[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SPICER AND OTHERS;

Ex parte FOSTER AND OTHERS.

H. C. OF A. 1958.

SYDNEY, *Mar.* 25, 26.

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

Industrial Law (Cth.)—Statutory provision authorising directions as to performance or observance of rules of registered organisations—Held applicable in relation to conduct of elections of office bearers—Subsequent enactment of provisions with respect to disputed elections—Purported election of office bearers—Dispute—Application made under earlier provision and direction given—Prohibition sought on ground that subsequent provision had restricted operation of earlier provision in relation to disputed elections—Subsequent provisions cumulative upon and not substitutional for earlier provisions—No implied repeal of earlier provisions in relation to disputed elections—Prohibition refused—Conciliation and Arbitration Act 1904-1956, *Pt.* VIII, *s.* 141, *Pt.* IX.

The provisions now standing as Pt. IX—" Disputed Elections in Organizations " of the *Conciliation and Arbitration Act* 1904-1956, notwithstanding their wider and different ambit, are cumulative upon and not substitutional for the provision now contained in s. 141 (formerly s. 81) the ambit of which they do not trench upon or reduce.

Barrett v. *Opitz* (1945) 70 C.L.R. 141, applied.

The jurisdiction conferred by s. 141 of the *Conciliation and Arbitration Act* 1904-1956 on the Commonwealth Industrial Court is conferred in permissive terms and the court has a discretion. In a case which it thinks unsuitable for the operation of s. 141 the court may hold its hand so that an application may be made under Pt. IX.

ORDER NISI for PROHIBITION.

On 10th January 1958 *McTiernan* J. on the application of Terence John Foster and others, being members of the Australian Builders' Labourers' Federation, New South Wales Branch, granted an order nisi directed to the Honourable John Armstrong Spicer, Chief Judge of the Commonwealth Industrial Court, and the Honourable Edward Arthur Dunphy and the Honourable Sir Edward James Ranembe Morgan, Judges of such court, and one John Wishart calling upon the

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respondents to show cause before the Full Court of the High Court of Australia why a writ of prohibition should not issue out of the said High Court directed to the said Chief Judge and Judges of the Commonwealth Industrial Court prohibiting them and each of them from proceeding further upon the order made in matter no. B no. 72 of 1957 upon the following grounds namely :—(1) The Commonwealth Industrial Court had no jurisdiction under s. 141 of the *Conciliation and Arbitration Act* 1904-1956 to make the said order in that the power of the said Commonwealth Industrial Court to deal with the subject matter of the claim before the said court in the above-mentioned matter and to make the order thereby sought was exclusively defined by the provisions of Pt. IX of the said Act and that upon the true construction of the said Act s. 141 must be read subject to those provisions. (2) The Commonwealth Industrial Court had no jurisdiction under s. 141 of the *Conciliation and Arbitration Act* 1904-1956 to deal with the claim by a member of an organisation registered under the said Act that there has been an irregularity in or in connexion with an election for office in such organisation and to make any order as aforesaid.

The order against which prohibition was sought had been made by *Dunphy* J. on 14th November 1957 at the instance of the respondent Wishart and directed that the purported election of certain persons to the offices of branch secretary, delegates from the branch to the federal council and committee-man on the executive committee of the branch for the Australian Builders' Labourers' Federation, New South Wales Branch, should be treated as void and that in the case of the offices of branch secretary and delegates new elections should be held.

E. S. Miller Q.C. (with him *L. K. Murphy*), for the prosecutors. The introduction of the now Pt. IX into the *Conciliation and Arbitration Act* requires that the present s. 141, which does not refer specifically to elections, be limited as a matter of construction so as to preclude the Commonwealth Industrial Court from dealing with questions of disputed elections under an application for the enforcement of the rules of an organisation. Section 141 should be construed as no longer applying to the question of irregularity in elections or alternatively as requiring the exercise of the powers contained in Pt. IX in relation to such questions. The decision in *Barrett* v. *Opitz* (1) proceeded upon the basis of the then state of the legislation which did not include the disputed elections provisions, these being first introduced into the *Conciliation and*

(1) (1945) 70 C.L.R. 141.

