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

Solicitor for the respondent Chief Judge and Judges of the Commonwealth Industrial Court and for the Attorney-General of the Commonwealth, intervening by leave, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the Commonwealth Steamship Owners' Association and other employers of the prosecutors intervening by leave, *Malleson Stewart & Co.*, Melbourne, by *Allen, Allen & Hemsley.*

Solicitor for the respondent Buchan, *Bruce Miles.*

R. A. H.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

Ex parte AUSTRALIAN BUILDERS' LABOURERS' FEDERATION

H. C. OF A. 1957.

SYDNEY, *Aug.* 13, 14; *Nov.* 22.

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

Constitutional Law (*Cth.*)—*Industrial law*—*Commonwealth Industrial Court*—*Statutory provisions*—*Industrial organisation*—*Rules*—*Allowance or disallowance by court*—*Power of court*—*Judicial or non-judicial*—*Validity*—*Prohibition*—*The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxv.*), (*xxxix.*), 76 (*ii.*), 77 (*i.*)—*Conciliation and Arbitration Act* 1904-1956, *s.* 140.

Section 140 of the *Conciliation and Arbitration Act* 1904-1956 provides, by sub-s. (1) that the Commonwealth Industrial Court may upon its own motion or upon application made under the section, disallow any rule of an organisation which in the opinion of the court (*a*) is contrary to law, or to an order or award; (*b*) is tyrannical or oppressive; (*c*) prevents or hinders members of the organisation from observing the law or the provisions of an order or award; or (*d*) imposes unreasonable conditions upon the membership of any member or upon any applicant for membership, and any rule so disallowed shall be void. By sub-s. (2) a right is given to any member of an organisation to apply to the Commonwealth Industrial Court for the disallowance of a rule; and by sub-s. (3) that court is given a discretion to direct the organisation to alter the offending rule, disallowing the rule only in the event of a failure to comply with the direction.

Held by *Dixon* C.J., *McTiernan*, *Kitto* and *Taylor* JJ., *Williams* and *Webb* JJ. dissenting following *Consolidated Press Ltd.* v. *Australian Journalists' Association* (1947) 73 C.L.R. 549, that the power intended to be conferred by s. 140 is not part of the judicial power and inasmuch as the Commonwealth Industrial Court is a federal court exercising the judicial power of the Commonwealth as was decided in *Seamen's Union of Australia* v. *Matthews* (1957) 96 C.L.R. 529 the attempt by s. 140 to confer the power on that court is invalid.

PROHIBITION

Upon an application made on behalf of the Australian Builders' Labourers' Federation *McTiernan* J., on 20th June 1957, granted an order nisi for a writ of prohibition directed to the Honourable John Armstrong Spicer, the Honourable Edward Arthur Dunphy and the

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Honourable Sir Edward James Renembe Morgan, Judges of the Commonwealth Industrial Court, and Stanley Winter—a financial member of the federation—prohibiting them and each of them from proceeding further: (1) in the matter B 54 of 1957 in the Commonwealth Industrial Court which was in respect of an application by the said Stanley Winter under s. 140 of the *Conciliation and Arbitration Act* 1904-1956 that rr. 10 and 4 (h) of the Branch and Sub-Branch Rules of the Australian Builders' Labourers' Federation, and r. 6 (j) of the rules of that federation be disallowed on the grounds that the said rules were tyrannical oppressive and impose unreasonable conditions upon the membership of the members; and (2) upon a rule to show cause made in the said matter by the said Honourable Edward Arthur Dunphy.

The grounds upon which the prohibition was sought were: 1 (a) that the Commonwealth Industrial Court is a court created by the Parliament of the Commonwealth under Chap. III of the Constitution of the Commonwealth; (b) that the proceedings in respect of which prohibition is sought are brought under s. 140 of the *Conciliation and Arbitration Act* 1904-1956 which purports to confer certain non-judicial power upon the Commonwealth Industrial Court; (c) that the purported conferring of such non-judicial power on the Commonwealth Industrial Court as constituted under the said Act is contrary to the Constitution of the Commonwealth; (2) s. 104 of the *Conciliation and Arbitration Act* 1904-1956 is *ultra vires* the Parliament of the Commonwealth and invalid in that the jurisdiction which the section purports to vest in the Commonwealth Industrial Court is not part of the judicial power of the Commonwealth or incidental or ancillary to the exercise by the court of any of its judicial functions and accordingly the court has no jurisdiction to make any order in that matter.

Further facts and relevant statutory provisions appear in the judgments hereunder.

E. S. Miller Q.C. (with him *L. K. Murphy*), for the prosecutor. Section 140 of the *Conciliation and Arbitration Act* 1904-1956 is *ultra vires* Chap. III of the Constitution. This Court held in *Consolidated Press Ltd.* v. *Australian Journalists' Association* and *Penton* v. *Australian Journalists' Association* (*Penton's Case*) (1) that the orders made under the then s. 58D, or under the then s. 60 and refusals to make orders under that section were not an exercise of judicial power and therefore no appeal lay from such order or

(1) (1947) 73 C.L.R. 549.

refusal to the High Court under s. 73 of the Constitution and s. 31 of the *Conciliation and Arbitration Act.* Section 58D, as it then stood, is exactly in the form of s. 140 except that by Act No. 10 of 1947 sub-s. (3) was added to s. 140. The jurisdiction authorised by s. 140 is in every respect non-judicial and the combination of judicial and non-judicial functions, the latter being not ancillary or incidental to judicial functions, is the one body in fact. [He referred to *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1), on appeal *Attorney-General of the Commonwealth of Australia* v. *The Queen* (2).] The question of whether a rule is contrary to an order or award is not a judicial question. It may be interpretation to an extent but the jurisdiction being exercised is to disallow or to strike out the rule. The jurisdiction sought to be given under s. 140 is actually to deal with the subject matter contained in the rules. From the constitution of the court it is clear that the court is constituted as a court in exercise of the power under Chap. III. It is part of the machinery for the prevention and settlement of industrial disputes that there should be registered organisations and they should have rules registered by the court, and that there should be, from time to time, a consideration of their rules and of the question whether such rules are tyrannical, oppressive and impose unreasonable conditions, and whether orders should be made or action taken to remould or refashion those rules. In *Penton's Case* (3) the Court, applying reasoning from earlier cases held that the power given by s. 58D was administrative or executive, not judicial. This Court will not review *Penton's Case* (4) particularly in the situation where the important question of separation of powers applies, with particular reference to the exercise by the appointed body of the power with respect to conciliation and arbitration.

[DIXON C.J. referred to *Re MacSween*; *Ex parte Fraser* (5).]

[TAYLOR J. referred to *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (6).]

Penton's Case (3) is an authoritative decision as to the nature of the power and of the function given to the body which exercises it under s. 58D, and now s. 140, and in view of the decision in *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (7) it follows

(1) (1956) 94 C.L.R. 254.
(2) (1957) A.C. 288, at pp. 311-318; (1957) 95 C.L.R. 529, at pp. 537-543.
(3) (1947) 73 C.L.R. 549.
(4) (1947) 73 C.L.R., at pp. 558-560, 564.
(5) (1956) 100 C.L.R. 273.
(6) (1943) 67 C.L.R. 25.
(7) (1956) 94 C.L.R. 254; (1957) A.C. 288; (1957) 95 C.L.R. 529.

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as a matter of logical sequence that s. 140 should be pronounced invalid for the same reason.

[McTIERNAN J. referred to *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (1).]

D. I. Menzies Q.C. (with him *J. McI. Young*), by leave addressed the Court on behalf of the Commonwealth. Section 140 is valid because the jurisdiction it confers is part of the judicial power of the Commonwealth. The 1956 Act accepts the judgment of the Court in the *Boilermakers' Case* (2) dividing the old functions of the court in two. When Parliament in s. 98 of this Act says " There shall be a Federal Court " it is validly exercising the power conferred upon it by s. 71, and when that is coupled with the grant of judicial power it follows that there is a court in which there has been vested a part of the judicial power of the Commonwealth. One of the considerations that influenced the Court in *Re MacSween; Ex parte Fraser* (3) to say that s. 141 was a grant of judicial power was that the tribunal to which that power was given was itself a court.

[McTIERNAN J. referred to *Reg.* v. *Davison* (4).]

