perhaps, find additional support in the provisions of sub-s. (3) which confers a power which, if not entirely foreign to judicial power, is quite unusual. It was, of course, framed at a time when it was believed that the powers given by the earlier sub-sections were not judicial and it may, perhaps, be thought that its provisions were merely intended to provide some elasticity in the exercise of a recognised administrative power.

These considerations lead me to the conclusion that the functions created by s. 140 as at present framed are not judicial in character and that the purported vesting of them in a federal court did not make them so. Accordingly I am of opinion that the order nisi should be made absolute.

Order nisi made absolute for a writ of prohibition directed to the judges of the Commonwealth Industrial Court restraining further proceedings upon the order to show cause dated 30th May 1957 directed to the Australian Builders' Labourers' Federation.

Solicitors for the applicant-prosecutor, *Morgan, Ryan & Brock.*

Solicitor for the respondents other than the respondent Winter, *H. H. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent Winter, *Harold Munro & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

Ex parte WATERSIDE WORKERS' FEDERATION OF AUSTRALIA.

H. C. OF A. 1957.

SYDNEY, *Dec.* 13, 20.

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

Industrial Law (Cth.)—Stevedoring Industry—Waterside workers—Registration by Australian Stevedoring Industry Authority—Waterside worker deregistered by authority—Appeal instituted to Commonwealth Industrial Court—Challenge to appeal provision by Waterside Workers' Federation—Judicial power—Administrative functions committed to judicial tribunal—Invalidity—The Constitution (63 & 64 *Vict. c.* 12), *Chap. III—Stevedoring Industry Act* 1954-1956, *s.* 37.

Section 37 of the *Stevedoring Industry Act* 1954-1956 (Cth.) purports to confer on the Commonwealth Industrial Court power to entertain appeals from decisions of the Australian Stevedoring Industry Authority made under s. 36 of such Act cancelling or suspending the registration of waterside workers and upon the consideration of any appeal to confirm vary or set aside the cancellation or suspension.

Held, that the section is invalid in that it purports to confer upon a judicial body created under Chap. III of the Constitution powers of a non-judicial character.

The history of s. 37 of the *Stevedoring Industry Act* 1954-1956, discussed.

Reg. v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis* (1954) 90 C.L.R. 55, referred to.

PROHIBITION.

On 29th November 1957 *Webb* J., on the application of the Waterside Workers' Federation of Australia as prosecutor, granted an order nisi directed to The Honourable John Armstrong Spicer, The Honourable Edward Arthur Dunphy and The Honourable Sir Edward James Ranembe Morgan, Chief Judge and Judges respectively of the Commonwealth Industrial Court, and one George Buchan calling upon the said respondent chief judge and judges to show cause before the Full Court of the High Court of Australia

why a writ of prohibition should not issue out of such court to prohibit them and each of them from proceeding further upon an appeal no. 73 of 1957 lodged by the respondent George Buchan pursuant to s. 37 of the *Stevedoring Industry Act* 1954-1956 upon the following grounds:—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 the said section hereinbefore mentioned 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. The said s. 37 of such Act is *ultra vires* the Parliament of the Commonwealth and invalid in that the jurisdiction which the section purports to invest 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.

Further relevant facts appear in the judgments of the Court hereunder.

J. D. Holmes Q.C. (with him *L. K. Murphy*), for the prosecutor. Section 37 is invalid in that it purports to confer a non-judicial function upon the Commonwealth Industrial Court. Upon any appeal under the section the powers of the court from the viewpoint of discretion are precisely the same as those of the authorities under s. 36. The latter powers are administrative in connection with the working of the industry concerned. The powers of the Commonwealth Industrial Court are conferred in precisely the same terms as were those given to the old Court of Conciliation and Arbitration under s. 25 of the *Stevedoring Industry Act* 1949. The decision in *Reg.* v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (1) on s. 25 of the 1949 Act here applies and renders s. 37 invalid for like reasons. Similar principles to those applied by the Court in *Reg.* v. *Spicer*; *Ex parte Australian Builders' Labourers' Federation* (2) should be here applied. The circumstance that the appeal is now given to a judicial body constituted under Chap. III of the Constitution cannot alter the construction to be given to s. 37. That section makes no provision

(1) (1954) 90 C.L.R. 55, at pp. 61, 62, 66, 67, 68, 69.

