[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION AND OTHERS;

Ex parte THE AUSTRALIAN FOREMEN STEVEDORES' ASSOCIATION AND OTHERS.

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SYDNEY, *Nov.* 12-14; *Dec.* 19.

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

Industrial Law (Cth.)—Commonwealth Conciliation and Arbitration Commission—Employee organisation—Waterside workers—Registration—Suspension—Inquiry Judicial power—Subsequent amendment of statute—Appeal—Right—Consideration of appeal by commission—Prohibition—Conciliation and Arbitration Act 1904-1956 *(Cth.)—Stevedoring Industry Act* 1954-1956, *ss.* 7 (1), 10, 14, 29, 36, 37, 38—*Stevedoring Industry Act* 1956-1957, *s.* 37—*Stevedoring Industry Act* 1957, *s.* 5.

Once the registration of a waterside worker has been effectively cancelled or suspended by the Australian Stevedoring Industry Authority pursuant to s. 36 of the *Stevedoring Industry Act* 1954-1956, the authority has no power either expressly by virtue of the section or by clear implication to set aside such cancellation or suspension either in the sense of revoking it so as to render it void *ab initio* or in the sense of cutting short its operation. The special power to " suspend " and " revoke suspension " given to the authority by s. 36 (4) is given only pending the holding of an inquiry.

Where cancellation or suspension of registration is decided upon, then in order to be legally effective it must be recorded in the register kept at the port in question pursuant to s. 25 (*e*) of the Act. In the case of an effective cancellation or suspension the waterside worker's remedy is to appeal to the Commonwealth Conciliation and Arbitration Commission pursuant to the new s. 37 substituted by the *Stevedoring Industry Act* 1957.

Where the authority has decided to cancel or suspend the registration of a waterside worker but before the cancellation or suspension has actually taken effect it may revoke its decision and substitute some other decision therefor.

The authority by its local representative at the port of Sydney suspended the registration of a waterside worker but made no entry of such suspension either in the book register kept at the port of Sydney or on the registration card relating to such waterside worker. The local representative later " cancelled " such suspension. The waterside worker lodged an appeal to the

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Commonwealth Conciliation and Arbitration Commission against the suspension by the local representative.

Held, by *Dixon* C.J., *Fullagar*, *Taylor* and *Windeyer* JJ., *McTiernan* J. dissenting, that no entry having been made, the suspension was thus ineffective and there was no subject matter for appeal to the commission. Accordingly prohibition should issue to restrain the commission from entertaining the appeal.

Per *McTiernan* J.: (1) Upon the proper construction of the *Stevedoring Industry Act* it is incident to the powers conferred upon the Commonwealth Conciliation and Arbitration Commission by s. 37 of such Act that the commission should decide finally and conclusively whether or not the registration of a waterside worker has been cancelled or suspended under s. 36 of such Act. Accordingly, no prohibition point is involved in such an issue.

(2) The *Stevedoring Industry Act* confers no power upon the authority to revoke a cancellation or suspension under s. 36. Once made, such cancellation or suspension takes effect according to s. 36 (2) and the authority has then no *locus poenitentiae*.

PROHIBITION.

Upon application made on behalf of The Australian Foremen Stevedores' Association and Michael Thomas O'Brien and Edward John Sykes, two members of such association, *Fullagar* J. on 6th May 1958 granted an order nisi directed to the Commonwealth Conciliation and Arbitration Commission, one George Buchan, a waterside worker, and certain other named waterside workers, calling upon the respondents to show cause why they should not be prohibited from proceeding further with the appeals of the said George Buchan and others filed in the registry of the Commonwealth Conciliation and Arbitration Commission on 14th February 1958 or alternatively from further inquiring in the course of the hearing of the said appeals into allegations that one John Krespi was assaulted by the prosecutors O'Brien and Sykes on 11th October 1957 upon the grounds :—(1) that the Commonwealth Conciliation and Arbitration Commission had no jurisdiction to hear the said purported appeal in that—(a) before they became effective in fact or in law the suspensions the subject of the appeal were cancelled by the Australian Stevedoring Industry Authority and there was not at any material time any suspension in force against which an appeal could be brought ; or (b) in the alternative there was not at the time of the filing of the said notices of appeal and was not in force at the time of the issue of the order nisi any suspension which the Commonwealth Conciliation and Arbitration Commission could confirm vary or set aside within the meaning of s. 37 of the *Stevedoring Industry Act* 1956-1957. (2) that the Commonwealth Conciliation and Arbitration Commission had no jurisdiction to inquire

in the course of the said appeals into allegations that the said John Krespi was assaulted by the said prosecutors O'Brien and Sykes on 11th October 1957 because the said allegations were not relevant to an appeal under s. 37 of the *Stevedoring Industry Act* 1956-1957.