Arbitration Act in 1949. The Court will not by virtue of that decision be precluded from giving effect to the construction for which we contend. [He referred to *R.* v. *Wallis* (1); *Craies* on *Statute Law*, 5th ed. (1952), p. 345; *Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (2); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union (Australian Section)* (3); *Williams* v. *Australian Railways Union* (4); *Ahearn* v. *McKeon* (5); *Lawrence* v. *Atkins* (6); *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union (Australian Section)* (7) *Craies* on *Statute Law*, 5th ed. (1952), pp. 203, 205; *Moss* v. *Elphick* (8).] If we be not right in our submission, then the same matter can be dealt with under s. 141 and under Pt. IX and for breach of an order under s. 141 a penalty different from that for breach of an order under Pt. IX is provided: see s. 166. This illustrates that the legislature cannot have intended s. 141 to have the same wide operation after the enactment of the disputed elections provisions as it had before. The Act must be construed apart from the history of s. 141 and its predecessors and Pt. IX, and so construed the prosecutors' submissions should be upheld. [He then sought the inclusion of further grounds in the order nisi and dealt therewith at some length. These do not call for report.]

R. J. Ellicott, for the respondent Chief Judge and Judges of the Commonwealth Industrial Court to submit to such order as the Court should see fit to make.

Simon Isaacs Q.C. (with him *J. D. Milford*), for the respondent Wishart. [At the invitation of the Court he addressed himself first to the additional grounds sought to be included by the prosecutors in the order nisi and, having done so, was then stopped.]

E. S. Miller Q.C., replied on the additional grounds.

The oral judgment of the Court was delivered by DIXON C.J.:—

This is an application to make absolute an order nisi for a writ of prohibition granted by *McTiernan* J. The prohibition sought would, if granted, be directed, I think, to *Dunphy* J., although the other two judges of the Commonwealth Industrial Court were

(1) (1949) 78 C.L.R. 529, at pp. 549-551.
(2) (1932) 47 C.L.R. 1, at pp. 6, 7, 20, 21.
(3) (1951) 82 C.L.R. 208, at pp. 254-256, 265, 266.
(4) (1953) V.L.R. 145, at pp. 153, 154.
(5) (1951) 72 C.A.R. 93, at pp. 96-98 100.
(6) (1952) 74 C.A.R. 139, at p. 141.
(7) (1953) 89 C.L.R. 636, at pp. 646, 647.
(8) (1910) 1 K.B. 846, at pp. 848, 849.

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named in the order nisi as respondents. The application to *McTiernan* J. was granted, a little reluctantly I think, and his Honour refused to include certain grounds, intimating however that he would see no objection to an application to include those grounds being made to the Full Court on the return of the order nisi. We have heard an application for the inclusion of those grounds and they have been explained to us and to a certain extent argued. I do not propose to say more about them than that having gone into them we think that his Honour was well justified in not including them in the order nisi. We do not think the objections to the order made by *Dunphy* J. so far as they rest on these additional grounds disclose in the circumstances a proper case for the issue of a writ of prohibition.

The ground upon which his Honour did grant the order nisi and upon which it has been moved absolute depends on the construction of the *Conciliation and Arbitration Act* 1904-1956. The order against which the prohibition is sought was made by *Dunphy* J. under the provision which appeared as s. 81 in the *Conciliation and Arbitration Act* 1904-1955 and now stands in the Act of 1904-1956 as s. 141. The provision has not been altered. Sub-section (1) of s. 141 provides that the Commonwealth Industrial Court may, upon complaint by any member of an organisation and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules. In 1945 the provision standing as it did as s. 81 was expressed to confer the like jurisdiction on the Court of Conciliation and Arbitration. In that year this Court placed an interpretation upon it in *Barrett* v. *Opitz* (1). The decision meant that the provision might be applied when a question arose with respect to the conduct of an election of office bearers in a registered organisation. At that time the provisions with respect to disputed elections which were subsequently introduced by s. 6 of Act No. 28 of 1949 formed no part of the legislation. Under the title of "Disputed Elections in Organizations" those provisions were introduced as Div. 3 of Pt. VI of the *Conciliation and Arbitration Act* 1904-1949. They now stand as Pt. IX of the *Conciliation and Arbitration Act* 1904-1956. The application to the Commonwealth Court of Conciliation and Arbitration which was the subject of the decision in *Barrett* v. *Opitz* (1) related to a disputed election. Upon that application the late *Piper* Chief Judge had made an order directing a federal executive

(1) (1945) 70 C.L.R. 141.

of a registered organisation to recognise certain persons as branch councillors duly elected to that office and to refrain from recognising other persons. The order was made under s. 81 and depended upon the rules of the organisation. It purported to give directions for the observance of those rules. Sections 159-168 in Pt. IX of the Act of 1904-1956 provide machinery for an inquiry by the Industrial Registrar into the conduct of an election of officers of an organisation and confer upon the Commonwealth Industrial Court powers to make orders and give directions relating to such matters. The provisions are full and relate to elections which are pending and to elections which have taken place. They cover questions of regularity as well as validity.

