husband. The basis of this mistaken belief was the further belief that the entry in the court records necessary to convert a decree *nisi* into a decree absolute had never been made. All the members of the High Court held that this was a mistake of fact. In *Tannella v. French*,[8] the defendant was convicted of 'wilfully demanding or wilfully recovering' as rent an irrecoverable sum. In that case, there was a division of opinion as to whether the mistake in question was one of fact or of law.

In the present case, it could well be said that the mistaken belief was one which combined both fact and law, but this was not considered in the judgment.

The authority in this area of mistake of fact or of law is not clear, but the generally accepted view is that held by Dixon J. in *Thomas v. R.*:[9]

> But, in any case, in this distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.

The case of *Gherashe v. Boase*,[10] which was similar on the facts, was not directly referred to by McInerney J. He said simply that the magistrate's decision in the case before him was apparently based on it. He did not discuss at all the proposition advanced by Dean J. in *Gherashe v. Boase*,[11] that the defendant's defence would not succeed unless he could show that he actually addressed his mind to the question about which he was mistaken; in other words, that mere ignorance, as opposed to mistake, is not enough. The reason, no doubt, is that in the present case the defendant evidently had directed his mind to the question of the extent of the Crown land, although he had not pursued his inquiries far enough.

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PITFIELD AND OTHERS v. FRANKI AND OTHERS[1]

Industrial law (Cth)—Registration of organizations—Concept of industry

To be registered as an organization under the Conciliation and Arbitration Commission, a union must comply, *inter alia*, with the provisions of section 132 of the Conciliation and Arbitration Act 1904-1970 (Cth).[2]

In September 1964, the United Firefighters Union applied for registration under the Act. After an amendment to its rules, and despite objections from the firefighting authorities, the Union was registered. The decision to register the Union was confirmed by Franki J. in the Commission. In the High Court, the authorities appeared against these decisions. The appeal succeeded on the ground that the Union did not comply with the provisions of section 132.

[8] *Ibid.*
[9] (1937) 59 C.L.R. 279, 306; [1938] A.L.R. 37, 47. *Cf. Bergin v. Stack* (1953) 88 C.L.R. 248; [1953] A.L.R. 805.
[10] [1959] V.R. 1; [1959] A.L.R. 218.
[11] *Ibid.*
[1] (1970) 44 A.L.J.R. 391. High Court of Australia; Barwick C.J., McTiernan, Menzies, Owen and Walsh JJ. The case has been noted elsewhere: see (1971) 45 *Australian Law Journal* 36; (1971) 45 *Australian Law Journal* 148; generally on the concept of 'industry'. Further, see (1971) 45 *Australian Law Journal* 34 on the granting of prerogative writs in this case.
[2] Referred to *infra* as 'the Act'.

Barwick C.J. stated the issues thus:[3]

> The substantial question therefore is whether the men and officers employed by the fire fighting authorities are employees in or in connexion with an industry[4] or engaged in an industrial pursuit[5] as the words "industry" and "industrial pursuit" are to be understood in the Act.

It seems quite reasonable that the High Court should have sought assistance from section 51(35) of the Constitution in the construction of section 132. However, in doing so one strongly suspects that the Court has tailored its interpretation of the industrial power to conform with the legislative provisions.[6]

The leading judgment was given by Barwick C.J.[7] As the sub-sections had never been fully considered, the issue was in some senses novel. In interpreting the section, the Chief Justice relied on the various constructions which have been placed on the term 'industrial dispute' found in section 51(35) of the Constitution.[8] This term can be given various interpretations, but the one given the *imprimatur* of the High Court can best be paraphrased as disputes located within the sphere of industrialism. A study of the cases revealed no clear definition of the concept of industry. There have been wide views and narrow ones, but Barwick C.J. considered that none were satisfactory.[9]

It was considered by Barwick C.J. that industry within the power was a dichotomous concept. Its presence may be indicated either by the nature of the employer's undertaking on the one hand, or by that of the employee's activity on the other. Therefore, the concept of industry may be present in purely clerical activities, should the employer be engaged in an undertaking which is characterized as industrial. On the same reasoning it will be present even if the employer is not engaged in industry, provided the activity of the employee can be characterized as an industrial pursuit. All the members of the Court considered that section 132 reflected the dichotomy.

However, this view of section 51(35) is not in line with previous interpretations of that section and is, in fact, much narrower than them. The history of the interpretation of the power is most perplexing and, now, the concept of industry lacks any sense of logical consistency.