The power itself takes colour from the body to whom Parliament entrusts it; if a power of this sort were entrusted to a non-judicial tribunal it would be legitimate, perhaps, to regard it as a non-judicial power; on the other hand, if it were entrusted to a judicial tribunal it would be proper to regard it as a judicial power: *Re MacSween*; *Ex parte Fraser* (3). It should be accepted that the Commonwealth Industrial Court is a court (*Reg.* v. *Spicer*; *Ex parte Seamen's Union of Australia* (5)) and exercises part of the judicial power of the Commonwealth to which appeals might be brought from State courts. In *Australian Iron and Steel Ltd.* v. *Australasian Coal and Shale Employees' Federation* (6) the Commonwealth Industrial Court, having considered the question under Chap. III, decided that it was a court. That gives colour to the jurisdiction which is conferred by s. 140 (*Federal Commissioner of Taxation* v. *Munro* (7)). The authority of what is there said is not detracted from by anything in the decision of this Court or of the Privy Council in the *Boilermakers' Case* (8). An illustration

(1) (1943) 67 C.L.R., at p. 35.
(2) (1956) 94 C.L.R. 254.
(3) (1956) 100 C.L.R. 273.
(4) (1954) 90 C.L.R. 353.
(5) (1957) 96 C.L.R. 341.
(6) (1957) L.B. Co.'s Indus. Arb. Serv.; Current Review 131: 18th August 1957: Cth. Ind. Court (*Spicer* C.J., *Dunphy* and *Morgan* JJ.)
(7) (1926) 38 C.L.R. 153, at pp. 175, 177, 178.
(8) (1956) 94 C.L.R. 254; (1957) A.C. 288; (1957) 95 C.L.R. 529.

is what Parliament has done under s. 47 of the Constitution. That is a valid grant of power. In the hands of this Court something is judicial which would not be judicial if done by a House of Parliament itself; the difference principally is the character of the body or tribunal to which the power is entrusted: see e.g., s. 95 of the *Patents Act* 1903-1950. In exercising the power, having regard to the character of the body to whom it is entrusted, there is an exercise of the judicial power and the normal constitutional provisions with regard to appeals would operate. One can look to the character of the body that is entrusted with particular powers as a way of assisting to determine what is the character of the powers themselves (*Reg.* v. *Davison* (1)). It is conceded that the things that s. 140 entrusts to the court are essentially of an arbitral character and that the mere reposing of those functions in a court cannot convert them into judicial functions. If it be merely the sort of power which, if entrusted to a non-judicial body is non-judicial then the character of the functionary is of great significance and there is nothing in any part of this section that disqualifies it from being classified as judicial power. Between 1918 and 1926 the court had lost all its judicial functions and that circumstance, doubtless, weighed with the court in determining that the cancellation of the registration of a union should be regarded as non-judicial rather than judicial. An informative collection of cases where a power may be either judicial or non-judicial, according very much as to whether or not it is given to a court or another body appears in the *Boilermakers' Case* (2). In a case where a standard was not provided, the court itself provided a standard that it would be just and equitable to order judicial management (*Insurance Commissioner* v. *Associated Dominions Assurance Society Pty. Ltd.* (3): see also the observations by the Chief Justice on the application for an order nisi in *Re MacSween*; *Ex parte Fraser* (4)).

[DIXON C.J. referred to *Barrett* v. *Opitz* (5).]

The actual decision in *Re MacSween*: *Ex parte Fraser* (4) is not of any significance here because what the court relied upon was the legislature acting upon decisions of this Court. Here the legislature has acted on the footing either that there is now a difference that makes *Penton's Case* (6) inapplicable or that the minority view in *Penton's Case* (6) was to be preferred. Section 140 empowers the court to disallow rules of an organisation by reference to prescribed standards. In effect it empowers the court to disallow

(1) (1954) 90 C.L.R., at pp. 366-368, 371, 388, 389.
(2) (1956) 94 C.L.R., at pp. 333-336.
(3) (1953) 89 C.L.R. 78.
(4) (1956) 100 C.L.R. 273.
(5) (1943) 70 C.L.R. 141.
(6) (1947) 73 C.L.R. 549.

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any rule not conforming with those standards, and in such event the power would be a judicial power. [He referred to ss. 5, 210 of the *Companies Act* 1948 (Imp.).] There is nothing in s. 140 (1) (*b*) or the *High Court Rules* that provides a standard that is beyond the capacity of a court to apply. The *Boilermakers' Case* (1) does not require that the powers which are normally in other jurisdictions conferred upon courts cannot be conferred upon Chap. III courts, and the phrase " the judicial power of the Commonwealth " should be construed in as comprehensive a manner as is possible so that this Court and the other federal courts will not be deprived of the sort of jurisdiction commonly given to courts and which has been part of the grant to courts for generations. The precise language of s. 140—including sub-s. (1) (*a*), (*b*), (*c*) and (*d*)—shows there is nothing in any of those standards that are prescribed that cannot be regarded as proper matters for judicial application. Much more precise standards are to be found in s. 140 than were to be found in the legislation considered in *Steele* v. *Defence Board Retirement Benefits Board* (2). The Court decided *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No.* 4 *Ltd.* (3) on the footing that the power there sought to be conferred was judicial power. The statements on the pages indicated show that such a power as this respondent contends is conferred by s. 140 is in its nature judicial. The presence of the word " may " in s. 140 (1) is significant. An unusual provision in relation to judicial power is that the court may act upon its own motion. Neither of those circumstances nor those two taken in conjunction mean that the power which is conferred by s. 140 is not judicial power. " May " in that section is equivalent to " shall " on the principle of *Julius* v. *Lord Bishop of Oxford* (4). There is a duty to exercise the power that is conferred, and this is the type of case where that interpretation might be put upon the word " may ". The word " may " perhaps is there because of the following words. If the word " may " is permissive in its strict sense here, that merely gives the court a discretion and the existence of a discretion is certainly no bar to a finding that the court has judicial power conferred upon it. In certain circumstances courts do act upon their own motion e.g., in contempt proceedings. A power to act of its own motion is in no way inconsistent with it exercising judicial power. The court in this case is not acting upon its own motion. If, however, the words are objectionable it could be a proper case for

(1) (1956) 94 C.L.R. 254; (1957) A.C. 288; (1957) 95 C.L.R. 529.
(2) (1955) 92 C.L.R. 177, at pp. 182, 185, 186.
(3) (1943) 67 C.L.R., at pp. 45, 52.
(4) (1880) L.R. 5 App. Cas. 214.

the application of s. 15A of the *Acts Interpretation Act* 1901-1950 to strike them out of the section. Looking at s. 140, both generally and in detail, there is here a case where were the court not confronted with authority which might constrain it to decide differently; that it would say that what Parliament has sought to do and what Parliament has done is to confer part of the judicial power of the Commonwealth upon the courts. *Penton's Case* (1) is distinguishable; alternatively, if not distinguishable the judgment of the minority in that case should be preferred. It is distinguishable not upon any change in the language but upon a change in the repository of the power. In *Penton's Case* (1) what the Court was considering was the character of a power in the hands of a tribunal which had two categories of power. Some reliance was there placed upon the earlier decisions of the Court in *Australian Commonwealth Shipping Board* v. *Federal Seamen's Union of Australasia* (2). The last-mentioned case did not deal with the disallowance of rules but it dealt with the deregistration of an organisation, the same power as is now conferred by s. 143, and arose at a time when the Arbitration Court did not have any judicial power. The registration of organisations is the exercise of non-judicial power in exactly the same way as the registration of a company is a non-judicial power. There is a presumption that power to deregister if conferred upon a court is judicial even if the actual registration was a non-judicial act. Where there is a power to deregister in a court the deregistration proceedings are usually judicial; where there is a power to deregister outside a court the deregistration proceedings are usually non-judicial. Section 143 confers what in the court is a judicial power, namely by reference to the provisions that are there laid down to determine whether or not an organisation should remain registered. Whether the power to disallow rules is judicial or non-judicial depends upon two things: (1) upon the character of the tribunal to which it has been entrusted and; (2) whether the legislature has itself provided standards. It does not follow as a matter of logic that a power to quash rules or disallow rules is non-judicial because a power to deregister is non-judicial. Whereas in *Penton's Case* (1) the power in s. 140 could be regarded as ancillary to the duty of the Court to maintain industrial peace, &c., that is just impossible now because the Commonwealth Industrial Court has no duty to maintain industrial peace. That has all gone to the commission. The duty of that court is to expound and apply the law. And whereas in *Penton's Case* (1) it was quite possible to treat this power as an appendage to a general duty to promote industrial

(1) (1947) 73 C.L.R. 549. (2) (1925) 36 C.L.R. 442.

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peace and to lay down industrial conditions, that cannot be treated now as an appendage to that because there is no such power to which it can be appended. The power in s. 140 is judicial and there is nothing else to give it any different colour as there was in *Penton's Case* (1). It is a substantive grant of power which must take its colour from its own provisions and from nothing else.

[DIXON C.J. referred to s. 135.]

The judicial power is not to be construed narrowly or in any pedantic sense; it is a wide power and it should comprehend all the powers that courts have historically exercised as part of their ordinary jurisdiction: *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (2).

[McTIERNAN J. referred to *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3).]

This court is intended to be a court of law and although it is established under a statute which at the same time establishes the commission, care has been taken by Parliament to ensure that the functions of the court are all the exercise of judicial power. It is immaterial that it is judicial power that arises out of industrial law. The Commonwealth Industrial Court is not a court that exercises any discretion by reference to industrial matters. It is a court which, *inter alia*, construes and enforces awards. Parliament intends that the Commonwealth Industrial Court should act as a strict court of law. Where the court is entrusted with a discretion it is required to exercise its discretion having regard to judicial standards and no others.

R. J. McConnell, for the respondent Winter.

E. S. Miller Q.C., in reply.

Cur. adv. vult.

1957, Nov. 22.