(2) (1957) 100 C.L.R. 277.

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for an appeal with parties; the authority is not joined as a party and the scope of the appeal is not limited in any way so far as the functions of the court are concerned. The court is required to act as it were in a supervisory capacity. Under s. 36 (4) no enquiry is called for, and there is an appeal to the court from any action taken under that sub-section by the authority. Under s. 36 the authority is not limited to finding matters in relation to pars. (*a*) to (*g*) of sub-s. (1); it may consider matters purely industrial in character and the power of the court under s. 37 is no less wide. Prohibition should go.

D. I. Menzies Q.C. (with him *J. McI. Young* and *J. H. Wootten*), for the respondent Chief Judge and Judges of the Commonwealth Industrial Court, and for the Attorney-General of the Commonwealth, intervening by leave, upon whose behalf the following arguments were addressed. The present legislation confers a right upon a waterside worker to be registered whereas under the earlier legislation registration was discretionary in the board. Under the earlier legislation the board in the first instance was to decide whether there was to be suspension or deregistration subject to an appeal under s. 25 and the appeal dealt commonly with employees and employers. In the present legislation a different course has been taken in respect of employers: see ss. 33, 34, 35. These differences are of value in considering the amendments made in relation to employees. Employers are subject to judicial control, and employees whilst initially subject to administrative control may, if dissatisfied, secure under s. 37 judicial review. There is no difficulty in treating one as an administrative and the other as a judicial function. Such is the scheme of the new Act and there is no lack of constitutional authority. An appeal is now given to a properly constituted court. [He referred to *Reg.* v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (1).] The qualifications appearing in the passages cited make *Ellis's Case* (2) not binding in the present circumstances. Under ss. 36 and 37 as they now stand any discretion which the court has is the kind of judicial discretion which is always employed by a court in dealing with appeals from administrative tribunals, particularly when the right of a person to earn his living by registration is concerned. He referred to *McCartney* v. *Victorian Railways Commissioners* (3); *Medical Board of Victoria* v. *Meyer* (4). It cannot be said from the passage of Act No. 93 of 1957 assented to yesterday

(1) (1954) 90 C.L.R., at pp. 63, 67.
(2) (1954) 90 C.L.R. 55.
(3) (1935) V.L.R. 51, at pp. 62, 63.
(4) (1937) 58 C.L.R. 62, at pp. 91-93.

and containing a new s. 37 that Parliament has said that by the present s. 37 it intended an administrative appeal. All that can be derived therefrom is that Parliament has now said that if an appeal to a court as intended is not possible then some other mode of appeal shall be provided. But it gives the court little assistance in the present case. [He referred to *Barnard* v. *National Dock Labour Board* (1); *Vine* v. *National Dock Labour Board* (2)]. In the latter authority there is support for the view that what is here being done is well within the category of the exercise of judicial power provided it is performed by a court. As a matter of construction there is no appeal given by s. 37 to a suspension under s. 36 (4); that section is concerned only with suspension or cancellation under s. 36 (1). If s. 37 were wide enough to cover an appeal under s. 36 (4) then this would be an appropriate case for the application to s. 37 of s. 15A of the *Acts Interpretation Act* 1901-1955. Upon its true interpretation s. 37 is a measure for the protection of the rights of individuals. It is not directed to achieving industrial peace but to preventing injustice. If the discretion given the authority under s. 36 is the wide general discretion which *Ellis's Case* (3) would seem to support, then s. 37 should be construed either as confined to determining whether or not there has been a departure from one of the standards set out in pars. (*a*) to (*g*) of s. 36 (1) or as conferring a discretion limited by reference to the matters set out in such paragraphs. The question of the adequacy of the penalty may also be a matter for the court's consideration. The narrow view of the discretion conferred by s. 37 is urged because of the substantial changes in the Act and because Parliament has evinced an intention that the appeal given by s. 37 should be an appeal to the court where the court must do no more than exercise judicial power. Such construction is reasonably open and the section should be upheld as it is now. [He referred to *Reg.* v. *Davison* (4)]. Having regard to the nature of the final determination to be made by the court under s. 37, from which no further appeal is given, the enquiry is one far more properly committed to a court than to an administrative tribunal. A determination so made by the court should be treated as a judicial determination. The present case is different from *Reg.* v. *Spicer*; *Ex parte Australian Builders' Labourers' Federation* (5). The court is not here dealing with a matter of the administrative control of organisations or such like but with the rights of waterside workers to earn their

