HIGH COURT OF AUSTRALIA

The Queen

Vs.

Marshall

(McTiernan (1), Gibbs (2), Stephen (3), Mason (4) and Jacobs (5) JJ.)

12 September 1975

CATCHWORDS

Conciliation and Arbitration (Cth) - Registered organizations - Associations of employees in or in connexion with any industry - Employees engaged in an industrial pursuit or pursuits - Connotation of industry and industrial pursuit - Connotation of Credit union - Provision of credit to members to enable purchase of commodities - Whether services incidental to industry - Conciliation and Arbitration Act 1904-1973 (Cth), ss. 4 "Industry", 132*, 139 - The Constitution (63 & 64 Vict. c. 12), s.51 (xxxv.).

* Section 132 of the Conciliation and Arbitration Act 1904-1969 (Cth) provides that there may be registered as an organization inter alia, "(1) (b) Any association the members of which include not less than one hundred employees in or in connexion with any industry and the other members, if any, of which are - (i) officers of the association; (ii) persons who follow an occupation in or in connexion with that industry; or (iii) persons who are employees who are qualified to be employed in or in connexion with that industry, but does not include an association that has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members who are employees in or in connexion with that industry; and (c) Any association the members of which include not less than one hundred employees engaged in an industrial pursuit or pursuits and the other members, if any, of which are - (i) officers of the association; (ii) persons engaged in that industrial pursuit or one of those industrial pursuits otherwise than as employees; or (iii) persons who are qualified to be engaged as employees in that industrial pursuit or in one of those industrial pursuits, but does not include an association which has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members who are employees engaged in that industrial pursuit or those industrial pursuits."

HEARING

Melbourne, 1975, February 21,24;
Sydney, 1975, September 12. 12:9:1975
CERTIORARI.

DECISION

September 12.
The following written judgments were delivered:-

McTIERNAN J. On 21st November 1973 the Australian Bank Officials' pursuant to the provisions

of the Conciliation and Arbitration Act 1904 (as amended), "the Act", filed with the Industrial Registrar of the Australian Conciliation and Arbitration Commission two applications pursuant to the provisions in s. 139 (1) of the Act. The first of the said applications was an application for the consent of the Industrial Registrar to an alteration made to the rules of the Association insofar as they related to conditions of eligibility for membership of the Association. The second of the said applications was an application for the consent of the Industrial Registrar to an alteration made to the rules insofar as they related to the description of the industry in connexion with which the Association is registered pursuant to the provisions of the Act. (at p598)

2. The rules of the Association sought to be altered by the first of the said applications provided as follows:

> "3. The Association is open to all employees in or in connection with the industry of Banking in Australia, together with Life Members appointed by any Branch of the Association and such other persons whether or not employees in the industry as have been appointed officers of the Association and admitted as members thereof." (at p599)

3. The said first application sought consent to the alteration of the said rule to the following:

> "3. The Association is open to all employees in or in connection with the industry of Banking in Australia and all employees in or in connection with the industry of Credit Unions in Australia, together with Life Members appointed by any Branch of the Association and such other persons whether or not employees in the industry as have been appointed officers of the Association and admitted as members thereof." (at p599)

4. The second of the said applications sought the consent of the Industrial Registrar to an alteration of the rules of the Association insofar as those rules related to the description of industry in connexion with which the Association is registered from "The Industry of Banking" to "The Industry of Banking and the Industry of Credit Unions". (at p599)

5. The Federated Clerks' Union of Australia, "the prosecutor", an organization of employees registered pursuant to the provisions of the Act, pursuant to reg. 127 of the Conciliation and Arbitration Regulations made under the Act, objected to both of the said applications. The prosecutor has, and has had for many years, members who are employees of credit unions throughout Australia and has actively advanced the industrial interests of those members by making claims and obtaining awards and determinations for them in the industrial tribunals of Queensland, Victoria and Western Australia. (at p599)