The affidavits filed in support of the application for the order nisi were those of Francis Ford White, the solicitor for the prosecutors.

The order nisi to show cause came on for hearing before the Full Court of the High Court.

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

J. H. Wootten, for the prosecutors. The suspension having been lifted at the time when the notice of appeal was filed there was no longer anything to appeal against. Independently of any express power, the power of the authority extends to a review of its decisions, including a cancelling of a suspension which it has imposed. There can be no appeal except against an existing suspension or cancellation: see ss. 36 and 37 of the *Stevedoring Industry Act*. It is for this Court to determine whether an existing suspension or cancellation is a necessary prerequisite to jurisdiction.

[DIXON C.J. At the moment it would seem that *Ashburner* J. would not have jurisdiction under the new s. 37 except as a result of the operation of the words "has been suspended before the commencement of this section."]

Without those words the section would operate only on future cancellations or suspensions. They are intended to give the section a retrospective operation but are not directed to reviving cancellations or suspensions, which, though once imposed, have been lifted. Alternatively, if there is a suspension for two or three days, or even a week, if the time has run out before the notice of appeal is filed there is no jurisdiction to entertain the appeal. Section 37 is directed to the litigation of questions concerning actual cancellations and suspensions, and not to mere questions of findings made in relation to one of the paragraphs of s. 36 (1) which a person may wish to challenge. The cancellation by the authority amounted to a revocation of the suspension, or, alternatively, to a termination of it. Section 29 (1) (*c*) applies only to a subsisting cancellation. Where power is given to an administrative body to make decisions regarding matters over which it exercises a continuing control, then prima facie it has power to review those decisions and undo what it has done. As to the authority's power to cancel the suspensions as it purported to do, see particularly ss. 17 (1) (*f*), 25 (*e*) and s. 36 (1) (*b*), (2). The nature of the power would suggest that the authority can, in the absence of an indication to the contrary in the legislation,

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review its decisions and undo what it had done. Sub-section (2) of s. 36 defines the types of suspension which may be imposed and specifies that the suspension may be one of two kinds—until the expiration of a specified period or until the expiration of a number of working days which may not occur until some indefinite future time. The sub-section further limits the power of the authority to the imposition of an immediate suspension. But the determination of the period may be reviewed and the power may be re-exercised and the period altered. Alternatively, the power of direction is caught by s. 33 of the *Acts Interpretation Act* 1901-1957. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 476, note (*m*), p. 524, par. 683.] There is no compelling common law doctrine which makes it necessary to approach a modern statute dealing with the powers of an administrative body with any assumption about the exhaustion of power or the like. There is nothing which would prevent one construing this Act in accordance with what appears to be its meaning. Sub-section (4) of s. 36 deals with a special and different situation, the situation before an inquiry, and empowers the authority to suspend pending the inquiry. [On the application of the maxim "*expressio unius exclusio est alterius*" he referred to *Rylands Bros.* (*Australia*) *Ltd.* v. *Morgan* (1); *Lowe* v. *Dorling & Son* (2); *Gregg* v. *Richards* (3) and *Dean* v. *Wiesengrund* (4).] If there were an *expressio* in relation to the power of suspension here being dealt with, that would be a compelling circumstance against the submission. But where the only *expressio* relates to a power of suspension exercisable in different circumstances the maxim loses a great deal of its force. The reasonable construction of the power includes the power to review the period, and to undo the suspension. Sub-section (4) of s. 36 supplies no sufficient indication of intention to exclude a power otherwise existing to revoke a cancellation. Nor do ss. 36, 37 and 37A indicate a contrary intention to exclude a power of revision of a suspension. For these reasons the first ground in the order nisi is made out. On the second ground of the order nisi the power exercised by *Ashburner* J. is really a re-exercise of the same power as the authority had and the discretion which he has is the same as that possessed by the authority itself under s. 36. It is not an appeal in the strict sense. [He referred to *Reg.* v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (5).] If the tribunal, in purporting to hear an appeal, embarks upon an inquiry which goes outside the