(1) (1953) 2 Q.B. 18.
(2) (1957) A.C. 488, at pp. 498, 499, 502, 503, 505, 510, 511.
(3) (1954) 90 C.L.R. 55.
(4) (1954) 90 C.L.R. 353, at p. 370.
(5) (1957) 100 C.L.R. 277.

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living. In a matter of such a nature there is far more warrant for saying that the power committed to the court is intended to be judicial power and that the court is intended to act judicially. Section 37 is valid.

G. Wallace Q.C. (with him *D. B. McKenzie*), for The Commonwealth Steamship Owners' Association and other employers of the prosecutor. We adopt the arguments put on behalf of the Attorney-General. On the question of reading down, see *Steele* v. *Defence Forces Retirement Benefits Board* (1). In so far as any difficulty arises by virtue of the presence of s. 36 (4) and its effect on s. 37, then on its true construction s. 37 does not apply to that kind of urgent interim suspension power, or, if it does, then there is no difficulty in eliminating that aspect of the appeal from the width of s. 37. In relation to *Ellis's Case* (2) see *Federal Commissioner of Taxation* v. *Munro* (3).

P. G. Evatt, for the respondent Buchan submitted to such order as the Court might see fit to make.

J. D. Holmes Q.C., in reply.

Cur. adv. vult.

Dec. 20

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, KITTO AND TAYLOR JJ. This is an order nisi for a writ of prohibition directed to the learned judges of the Commonwealth Industrial Court. The tenor of the writ sought is to restrain their Honours from proceeding further with an appeal to the Commonwealth Industrial Court instituted in purported pursuance of s. 37 of the *Stevedoring Industry Act* 1954-1956. Section 37 is expressed to enable a person whose registration as a waterside worker is cancelled or suspended to appeal to that court. The respondent, Buchan, is a waterside worker whose registration was suspended and on 27th November 1957 he lodged with the Registrar of the Commonwealth Industrial Court a notice of appeal supported by an affidavit. What view that court might take as to Buchan's right of appeal does not appear for the appeal has not come on before the court for hearing. Buchan is a member of the Waterside Workers' Federation of Australia, a registered organisation of employees, but that body is the prosecutor in the present proceedings to prohibit any further proceeding in the appeal. The ground simply is that s. 37 is invalid. No one has suggested that the

(1) (1955) 92 C.L.R. 177, at pp. 186, 187.

(2) (1954) 90 C.L.R., at p. 63.

(3) (1926) 38 C.L.R. 153, at p. 212.