6. The said applications came on for hearing before the Industrial Registrar on 12th March 1974 and on subsequent days, the Victorian Employers' Federation on behalf of the Victorian Credit Co-operative Association Ltd. was also represented. The Victorian Employers' Federation submitted that the Industrial Registrar did not have jurisdiction to proceed to hear the said applications or either of them or otherwise deal with the same since employees of credit unions are not employees in or in connexion with an "industry". (at p599)

7. On 23rd May 1974 the Industrial Registrar gave his decision in the said applications. The Industrial Registrar decided inter alia that credit unions were within the expression "in or in connection with any industry" and granted the said applications. On 5th June 1974 the Industrial Registrar recorded in the register the said alterations in the said rules. (at p599)

8. The prosecutor is aggrieved by the said decision of the Industrial Registrar and seeks, from this Court in its original jurisdiction, a writ of certiorari to quash the decision of the Industrial Registrar of 23rd May 1974 or alternatively a writ of prohibition directed to the Industrial Registrar and to the Association restraining them and each of them from proceeding further in the purported alterations to the said rules. (at p600)

9. Section 132 of the Act reads:

> "(1) Any of the following associations or persons may, on compliance with the prescribed conditions, be registered in the manner prescribed as an organization -
> . . .
> (b) Any association the members of which include not less than one hundred employees in or in connexion with any industry and the other members, if any, of which are -
> (i) officers of the association;
> (ii) persons who follow an occupation in or in connexion with that industry; or
> (iii) persons who are employees who are qualified to be employed in or in connexion with that industry,
> but does not include an association that has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members who are employees in or in connexion with that industry; and
> (c) Any association the members of which include not less than one hundred employees engaged in an industrial pursuit or pursuits and the other members, if any, of which are -
> (i) officers of the association;
> (ii) persons engaged in that industrial pursuit or one of those industrial pursuits otherwise than as employees; or
> (iii) persons who are qualified to be engaged as employees in that industrial pursuit or in one of those industrial pursuits,
> but does not include an association which has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members who are employees engaged in that industrial pursuit or those industrial pursuits." (at p600)

10. Section 4 (1) of the Act says except when otherwise clearly intended - "Industry" includes:

"(a) any business, trade, manufacture, undertaking, or calling of employers;
(b) any calling, service, employment, handicraft, or industrial occupation or vocation of employees; and
(c) a branch of an industry and a group of industries;" (at p600)

11. The question which is raised by this matter is whether credit unions in Australia constitute an "industry" within the meaning of the Act. Counsel for the prosecutor argued that the word "industry" must be read in the light of s. 51(xxxv.) of the Constitution, which provides that "(t)he Parliament shall . . . have power to make laws for the peace, order, and good government of the Commonwealth with respect to : Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". This argument is clearly right. In the Jumbunna Case, O'Connor J. said (1908) 6 CLR 309, at p 365 , "If, therefore, 'industry' includes classes of labour not covered by the word 'industrial' in sub-s. xxxv. of s. 51 of the Constitution, it is clear that the Act has gone beyond the limits within which the Parliament has power to legislate." Counsel for the respondent Association, as I understand his argument, contended that the word "industry" is used in s. 132 of the Act in relation to registration of organizations without any degree of circumscription derived from placitum (xxxv.). In my opinion the interpretation in s. 4 of the Act of "Industry" applies to s. 132. (at p601)

12. Credit unions are in fact employers and disputes may occur between credit unions and their employees as to conditions of employment. If such disputes would be "industrial disputes" for the purposes of placitum (xxxv.) then credit unions would constitute an "industry" within the meaning of the Act. It is said in the State School Teachers' Case [1929] HCA 11; (1929) 41 CLR 569, at p 574 that, "the view that the sphere of industrialism is to be found in operations in which the relation of employer and employee subsists is also, in our opinion, too wide: it approaches the economic view, and would bring within the range of the industrial power of the Commonwealth services of all kinds whatever. It cannot, we think, be supported, for it ignores the use of the word 'industrial' in the composite expression 'industrial dispute' in the Constitution." (per Knox C.J., Gavan Duffy and Starke JJ.) In the judgment from which this passage is quoted the "economic view" of what "industry" includes is rejected as a guide to what the word means in the Act. (at p601)