(1) (1927) 27 S.R. (N.S.W.) 161, at p. 168; 44 W.N. 56.
(2) (1906) 2 K.B. 772, at p. 785.
(3) (1926) Ch. 521, at pp. 527. 528.
(4) (1955) 2 Q.B. 120, at pp. 129, 130, 137, 138.
(5) (1954) 90 C.L.R. 55, at p. 63.

purposes of a discretion entrusted to it and which is not connected with the other branch of its jurisdiction—here the ascertainment of whether or not one of the conditions in s. 36 has been satisfied—it exceeds its jurisdiction and is subject to prohibition. The judge is proposing to inquire into the truth or otherwise of the allegations of assault and this is now the only substantial matter before him. Such inquiry goes beyond the limits of the power, and, accordingly, prohibition should go.

D. L. Mahoney, for the Commonwealth Conciliation and Arbitration Commission, submitted to such order as the Court should see fit to make.

J. O'Brien, for the Australian Stevedoring Industry Authority. The authority does not wish to make any submissions.

D. B. McKenzie (with *G. Wallace* Q.C.), for the Central Wharf Stevedoring Co. and other employers, addressed the Court by leave. *Ashburner* J. has no jurisdiction to proceed. The only ground upon which the particular inquiry on which his Honour proposes to continue could be within the limits of his admittedly wide discretion would be if it were sought to establish justification in all the circumstances of this case for the refusal to work which was charged against the men and which is admitted. The only issue now before that judge is whether there was an assault as alleged. [He referred to *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (1).] The judge is proposing to decide something outside the boundary of the discretion and outside the power to inquire conferred. The men refused to work and they thereby placed their registration in jeopardy, and the only question before the judge should be as to the exercise of his discretion to confirm, vary or set aside the suspension. The ban imposed by the waterside workers was unlawful. [He referred to *Reg.* v. *Spicer*; *Ex parte the Waterside Workers' Federation* [*No.* 2] (2).] In embarking upon an inquiry as to whether the alleged assault provides justification for the ban, and thus justification for the refusal to work, the judge is going beyond any possible view of the extent of the discretion vested in him. If it were to be accepted as principle that the power to inquire and to exercise a discretion is so wide that it confers power to inquire into every allegation which forms the reason for a ban, then there are no limits either to the power or to the discretion. [He referred

(1) (1953) 88 C.L.R. 100. (2) (1958) 100 C.L.R. 324.

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to *R.* v. *Wallis*; *Ex parte Employers' Association of Wool-Selling Brokers* (1)]. Mere wrongful admission of evidence does not affect the situation. [He referred to *Reg* v. *The Commonwealth Conciliation and Arbitration Court*; *Ex parte Ellis* (2) and *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (3).]

J. D. Holmes Q.C. (with him *F. W. Paterson*), for George Buchan and other named respondent waterside workers. The provisions of s. 37 as they now stand are more than merely provisions providing for a change-over from an appeal to the Industrial Court to an appeal to the commission. The intention is that there shall be a jurisdiction empowering the commission to hear an appeal from any suspension imposed. It is not to be implied that the authority, which has suspended a waterside worker either for a period or for a number of working days, should also have power to revoke or to cancel, in the sense of terminate, the order which it had already made. The statute has confined the disciplinary powers to two, viz. cancellation or suspension, and has made provision for revocation of suspensions where there has been no inquiry: s. 36 (4). The provisions of that sub-section reinforce the view that no implication such as that contended for should be made. When an appeal is conferred, and there has been an appeal under this Act either to the Industrial Court or to the commission from a suspension, there can be no strong reason for implying that the authority has similar powers to the appellate body, i.e. to confirm, vary or set aside the cancellation. The authority did not, in this case, set aside the suspension, and did not make an order which had the effect of disposing of the suspensions as if they had never been. It was simply a termination and no more. It does not matter in this case if all that has happened is the termination, because there is still a suspension from which there can be an appeal. The commission could set aside the suspension. In relation to any particular matter touching a particular waterside worker, once the authority has made a decision to suspend or cancel registration, its power under s. 36 (2) is exhausted. "Set aside" in s. 37 means "set aside the order of suspension." It was made clear by the authority to his Honour that the view which the authority took of what it had done was simply to terminate the suspensions, and the suspensions, as suspensions, were still there. It was an appeal against those. It is not agreed that the suspensions had never been effective and that the appeals were academic. What the

(1) (1949) 78 C.L.R. 529.
(2) (1954) 90 C.L.R. 55.
(3) (1953) 88 C.L.R. 100.