The following written judgments were delivered:—

DIXON C.J. The question we are called upon to decide is whether s. 140 of the *Conciliation and Arbitration Act* 1904-1956 is valid. Section 140 purports to confer upon the Commonwealth Industrial Court power to disallow a rule of an industrial organisation registered under the Act if the rule is in the opinion of that court open to any of certain enumerated objections. The question is raised before us by an order nisi for a writ of prohibition directed to the judges of the Commonwealth Industrial Court and to a member of an organisation who has applied to that court for an order under s. 140

(1) (1947) 73 C.L.R. 549.
(2) (1956) 94 C.L.R. 254.
(3) (1925) 36 C.L.R., at pp. 462, 463.

disallowing certain rules of the organisation. The organisation is the Australian Builders' Labourers' Federation, and it was upon that body's application to a judge of this Court that the order nisi for a writ of prohibition was granted.

It is unnecessary fully to state the provisions of those rules of the organisation the disallowance of which is sought at the hands of the Commonwealth Industrial Court. It is enough to say that the complaint against the rules is that they have the effect of requiring the payment of annual subscriptions during the month of December of each year or, if the subscription is paid in half-yearly instalments, during the months of June and December, on pain of loss of all privileges of membership, including of course the right to vote at the election of office bearers. It is said that the offices of the organisation are closed during the last eight days of every December, as are many of the places of employment where members work. For that and other reasons the greater number of members pay their subscriptions after 31st December and are accordingly treated as ineligible to vote.

The application to the Commonwealth Industrial Court for a disallowance of the rules is made upon the grounds that they are tyrannical, oppressive and impose unreasonable conditions upon the membership of the members. These grounds are expressed in the language of pars. (*b*) and (*d*) of sub-s. (1) of s. 140. Section 140 (1) says that that court may, upon its own motion or upon application made under the section, disallow any rule of an organisation which in the opinion of the court (*a*) is contrary to law, or to an order or award, (*b*) is tyrannical or oppressive, (*c*) prevents or hinders members of the organisation from observing the law or the provisions of an order or award; or (*d*) imposes unreasonable conditions upon the membership of any member or upon any applicant for membership, and any rule so disallowed shall be void.

By sub-s. (2) a right is given to any member of an organisation to apply to the Commonwealth Industrial Court for the disallowance of a rule. By sub-s. (3) that court is given a discretion to direct the organisation to alter the offending rule, disallowing the rule only in the event of a failure to comply with the direction.

This Court has held that the Commonwealth Industrial Court is validly established by Act No. 44 of 1956 as a federal court exercising part of the judicial power of the Commonwealth: *Seamen's Union of Australia* v. *Matthews* (1). But in so deciding this Court did not hold that all the powers or authorities which Act No. 44 of 1956 purported to confer upon the new court fell within the judicial

(1) (1957) 96 C.L.R. 529.

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power of the Commonwealth and could validly be vested in a federal court established under Chap. III of the Constitution for the exercise of some part of the judicial power with which that chapter deals. The decision does not therefore stand in the way of the attack now made upon the validity of s. 140. That section was mentioned in the judgment among a list of sections which in that case were alleged to fall outside the judicial power of the Commonwealth. While we stated that we were by no means prepared to say that in the case of each of the provisions in the list the contention that it fell outside the conception of judicial power was made out, at the same time we expressly avoided any discussion of the characterisation of the provisions of the various sections in the list comprising s. 140 as belonging or not belonging to judicial power.

The provisions of s. 140 (1) and (2) were introduced into the legislation as s. 58D by s. 48 of Act No. 18 of 1928. Sub-section (3) of s. 140 was added by Act No. 10 of 1947, but as a subsequent and severable provision little seems to turn upon it for present purposes. It is still the same section, though, owing to the very inconvenient practice of renumbering the sections of the Act, it passed some years of its now challeged existence as s. 80 (see the Second Schedule of Act No. 10 of 1947) and now it is to be called s. 140 (see the First Schedule of Act No. 44 of 1956). These aliases cannot however deprive it of its identity. But in the meantime the interpretation section has changed its operation or application. In 1928 the words "the Court" which the section employs meant by definition the Commonwealth Court of Conciliation and Arbitration: s. 4 of the Commonwealth *Conciliation and Arbitration Act* 1904-1928. And that remained the meaning of the words until the passing of Act No. 44 of 1956 by which the Commonwealth Industrial Court was created. By s. 6 of that Act the definition of the court in s. 4 of the principal Act was replaced and the words were defined to mean the Commonwealth Industrial Court created by the Act. This of course meant a transfer from the old to the new court of the power described in the section. The difficulty which such a simple method of bodily transfer occasions comes of the fact that the provision was drafted without any attempt to distinguish between judicial power and the kind of authority lying outside Chap. III which may be conferred on a body under s. 51 (xxxv.) of the Constitution and doubtless without any belief that the distinction possessed any relevant importance. But the simple transfer was made after the decision of this Court in *Reg.* v. *Kirby*: *Ex parte Boilermakers' Society of Australia* (1) from which it appeared that the distinction

(1) (1956) 94 C.L.R. 254.

had proved vital. The new Commonwealth Industrial Court was established by the same Act in order, so it would seem, that the distinction might be observed. It meant there would be a special court for the exercise of a certain portion of the judicial power of the Commonwealth which the Parliament might confer under a combination of s. 51 (xxxv.) and (xxxix.) and ss. 76 (ii.) and 77 (i.) of the Constitution. A consequence of that however is that powers cannot be validly conferred upon the new court which go outside the conception of judicial power and what is incidental to it in the very wide sense explained in *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1); *Queen Victoria Memorial Hospital* v. *Thornton* (2) and *Reg.* v. *Davison* (3).

Unfortunately while the power described by s. 140 was one which, according to the definition in s. 4 of the Act, belonged to the Commonwealth Court of Conciliation and Arbitration it was declared judicially to be no part of the judicial power of the Commonwealth. The necessity of deciding whether or not the power described by s. 140 formed part of the judicial power of the Commonwealth arose out of the fact that for a considerable period, to be precise from Act No. 43 of 1930 to Act No. 10 of 1947, s. 31, as the provision now recast as s. 60 used to be called, failed to exclude an appeal from the Commonwealth Court of Conciliation and Arbitration to this Court, assuming such an appeal would lie under s. 73 (ii.) of the Constitution. In *Jacka* v. *Lewis* (4) this Court (*Latham* C.J., *Rich* and *Starke* JJ., *McTiernan* J. dissenting) held that an appeal would so lie from a judicial order of the Court of Conciliation and Arbitration. In *Consolidated Press Ltd.* v. *Australian Journalists' Association* (5) an appeal was instituted in purported pursuance of this ruling against an order or orders of the Commonwealth Court of Conciliation and Arbitration. The order or orders dismissed certain applications to that court. One such application was made under the provisions now contained in s. 140. It was objected that from such an order an appeal did not lie under s. 73 (ii.) of the Constitution because the power invoked by the applications formed no part of the judicial power of the Commonwealth. The objection was upheld by the Court (*Latham* C.J., *Starke* and *McTiernan* JJ., *Rich* and *Williams* JJ. dissenting). In *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (6) the Court

(1) (1956) 94 C.L.R., at pp. 278-280; (1957) A.C. 288, at p. 319; (1957) 95 C.L.R. 529, at p. 544.
(2) (1953) 87 C.L.R. 144, at pp. 151, 152.
(3) (1954) 90 C.L.R. 353, at pp. 366-370, 381, 382.
(4) (1944) 68 C.L.R. 455.
(5) (1947) 73 C.L.R. 549.
(6) (1925) 36 C.L.R. 442.

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had decided that the power of cancelling registration of an organisation contained in s. 60 of the Act 1904-1921 (its counterpart is now s. 143 of the Act 1904-1956) formed no part of the judicial power of the Commonwealth. In his reasons for this conclusion *Isaacs* J. had said: " The creation and equipment of representative organizations both of employers and employees is an incident to the power in s. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power . . . . Parliament may adopt them as part of its mechanism. That mechanism can be made or unmade at the will of Parliament. It may be moulded, refashioned, or abolished in any manner indicated. The step of establishing an organization may be retraced at any point and, for any reason declared by the Act, by any officer in whom Parliament places confidence for the purpose and to whom it gives the necessary discretion " (1). *Latham* C.J. and *McTiernan* J. in their joint judgment in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (2) applied the views expressed in this passage to the power described by s. 58B, now s. 140. Their Honours said : " The disallowance of a rule of an organization is a moulding or refashioning of the organization. The procedure is part of the procedure which is described as not judicial in the constitutional sense. An order under s. 58D disallowing a rule, or a refusal to make such an order, is therefore not a judicial order " (2). *Starke* J. appears to have adopted the same view. The material passage in his Honour's judgment which shows this follows a reference to the fact that under Act No. 22 of 1926 the tenure of office required by s. 72 of the Constitution was conferred on the judges of the Commonwealth Court of Conciliation and Arbitration and that judicial functions had been acquired by that court. The passage continues:—" But this did not convert the arbitral functions of the Court and the provisions of the Act relating to the registration and cancellation of organizations and the disallowance of their rules into judicial functions. Such provisions as I said in the *Shipping Board Case* (3) were 'in no sense an exercise of the judicial power of the Commonwealth' " (4). The passage in his Honour's reasons in the *Shipping Board Case* from which *Starke* J. quoted is this:—" But if the Parliament has authority under the arbitration power to permit the registration and incorporation of organizations, then that power necessarily extends to the control and regulation of those organizations, and to the cancellation or suspension of the registration or incorporation

(1) (1925) 36 C.L.R., at pp. 453, 454.
(2) (1947) 73 C.L.R., at p. 560.
(3) (1925) 36 C.L.R., at p. 463.
(4) (1947) 73 C.L.R., at p. 564.

in such manner and by such means as Parliament provides. Provisions to that end are in no sense an exercise of the judicial power of the Commonwealth " (1).