13. Griffiths C.J. said in the Jumbunna Case (1908) 6 CLR, at p 333 , " . . . in my judgment, the term 'industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life". I do not think that this is a criterion by which credit unions would qualify for inclusion in the expression "industry". (at p601)

14. In the Australian Insurance Staffs' Federation v. Accident Underwriters' Association ; Bank Officials' Association v. Bank of Australasia [1923] HCA 61; (1923) 33 CLR 517 , the Court decided by a majority that a dispute between employers who carry on the business of banking or the business of insurance and their employees engaged in the business as to wages to be paid and the conditions of employment to be observed with respect to such employees is an "industrial dispute" within the meaning of s. 51 (xxxv.) of the Constitution and the Commonwealth Conciliation and Arbitration Act 1904-1921. Isaacs J., as he then was, and Rich J., in a joint judgment, said (1923) 33 CLR, at p 527 , that banking and insurance "are indispensable portions of the general industrial mechanism. Without the aid of the capital and credit furnished by bankers the present system of industrial organization would collapse. They directly furnish an essential instrument of production." Higgins J. in a separate judgment, agreed with Isaacs and Rich JJ. and referred to the words of

Griffith C.J. quoted above as "carefully weighed words" (1923) 33 CLR, at p 530 . Powers J. also, in a separate judgment, agreed that the dispute was "industrial" and stated that, "(s)urely a cessation of the banks' operations would come within" the words of Griffith C.J. (1923) 33 CLR, at p 534 . Powers J. added, "(t)he cessation of insurance business would at once cause an increase in the cost of building operations and in the price of goods and materials for other industrial occupations if the employers had to bear individually the risk of loss by fire and otherwise". (1923) 33 CLR, at p 535 Starke J. said in his judgment that, "(t)he functions of insurance and banking simply constitute the financial side of the industrial system, and are attendant upon its directly productive and distributive activities". (1923) 33 CLR, at p 536 (at p602)

15. The proofs before the Court with respect to credit unions do not, in my opinion, establish that they carry on the business of banking. In my opinion the considerations upon which the Court decided in the last mentioned case that an "industrial dispute" existed between the employer and the employees do not apply in the present case. (at p602)

16. The book, Credit Unions in the South Pacific, edited by N. Runcie, which was tendered at the hearing before the Industrial Registrar and was received in evidence at the hearing before us in the present matter provides an account of credit unions, their organization, aims and objects, the service they perform for their members, and the conditions on which the services are rendered, which in my opinion, is not reconcilable with the concept of "industry" which formed the basis of the decision in the Australian Insurance Staffs' and Bank Officials' Case [1923] HCA 61; (1923) 33 CLR 517 . (at p602)

17. Credit unions were founded by people of small means who pooled their savings and out of the fund thus created made loans to members at the lowest possible interest rates - their motive was not profit but mutual helpfulness. The main functions of credit unions are still to provide low interest loans for consumer purposes to members, and generally help members manage their money - to teach thrift. People also save in a credit union to pay their bills and accounts, for example, rates on a house, insurance and registration on a motor car, medical expenses. The motto of the movement is, to quote from Runcie's book, "Save Regularly, Borrow Wisely, Repay Promptly". With a view to fulfilling its objects, a credit union, no doubt, would carry on its business profitably, but the governing principle is still mutual helpfulness. By a system of insurance many credit unions operate on the "debt dies with the debtor" principle - see Runcie's book at p. 31. According to evidence, credit unions provide only a minute portion of the loan capital generated in Australia. (at p603)