authority did when it cancelled the suspensions was to terminate them as from that time. Prior thereto they had been effective. Being suspended, the men then proceeded with an appeal which the statute gives to them. The suspensions deprived them of their rights to attendance money between the date of imposition and the date of lifting of the suspension. It would not be unusual but would rather be the usual practice in the past for an appeal not to be lodged until the period of the suspension had in fact expired. Section 37 intended that the men should have the appeal in order to remove the effect that the suspension had on their rights. The onus is on the prosecutor to show there was no jurisdiction. The second ground of the order nisi does not raise a question of jurisdiction at all. It is not a reasonable hypothesis that his Honour will proceed to try an issue of assault unrelated to any issue necessary to be decided in order to determine the appeal. The applicants have shown no basis for prohibition on either the first or second grounds.

After a short adjournment the following announcement was made by:—

DIXON C.J. Mr. *Wootten* and Mr. *O'Brien*, you are both, I think, concerned with what I am about to say. We are much inclined to think that the whole question of whether the prohibition should go or not comes down to the view that I was endeavouring to put, which might be summarised by saying that it depends on whether the suspensions possess any operation—or possessed when the Act came into force—which could do any prejudice to the men who appealed, and that that depends upon the material we have before us, of course, is quite clear, coupled with the construction of the Act.

We do not know Mr. *O'Brien*, whether you would wish to put anything before us on that subject, and as far as Mr. *Wootten* is concerned, we really did not want to confine him in his reply to that topic, but that is how the matter at present strikes us although we are not prepared to give any definitive view on the matter. At the moment we want to reserve judgment.

As to Mr. Buchan, there seems to be a special question under sub-s. (2) which may take him out of the general case, and we would like some observations directed to that.

That is how the matter strikes us at present.

J. O'Brien. When the general stoppage of work was settled, the authority was invited to let " bygones be bygones " and therefore sought to erase the suspensions as far as that could be done without disturbing history. As far as could be done they were cancelled in the strict sense.

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B. P. Macfarlan Q.C. (with him *D. L. Mahoney*), for the Attorney-General for the Commonwealth. We do not desire to seek leave to intervene.

J. H. Wootten, in reply. By reason of s. 38 the authority was turning to deal with a notional entry in a register. The term " cancel " when used in relation to an entry in a register, whether notional or not, shows an intention to obliterate, to strike out the suspension. The whole tenor of it is that it has obliterated this notional entry from the register, which is precisely the same thing as would be done if the suspension were set aside on appeal. The fact that the authority has done it for different reasons from those for which the appeal tribunal would be asked to do it is quite irrelevant. As far as the authority is concerned the reason is that these men never had been suspended. The effect of the authority's decision was to expunge the suspension from the register, whether notionally or by actual entry, and that can be no less effective than setting it aside. The words " or has been " in the new s. 37 (1) go with the words " before the commencement of the section. " The purpose of the sub-section is to deal with time and to preserve the right of any person who has an appeal and has set about exercising it against being adversely affected as to time by the holding invalid of the earlier section and the passing of the new section. [He referred to *Gregg* v. *Richards* (1).]

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR, TAYLOR AND WINDEYER JJ. This is the return of an order nisi for a writ of prohibition directed to the Commonwealth Conciliation and Arbitration Commission and to George Buchan and a number of other individuals who are members of the Waterside Workers' Federation. The prosecutors are the Australian Foremen Stevedores' Association, which is an organisation registered under the *Conciliation and Arbitration Act* 1904–1956 (Cth.), and two individual members of that association. It is sought to prohibit the commission from entertaining what purport to be appeals by Buchan and the other individual respondents against suspensions by the Australian Stevedoring Industry Authority of their registration as waterside workers in the port of Sydney under the *Stevedoring Industry Act* 1954–1956. The substantial ground of the application is that there was not at any material time any effective suspension against which an appeal could be brought by

(1) (1926) 1 Ch., at p. 527.

any of the individual respondents. There is a second ground taken by the order nisi, but that may be put on one side for the time being.