application for prohibition is premature or that Buchan's appeal was made only for the purpose of founding a writ of prohibition so that the validity of s. 37 might be attacked, or that as the prosecutors are strangers to the appeal we should exercise our discretion against granting a remedy. We have had the advantage of the intervention in the argument, though not as parties to the cause, of the Commonwealth and of other interested bodies and all concerned seem strongly to desire that in this proceeding, notwithstanding the handicaps from which it might be found to suffer if its history were too curiously examined, we should decide the validity of s. 37. The validity of s. 37 depends upon its real nature and meaning. If it is to be interpreted as conferring upon the Commonwealth Industrial Court jurisdiction to hear and determine a matter arising under a law made by the Parliament of the Commonwealth within the meaning of s. 76 (ii.) of the Constitution, then there is nothing to be said against its constitutional validity. A matter of that description involves a claim of right depending on the ascertainment of facts and the application to the facts of some legal criterion provided by the legislature: see *Barrett* v. *Opitz* (1); *Hooper* v. *Hooper* (2). The existence of some judicial discretion to apply or withhold the appointed legal remedy is not necessarily inconsistent with the determination of such a matter in the exercise of the judicial power of the Commonwealth. But it is perhaps necessary to add that the discretion must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards. An analysis of s. 37 (1) considered independently of the sections which precede it in the *Stevedoring Industry Act* 1956 shows that in reality it does nothing but say that a person whose registration as a waterside worker has been cancelled or suspended may within a limited time appeal to the Commonwealth Industrial Court and that that court may confirm, vary or set aside the cancellation or suspension. Sub-sections (2), (3) and (4) contain nothing material to the present question. The nature and scope of the authority which it is intended that the Commonwealth Industrial Court should exercise under s. 37 (1) must in truth be ascertained from the sections in the *Stevedoring Industry Act* which precede and so to speak lead up to it, aided no doubt by the history of these various provisions. The sections in question now form Pt. III of the *Stevedoring Industry Act* 1956 which is entitled "Port Quotas and Registration of Employers and Waterside Workers". Putting aside provisions that may be regarded as introductory and machinery

(1) (1945) 70 C.L.R. 141, at pp. 166-169.

(2) (1955) 91 C.L.R. 529.

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provisions, the material sections begin with s. 28. Section 28 provides for the registration of employers, an expression defined by s. 7 (1) in terms which it is unnecessary to repeat, but which in substance mean an employer offering stevedoring work. Section 29 then provides for the registration of waterside workers. Certain conditions are laid down which an applicant for registration must satisfy. If he satisfies them the authority, which means the Australian Stevedoring Industry Authority established under the Act, is required to register the person as a waterside worker at the port in respect of which he applies. There is a limitation in s. 30 of quotas for the respective ports. Section 31 requires that the waterside worker should submit his application for registration through the union, and the expression union is limited to the Waterside Workers' Federation of Australia and the North Australian Workers' Union and organisations of employees specified in some declaration in force made by the authority. There are provisions in ss. 32, 33, 34 and 35 relating to the quotas, to a registered employer's obligations and their enforcement and to the cancellation and suspension of the registration of employers. There follows what for the present purpose is the most material provision, viz. s. 36. Sub-section (1) of s. 36 sets out the grounds upon which the authority may cancel or suspend the registration of a waterside worker. The authority may do so on any of the following grounds: namely, that the waterside worker (*a*) is, by reason of misconduct in or about an employment bureau, or a wharf or ship, unfit to be a registered waterside worker; (*b*) is, by reason of his physical or mental condition or his incompetence or inefficiency, not capable of properly carrying out the duties of a waterside worker or may be a danger to others; (*c*) has acted in a manner whereby the expeditious, safe or efficient performance of stevedoring operations has been prejudiced or interfered with; (*d*) has not attended regularly for employment as a waterside worker; (*e*) has failed (i) to offer for or accept employment as a waterside worker; (ii) to commence, continue or complete an engagement for employment as a waterside worker; or (iii) to perform any stevedoring operations which he was lawfully required to perform; (*f*) has been convicted of an offence against this Act; or (*g*) has failed to comply with an order or direction of the authority under this Act or an award of the commission. Before exercising the power to suspend or cancel registration the authority must make such inquiries as it thinks fit, but sub-s. (4) makes it possible to suspend the registration before the inquiry is held. Sub-section (5) provides that in considering whether the registration of a waterside worker should be cancelled or suspended under