Bearing the stamp of this characterisation, without any change in the provisions delimiting and describing the power, the power has been transferred bodily to a court created under ss. 71 and 72 of the Constitution and armed with judicial powers. Why this course was taken we cannot know. Perhaps the decision in the case of *Consolidated Press Ltd.* v. *Australian Journalists' Association* (2) escaped notice; and that may be true too of the decision in the *Shipping Board Case* (3) as to the power to cancel registration. If the characterisation was correct and it remains true of the power after the transfer, then the provision must be invalid. As to the correctness of the characterisation, it is proper to say that a close examination of the provision suggests additional reasons in support of it. In the first place the draftsman of s. 140 has not approached his task as if he were giving jurisdiction over a " matter " in accordance with s. 76 (ii.) of the Constitution. Provided the necessary existence of a " matter " can be extracted from the nature of the power or authority given or from the terms in which it is given or from the implications, that might not be fatal. The question was discussed in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett*; *Barrett* v. *Opitz* (4) and in *Hooper* v. *Hooper* (5). But while, if the conditions stated are fulfilled, it is possible that the legislative power given by s. 76 and by s. 77 (i.) and (iii.) may be validly exercised by an enactment expressed in terms of authorisation or empowering, it is more natural to treat a provision so expressed as an exercise of some other legislative power. In the next place the fact that the court is authorised to act of its own motion tells rather strongly against the view that it is intended to exercise part of the judicial power of the Commonwealth. Again, this is not necessarily decisive: for clearly there may be " matters " for judicial decision where a court exercising judicial powers must act of its own motion, as for example in the case of certain contempts. But these are special cases. In the third place, you find the word " may " employed in conferring the power and that is apt enough if it were intended to give a complete discretion based wholly on industrial or administrative considerations. Sub-section (3), though otherwise of little importance in

(1) (1925) 36 C.L.R., at p. 463.
(2) (1947) 73 C.L.R. 549.
(3) (1925) 36 C.L.R. 442.
(4) (1943) 70 C.L.R. 141, at pp. 164-169.
(5) (1955) 91 C.L.R. 529, at pp. 535-538.

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the question, does lend some support to this interpretation of the provision.

In the fourth place, the criteria set by pars. (*b*), (*c*) and (*d*) are vague and general and give much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial decision. Parenthetically, it may be remarked that the meaning is by no means self-evident of the expression "impose unreasonable conditions upon the membership of any member".

Having regard to the foregoing considerations it is difficult to see any safe ground upon which we can now proceed to treat the transfer of the power described in s. 140 to the new Commonwealth Court as involving an entire change in the meaning and effect of the provision so that the decision in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (1) no longer holds and the provision takes on the character of a grant of portion of the judicial power of the Commonwealth. It is a great deal to spell out of the change in the definition of court. The words "upon its own motion" are still there. It is hardly possible to treat those words as simply going beyond power and having no other effect and then with the aid of s. 15A of the *Acts Interpretation Act* to disregard them altogether. If this could be done the path might be less impossible. For had it not been for those words it might conceivably have been considered a permissible course to treat the word "may" as meaning no more than to grant a power or jurisdiction. If that had been possible, then perhaps its exercise would become obligatory upon the new court and not discretionary, once the jurisdiction was invoked and the requisite conditions were satisfied. But even so, an attempt to construe s. 140 down so that it could assume the shape of a grant of portion of the judicial power of the Commonwealth would seem somewhat heroic. It would appear a bold undertaking even if there had been no decision of the Court fixing the character of the power which it was designed to give the Commonwealth Court of Conciliation and Arbitration. It is true that since the commencement of *S.R.* 1956 No. 60, reg. 115 (1) (i) there has been a prohibition against the adoption by an organisation of a rule offending against any of the criteria expressed in the paragraphs of s. 140 (1). And before that, objections might be taken on the grounds those paragraphs express to the registration of an organisation or to an amendment of its rules. See *S.R.* 1928 No. 81, reg. 10 (2) and *S.R.* 1947 No. 142, reg. 110 (2) (d). This might assist the view that s. 140 did nothing but enforce *ex post facto*

(1) (1947) 73 C.L.R. 549.

the prohibition or objection if it had been infringed, ignored or neglected in the first instance. But even so, there seems no safe ground for giving to s. 140 an entirely new operation. In my opinion we should follow the decision of the Court in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (1) and treat the provision as outside judicial power accordingly. This does not mean that I regard the question whether rules of an organisation should be quashed as necessarily outside the judicial power of the Commonwealth. On the contrary, in my opinion there is no reason why, if by or under statute the rules of an organisation must conform with certain tests or standards of justice, fairness or propriety, jurisdiction to quash the rules might not be conferred upon a federal judicial court by an enactment framed in some form appropriate to s. 76 (ii.) of the Constitution. Nor does it seem to me that the existence of a discretion necessarily takes such a jurisdiction outside judicial power. Of course it must not be an arbitrary discretion; it must be a judicial discretion proceeding upon grounds that are defined or definable, ascertained or ascertainable, and governed accordingly. Needless to say, in other respects the federal enactment must fall within the legislative power of the Commonwealth. The basis of my opinion is that s. 140 was framed as one of the industrial powers of the Commonwealth Court of Conciliation and Arbitration to be exercised at the instance of the court or a member of the organisation independently of any consideration which must govern a judicial determination within Chap. III except that that court should have assured itself that there was a compliance with one or other of the pars. (*a*), (*b*), (*c*) or (*d*) of sub-s. (1) of s. 140. In effect, that is what was decided in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (1) and there is no sufficient reason for refusing to apply that decision. Section 143 is of course not before us for consideration but it is perhaps proper to direct attention to the difficulties occasioned by the *Shipping Board Case* (2).

I think that the order nisi should be made absolute for a writ of prohibition restraining the judges of the Commonwealth Industrial Court from proceeding further with the order to show cause dated 30th May 1957 directed to the Australian Builders' Labourers' Federation.

McTIERNAN J. The question for decision is whether the function defined by s. 140 of the *Conciliation and Arbitration Act* 1904-1956 is a part of the judicial power of the Commonwealth. The nature of

(1) (1947) 73 C.L.R. 549. (2) (1925) 36 C.L.R. 442.

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the function is reform and annulment of a rule of "an organisation" defective according to the standards laid down in the section. An organisation to which the section applies is created by the registration, pursuant to the Act, of an "association". It may be an association of employers or employees. The association is incorporated by its registration under the Act. The effect of incorporation is that it gets a capacity to represent its members for the purposes of the Act. The creation of the organisation is not an end in itself; simply a means of administering the Act and pursuing its objects. *Isaacs* J. said that an organisation is "a public instrument for effectively administering an important statute of public policy for the general welfare"—*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1). It would appear that the function of reforming and annulling a rule of a public agency of this kind is peculiarly one for executive action. "Very special and important rights" said *Griffith* C.J., "are conferred by the Act on a duly registered organization and its members, rights which are not merely rights *inter se* but against the public"—*United Grocers, Tea and Dairy Produce Employees' Union of Victoria* v. *Linaker* (2).

Section 140 enacts that the repository of the power which it defines should be the Commonwealth Industrial Court. The power may be exercised either with or without the form of a *lis* between parties. The section says that the court may disallow any rule of an organisation either on the court's own motion or an application by a member. The power arises if the court is of the opinion that any rule falls within s. 140 (1) (*a*) or (*b*) or (*c*) or (*d*). What is the proper meaning and application of each of these clauses is to be ascertained by canons of legal interpretation. But where the court entertains such opinion the section does not immediately invalidate the subject rule. The function of disallowance consists in a discretionary authority to disallow any rule which is within any of the enumerated descriptions. The court may disallow the rule at once, if its opinion is adverse to the rule. Or, instead of summarily disallowing the rule, the court may direct the organisation to alter it, within a specified time, "so as to bring it into conformity with the requirements of the Act". The court may disallow the rule if its direction is not carried out. There is no avoidance of the rule until the court has ordered that the rule be disallowed. In short, there is involved in s. 140 the power to decide, according to criteria therein enumerated, whether a rule of an organisation is within

(1) (1925) 35 C.L.R. 462, at p. 475. (2) (1916) 22 C.L.R. 176, at pp. 178, 179.

the purview of the section, and, if it is, a discretionary authority to disallow the rule forthwith or upon failure to comply with the direction authorised by the section. The power to decide the initial question is consistent with judicial action but not inconsistent with executive action. The function consisting in the discretionary authority is essentially an operation of improving an administrative instrument and for this reason the exercise of the authority may involve weighing considerations of policy. It follows that the function is not in itself judicial. An order of disallowance under s. 140 could not be tested by legal principles. It would not be really a judicial order.