In *Barrett* v. *Opitz* (1) the whole question was one of validity. It is not necessary to go into the facts of the present case; it is enough to say that within the branch of the organisation with which the case is concerned an election took place. The application was made under s. 141 to the Commonwealth Industrial Court, and *Dunphy* J. who heard the application made the order which is now challenged upon this order nisi for prohibition. The validity of the the order made by *Dunphy* J. must depend upon the applicability of s. 141. Guided, as one would think, to some extent by the order of *Piper* Chief Judge which was upheld in *Barrett* v. *Opitz* (1), *Dunphy* J. directed that the respondents to the application before him should treat as void the purported election for the positions of certain branch officers and should thereupon cause to be conducted and should conduct another election for those positions. The latter direction was of course based upon the view expressed in the earlier part of the order that the prior election was void. The ground upon which the order nisi for prohibition against this order is based is that since the enactment of what is now Pt. IX, s. 141 ought not to be construed as enabling such an order to be made. The argument is that by the enactment of the provisions now standing as Pt. IX there was an implied restriction upon the operation of the provisions now standing as s. 141. Part IX deals, so it is said, with the whole subject matter of disputed elections afresh and deals with it in a manner showing that the legislature considered that the jurisdiction of the court should be regulated by certain conditions and qualifications and that the court should possess a discretion which it might exercise for the attainment of the main purpose. On these grounds it is said that by the enactment of these provisions in 1949 the legislature trenched upon the jurisdiction which, according to the

(1) (1945) 70 C.L.R. 141.

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decision of this Court in *Barrett* v. *Opitz* (1), the provisions of what is now s. 141 confer.

We think that the short answer to this argument is that when the new provisions now standing as Pt. IX were introduced they were intended to be cumulative upon and in no degree substitutional for the provision now contained in s. 141. The decision in *Barrett* v. *Opitz* (1) had given a meaning to s. 81, as it then stood, and there is no ground for regarding the new provisions as intending to change the operation or the meaning of what is now s. 141. There is of course nothing contrary to principle in an argument that a later statutory provision dealing with a subject matter may be taken impliedly to repeal an earlier statutory provision in so far as it might extend to any part of the same subject matter. But in the present case the two sets of provisions deal with entirely different aspects of the administration of the rules of registered organisations. Part IX is devoted entirely to elections. But it treats of elections to offices from various points of view; irregularity, not merely validity; fairness and propriety and *bona fides*, not merely enforcement of the rules of an organisation. Section 141 is not concerned with elections as such. It is concerned with compliance with the rules of a registered organisation and it gives jurisdiction to the Commonwealth Industrial Court to enforce compliance. Because elections take place in accordance with the rules of an organisation it becomes possible, as *Barrett* v. *Opitz* (1) decided, to give directions that a rule shall be observed in such a matter. But we do not think that it at all follows that the later provision with its wider and different ambit was intended to whittle down, trench upon or reduce the ambit of the earlier provision.

It seems to be suggested that *Barrett* v. *Opitz* (1) gave an unnecessarily wide meaning or application to s. 81. There are two observations to be made concerning that decision. First of all it was a decision of the Full Court which followed previous decisions and placed a meaning on the provision which must have been known to the legislature. Yet there are no references in Pt. IX directed to the provision, no indication of intention to detract from the meaning assigned to it. In the second place the Commonwealth Industrial Court is not bound under s. 141 to exercise its jurisdiction. It is a jurisdiction which is conferred in permissive terms and the Court has a discretion. In a case which it thinks unsuitable for the operation of s. 141 it may hold its hand so that an application may be made under Pt. IX.

(1) (1945) 70 C.L.R. 141.

It is perhaps unnecessary to add that, when Act No. 28 of 1949 was passed, the present Commonwealth Industrial Court had not been established, and of course that was so when s. 81 was introduced. The jurisdiction given by s. 81, however, was declared to be judicial power, as appears from *Barrett* v. *Opitz* (1).

For those reasons we think that the order nisi should be discharged.

Order nisi discharged. Costs of the application to be paid by the prosecutors.

Solicitors for the prosecutors, *Morgan Ryan & Brock.*

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

Solicitor for the respondent Wishart, *Harold Munro.*

R. A. H.

(1) (1945) 70 C.L.R. 141.