s. 36 the authority may take into account any disciplinary action which has been taken against the waterside worker by a union of which he is a member. Sub-section (2) provides that the suspension of the registration of a waterside worker at a port is to have effect until the expiration of such period, or of such number of working days at the port, as the authority directs. It would seem that s. 37 intends that the Commonwealth Industrial Court should exercise by way of review or revision all the powers which are conferred upon the authority under s. 36. The Commonwealth Industrial Court is of course a court established for the exercise of part of the judicial power of the Commonwealth. We have recently upheld the validity of the provisions which established the court on the specific ground that the main overriding intention was to establish a court qualified to exercise the judicial power of the Commonwealth for the purpose of exercising that judicial power. Any provisions which may chance to confer some other power on the court must be considered severable and void: see *Seamen's Union of Australia* v. *Matthews* (1). If s. 37 had been framed in such a way as to invest the Commonwealth Industrial Court with power to hear and determine issues defined with more or less precision as to the infringement by waterside workers of prescribed standards of conduct or as to the fulfilment of other definite conditions upon which the cancellation or suspension of registration was to depend, there might have been little difficulty in treating the duty or authority thus imposed or conferred upon the court as part of the judicial power of the Commonwealth. And if a discretion had been added to remove or reduce the suspension or cancellation if the real merits appeared so to require, notwithstanding that an infringement had occurred, that would not necessarily have been inconsistent with a grant of judicial power.

Provisions very similar to those now found in Pt. III of the *Stevedoring Industry Act* 1956, although by no means entirely the same, were contained in Pt. III of the *Stevedoring Industry Act* 1949. Section 25 of that Act, which was a provision of Pt. III, corresponded sufficiently with s. 37 of the *Stevedoring Industry Act* 1956, but the power there given was to the Commonwealth Court of Conciliation and Arbitration. Clearly enough it was not part of the judicial power of the Commonwealth. It formed part of the general industrial powers of that court although it was exercisable by way of review or revision of the decisions of the Australian Stevedoring Industry Board. The differences between s. 25 of the Act of 1949 and s. 37 of the Act of 1956 are of no significance with reference to

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

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the character of the power as judicial or industrial. It seems reasonably plain that the real intention was that the Commonwealth Industrial Court should exercise the same power as theretofore had been reposed in the Commonwealth Court of Conciliation and Arbitration in entertaining appeals against the suspension or cancellation of the registration of a waterside worker. There can be little doubt that it was intended as an industrial power, or if you like an administrative power, the exercise of which should be governed by a consideration not only of the specific matters set out in s. 24, which roughly correspond with those enumerated in the present s. 36, but also of all matters which might seem relevant to a sound and wise administrative control over the stevedoring industry. This Court took the view in *Reg.* v. *The Commonwealth Court of Conciliation and Arbitration*: *Ex parte Ellis* (1) that s. 25 of the Act of 1949 conferred upon the waterside worker, by the remedy which s. 25 called an appeal, a right to a review of the action of an administrative body by the Court of Conciliation and Arbitration exercising a special authority. That court as a revisory tribunal was placed in the same position as the Stevedoring Industry Board; it must be satisfied of the existence of the necessary conditions prescribed by the provision, but once so satisfied the same discretion arose in the court for exercise on the same considerations. It is difficult to believe that as s. 37 of the Act of 1956 the provision, unaltered in substance, is based on any other principles or expresses any other intention. The same legislative intention is apparent in s. 5 of the recently enacted *Stevedoring Industry Act* 1957. Section 5 is expressed to repeal the present s. 37 and replace it with a provision in almost identical terms conferring the power which it describes upon the Commonwealth Conciliation and Arbitration Commission. Section 5, however, is not to go into operation until such date as is fixed by proclamation and it therefore has no present effect. We were informed that only in the event of the present s. 37 being held invalid was it intended to proclaim the new one. Nevertheless, it represents the expression of a legislative intention and does nothing to dispel the notion that the words used in s. 37 were not intended to be read in any limited fashion so as to accommodate them to the judicial power and restrain their operation within the limits of that power; on the contrary it tends, if anything, to confirm the contrary view. It seems clear enough that the power in the hands of the Commonwealth Industrial Court was intended to be of the same scope and have the same purpose as that given to the Court of Conciliation and Arbitration by s. 25 of the

(1) (1954) 90 C.L.R. 55.