Much of the present confusion stems from the tendency to approach the concept from different directions. In the one concept are confused activities close to the earth on the one hand, and those related, *inter alia,* to the production and distribution of material wealth on the other. In the *Professional Engineers* case,[10] Dixon C.J. spoke of industry as those activities which were:

> ancillary or incidental to the organized production, transportation and distribution of commodities or other forms of material wealth.

[3] (1970) 44 A.L.J.R. 391, 393.
[4] This refers to s.132(1)(b).
[5] This refers to s.132(1)(c).
[6] A case of the 'tail wagging the dog'. See (1971) 45 *Australian Law Journal* 148, 150.
[7] With whom Owen J. concurred.
[8] (1970) 44 A.L.J.R. 391, 393. The relevant cases appear in the judgments and are referred to, *passim,* in this note.
[9] (1970) 44 A.L.J.R. 391, 394.
[10] *R. v. Commonwealth Conciliation and Arbitration Commission and Others; Ex parte Asosciation of Professional Engineers of Australia* (1959) 33 A.L.J.R. 236, 240.

However, he went on to say that manual labour is probably always industrial.[11] Although Dixon C.J.'s latter proposition was disputed in the present case,[12] nevertheless the ambivalent approach to the nature of industry remains. Originally, the term 'industrial' referred to employment involving manual labour. However, the High Court has broadened the scope of the industrial power to include employment not traditionally thought of as industrial; for instance, the activities mentioned by Dixon C.J. which include, for example, banking and insurance. Walsh J. suggested[13] that if the workers in the *Municipalities* case[14] were involved in industry, *a fortiori* so were the firefighters. Moreover, on this reasoning it could be argued that if banking and insurance clerks are involved in industry, surely firefighters must be.

The term 'industrial' has usually been applied to all contracts of employment which are located in a certain sector of the community. The term involves a characterization of the relationship of employer and employee rather than that of the activity involved. Isaacs and Rich JJ. said that:

> Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute . . . .[15]

There was, in fact, a sphere of industrialism in which the relevant relationship was located. Windeyer J. spoke of

> a concept of work directly concerned with the production, maintenance, repair, distribution or transport of tangible things and also with the provision of intangible things such as gas and electricity.[16]

This view accords with that of Dixon C.J. in the same case, quoted above. Policy reasons have dictated the exclusion of certain relationships from the industrial sphere. The clearest examples are provided by the army and the police force. Section 4 of the Act provides a definition of 'industry' which, although not definitive and which must be read subject to the breadth or narrowness of the constitutional power, provides yet another example of this wide view of industry. The import of this section was effectively ignored in the present case.[17]

There has only been one exception to this type of reasoning in the High Court. In the *State School Teachers* case,[18] rather than exclude teachers for policy reasons similar to those which accounted for the exclusion of the police, the High Court sought to narrow the concept of industry to one which characterized the activity rather than the relationship. The wider economic view was rejected, and the activity had to conform to some industrial standard. This approach appears to be very similar to the dichotomy expressed in section 132. The present case adopts a very similar view. The drafting of section 132 may well account for this narrow view of what constitutes the concept of industry.

[11] *Ibid.*
[12] (1970) 44 A.L.J.R. 391, 396 *per* McTiernan J.
[13] *Ibid.* 400. Walsh J. dissented.
[14] *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1919) 26 C.L.R. 508.
[15] *Ibid.* 554.
[16] The *Professional Engineers* case (1959) 33 A.L.J.R. 236, 253.
[17] Only McTiernan and Walsh JJ. mentioned it, but neither used it to assist in the interpretation of either s.51(35) or s.132. Walsh J. indicated that the vocations in s.4 were limited to the extent of s.51(35).
[18] *Federated State School Teachers' Association of Australia v. State of Victoria* (1929) 41 C.L.R. 569.

At present, on the basis of the *Professional Engineers* case[19] it is quite possible to contemplate that firefighters could be parties to an industrial dispute, yet not be permitted registration under the Act as an industrial organization. However, this appears quite illogical, for although it is quite acceptable to register an organization and then refuse to deal with part of its membership,[20] it would, to say the least, be odd to refuse registration and then concede that an industrial dispute exists.[21]

Possibly the High Court has attempted to exclude from the jurisdiction of the Commission yet another activity which it considers more akin to community welfare than to industry. However, it would be more appropriate and, with respect, less misleading if it were to state its policy explicitly rather than by resorting to *ad hoc* expansions or contractions of the concept of industry to effect its purpose.