The contrary view cannot be maintained without overruling *Penton* v. *Australian Journalists' Association* (1). That case was decided under s. 58D of the *Conciliation and Arbitration Act* 1904-1946. Under that provision, the Court of Conciliation and Arbitration was vested with a power to which s. 140 is similar. The case was decided upon the basis that by reason of Act No. 22 of 1926, the Court of Conciliation and Arbitration could constitutionally exercise the arbitral and strictly judicial powers that the Parliament had conferred on it. Section 58D was introduced into the Act by the Act No. 18 of 1928. The question which the High Court had to decide in *Penton* v. *Australian Journalists' Association* (1) was whether s. 58D was a judicial or arbitral power. The decision was governed by the nature of the power. It was not influenced by considerations derived from the nature of the tribunal in which the power was vested. The majority of the Court decided that the power was arbitral, not judicial. The decision in the *Boilermakers' Case* (2) shows that Act No. 22 of 1926 was not effective to create the Court of Conciliation and Arbitration as a federal court under Chap. III of the Constitution. The court was, in truth, as devoid of effective judicial power as *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3) had, previously to the enactment of Act No. 22 of 1926, said it was. Nevertheless, because of the view that Act No. 22 of 1926 operated according to its tenor, it was the duty of the High Court in *Penton* v. *Australian Journalists' Association* (1) to decide whether the power of the Court of Conciliation and Arbitration under s. 58D was in itself arbitral or judicial and the Court decided that the power was not judicial in the constitutional sense. It is said that this decision does not apply to the present matter because the power of disallowing rules of organisations takes on a judicial character in the hands of the

(1) (1947) 73 C.L.R. 549.
(2) (1956) 94 C.L.R. 254.
(3) (1918) 25 C.L.R. 434.

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Commonwealth Industrial Court. It is possible that a power which is fit for executive or administrative action may be consistent with judicial action and if put in the hands of a court of law could properly be part of its jurisdiction as such. In support of this approach to the problem of upholding s. 140, notwithstanding the decision in *Penton* v. *Australian Journalists' Association* (1), reliance was placed upon the discussion in *Davison's Case* (2) to the possibility of a function being of such a kind that it could be committed either to an administrative body or a court of law. But the difficulty of sustaining the section in this way is that upon the reasoning in *Penton* v. *Australian Journalists' Association* (1) the power now in question is peculiarly a function for administrative action. As the power defined by s. 140 is in the same terms as that in s. 58D, it seems hardly possible to hold that it is of a judicial character without overruling *Penton* v. *Australian Journalists' Association* (1). The majority in the case held that the power was a procedure for the supervision and control of a registered organisation of the same nature as the power to cancel its registration. The subject of the power is such that it belongs irrevocably to the administrative sphere. It was decided in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3) that the power of the Court of Conciliation and Arbitration under s. 60 of the *Conciliation and Arbitration Act* 1904-1921 was not part of the judicial power and, accordingly, it could be exercised by that court. The latter case was decided in the interval between *Alexander's Case* (4) and the enactment of Act No. 22 of 1926 which purported to establish the Court of Conciliation and Arbitration as a federal court under Chap. III. By reason of *Alexander's Case* (4), the last-mentioned case was decided upon the basis that if the subject of s. 60 was a judicial power, the Court of Conciliation and Arbitration could not exercise it. *Isaacs* J. said: "It was argued for the organization that s. 60 of the *Arbitration Act* purported to confer strictly judicial power. But that cannot be sustained. The creation and equipment of representative organizations both of employers and employees is an incident to the power in s. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power (*Jumbunna Case* (5)). Parliament may adopt them as part of its mechanism. That mechanism can be made and unmade at the will of Parliament. It may be moulded, refashioned, or abolished in any manner indicated. The step of establishing an

(1) (1947) 73 C.L.R. 549.
(2) (1954) 90 C.L.R., at pp. 368-370.
(3) (1925) 36 C.L.R. 442.
(4) (1918) 25 C.L.R. 434.
(5) (1908) 6 C.L.R. 309.

organization may be retraced at any point and, for any reason declared by the Act, by any officer in whom Parliament places confidence for the purpose and to whom it gives the necessary discretion. The function created by s. 60 is not judicial in the constitutional sense" (1). *Starke* J. said: "The provisions of the *Arbitration Act* permitting the registration and incorporation of organizations under the Act have been upheld in this Court as a valid exercise of the power conferred by s. 51, pl. xxxv., and pl. xxxix., of the Constitution (*Jumbunna Case* (2)). But if the Parliament has authority under the arbitration power to permit the registration and incorporation of organizations, then that power necessarily extends to the control and regulation of those organizations, and to the cancellation or suspension of the registration or incorporation in such manner and by such means as Parliament provides. Provisions to that end are in no sense an exercise of the judicial power of the Commonwealth, and the opinion of the Deputy-President is quite untenable" (3). *Penton* v. *Australian Journalists' Association* (4) was heard with *Consolidated Press Ltd.* v. *Australian Journalists' Association* (4). The former was an appeal from an order dismissing an application made under s. 58D; the latter an appeal from an order made under s. 60 of the *Conciliation and Arbitration Act* 1904-1946. At that time an appeal lay from an order of the Court of Conciliation and Arbitration made pursuant to any section of the Act conferring a judicial power or function: *Jacka* v. *Lewis* (5); *Barrett* v. *Opitz* (6). The view then was that by reason of Act No. 22 of 1926 arbitral and judicial powers were correctly joined in the jurisdiction of the Court of Conciliation and Arbitration. In *Consolidated Press Ltd.* v. *Australian Journalists' Association* (7) *Latham* C.J. and I applied the passage cited above from the judgment of *Isaacs* J. in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (8) as to the nature of the function of cancelling the registration of an organisation. In the other case, *Penton* v. *Australian Journalists' Association* (4), *Latham* C.J. and I said: "The disallowance of the rule of an organization is a moulding or refashioning of the organization. This procedure is part of the procedure which is described as not judicial in the constitutional sense. An order under s. 58D disallowing a rule, or a refusal to make such an order, is therefore not a judicial order" (7). This case is an authority for the proposition

(1) (1925) 36 C.L.R., at pp. 453, 454.
(2) (1908) 6 C.L.R. 309.
(3) (1925) 36 C.L.R., at p. 463.
(4) (1947) 73 C.L.R. 549.
(5) (1944) 68 C.L.R. 455.
(6) (1945) 70 C.L.R. 141.
(7) (1947) 73 C.L.R., at p. 560.
(8) (1925) 36 C.L.R. 442.

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that the power of disallowing rules of organisations created by s. 58D although it falls short of the power to cancel its registration is a power of the same nature. *Starke* J. also decided that these two powers are of the same nature and that an order made under either of them was not a judicial order. He said, in the course of reasons for judgment: " The Act No. 22 of 1926 created the Arbitration Court a federal court in the strict sense. It conferred upon the judges of that court the tenure required by s. 72 of the Constitution. By this means the court acquired judicial functions in addition to the arbitral function already conferred upon it. But this did not convert the arbitral functions of the court and the provisions of the Act relating to the registration and cancellation of organizations and the disallowance of their rules into judicial functions. Such provisions, as I said in the *Shipping Board Case* (1), ' were in no sense an exercise of the judicial power of the Commonwealth ' " (2). The reasoning is opposed to the idea that the consequence of transferring the power of disallowing rules to the Commonwealth Industrial Court is that the power has become one of a judicial character. Indeed the reasoning rather supports the view that the power is strictly one consistent only with administrative action and it is not a power which can be committed by the Parliament to the judicial power. " A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of courts established by or under Chap. III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto " : *Boilermakers' Case* (3). I am therefore of the opinion that s. 140 offends against the Constitution and that the Commonwealth Industrial Court has no jurisdiction to proceed upon the application which the respondent made under that section in respect of certain rules of the Australian Builders' Labourers' Federation. I would make the order nisi for prohibition absolute.

WILLIAMS J. This is an application by the Australian Builders' Labourers' Federation, an organisation of employees registered under the provisions of Pt. VIII of the *Conciliation and Arbitration Act* 1904-1956 to make absolute an order nisi for a writ of prohibition prohibiting the Commonwealth Industrial Court, a federal court created under the provisions of Pt. V of that Act, from proceeding further with an application made to that court by one, Stanley

(1) (1925) 36 C.L.R., at p. 463.
(2) (1947) 73 C.L.R., at p. 564.
(3) (1956) 94 C.L.R., at pp. 271, 272.

