

[HIGH COURT OF AUSTRALIA.]

SEAMEN'S UNION OF AUSTRALIA . . APPELLANT ;
 APPLICANT,

AND

MATTHEWS AND ANOTHER . . . RESPONDENTS.
 RESPONDENTS,

Constitutional Law (Cth.)—Industrial arbitration—Commonwealth Industrial Court—Establishment—Validity—Alleged combination of judicial and non-judicial powers—Severability—Conciliation and Arbitration Act 1904-1956 (No. 13 of 1904—No. 103 of 1956).

By virtue of the provisions of the *Conciliation and Arbitration Act 1904-1956* the Commonwealth Industrial Court is validly established pursuant to ss. 71 and 72 of the Constitution and is validly invested with jurisdiction forming part of the judicial power of the Commonwealth. To the extent to which the provisions of such Act may confer on the court non-judicial powers (if any), such provisions are severable.

Decision of *McTiernan J.*, affirmed.

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SYDNEY,
 June 13,
 July 23.

McTiernan J.
 Sept. 3, 12.

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

APPEAL from *McTiernan J.*

On 13th June 1957 the Seamen's Union of Australia applied *ex parte* to *McTiernan J.* for an order nisi for a writ of prohibition directed to the Commonwealth Industrial Court and *Spicer C.J.* and *Dunphy* and *Morgan JJ.*, judges of such court, and one Leonard George Matthews calling upon it and them to show cause why a writ of prohibition should not issue to restrain further proceedings upon certain informations laid by the said Leonard George Matthews and then before such court and the said judges thereof.

The relevant parts and the grounds of the application appear in the judgment of his Honour hereunder.

Gregory Gowans Q.C., and *F. C. Hutley*, for the applicant.

G. Wallace Q.C. and *R. L. Gilbert*, sought leave to be heard on the application on behalf of the Commonwealth Steamship Owners' Association, but were not called upon.

Cur. adv. vult.

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McTIERNAN J. delivered the following judgment:—

Mr. *Gowans* moves on behalf of the Seamen's Union of Australia for an order nisi directed to the judges of the Commonwealth Industrial Court and Leonard George Matthews with a view to obtaining a writ of prohibition under s. 75 (v.) of the Constitution. The order nisi for which counsel moves would call in question the validity of the Commonwealth Industrial Court; in the alternative it would call in question the jurisdiction of that court to proceed upon nine informations which Matthews laid against the union for contempt of court. The union contends that he had no *locus standi* to lay any of them.

The Commonwealth Industrial Court heard the nine informations together. On 24th May 1957 it found the union guilty upon all of the informations, imposed penalties in three cases and ordered the union to pay the costs of all the informations.

Every contempt of which the court found the union guilty was of the nature of disobedience by it to an order which had been made pursuant either to cl. (a) or (b) of sub-s. (1) of s. 109 of the *Conciliation and Arbitration Act* 1904-1956.

Both of these orders were made at the instance of the Commonwealth Steamship Owners' Association which desired to enforce cl. 38 of the *Seamen's Award* 1955—a prohibition of certain strikes and other practices which would cause interference with work. The union and the association, respectively, are registered pursuant to the Act and each of these organisations and its members are bound by the award.

The *locus standi* of Matthews as informant appears to have rested upon an authority which the Steamship Owners' Association had given him. I am clearly of the opinion that the question whether the *locus standi* of Matthews was satisfactory is merely a question of procedure. The Commonwealth Industrial Court being a superior court of record, it was within its province while exercising the jurisdiction defined in s. 111 of the Act to pass upon the *locus standi* of Matthews. The union's objection to the *locus standi* of Matthews raises no point upon which it could possibly obtain a writ of prohibition. Mr. *Gowans* did not argue this ground of the application. However, it was not formally abandoned. In my opinion, it must be rejected as being beyond the scope of prohibition.

I return to the other ground on which the order nisi is sought. This ground was skilfully argued by Mr. *Gowans* but I am clearly of opinion that it is not tenable. What he argued is that the Parliament created the Commonwealth Industrial Court to exercise

dual functions, some judicial and others non-judicial, and that, therefore, the Parliament offended against the doctrine of *Reg. v. Kirby*; *Ex parte Boilermakers' Society of Australia* (1). Admittedly, the court possesses powers which are judicial. Section 111 is one of these powers.

