LEGAL LANDMARKS

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Federal Judicial Power

In *R. v. Commonwealth Industrial Court and Another; Ex parte The Amalgamated Engineering Union*[1] the High Court was called upon to determine whether s. 140 of the Conciliation and Arbitration Act 1904-1959 conferred judicial or non-judicial power on the Industrial Court. S. 140 sub-s. 1 provided that the rules of an organization should fulfil certain conditions including the condition that they should not "impose upon applicants for membership, or members of an organization, conditions, obligations or restrictions which, having regard to the objects of this Act, are oppressive, unreasonable or unjust". Sub-s. 2 provided that a member of an organization might apply to the Court for an order declaring that the whole or part of a rule of an organization contravened the previous sub-section. Sub-s. 3 conferred on the Court jurisdiction to hear and determine an application under the preceding sub-section. Sub-section 4 vested in an organization in respect of which an application was made the opprotunity of being heard before the Court. Sub-s. 5 was to the effect that the Court in making its order might declare that the whole or a part of a rule contravened sub-s. 1 and that the rule (or part thereof) so declared would be void from the date of the order. Finally sub-s. 6 gave the Court power to adjourn proceedings to give an organization the opportunity of altering a rule which might be affected by the section.

It was contended that this section conferred on the Industrial Court power which was non-judicial in view of the vague nature of the grounds specified in sub-s. 1 and the discretion conferred upon the Court by sub-s. 5 and 6. The High Court rejected this contention.

It will be remembered that in *R. v. Spicer; Ex parte Australian Builders' Labourers Federation*,[2] s. 140, as it then stood, was declared void. In the present case the members of the High Court were of the opinion that the amendments which had been made to s. 140 in the meantime had the effect of saving it from the invalidity attaching to its earlier formulation. Fullagar J. pointed out that the power which was interpreted in the *Builders' Labourers Case* was not a power of determination but a general supervisory power which might be exercised by the Industrial Court on its own motion and according to a discretion based on purely industrial or adminis-

1. (1960) 34 A.L.J.R. 155.
2. (1958-9) 100 C.L.R. 277.

trative considerations.[3] Under the new section, the Court was not entitled to entertain an application on its own motion—it could only act once an application was made to it by a member of an organization. The fundamental difference, in Fullagar J's. opinion, between the old s. 140 and the new s. 140 could be expressed by saying that "under the old section the Court by its own act—the act of 'disallowance'—nullified the rule, whereas under the new section it determines judicially whether the rule is antecedently nullified by sub-s. (1). And this difference is a difference between a judicial power and non-judicial power".[4]

In the opinion of McTiernan J. the standards laid down in sub-s. 1 were not so vague as to be incapable of judicial determination.[5] The procedure laid down for determining validity of a rule was separate from the act of annulling a rule contravening sub-s. 1 which, although it was the result of the court's declaration, received its force from direct legislative enactment. His Honour distinguished the administrative power of annulling a rule (falling within the principle enunciated in the *Builders' Labourers Case*) and the judicial power of determining whether a rule infringed sub-s. 1 (to which the legislature had attached as an effect invalidity).[6]

Kitto J. (with whom Dixon C.J. agreed) while admitting that the notions contained in sub-s. 1 had a degree of vagueness about them thought that they were not so indefinite as to be incapable of judicial scrutiny.[7] He was prepared to admit that the notions were more closely associated with administrative activity but on the balance of probabilities he thought that the intention of the Legislature was that the Court would be acting judicially in interpreting them. Among the indications supporting such an intention were the laying down of a judicial procedure, provision for the making of an application by a person who had an interest in the matter, the fact that the process which the Court was to follow was one of "hearing and determining", the fact that the final order to be made was declaratory.[8]

Taylor, Menzies and Windeyer JJ. were also of the opinion that the power conferred was of a judicial nature.

The decision suggests that the High Court will not in future subject Commonwealth legislation conferring judicial power on the Industrial Court to an excessively exacting scrutiny. If the intention of the Legislature is to lay down a judicial procedure for the Court to observe and it has sufficiently prescribed the steps which the Court is to follow, then the conferment of power will not

3. 34 A.L.J.R. at 157.
4. *Ibid.*, at 158.
5. *Ibid.*, at 156.
6. *Ibid.*, at 156–7.
7. *Ibid.*, at 161.
8. *Ibid.*, at 160–1.

be struck down because the considerations which the Court is to have in mind in arriving at a determination are closely related to social policy.

Privative Clauses

In *Coal Miners' Industrial Union of Workers of Western Australia v. Amalgamated Collieries of W.A. Ltd.*[9] the High Court examined the effect of a privative clause in a section of the Western Australian Industrial Arbitration Act. The section in question was s. 108 which provided that "proceedings in the Court [of Arbitration] . . . shall not be impeached . . . nor shall the same be removable to any Court by certiorari or otherwise; and no award, order or proceeding of the Court . . . shall be liable to be challenged, appealed against, reviewed, quashed or called in question by any court of judicature on any account whatever".

The material facts of the case were as follows. The respondent company had circularized its employees who were members of the appellant union to the effect that unless production in its mechanized pits immediately increased to a quantity sufficient to enable the company to meet its orders and carry out its mining operations otherwise than at a loss the company would have no option but to cease operations. On the application of the appellant union, the W.A. Court of Arbitration made an order prohibiting the respondent during the continuance of the order from terminating the employment of members of the Union because of a failure to increase their output to the level desired by the Company. The Court acted according to s. 137 (1) of the Arbitration Act which empowered it to make an order "where it appears reasonably likely to the Court that an act, omission or circumstance will occur, or has occurred, or having occurred, will be repeated or continued, and that the result of the act, omission or circumstance, repetition or continuance is or will be to cause, contribute or to hasten the occurrence of a lock-out . . ." The order was quashed by the Supreme Court of Western Australia on the ground that the Arbitration Court had acted outside its jurisdiction. On appeal, the High Court overruled the Supreme Court and held that the order made by the Court of Arbitration should stand.