Winter, who claims to be a member of that organisation as claimant against the organisation as respondent. Upon that application an order was made calling upon the respondent organisation to show cause why an order should not be made that rr. 10 and 4 (h) of the branch and sub-branch of that organisation and r. 6 (j) of the rules of that organisation be disallowed on the grounds that the said rules are tyrannical oppressive and impose unreasonable conditions upon the membership of the members. In support of the application Winter relies on the provisions of s. 140 of the *Conciliation and Arbitration Act*. The ground on which the writ of prohibition is sought is that that section is *ultra vires* the Parliament of the Commonwealth and invalid in that the jurisdiction which the section purports to vest in the Commonwealth Industrial Court is not part of the judicial power of the Commonwealth or incidental or ancillary to the exercise by the court of any of its judicial functions and accordingly the court has no jurisdiction to make any order in the said matter. It is true that the Parliament of the Commonwealth can only confer on the Commonwealth Industrial Court functions that are part of the judicial power of the Commonwealth (*Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1); *Attorney-General of the Commonwealth of Australia* v. *The Queen* (2)) and the crucial question is whether the functions sought to be imposed upon that court by s. 140 fall within the judicial power of the Commonwealth. If these functions are not part of the judicial power of the Commonwealth they are not functions which the Commonwealth Industrial Court has jurisdiction to entertain. The meaning of judicial power as used in s. 71 of the Constitution has been discussed in many cases in this Court. There is the classic definition by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3) which has received the approval of the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4) and in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (5). "'The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action' (6). But this definition is not exhaustive. It defines what lies at the very centre of judicial power. There are many functions

(1) (1956) 94 C.L.R. 254.
(2) (1957) A.C. 288; (1957) 95 C.L.R. 529.
(3) (1909) 8 C.L.R. 330.
(4) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(5) (1949) A.C. 134.
(6) (1909) 8 C.L.R., at p. 357.

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of a quasi-judicial administrative character which have achieved recognition as functions suitable for courts to undertake and have become part of the ordinary business of courts because they are proper to the functions of a judge. Examples of these forms of judicial power, which must form part of the judicial power of the Commonwealth under s. 71 of the Constitution, where duties of this kind can be created by the exercise by the Parliament of its legislative powers under the Constitution, will be found in *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (1) and *Reg.* v. *Davison* (2). They are exercisable by the Court because they are proper subjects for the exercise of the judicial process" (3). In *Federal Commissioner of Taxation* v. *Munro* (4) (affirmed in the Privy Council (5)) *Isaacs* J. said: "The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ . . . . I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances" (6). In *Reg.* v. *Davison* (2) *Dixon* C.J. and *McTiernan* J. said: "But there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental to the exercise of judicial power or because they are proper subjects of its exercise. How a particular act or thing of this kind is treated by legislation may determine its character. If the legislature prescribes a judicial process, it may mean that an exercise of the judicial power is indispensable. It is at that point that the character of the proceeding or of the thing to be done becomes all important." (7).

Section 140 of the *Conciliation and Arbitration Act* is in the following terms:—"(1) The Court may, upon its own motion or upon application made under this section, disallow any rule of an

(1) (1943) 67 C.L.R. 25.
(2) (1954) 90 C.L.R. 353.
(3) (1956) 94 C.L.R., at pp. 307, 308.
(4) (1926) 38 C.L.R. 153.
(5) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(6) (1926) 38 C.L.R., at pp. 178, 179.
(7) (1954) 90 C.L.R., at pp. 369, 370.

organization which, in the opinion of the Court—(*a*) is contrary to law, or to an order or award; (*b*) is tyrannical or oppressive; (*c*) prevents or hinders members of the organization from observing the law or the provisions of an order or award; or (*d*) imposes unreasonable conditions upon the membership of any member or upon any applicant for membership, and any rule so disallowed shall be void. (2) Any member of an organization may apply to the Court for the disallowance of any rule of the organization on any of the grounds specified in the last preceding sub-section. (3) The Court may, in its discretion, instead of disallowing the rule, direct the organization concerned to alter that rule, within a specified time, so as to bring it into conformity with the requirements of this Act and, if, at the expiration of that time, the rule has not been so altered, the Court may then disallow the rule and the rule shall be void." In *Consolidated Press Ltd.* v. *Australian Journalists' Association*; *Penton* v. *Australian Journalists' Association* (1) a majority of this Court held that the functions imposed upon the Commonwealth Court of Conciliation and Arbitration by s. 58D of the *Conciliation and Arbitration Act* 1904-1948, the terms of which were identical with s. 140 of the present Act, were not judicial but incidental to the arbitral powers conferred upon the court by that Act and administrative so that there was no appeal to this Court from an order made under that section by the Commonwealth Court of Conciliation and Arbitration. But that decision was given whilst it was still thought that that Commonwealth Court of Conciliation and Arbitration was a tribunal capable of exercising both judicial and non-judicial functions. Assuming that *Penton's Case* (1) was rightly decided, the functions imposed upon the Commonwealth Industrial Court by s. 140 are at least functions which are capable of being discharged by a judicial or non-judicial tribunal and of acquiring a judicial or administrative character from the constitution of the tribunal by which they are to be exercised. They are functions similar to those imposed upon courts by such Acts as those mentioned in *Peacock's Case* (2) and in the *Boilermakers' Case* (3). The question whether an applicant for an order under s. 140 is a member of an organisation and therefore entitled to make the application is a question of law and therefore essentially a judicial question. Questions that would arise under pars. (*a*) and (*c*) of sub-s. (1) of s. 140 are also questions of law and therefore essentially judicial questions. It is not so clear that questions that would arise under pars. (*b*) or (*c*) of sub-s. (1) are judicial

(1) (1947) 73 C.L.R. 549.
(2) (1943) 67 C.L.R., at pp. 35, 46, 54, 55.
(3) (1956) 94 C.L.R. at pp. 278, 279, 294, 308, 309, 333-336.

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questions. But there is no reason why they should not be classed as judicial questions where their solution is entrusted to the opinion of a court. In *Steele* v. *Defence Forces Retirement Benefits Board* (1) it was pointed out that, while bare administrative functions cannot be committed to a court, judgments based upon an ascertainment of facts and governed by standards which if indefinite are not undefined are by no means foreign to the judicial function. The determination of the question whether a rule of an organisation is tyrannical or oppressive or imposes unreasonable conditions upon the membership of any member or upon any applicant for membership is not so undefined as to be incapable of solution by judicial process.

Section 140 provides that the court may act upon its own motion. It also provides that the Commonwealth Industrial Court "may" disallow any rule either in the first instance or after the organisation has been given an opportunity to alter it. It was contended that these provisions when found in an Act relating to conciliation and arbitration for the prevention and settlement of industrial disputes should be construed as primarily intended to be used in aid of the prevention and settlement of such disputes and therefore as purely administrative. It was contended that the court is under no duty to disallow a rule even if it forms the opinion that the rule offends against one of the paragraphs in sub-s. (1) if it also forms the opinion that in the interests of industrial peace it is advisable to refuse to do so. There is no express provision to this effect in the section and there is nothing in the scope and policy of the *Conciliation and Arbitration Act* to be gathered from its contents which could give rise to such an implication. In *Consolidated Press Ltd.* v. *Australian Journalists' Association* (2) the majority of the court relied upon the decision of this Court in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3) that s. 60 of the Commonwealth *Conciliation and Arbitration Act* 1904-1921 (s. 143 of the present Act) did not purport to confer and did not confer any part of the judicial power of the Commonwealth upon the Commonwealth Court of Conciliation and Arbitration. But that case was decided in the period prior to 1926 following *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) when that tribunal admittedly could not exercise judicial powers. In that period it may have been possible to construe the powers now contained in the ss. 140 and 143 as intended to confer upon the Commonwealth Court of Conciliation and Arbitration the only class

(1) (1955) 92 C.L.R. 177.
(2) (1947) 73 C.L.R. 549.
(3) (1925) 36 C.L.R. 442.
(4) (1918) 25 C.L.R. 434.

of functions which it then had jurisdiction to entertain. In the *Consolidated Press Case* (1) that construction was followed in the period when that court had been reconstituted and was believed to have both arbitral and judicial functions. But now that the functions under the *Conciliation and Arbitration Act* have been divided between the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court there is every reason for construing the functions conferred upon the commission as arbitral and those conferred upon the court as judicial so far as these respective functions are capable of such a construction. The mere fact that the Commonwealth Industrial Court is empowered by s. 140 to act of its own motion is not sufficient to prevent the powers conferred upon the court by s. 140 from being judicial. It may be said to be somewhat unusual to give a court this power. But the Commonwealth Industrial Court, as its name implies, and as its judicial powers, for instance those contained in ss. 109 (1) (*a*), 110, and 111 emphasize, was created to perform such judicial functions as should arise under laws passed by the Parliament under s. 51, par. xxxv of the Constitution with respect to the prevention and settlement of industrial disputes. It may well be necessary at times, in order to make such legislation effective, for the court to have power to intervene of its own motion in order to disallow a rule; for instance in cases where a member of an organisation might hesitate to apply to the court himself. The mere fact that s. 140 provides that the Commonwealth Industrial Court may disallow any rule and does not provide that it " shall " do so is quite insufficient to show that the functions conferred upon the court by the section are arbitral and not judicial. Functions that form part of the judicial power are often conferred upon courts as discretionary and not mandatory duties. The mere fact that the court, having formed the requisite opinion, has a discretion whether to apply some particular remedy or not is not sufficient to make the opinion non-judicial. Courts of Equity have a discretion whether to grant the remedies of specific performance or injunction but it could hardly be suggested that on this account courts administering equitable principles and remedies are not performing strictly judicial functions. Further when legislation uses the word " may ", this is often merely a polite way of saying " shall ". The word " may " in s. 140 is in its ordinary meaning permissive and not imperative but, having regard to the nature of the thing empowered to be done, and the conditions under which it is to be done, the purpose of the section appears to be to confer a power coupled with a duty

(1) (1947) 73 C.L.R. 549.

