63. (*a*) The employer shall notify as soon before the times appointed for the pick-up as possible to the office of the Union, and to the office of the Shipping Master what ratings he requires and shall state the name of the ship and its proposed voyage. This notification may be by telephone, in writing, or orally. (*b*) The Union shall inform its members of the employment offering and cause them to proceed to the Shipping Master's office for the purpose of engagement. (*c*) If the employer refuses or declines to accept any seaman who offers for employment the employer shall state to the Shipping Master in the presence of the seaman his objections; if the Shipping Master upholds the objection another seaman shall be obtained by the Union. (*d*) If the seaman objects to the offered engagement he shall state his objection to the Shipping Master; if the objection is upheld another seaman shall be obtained by the Union. (*e*) The Union shall inform employers as soon as possible on each pick-up day whether the employment requirements of the port can be met." It will be seen that the clause, whilst operating to confer privileges upon the organisation, imposes upon it the obligation to assist in procuring ratings for vessels. Indeed, all employees must be engaged through the organisation. It can hardly be doubted that cl. 63 assures to the organisation a position of great influence which might be used for the purpose of ensuring peace in the industry and uninterrupted employment or, on the other hand, which could be exercised in such a way as to disrupt the industry and make it impossible for the standards prescribed by the award to be maintained. Moreover, the concomitant obligations which the provisions of the clause lay upon the organisation can scarcely be regarded as being less stringent in character than those created by the anti-ban clause itself. In these circumstances we are of the opinion that it is not too much to say that the Arbitration Court could well form the opinion that such a clause was reasonably necessary or proper for the effective determination of the dispute between the parties and to secure the maintenance of the award provisions. In our view the prosecutor's argument on this aspect of the case should be rejected.

The alternative submission of the prosecutor was that, even if such a clause might be said to be justifiable if made in the settle-

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ment of an industrial dispute pursuant to the *Conciliation and Arbitration Act*, it was not competent for a judge of that court exercising jurisdiction under Pt. XA of the *Navigation Act* to prescribe such a clause. This argument was based upon the submission that the definition of industrial matters in Pt. XA is substantially narrower than the definition of the same term in the *Conciliation and Arbitration Act*. For the purposes of this case we may assume that this is so but, though in defining the term in Pt. XA the legislature may be said to have employed a narrower form, it is not a definition which unduly restricts the meaning of the term. Nor, so far as we can see, is there any difference between the two definitions or sets of definitions which, upon the views already expressed, is material in determining the present case. It is not suggested that the other provisions of the award, and particularly cl. 63, were beyond the power of the award-making authority and in those circumstances there is no substantial reason for holding that the authority of the court did not extend to the prescription of the impugned clause.

For the reasons given we are of the opinion that the rule nisi should be discharged.

McTIERNAN J. I am of opinion that at so early a stage in this matter, this Court, in its discretion, ought not to grant prohibition, if that remedy lies.

The Commonwealth Industrial Court is constituted with jurisdiction to decide the very sort of question which has been debated in this Court. I am of opinion that, assuming that a prima-facie case can otherwise be made out for exercising the jurisdiction to issue a prerogative writ under s. 75 (v.) of the Constitution, this Court ought to exercise its discretion against intervening unless and until the Commonwealth Industrial Court has considered the matter and adjudicated. In these circumstances, I should not think it right to express any opinion on the question.

I agree in the order of the Court.

Order nisi discharged with costs to be paid by the prosecutor.

Solicitors for the prosecutor, *Sullivan Bros.*, Sydney, by *Macpherson & Kelley.*

Solicitors for the respondent, The Commonwealth Steamship Owners' Association, *Malleson, Stewart & Co.*

Solicitor for the respondent Judges of the Commonwealth Industrial Court, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.