Act of 1949 and when in the Act of 1957 the same words are used so that they may be applied to the Commonwealth Conciliation and Arbitration Commission, no change of meaning is intended. The argument in support of the validity of s. 37 was simply that once the power was conferred on a court established for the exercise of the judicial power of the Commonwealth the provision should be restrained by construction to the limits required for the exercise of jurisdiction falling within the judicial power of the Commonwealth. For this argument much might be said were it not for the history of the provisions and were there not so much evidence of the fact that the true intent of the legislation is that the exercise of power arising under s. 37, wherever it might reside, should be governed by what might broadly be called administrative and industrial considerations and should not be restricted to purely legal criteria. If what may be described as a realistic approach is made to s. 37, there can be no escape from the conclusion that it can have no validity as a provision purporting to confer jurisdiction on the Commonwealth Industrial Court.

The order nisi should therefore be made absolute for a writ of prohibition restraining their Honours of the Commonwealth Industrial Court from further proceeding with Buchan's appeal.

McTIERNAN J. An order cancelling or suspending the registration of a waterside worker is an administrative order. The order is the exercise of a discretionary power given to the authority by s. 36 of the *Stevedoring Industry Act* 1956. The authority is not bound to cancel or suspend the registration of a waterside worker even though it has found adversely to him in an inquiry under sub-s. (1) of s. 36. If the authority is not acting under sub-s. (4), it is a condition precedent to the exercise of its discretion that the result of the inquiry is adverse to the worker. The question whether the authority has made a sound exercise of the discretion to cancel or suspend registration cannot be completely determined by judicial standards. For it is clear from the provisions of the Act that it would be proper for the authority to take into account matters purely of public policy. The Industrial Court, therefore, would in the proceeding which s. 37 calls an appeal, have the duty of reviewing an order founded upon a finding of fact and involving the resolution against the waterside worker of a question of policy. The court could, of course, consistently with the exercise of judicial power, decide whether the finding of fact was correct. But if it found that it was correct, it could not consistently with the exercise of judicial power decide that there was no ground of policy to be

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drawn from the Act which ought to preclude the waterside worker from retaining his registration. If the court confined itself simply to the issue whether the waterside worker fell within any of the express grounds of disqualification enumerated in s. 36 (1) and determined the "appeal" on that basis, its method of proceeding might be consistent with an exercise of the judicial power, but it would not be consistent with the intention which s. 37 manifests. That intention is to determine whether the authority has correctly applied s. 36. That would, in part, involve the exercise of the judicial power but it would also involve the consideration of the questions of policy. These lie outside the realm of judicial power. I am of the opinion that the jurisdiction which s. 37 defines is not strictly judicial power in the constitutional sense. If this opinion is right s. 37 is not valid, because, as the Industrial Court is created under Chap. III of the Constitution, it is contrary to the Constitution for Parliament to confer upon it any power or function not belonging or incidental to the judicial power.

For these reasons I would make the order nisi absolute.

WEBB J. I would make absolute the order nisi for prohibition. In *Reg.* v. *The Commonwealth Court of Conciliation and Arbitration*: *Ex parte Ellis* (1) I expressed the view that s. 25 of the *Stevedoring Industry Act* 1949, which in material respects was in the same terms as s. 37 of the *Stevedoring Industry Act* 1956, conferred administrative power and not judicial power on the Court of Conciliation and Arbitration established by the *Conciliation and Arbitration Act* 1904-1952. But I indicated that if the same power were conferred on a court having only judicial power it would become judicial power. However, that would have necessitated a modification of the terms in which the power was granted by resort to s. 15A of the *Acts Interpretation Act* 1901-1950, which a majority of this Court held in *Reg.* v. *Spicer*: *Ex parte Australian Builders' Labourers' Federation* (2) was not available for the purpose of converting a non-judicial power into a judicial power. I dissented in the last-mentioned case, but I am not warranted in persisting in dissenting as to the effect of s. 15A.

Order absolute for a writ of prohibition prohibiting further proceedings on the purported appeal of the respondent George Buchan to the Commonwealth Industrial Court numbered in the Registry of the said Court No. 73 of 1957.

(1) (1954) 90 C.L.R., at p. 67.

(2) (1957) 100 C.L.R. 277.