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to exercise it if the court forms the necessary opinion: *Julius* v. *Lord Bishop of Oxford* (1). It would be strange indeed if the court could form an opinion that a rule offended against one of the provisions of these paragraphs, for instance that it was contrary to an order and award, but nevertheless could exercise its discretion not to disallow it. The word " may " is probably used because the court is not bound to disallow the rule in the first instance but may in the exercise of its discretion first give the organisation an opportunity to bring the rule into conformity with the requirements of the Act. Sub-section (3) provides that the court may, in its discretion, instead of disallowing the rule, give the organisation this opportunity and if it neglects to do so may then disallow it. The words " in its discretion " in addition to the word " may " in this sub-section suggest that the word " may " is really imperative, because if " may " is only intended to confer a discretion and not a duty upon the court, it is difficult to understand why sub-s. (3) should also contain the words " in its discretion ". It would appear that the legislature thought it necessary to add these words to the word " may " when it was intended to give the court a discretion either to disallow the rule in the first instance or only to do so after the organisation had been directed to alter the rule within a specified time so as to bring it into conformity with the requirements of the Act and at the expiration of that time had not so altered the rule.

For these reasons I am of opinion that the order nisi should be discharged.

WEBB J. In *Atkinson* v. *Lamont* (2) the Supreme Court of Queensland, applying the reasoning in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3), held that s. 58D (1) and (2) of the Commonwealth *Conciliation and Arbitration Act* 1904-1928, which was in the same terms as s. 140 (1) and (2) of the Act of 1904-1956, did not confer judicial power. Subsequently this Court in *Penton* v. *Australian Journalists' Association* (4) took the same view and for the same reason. Later still in the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (5), their Lordships did not doubt that " there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals,

(1) (1880) L.R. 5 App. Cas. 214, at p. 223.
(2) (1938) S.R. (Q.) 33, at pp. 41, 55.
(3) (1925) 36 C.L.R. 442.
(4) (1947) 73 C.L.R. 549.
(5) (1949) A.C. 134.

the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also" (1). Their Lordships proceeded to state that "It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between the Crown and subject or between subject and subject" (1).

Judged by these two tests s. 140 (1) and (2) sought to confer non-judicial power. In cases where the court acts of its own motion under s. 140 (1) there are no parties. It is true that when the court of its own motion institutes summary proceedings for contempt of court the proceedings are criminal in character and the Crown is a party: see *R. V. Foster Hardy Miller and Wheller*; *Ex parte Gillies* (2). But that has no application to proceedings by the court under s. 140. Again as I understand Mr. *Menzies* he concedes for the Commonwealth that the word "may" in s. 140 (1) is necessarily permissive when the court acts of its own motion, that is to say, that even if the court finds the rule in question to be tyrannical, oppressive or unreasonable it is still not obliged to strike it out but can leave it stand in the interests of industrial peace, that is to say, because of considerations of policy. But if that is so, I fail to see why the court's duty is different and the word "may" becomes imperative, on the principle of *Julius* v. *Lord Bishop of Oxford* (3), when the court does not act of its own motion. Why should the interest of industrial peace be considered in the one case and disregarded in the other?

However in view of s. 15A of the *Acts Interpretation Act* 1901-1950 I think, as Mr. *Menzies* submits as an alternative, that s. 140 (1) should be read as if the words "of its own motion" did not appear, and as if "may" meant "shall". This is the intention of Parliament as expressed in s. 15A, as I understand it, and as it does not require this Court to discharge any legislative task I see no reason why we should not give effect to that intention. Section 15A validly extends to requiring the court to omit words or to give a word a different meaning from that which it would otherwise bear if that is necessary to prevent the particular enactment from being unconstitutional, provided the enactment remains intelligible. However re-writing would involve legislating. In other words the legislature can validly supply contingent meanings for the words it uses in, or direct the omission of words from its enactments in order that invalidity in its enactments may be avoided. See *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (4).

(1) (1949) A.C., at p. 149.
(2) (1937) S.R. (Q.) 368, at p. 383.
(3) (1880) L.R. 5 App. Cas., at p. 223.
(4) (1952) 85 C.L.R. 467, at p. 485.

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Then reading " may " as meaning " shall " I think s. 140 should be construed as enacting in effect that a rule of an organisation which has the characteristics set out in pars. *a*, *b*, *c* or *d*, shall be disallowed on application under s. 140 and that the court shall have the jurisdiction to disallow it. In other words I think that s. 140 *uno ictu* creates the right and invests the jurisdiction in the court which, we have already held, is validly created under Chap. III of the Commonwealth Constitution to exercise judicial power of the Commonwealth: see *Hooper* v. *Hooper* (1). Thus standards for rules are provided with which the court can require compliance as an exercise of judicial power. This gives s. 140 a different effect, but only because of a reduction of power in the court, and incidentally of a change in the quality of the power, albeit from non-judicial to judicial, which however s. 15A validly requires. In thus giving effect to s. 15A the woof is not separated from the warp and a new net made; nor is there any diversion of the legislation from one purpose to another: the purpose remains the disallowance of union rules. See *Australian Railways Union* v. *Victorian Railways Commissioners* (2). The test which *Griffith* C.J. suggested in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3), i.e., whether the statute with the invalid portions omitted is a substantially different law, was later rendered inapplicable by the enactment in 1930 of s. 15A. Certainly a law conferring non-judicial power is substantially a different law from one conferring judicial power.

To change the metaphor: excision is permissible but not plastic surgery; see *Bank of New South Wales* v. *The Commonwealth* (4), per *Dixon* J. as he then was. But plastic surgery is not resorted to where, as here, a phrase is omitted and a word capable of two meanings is now given one of those meanings instead of the other meaning which it had before. Further there are no elaborate countervailing considerations here as there were in the *Bank Case* (5).

I would discharge the order nisi for prohibition.

KITTO J. In my opinion s. 140 of the *Conciliation and Arbitration Act* 1904-1956 is invalid as an attempt to confer on a court established under Chap. III of the Constitution a power which is not judicial.

To construe the section as intending to confer an example of judicial power I should find difficult, even if the case of *Penton* v. *Australian Journalists' Association* (6) had not been decided. It

(1) (1955) 91 C.L.R. 529.
(2) (1930) 44 C.L.R. 319, at p. 386.
(3) (1910) 11 C.L.R. 1, at p. 27.
(4) (1948) 76 C.L.R. 1, at p. 372.
(5) (1948) 76 C.L.R. 1.
(6) (1947) 73 C.L.R. 549.

is true, no doubt, that a power to disallow a rule of an organisation has a degree of resemblance to some other powers which have been given to courts in the past, and that there is nothing necessarily foreign to the nature of judicial power in the fact that its exercise is conditional upon the formation of an opinion described in broad terms. It is true also that sometimes a grant of a power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial. But it by no means follows that whenever a power which has some similarity to an acknowledged judicial power is given to a judicial person or body there is a grant of judicial power. The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities. That is not a necessary inference, however, in every case of this kind. The authorised act itself, though not inherently incapable of judicial performance, may be by nature more appropriate for administrative performance. The possible effects of the act when done upon persons, situations and events may be such as to suggest the probability that decisions to exercise or to refrain from exercising the power were intended to be made upon considerations of general policy and expediency alien to the judicial method. The circumstances in which the power is to be exercisable may be prescribed in terms lending themselves more to administrative than to judicial application. The context in which the provision creating the power is found may tend against a conclusion that a strictly judicial approach is intended. And there may be other considerations of a similar tendency. The problem in such a case ought therefore to be recognised as one of statutory construction, the task being to decide whether or not the provision should be understood as intending that in discharging the responsibility which possession of the power entails the person or body entrusted with it is to act strictly as a judge. The fact that the person occupies a judicial office, or that the body is or is not a judicial tribunal is only one matter to be considered. There may be many others.

Section 140 seems to me an example of a provision which, though it empowers a court to do an act—the disallowing of a rule—which is not insusceptible of a judicial performance, nevertheless is found

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to mean, on a clear preponderance of considerations, that the function for which it provides is to be performed as an administrative function, with a more elastic technique, and more of an eye to consequences and industrial policy generally, than could properly be expected of a court. The authority given is to act in pursuance of an opinion, formed either spontaneously or upon representations made by a person who may or may not be affected by the rule in question. The kinds of rules which may be disallowed are described as possessing any of several qualities which are indicated in terms so broad as to be more appropriate for conveying general conceptions to a person engaged administratively in performing a function conceived of as part of a system of industrial regulation than for stating, to a body acting judicially, grounds of jurisdiction which it is to interpret and apply with precision. The immediate context provided by ss. 132, 133 and 139 strongly suggests a similarity of nature between the power of the registrar under those sections (see especially s. 139 (4)) and the power given by s. 140. Moreover—and this is the most important consideration of all—s. 140 belongs to a group of provisions, comprising all those which deal with the registration and regulation of industrial organisations, which as a group are characterised by the purpose of facilitating the prevention and settlement of inter-State industrial disputes by conciliation and arbitration under the Act. It is difficult to think that s. 140 intends a consideration of an organisation's rules to be undertaken otherwise than with a view to the improvement of the organisation as an instrument for the representation of employees in everything connected with the maintenance and restoration of industrial harmony. To read the section as creating a jurisdiction to apply fixed standards to particular situations, and to make decrees with a judicial disregard of consequences, would be plainly incongruous with the scheme of the Act and the terms of the section. In particular, it seems to me to be required, as a matter of practical good sense, that in forming an opinion as to whether a rule of an organisation is " tyrannical " or " oppressive ", or imposes " unreasonable " conditions upon the membership of a member or upon an applicant for membership, the repository of the power should look to the effect which the existence or non-existence of the rule will be likely to have upon the working of the machinery of conciliation and arbitration under the Act; and this points unmistakably to an intention that the performance of the function provided for by the section is to be approached in a manner incompatible with the restraints peculiar to judicial power.