It is convenient to begin by referring to the relevant provisions of the *Stevedoring Industry Act*. That Act makes provision for the registration of employers and waterside workers in Australian ports, and prohibits the employment of unregistered persons as waterside workers. Section 36 (1) provides that where, after such inquiry as it thinks fit, the Stevedoring Industry Authority constituted under s. 10 of the Act is satisfied that a registered waterside worker . . . (*c*) has acted in a manner whereby the expeditious safe or efficient performance of stevedoring operations has been prejudiced or interfered with . . . the Authority may cancel or suspend the registration of the waterside worker. Sub-sections (2), (3) and (4) of s. 36 are in the following terms :—" (2) The suspension of the registration of a waterside worker at a port under the last preceding sub-section has effect until the expiration of such period, or of such number of working days at the port, as the Authority directs. (3) For the purposes of the last preceding sub-section, ' working day ', in relation to a port, does not include a day declared by the Authority, in writing, to be a day on which there has been a concerted failure by all or any of the waterside workers registered at the port to comply with a provision of this Act, an order or direction of the Authority under this Act or an award of the Commission. (4) The Authority may, before holding an inquiry under this section in respect of a waterside worker, suspend the registration of the waterside worker and may at any time revoke that suspension." The term " working day " is defined by s. 7 (1) as meaning in relation to any port a day other than Saturday or Sunday or a day which is a holiday for waterside workers at that port. Sub-section (3) thus restricts the meaning of the term for the purposes of s. 36.

Section 37, as it stood in November 1957, purported to give to a waterside worker whose registration had been cancelled or suspended under s. 36 a right of " appeal " to the Commonwealth Industrial Court. In that month, as will be seen, the authority pronounced the " suspensions " which are now in question, and the respondent Buchan gave, within the time allowed by s. 37, notice of appeal to the Commonwealth Industrial Court. Thereupon the Waterside Workers' Federation applied to the High Court for a writ of prohibition on the ground that the power conferred by s. 37 was not judicial power and could not therefore be validly conferred on the Commonwealth Industrial Court : *Attorney-General of the Commonwealth of Australia* v. *The Queen* (1). The order nisi for prohibition

(1) (1957) A.C. 288 ; (1957) 95 C.L.R. 529.

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was made absolute on 20th December 1957 : see *Reg.* v. *Spicer*; *Ex parte Waterside Workers' Federation* (1). On 18th January 1958 s. 5 of the *Stevedoring Industry Act* 1957, which had received the Royal Assent on 12th December 1957, was proclaimed to come into operation. That section repealed the old s. 37 and substituted a new section, which gave a right of appeal from the authority to the Conciliation and Arbitration Commission, and, in cases where notice of appeal to the Commonwealth Industrial Court had been given, extended the time for appealing to fourteen days after the commencement of the new section. Notices of appeal to the commission against the suspensions pronounced in November 1957 were given on 4th February 1958. It is to prevent the commission from dealing with these " appeals " that a writ of prohibition is now sought.

The " suspensions " in question had their origin in a dispute between the two individual prosecutors, O'Brien and Sykes (who are foremen stevedores employed by the Central Wharf Stevedoring Co.), and a man named Krespi. Krespi alleged that he had been assaulted by O'Brien and Sykes, and thereafter certain waterside workers, including the individual respondents, refused to work on certain ships to which they had been rostered to work under O'Brien and Sykes. On 14th November 1957 the local representative of the Stevedoring Industry Authority, acting under a delegation in pursuance of s. 14 of the Act, purported to suspend the registration of the individual respondents for two working days. There were in fact from 14th November to 4th December inclusive no " working days " in the port of Sydney within the meaning of s. 36. This was because every day in that period except Saturdays and Sundays was a day declared by the local representative of the authority in writing to be a day on which there had been a concerted failure by waterside workers in the port of Sydney to comply with an award of the Commonwealth Conciliation and Arbitration Commission: see s. 36 (3). No such declaration was made on 5th December (which was a Thursday), and, although no stevedoring work was in fact performed in the port on that day by any member of the Waterside Workers' Federation, it would appear that that day was a " working day " within the meaning of s. 36. It would appear also that during that day negotiations were proceeding, and that an understanding was reached between the local representative of the authority and the union that, if the waterside workers " lifted the ban " on the foremen concerned, the " suspensions " would be " cancelled ". Mr. White says in his second affidavit that

(1) (1957) 100 C.L.R. 312.

the suspensions were, in accordance with this understanding, "cancelled on the 5th December 1957 at approximately 4.0 p.m.". There is no evidence that this "cancellation" consisted of anything more than an oral intimation that the suspensions were or would be "cancelled". In the press pick-up notice published in the Sydney Morning Herald and the Daily Telegraph of 6th December 1957 the following announcement appeared :—"The suspensions imposed on men involved in the foremen dispute and the sling load dispute on the undermentioned vessels have been cancelled, and all men are now rostered for work". The names of six vessels followed. An announcement in the same terms was made in the radio pick-up notice of the same day.