In the opinion of Dixon C.J. (with whom Fullagar[10] and Kitto JJ. agreed) the effect of s. 108 was to remove the jurisdiction of the Arbitration Court from examination by any other court except where it could be shown that the Court had acted altogether outside its jurisdiction or could be said not to have made a *bona fide* attempt

9. (1960) 34 A.L.J.R. 248.
10. Fullagar J. was also in agreement with the judgment of Menzies J.

to exercise its power.[11] S. 137 (1) conferred a jurisdiction where it appeared reasonably likely to the Court that an act would occur which would "be likely" to contribute to a lock-out. As Dixon C.J. pointed out these words committed to the Arbitration Court the judgment of the facts which would enable it to make an order such as the one which it made. The fact that the Court might possibly have misapprehended its jurisdiction—for example, in the present case, might have misinterpreted the meaning of "a lock-out" and of the manner in which it applied to s. 137 (1)—would not be of such a nature as to take the order completely outside the jurisdiction of the Court.[12]

Menzies J. distinguished the present case from the facts of *Connell's Case*[13]. In that case it was decided that an industrial authority had exceeded its jurisdiction by a misconstruction of the very term on which its jurisdiction was founded. That jurisdiction was one to alter rates of remuneration on the authority's being satisfied that the rates in question were "anomalous". In the opinion of Menzies J., the difference between the two cases was that in *Connell's Case* jurisdiction was not assumed until a correct interpretation was put on the word "anomalous", while in the present case the matter upon which the Arbitration Court had to form an opinion included the meaning of the word "lock-out". It could not be said that the Court had not formed an opinion on the likelihood of a lock-out—at most, it could be said that it had formed a wrong opinion.[14]

But Menzies J. was also of the opinion that s. 108 of that Act protected the order of the Arbitration Court even if it were considered to be in excess of jurisdiction. He recognized that such a clause could not operate where the Court had acted entirely outside its jurisdiction for the reason that there would be in that case an inconsistency between the provisions imposing fundamental restrictions upon jurisdiction and those exempting the proceedings of the Court from scrutiny—an inconsistency which would have to be resolved by a superior court.[15] McTiernan J. was also of the opinion that the Arbitration Court had acted within jurisdiction.[16] It is to be noted too that both Dixon C.J. and Menzies J. considered that the effect of s. 108 was to exclude both *prohibition* and *certiorari* even though the section made no mention of *prohibition*.[17]

The distinction between a misconstruction of the jurisdictional facts and a misinterpretation of the facts which are part and parcel of the material upon which the court is entitled to pass judgment

11. 34 A.L.J.R. at 249.
12. *Ibid.*, at 250–1.
13. *R. v. Connell; Ex parte The Hetton Bellbird Collieries Ltd.* (1944) 69 C.L.R. 407.
14. 34 A.L.J.R. at 254.
15. *Ibid.*
16. *Ibid.*, at 251–2.
17. *Ibid.*, at 250, 254.

(albeit an erroneous judgment) in determining its jurisdiction is a very fine one. It is difficult to see what is the precise distinction between the type of jurisdiction denied in *Connell's Case* and that upheld in the present case.[18] It is clear, however, that where there is doubt a privative clause such as s. 108 will operate to validate what *ab initio* is in excess of jurisdiction except in the case where the tribunal acts altogether outside its jurisdiction or in bad faith.[19]

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SECTION 92 OF THE CONSTITUTION AND "BORDER HOPPING"

Although *Harris v. Wagner*[1] is only another of the now long series of transport cases, it is something of a landmark in the law of Queensland. The case received a deal of publicity in the popular press and produced several ripples in the political life of the State. The drain on State revenue caused by the practice known as "border hopping" focused public attention on a case which would otherwise have been recognized by lawyers as a mere further refinement of the principle in *Hughes and Vale Proprietary Limited v. The State of New South Wales No.* 1.[2]

The appellant, a Queensland carrier, contracted to carry goods from one Queensland town to another via a town in New South Wales. This detour was unnecessary and was done solely to attract the application of Section 92 of the Constitution. The driver of the vehicle was intercepted in Queensland on the direct route between the point of departure and the point of destination and at a point prior to making the detour. The question arose whether the transaction was protected from certain provisions of State transport legislation.

Two relevant cases discussed by the High Court were *Golden v. Hotchkiss*[3] and *Beach v. Wagner*[4]. In the former case the carrier started from a station within the border of New South Wales, and then, by the only route which was possible for him, he crossed the

18. It could be said that the words "if the Industrial Authority is satisfied that the rates of remuneration in respect of which the alteration is sought are anomalous" imply a firmer and more objectively based opinion than the words "where it appears reasonably likely to the Court that an act . . . will occur and that the result of such an act . . . will be to contribute to a lock-out".
19. In *Connell's Case* there was also a privative clause. However, the High Court held such a clause could not deprive the High Court of the jurisdiction conferred upon it by s. 75 (v) of the Constitution to grant prohibition against an officer of the Commonwealth.

1. (1959) 33 A.L.J.R. 353.
2. (1954) 93 C.L.R. 1.
3. (1959) A.L.R. 573.
4. (1969) A.L.R. 707.