There is another matter. The concept of industry may no longer need to be present to the notion of an industrial dispute. To date, as has been noted, that latter term has been paraphrased to mean 'disputes located within industry'. This may be too narrow. It is possible to argue that the term 'industrial' tells us something about the dispute *per se* rather than about the location of the relationships involved. Although teachers and nurses are not usually thought of as engaged in industry there are few people who would doubt that strikes by them over wages and conditions do amount to industrial disputes.

When dealing with section 132 particularly, Barwick C.J. considered each sub-section separately.[22] Under section 132(1)(b) he was of the opinion that the undertaking of the authorities could not be characterized as industrial. He considered that their trading activities were incidental, and that their work as a whole was more in the nature of community welfare. It was not a necessary or indispensable portion of the general industrial mechanism.[23]

The Chief Justice was unable to characterize the actual activity of the firefighter as an 'industrial pursuit' under section 132(1)(c).[24] The activity involved skill and judgment rather than manual labour. It did not assist in the production or distribution of commodities and was not necessarily incidental to some other industrial pursuit. The duties of a firefighter were, to a degree, parallel to those of a policeman.

The other judgments follow a similar approach and add very little. McTiernan J. took the opportunity to criticize the breadth of the decision in the *Professional Engineers* case.[25] It is interesting to note that he considered that manual labour did not necessarily connote the presence of an industry.[26] Menzies J. agreed that firefighting was not an industrial activity. He states that his decision is based on his *personal impressions* of the nature of firefighting.[27]

[19] (1959) 33 A.L.J.R. 236.
[20] The *Professional Engineers* case (1959) 33 A.L.J.R. 236, 254 *per* Windeyer J.
[21] On the concept of industry generally, see Thompson, *'Professional Engineers* Case' (1960) 34 *Australian Law Journal* 35.
[22] (1970) 44 A.L.J.R. 391, 394.
[23] *Ibid.*
[24] *Ibid.* 395.
[25] (1959) 33 A.L.J.R. 236. McTiernan J. was the only dissentient in the earlier case.
[26] *Cf.* remarks of Dixon C.J. in the *Professional Engineers* case (1959) 33 A.L.J.R. 236, 240.
[27] (1970) 44 A.L.J.R. 391, 398.

In fact all the judgments appear to be based on impressions.[28] Each of them reads more like the projected musings of a juror deciding a matter of fact on the balance of probabilities rather than the subtle analysis by a High Court judge of a matter of law. With respect, it appears unjust that such litigation should ultimately depend upon such unpredictable personal impressions. The *Professional Engineers* litigation took nearly a decade to be resolved; the present action took nearly six years. In the end the Union had to pay the costs. Some clearer criteria must be found either by Parliament or by the High Court to guide unions and their advisers before embarking upon what, at present, can prove to be a very hazardous course of action.[29]

This case highlights several unsatisfactory features in the exercise of the Commonwealth industrial power. The concept of an 'industrial dispute' has stagnated. The drafting of the Act unnecessarily limits the possible exercise of the powers of conciliation and arbitration. In another case, *Moore v. Doyle and others*,[30] the Commonwealth Industrial Court called for clarification of the issue of legal personality involved in the federal distribution of industrial law. Should the present system survive the current attacks upon it, it will nevertheless have to be reformed to obviate the problems which have been raised by both *Pitfield v. Franki*,[31] and *Moore v. Doyle*.[32]

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[28] The dissent of Walsh J. is based on a different impression of firefighting. His approach, however, is much the same as that of the majority.

[29] See Thompson, *op. cit.* 45.

[30] (1969) 15 F.L.R. 59. The court was composed of Spicer C.J., and Smithers and Kerr JJ., and their joint judgment concluded, at 124, as follows: '[o]ur sole concern is with legal personality, structure and organization for the purpose of both systems. We have decided to refer our judgment in this matter and these remarks to the Attorney-General for the Commonwealth in the hope that it may be possible, after consultation between Commonwealth and State Attorneys-General, the trade unions, both federal and State, and other interested government authorities to arrange for the examination of the important organizational matters to which we have referred'.

[31] (1970) 44 A.L.J.R. 391.

[32] (1969) 15 F.L.R. 59.