The position of all the individual respondents is, for all material purposes, the same, and it will make for simplicity if we deal expressly only with the case of Buchan.

Now, if the registration of Buchan as a waterside worker was ever effectively suspended under s. 36, it would seem clear that the authority had no power to cancel the suspension either in the sense of revoking it so as to make it void *ab initio* or in the sense of cutting short its operation. The power given to the authority by s. 36 is to cancel or suspend registration. A power to cancel either a cancellation or a suspension could not be held to exist unless it were given by express words or by clear implication. No such power is given expressly, and every indication of intention that can be found in the Act is clearly against the giving of such a power by implication. The Act itself prescribes or indicates what are to be the consequences of a cancellation or suspension, and those consequences must attach finally on an exercise by the authority of its powers under s. 36. The effect of a suspension is, by virtue of s. 38, that the waterside worker is deemed not to be registered, and a cancellation is clearly intended (subject, of course, to the right of appeal) to be final unless the person affected applies for re-registration under s. 29, in which case he must satisfy the authority as to certain specified matters. The special power to "suspend" and "revoke suspension", which is given by s. 36 (4), is given only pending the holding of an inquiry.

It is, of course, perfectly consistent with what has been said that the authority should have power, after deciding to cancel or suspend but before the cancellation or suspension has actually taken effect, to revoke its decision and substitute some other decision. But it follows from what has been said that, if there was in the first place a legally effective suspension of Buchan's registration, it operated in law (although the authority purported to "cancel" it) on 5th

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and 6th December, which were " working days " within the meaning of s. 36, and Buchan has a right of appeal to the commission. That right should be held to subsist, notwithstanding that the period of suspension expired on 6th December 1957, because Buchan must be taken to have an interest in establishing that the suspension was wrongly imposed in the first place. If, on the other hand, there was never any legally effective suspension of Buchan's registration, there can be no right of appeal. There is in that case no subject matter for the exercise of jurisdiction by the commission, and the order nisi for prohibition must be made absolute. The jurisdiction of the commission depends on the existence of a suspension—that is to say, a suspension which is operative and effective in law, and the existence of such a suspension is not a matter which can be conclusively determined by the commission. If there is such a suspension, the commission can be compelled by mandamus to entertain an appeal. If there is not such a suspension, it can be prohibited from entertaining an appeal. The real question in the case is, therefore, whether there was ever any legally effective suspension of Buchan's registration, and it is necessary to consider exactly what was done in the matter. All the relevant facts are before the Court.

It appears that Mr. J. A. Murphy, the local representative of the authority, on 12th November 1957 held an inquiry, at which were present a representative of the Waterside Workers' Federation, a representative of the employers, Captain Stringer (who is described as " supervisor ") and certain waterside workers members of gangs 311 and 346. The inquiry was in relation to the conduct of members of those gangs in refusing to work on the ship *Shansi* under foremen Sykes and O'Brien. Shorthand notes of the proceedings were taken and later transcribed. The transcript records that at the end of the inquiry the local representative said :—" I am satisfied that the men by their failure to commence work and complete an engagement as a waterside worker, they interfered with the expeditious performance of stevedoring operations, and their registrations are suspended under ss. 36 (1) (*c*) and 36 (1) (*e*) (ii) of the *Stevedoring Industry Act* 1956 for two working days. If this vessel is worked tonight by members of the Sydney Branch then the penalty imposed will be reconsidered." At the foot of the transcript appears the signature " J. Murphy " followed by the words " Act. Local Representative, Delegate A.S.I.A., 13th November 1957 ".

On 14th November 1957 the local representative held a further inquiry, at which were present a representative of the employers, Captain Stringer, and certain waterside workers members of gangs

303 and 338. The inquiry was in relation to the conduct of members of those gangs in refusing to work on the ship *Shansi* under foremen Sykes and O'Brien. The transcript of the shorthand notes of the proceedings records that at the end of the inquiry the local representative said :—" As a result of the men's refusal to commence work and complete this engagement I consider the men acted in a manner whereby the expeditious performance of stevedoring operations was interfered with and their Registrations are suspended under cl. 36 (1) (*c*) and 36 (1) (*e*) (ii) for two working days." The transcript appears to be signed by " J. A. Murphy ", and the signature is followed by the words " Local Representative, Delegate A.S.I.A., 14th November 1957 ". Nothing further was done in relation to the " suspensions " until the local representative on 5th December (which was the first working day after 13th November) made, as has been seen, some informal intimation that the suspensions were " cancelled ", and on 6th December announced in the press and by radio that they had been " cancelled ".