When one adds to all this the decision in *Penton's Case* (1) and the history of the legislation since, it becomes, I think, impossible to uphold the section as a grant of judicial power. In *Penton's Case* (1) it was held that s. 58D of the Commonwealth *Conciliation and Arbitration Act* 1904-1946 did not confer judicial power. The present s. 140 (except sub-s. (3) which may be put aside) is that very section re-numbered. The only material change that has been made is in the definition of "the Court". The expression referred at the time of *Penton's Case* (1) to a body which in that case was taken to have a dual character, judicial and non-judicial. The expression now refers to a federal court, a body exclusively judicial. In respect of some provisions conferring powers which might be either judicial or non-judicial the change could suffice to show that henceforth the power is to be regarded and exercised as a judicial power, even if formerly it was non-judicial. But in my judgment it does not suffice in this instance; for the essential nature and purpose of the function remain unaltered, and they, for the reasons I have given, seem to me to necessitate the conclusion that whatever may be the hands to which the power is committed, it is an administrative and not a judicial activity that is provided for. Indeed in *Penton's Case* (1) the majority of the Court, in order to reach this conclusion, found no need to go beyond the last of the matters to which I have referred, namely the nature of the power as one for the "remoulding or refashioning" of a part of the "mechanism" created by Parliament in exercising its authority under s. 51 (xxxv.) of the Constitution. The distinction which was being emphasised, of course, was the fundamental distinction between a function provided for under the authority of s. 51 (xxxv.) and a jurisdiction defined under the authority of s. 77 (i.). Both upon an independent consideration of the matter and upon the authority of *Penton's Case* (1), I find the conclusion inescapable that the attempt which has been made in consequence of the *Boilermaker's Case* (2) to produce a full observance of the distinction throughout the *Conciliation and Arbitration Act*—an attempt necessarily fraught with difficulty—has not been successful so far as s. 140 is concerned.

I am therefore of opinion that the order nisi should be made absolute.

TAYLOR J. The two broad questions which require our consideration in this case are, firstly, whether a majority of this Court erred when it decided that s. 58D of the Commonwealth *Conciliation and Arbitration Act* 1904-1946 did not confer, or purport to confer, upon

(1) (1947) 73 C.L.R. 549. (2) (1956) 94 C.L.R. 254.

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the Commonwealth Court of Conciliation and Arbitration any part of the judicial power of the Commonwealth (*Consolidated Press Ltd.* v. *Australian Journalists' Association* (1)) and, secondly, whether, if that case was correctly decided, it should be regarded as conclusive of the question whether s. 140 of the *Conciliation and Arbitration Act* 1904-1956 now confers judicial power upon the Commonwealth Industrial Court.

Reference has already been made to the manner in which s. 140 found its way into the present Act and it is unnecessary, again, to trace its history. It is, however, of some importance to observe that the first and second sub-sections of the section are identical with the first and second sub-sections of s. 58D of the Act in its earlier form and that these provisions were to be found in the Commonwealth *Conciliation and Arbitration Act* at all times after 1928 when they were introduced by the amending Act of that year (No. 18 of 1928). The third sub-section of s. 140 was enacted in 1947. The amending Act was assented to on 20th May 1947 and was to come into operation on a date to be fixed by proclamation. The date of assent, it will be noticed, was some six weeks after the decision in the *Journalists' Case* (1). Two further matters which it is not unimportant to mention is that in 1918 this Court held that the provisions of the Commonwealth *Conciliation and Arbitration Act* which purported to confer judicial power upon the Commonwealth Court of Conciliation and Arbitration were invalid (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2)) and that it was not until 1926 (Act No. 22 of 1926) that steps were taken to constitute the Arbitration Court a federal court in the strict sense. At least that is what it was thought had been accomplished until the decision in *Reg.* v. *Kirby; Ex parte Boilermakers' Society of Australia* (3).

It will appear from these observations that the decision in the *Journalists' Case* (1) was given at a time when it was thought that the Arbitration Court was such a court and that, in addition to its arbitral functions, it might validly exercise the judicial powers which the Act purported to commit to it. The position was, however, otherwise, when the decision in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4) was given. The decision in this case, which was given in 1925, was thought by a majority of the Court in the *Journalists' Case* (1) to provide a solution of the problem which arose in that case and it was given at a time when it was of vital importance to determine whether

(1) (1947) 73 C.L.R. 549.
(2) (1918) 25 C.L.R. 434.
(3) (1956) 94 C.L.R. 254.
(4) (1925) 36 C.L.R. 442.

the power to direct the deregistration of a registered organisation was or was not a judicial function.

In the course of their observations in that case *Latham* C.J. and *McTiernan* J. expressed the view that the reasoning in the *Shipping Board Case* (1) showed " that an order made under s. 58D for the disallowance of a rule is not a judicial order " (2) and it is not out of place to quote again a passage from the reasons of *Isaacs* J. (3) which they considered conclusive of the problem before them : " ' It was argued for the organization that s. 60 of the *Arbitration Act* purported to confer strictly judicial power. But that cannot be sustained. The creation and equipment of representative organizations both of employers and employees is an incident to the power in s. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power (*Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (4)). Parliament may adopt them as part of its mechanism. That mechanism can be made and unmade at the will of Parliament. It may be moulded, refashioned, or abolished in any manner indicated. The step of establishing an organization may be retraced at any point and, for any reason declared by the Act, by any officer in whom Parliament places confidence for the purpose and to whom it gives the necessary discretion. The function created by s. 60 is not judicial in the constitutional sense ' " (2). The disallowance of the rules of an organisation was, their Honours thought, " a moulding or refashioning of the organization " and was part of the procedure described in the quoted passage as not judicial in the constitutional sense. *Starke* J. also was of opinion that the question in the case was concluded by the decision in the *Shipping Board Case* (1) and he added that the establishment of the Arbitration Court as a federal court " did not convert the arbitral functions of the Court and the provisions of the Act relating to the registration and cancellation of organizations and the disallowance of their rules into judicial functions " (5).

Consideration of the character and history of the provisions now contained in sub-ss. (1) and (2) of s. 140, and of other provisions with which they are, and have been, intimately associated, leads inevitably to the conclusion that it is impossible to say that they deal with functions which cannot be committed to a non-judicial body. Both at times when the Arbitration Court was, merely, an arbitral body and, later, when it was thought to be a court in the strict sense, though with mixed functions, they were thought to

(1) (1925) 36 C.L.R. 442.
(2) (1947) 73 C.L.R., at p. 560.
(3) (1925) 36 C.L.R., at pp. 453, 454.
(4) (1908) 6 C.L.R. 309.
(5) (1947) 73 C.L.R., at p. 564.

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confer functions essentially arbitral in character or, perhaps, functions properly regarded as incidental to the arbitral powers and functions of the court. But the contention which is advanced against the prosecutor is that the reasoning in the *Shipping Board Case* (1) and, in particular, the *Journalists' Case* (2) precludes the conclusion that the functions which s. 140 purports to vest in the Commonwealth Industrial Court fall within the " borderland in which judicial and administrative functions overlap " (*Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (3)) and establishes that they may not, properly, be committed to a federal court.

Although s. 140 confers, in terms, a simple power to disallow rules of an organisation a perusal of the section shows that the conditions upon which the power may be exercised are both wide and varied; it is exercisable if, on the one hand, a challenged rule is contrary to law or, on the other, if it is thought to be tyrannical or oppressive or if it imposes unreasonable conditions upon the membership of any member or upon any applicant for membership. It is in this feature of the legislation, of course, that the strength of the prosecutor's case lies for, although it may be conceded that the function of disallowing rules of an organisation which are contrary to law may be committed to a court by appropriate legislation, it is, by no means, a simple matter to justify the investing of a court with a power to disallow rules upon the amorphous and special grounds to which reference has already been made. Particularly is this so when it is seen that the special character of the grounds proclaims the intimate relationship of the power with the general administrative functions which, for so many years, were exercisable by the Arbitration Court in relation to the registration of organisations and the maintenance of broad standards both in their constitutional instruments and in their relations with their members.

When close consideration is given to the character and history of the section, and to provisions with which it is closely associated, it may, I think, be said that complete appreciation of the wide grounds upon which the power may be exercised must, necessarily involve considerations of industrial policy and, therefore, that the provision travels outside any concept of judicial power. The difficulty in the way of the respondents is, if possible, increased by the fact that the exercise of the power is not dependent upon its invocation by a litigant but is expressed to be exercisable by the court upon its own motion. The view that the section creates a supervisory power of an administrative character only may,

(1) (1925) 36 C.L.R. 442.
(2) (1947) 73 C.L.R. 549.
(3) (1949) A.C. 134, at p. 148.