Provisions of the Act were referred to which, it was argued, confer powers on the court referable to s. 51 (xxxv.) of the Constitution. If this argument about these provisions is wholly or partly true, it does not follow that the court is not validly created and cannot exercise the judicial powers vested in it. Section 15A of the *Acts Interpretation Act* 1901-1950 saved the arbitral powers of the Conciliation and Arbitration Court, the subject of the *Boilermakers' Case* (1), because the primary and dominant purpose or character of that tribunal was arbitral. Mr. *Gowans* argued that what is given to the Commonwealth Industrial Court is a miscellany of powers in which neither the judicial nor the non-judicial element predominates. There is tacit in this argument an assumption that s. 15A is not applicable to preserve the provisions defining the court's strictly judicial jurisdiction. The plan of the present Act is, in my opinion, clear. The Parliament created the Commonwealth Industrial Commission pursuant to its powers under s. 51 of the Constitution; and it plainly intended to create the Commonwealth Industrial Court pursuant to its powers under s. 71 of the Constitution, and to define its jurisdiction according to the requirements of s. 77 (ii.) of the Constitution. Accordingly, arbitral and judicial powers are distributed between the commission and the court respectively.

I think it follows from this legislative plan that, if a power which on examination is found to be strictly judicial, has been assigned by the Parliament to the commission, it is severable under s. 15A; and conversely, if any power conferred on the court is not within the realm of the judicial power, it is invalid and likewise severable. If this is correct, the legislative intention manifested by ss. 98 and 99 of the *Conciliation and Arbitration Act* 1904-1956 is effective; and the Commonwealth Industrial Court is a valid federal court, even though the *Conciliation and Arbitration Act* 1904-1956 purports to attach to its jurisdiction some power which is not within the realm of the judicial power.

I entertain no doubt that the jurisdiction which is defined by s. 111 of the Act is constitutionally vested in the Commonwealth Industrial Court. It was by an exercise of that jurisdiction that the court convicted the Seamen's Union of the contempts and

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made the orders for the payment of penalties and costs, from which the union seeks relief by this application. No ground is shown for doubting that the Commonwealth Industrial Court had jurisdiction to convict the union upon any of the informations laid by Matthews and thereupon to make the orders of which the union complains. I therefore refuse the application.

It was brought by an *ex parte* motion. When Mr. *Gowans* moved the Court, Mr. *Wallace* applied for leave to be heard. I do not find it necessary to trouble him to argue any question.

From this decision the applicant appealed to the Full Court. The arguments addressed to the Court on behalf of the appellant appear sufficiently in the judgment of the Court hereunder.

Gregory Gowans Q.C. and *F. C. Hutley*, for the appellant.

G. Wallace Q.C. and *R. L. Gilbert*, for the respondents Matthews and the Commonwealth Steamship Owners' Association, were not called upon.

D. I. Menzies Q.C. and *J. McI. Young*, appeared on behalf of the judges of the Commonwealth Industrial Court against whom the order nisi was sought; also on behalf of the Attorney-General of the Commonwealth to seek leave to intervene, should it become necessary. They were not called upon.

Cur. adv. vult.

Sept. 12.

THE COURT (DIXON C.J., WILLIAMS, WEBB, KITTO AND TAYLOR JJ.) delivered the following written judgment:—

This is an appeal from an order of *McTiernan* J. refusing an application made *ex parte* for a writ of prohibition. The appeal was instituted by the applicant pursuant to O. 70, r. 27 of the *Rules* of the High Court. The writ of prohibition was sought against an order of the Commonwealth Industrial Court made on 24th May 1957, adjudging the applicant guilty of contempts of that court consisting in acts or omissions contrary to certain orders of the court. Fines were imposed in respect of the contempts found to have been committed. Section 111 of the *Conciliation and Arbitration Act* 1904-1956 is expressed to confer upon the Commonwealth Industrial Court the same power to punish contempt of its power and authority as is possessed by this Court in respect of contempts of this Court. The writ of prohibition was sought substantially on the ground that the Commonwealth Industrial

Court is not validly established. The attack was made upon the validity of the provisions establishing the court and conferring jurisdiction upon it. The attack was supported by the contention that the purpose of the legislature, as disclosed by the Act, in setting up the court was to invest it with a conglomerate mass of powers and authorities some only of which fell within the judicial powers of the Commonwealth, that there was no predominant intention to give it judicial power and that, in spite of the provisions of the Act which set it up in apparent conformity with ss. 71 and 72 of the Constitution, it was in fact a body established for the purpose of the fulfilment of functions conferred without regard to the question whether by their nature they fell within the judicial power of the Commonwealth or outside that power. In short, it was said that the Commonwealth Industrial Court was a body established for the fulfilment of purposes of a mixed character and the learned counsel explained away the establishment of the court under ss. 71 and 72 by saying that only because some of them happened to be judicial had the legislature given it the status of a court and provided the judges with a tenure satisfying the requirements of s. 72 of the Constitution.