Section 25 (*e*) of the Act requires the authority to " establish and maintain a register of employers and a register of waterside workers " at each port, but the Act contains no detailed directions as to the form of the registers or the making of entries therein. It may have been contemplated that such matters would be the subject of regulations made under s. 60. It may have been thought that no such detailed directions were necessary. But, be these things as they may, the elementary necessities of the case require that a formal record shall be kept which contains the names and sufficient particulars of persons registered, and in which entries are made of all cancellations and re-registrations and suspensions. The very words " cancellation " and " suspension ", like the word " registration " itself, denote the making of entries in a register. In fact the authority, as one would expect, maintains in book form a register of waterside workers in the port of Sydney. It also maintains a registration card in respect of each waterside worker registered in the port, and the registration cards are kept in a card index. No entry of any suspension of Buchan's registration was ever made either in the book register or on Buchan's registration card. Nor was any entry ever made either in the book register or on Buchan's registration card of any " cancellation " of any suspension of his registration.

In these circumstances it seems impossible to hold that there was ever any legally effective suspension of Buchan's registration. The effect of what happened was simply this. On 14th November 1957 the local representative decided that Buchan's registration should

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be suspended for two working days. The decision, however, was never carried into effect, and there was in fact no working day in the port until 5th December. When the local representative on that day announced that Buchan's suspension was "cancelled", what was really being conveyed was an intimation that there was to be no suspension of Buchan's registration. In other words, the local representative was revoking his decision of 14th November, and there was no reason why he should not do so, because that decision had never been carried into effect. Actually the men were rostered for work and worked on 6th December: this would have been unlawful if any legally effective suspension had been in force.

The view that there was never any effective suspension of Buchan's registration was the view taken by the authority itself. The intention of the local representative was made plain on 8th April 1958, when Buchan's appeal came before a Deputy President of the Conciliation and Arbitration Commission. Mr. *R. L. Taylor* Q.C., who appeared for the authority, said that the authority was not prepared to consent to the allowance of Buchan's appeal, because such a consent might be regarded as an admission that there was no justification for the original decision that Buchan's registration should be suspended. But he made it clear that the authority regarded the question raised by the appeal as "academic". He said:—"As far as the authority is concerned, the position is that these men never had been suspended . . . The suspension of the registration for two working days never became effective, and before it became effective the suspensions were lifted." Asked what was meant by "lifting the suspension", he said:—"It means in effect that they were not taken off the register for two working days." A little later he said:—"Their registration never has been affected. 'Suspension for a working day' really means that you go off the register in effect for the working day, and then you go back on again. That never happened to these men."

For the above reasons there is no subject matter for appeal to the Conciliation and Arbitration Commission, and the order nisi for prohibition should therefore be made absolute. A second ground taken in the order nisi is:—"That the Commonwealth Conciliation and Arbitration Commission has no jurisdiction to inquire in the course of the said appeals into allegations that John Krespi was assaulted by the said Michael Thomas O'Brien and Edward John Sykes on the 11th day of October 1957 because the said allegations are not relevant to an appeal under s. 37 of the *Stevedoring Industry Act* 1956–1957." It is not necessary to consider this ground, but it is to be observed that on its face it does not appear to go to jurisdiction so as to afford ground for a writ of prohibition.

McTIERNAN J. In my opinion this order nisi should be discharged. I think that it is incident to the powers conferred upon the Commonwealth Conciliation and Arbitration Commission by s. 37 to decide finally and conclusively whether or not the registration of a waterside worker was cancelled or suspended under s. 36. It seems to me that upon the proper construction of the Act, that should be presumed to be the intention of the legislature. It would follow, in my opinion, that no prohibition point is involved in the issue whether the registration of any of these waterside workers was suspended under s. 36. I think that it is not a question upon which the Court can, in these proceedings, properly express an opinion which is binding upon the Commonwealth Conciliation and Arbitration Commission. (See *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1).)

As I have said, I think that the better construction of the Act is that its intention is that the Conciliation and Arbitration Commission should decide whether or not a waterside worker who complains, by way of appeal, that his registration has been suspended, has been so dealt with. It seems to me that the question is one depending upon an examination of the relevant records of the Stevedoring Industry Authority, and essentially one more fit to be determined by the commission than by this Court. I can see no indication in the Act of a contrary intention. It seems to me to be clear upon the materials before this Court that the prosecutors, at any rate, alternatively, seek a writ of prohibition on the basis that the registrations of all these waterside workers were suspended under s. 36, and that the waterside workers themselves resist the present application on that basis. Indeed, counsel for the authority has not suggested that there was not an exercise of the power of suspension given by s. 36. What the prosecutors allege in denial of jurisdiction is that the suspensions were " lifted ", that is to say, cancelled or revoked. The administrative action taken under s. 36, in order to suspend the registrations in question, and to " cancel " the suspensions, is detailed in the affidavit of Francis Ford White sworn on 28th August 1958. If it were a matter for this Court to decide whether or not decisions were made, pursuant to s. 36, suspending the registrations of these waterside workers respectively, I should, in view of the matters to which Mr. White deposes, have difficulty in deciding that the local representative of the authority did not decide to suspend such registrations. In this view the prosecutors have not discharged the onus of proving that the commission has no jurisdiction. That onus properly belongs to them. It is clear from this affidavit that the authority pronounced decisions to the

(1) (1938) 59 C.L.R. 369, at pp. 384, 391, 392.

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effect that the registrations were respectively suspended. It seems to me, even if the point in question be a prohibition point, that the Court should not exercise its discretion to grant this remedy of prohibition to the prosecutors, on the basis that no suspensions under s. 36 did take place when they have not unequivocally affirmed that position. As I apprehend the argument, the ground upon which the prosecutors really contended that the commission has no jurisdiction to entertain the appeals, is that the suspensions were cancelled or obliterated and never resulted in loss by any of the waterside workers of his rights as such.

The Act confers no express power upon the authority to revoke a suspension which it has made under s. 36. Once the suspension is made under that section, it takes effect according to the terms s. 36 (2). I do not agree that the authority has then any *locus poenitentiae*.

Notwithstanding Mr. *Wootten's* forceful and able argument, I find no room for an implication that the authority may revoke a suspension which it has made and promulgated under s. 36. The authority cannot by an attempt to revoke, interrupt the operation of the Act. It follows that if the commission should decide that the suspensions complained of by the respondents had taken effect under s. 36—and it appears that the commission was proceeding on that basis—it would not be exceeding any jurisdiction with which it is vested by the Act to entertain the appeals in question. The materials before this Court show that the authority had resolved not to oppose the appeal of any of the respondents against the suspension of his registration. The commission has power under s. 37 to set aside the suspension of a registration against which it entertains an appeal. The respondents are entitled to look to the exercise of that power to undo all the effects of the suspension of their registrations. If the authority should maintain the attitude, which it appears to have manifested, of not opposing the appeal of any of these waterside workers, it would not appear likely that the commission would embark upon an inquiry into the allegations of assault against the individual respondents. Whether those allegations are so remote from any question upon which the appeal could reasonably turn as to be outside any jurisdiction conferred upon the commission by the Act, is a question which it is not possible to determine at this stage. However, if the commission were to proceed to investigate those allegations, I should not desire anything which I have said here to be taken as precluding me from regarding as *res integra* the question whether the commission would, in the circumstances, have jurisdiction to make findings adverse to the individual prosecutors that

might prejudice them in the eyes of their employers. As I have said at the beginning of this judgment, the order nisi should, in my opinion, be discharged.

Order absolute for a writ of prohibition directed to the learned Presidential Member of the Commission constituting the Commonwealth Conciliation and Arbitration Commission for the purposes of Div. 4 *of Pt. III of the Conciliation and Arbitration Act* 1904-1957, *and exercising or purporting to exercise authority under the provisions of s.* 37 *of the Stevedoring Industry Act* 1956–1957, *and prohibiting further proceedings upon the appeals or purported appeals of the respondents Buchan and others mentioned in Sched. A of the order nisi herein. No order as to costs.*

Solicitors for the prosecutors, *Francis Ford White & Barnes.*

Solicitor for the Commonwealth Conciliation and Arbitration Commission, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitor for the Australian Stevedoring Industry Authority, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the Central Wharf Stevedoring Co. and other employers, *Allen, Allen & Hemsley*, agents for *Malleson, Stewart & Co.*

Solicitors for George Buchan and other named respondent waterside workers, *C. Jollie Smith & Co.*

Solicitor for the Attorney-General for the Commonwealth, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.