In support of this argument a number of sections was examined with a view of showing that they conferred or included power or authority which fell outside the judicial power of the Commonwealth. In particular, it was said that the following sections of the *Conciliation and Arbitration Act* 1904-1956 conferred an authority falling outside Chap. III of the Constitution: viz. ss. 134, 112, 109 (1) (c), 144, 159, 161, 165, 167, 107, 140 and 143. We are by no means prepared to say that in the case of each of these provisions the contention that it fell outside the conception of federal judicial power was made out. But as we are unable to agree with the basal conception upon which the argument is based we think that the proper course is to avoid any unnecessary discussion of the characterisation of the provisions of these various sections as belonging or not belonging to judicial power. We think that, however the argument may be stated, in the result it comes back to a contention that in the powers conferred upon the Commonwealth Industrial Court some non-judicial powers are included and that there is no sufficient indication in the Act to show which in the view of the legislature is the principal and which is the accessory set of provisions, the provisions within the judicial power or the provisions outside the judicial power. On the footing that you cannot tell which is the principal and which is the accessory set of provisions it is said that it is impossible to say whether the judicial powers

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are to be held good and capable of exercise by a validly created court or the non-judicial powers are to be held good and the judicial powers are to be severed from them so that the creation of the court as a federal court is not to be referred to Chap. III of the Constitution and is not effectual to enable the tribunal to receive a grant of any part of the judicial power of the Commonwealth.

We think that it is simply not correct to treat the establishment of the court and its investment with judicial power as well as with powers possibly going outside Chap. III as providing no basis for saying that the intention of the legislature to set up the tribunal as a federal court and arm it with judicial powers was paramount. By ss. 98, 99, 100, 102 and 103 the Commonwealth Industrial Court is clearly established in pursuance of ss. 71 and 72 of the Constitution and with the object of its being another federal court of the Commonwealth capable of receiving judicial power. Jurisdiction forming part of the judicial power of the Commonwealth is immediately conferred upon the court by ss. 108, 109 (1) (a) and (b), 110, 111, 113, 115, 116 and, as we think, by s. 107, although that was disputed. Judicial power is conferred upon it also by s. 119 (1).

It appears to us to be quite clear that the purpose of establishing the court was to enable it to exercise these powers and whatever other judicial powers have been conferred. If upon a proper examination of some of the provisions conferring powers that are now said to be non-judicial they are hereafter found to be outside the judicial power of the Commonwealth, those provisions should be treated as severable. We do not agree that the history of the legislation is of no importance. We think that the fact that it was passed after the decision of this Court in *Reg. v. Kirby; Ex parte Boilermakers' Society of Australia* (1) the judgment in which was pronounced on 2nd March 1956, is confirmatory of the view which we have expressed. But independently of that consideration the character of the statute (No. 44 of 1956) by which the *Conciliation and Arbitration Act* 1904-1956 was brought into its present form provides abundant evidence of the intention to establish a Commonwealth Industrial Court for the purpose of exercising judicial power even if some of the functions conferred upon it may in truth go outside Chap. III of the Constitution. It is unnecessary to go over the provisions of the Act. It is enough to refer to Pt. III containing a complete legislative scheme for dealing with industrial matters falling within the main purpose of s. 51 (xxxv.) of the Constitution and to the separation of those powers from those

conferred on the Industrial Court, to the fact that the Industrial Court was set up under ss. 71 and 72 of the Constitution and to the particular provisions which we have mentioned conferring upon the Industrial Court its main judicial powers. When you look at the powers of the Commonwealth Industrial Court which it is said go beyond the judicial power of the Commonwealth it will be seen that they are of a kind which the legislature might well have thought appropriate to a judicial tribunal and are not manifestly and clearly of an industrial or arbitral character. We think that it is quite plain that in the light of the decision of the Court in *Reg. v. Kirby*; *Ex parte Boilermakers' Society of Australia* (1) the legislature attempted to set up a new court for the judicial enforcement of the provisions of the Act and of the award and for the exercise of other judicial functions arising out of the *Conciliation and Arbitration Act*. On the assumption that provisions conferring authority upon the court are found which do go outside Chap. III of the Constitution we think it is quite clear that the only result is that they must be severed as bad and that the Commonwealth Industrial Court is validly established and remains in possession of the judicial powers conferred on it by the Act.

At the conclusion of the argument for the appellant we intimated that we would dismiss the appeal and reserve our reasons. An application for costs was made which we said we would consider. We can see no reason why the appeal should not be dismissed with costs. The order will be appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Sullivan Bros.*

Solicitors for the respondents Matthews and the Commonwealth Steamship Owners' Association, *Malleon Stewart & Co.*, Melbourne, by *Allen, Allen & Hemsley*.

Solicitors for the judges of the Commonwealth Industrial Court and the Attorney-General of the Commonwealth, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

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