18. In Pitfield v. Franki [1970] HCA 37; (1970) 123 CLR 448, at p 458 Barwick C.J. said, "it cannot properly be said, in my opinion, that the services of the fire fighting authorities are incidental to the industrial activity of the industrial section of the community in the same sense that banking and insurance have been said to be industrial. They are certainly not necessarily or indispensably so, however important the protection of industrial assets may be. It cannot properly be said of them that 'they are indispensable portions of the general industrial mechanism' per Isaacs and Rich JJ. in Australian Insurance Staffs' and Bank Officials' Case (1923) 33 CLR, at p 527 ." Furthermore, the Chief Justice said, "The work of the fire fighter is not productive of commodities nor is it instrumental in their distribution" [1970] HCA 37; (1970) 123 CLR 448, at p 458 . Consequently his Honour arrived at the conclusion that the work of a "fire fighter" is not "industrial". Much that is said in these passages is contrary to the view that "industry" comprehends credit unions. (at p603)

19. The expression "credit unions" is defined in Websters' Third New International Dictionary of the English Language, unabridged, as follows - "A co-operative association that makes small loans to its

members at low interest rates." Having regard to the state of the authorities I am not prepared to hold that such a body is an "industry" and I do not think that essentially it is. (at p603)

20. In my opinion certiorari should issue. (at p603)

GIBBS J. I would discharge the order nisi for the reasons given by my brother Mason with which I agree and to which I have nothing to add. (at p603)

STEPHEN J. I have had the advantage of reading the judgment of Mason J. and, for the reasons stated by him, agree that the order nisi should be discharged. (at p603)

MASON J. The prosecutor, the Federated Clerks Union of Australia, an organization of employees registered under the Conciliation and Arbitration Act 1904-1973 (Cth) ("the Act"), seeks a writ of certiorari to quash a decision of the Industrial Registrar of the Australian Conciliation and Arbitration Commission. The decision was given on 23rd May 1974 on an application made under s. 139 of the Act by The Australian Bank Officials' Association ("the respondent"), which is also an organization of employees registered under the Act, for consent to alterations of its rules in so far as they relate to conditions of eligibility of membership and the description of the industry in or in connexion with which the respondent was registered. (at p604)

2. Under r. 3 of its existing rules, membership of the respondent was open to

> "all employees in or in connection with the industry of
> Banking in Australia, together with Life Members appointed by
> any Branch of the Association and such other persons whether
> or not employees in the industry as have been appointed officers
> of the Association and admitted as members thereof."

The application sought consent to the inclusion in the eligibility clause of the words "and all employees in or in connection with the industry of Credit Unions in Australia" after the words "the industry of Banking in Australia" where appearing in the clause. Consent was also sought to an alteration in the description in the rules of the industry from "The Industry of Banking" to "The Industry of Banking and the Industry of Credit Unions". (at p604)

3. The prosecutor filed notice of objection which included the ground specified in reg. 119 (2) (c) that an organization to which members of the respondent might conveniently belong, i.e. the prosecutor, had already been registered. By way of preliminary objection to the Registrar's jurisdiction the prosecutor submitted that employees of credit unions are not employees in or in connexion with an industry, as that word is understood in the setting of s. 51 (XXXV.) of the Constitution. The Registrar did not deal with the submission as a preliminary point but heard the application in full and then decided on all issues which had arisen in the course of the hearing, making an order giving his consent to the alterations sought. (at p604)

4. In his decision the Registrar accurately summarized the effect of the evidence which was called in support of the application. The account of the evidence which follows is in large measure taken from the decision. (at p604)

5. A credit union is a group of natural persons united by some common bond - whether it be the area in which they live, the place where they work, the religion to which they subscribe or some other characteristic - who agree to save regularly to give and to lend their savings to one another at a low

rate of interest. In Australia credit unions are incorporated as co-operative or credit societies under the legislation in force in the various States, e.g. the Credit Union Act, 1969 (N.S.W.), as amended, the Co-operation Act 1958 (Vict.), as amended. (at p604)

6. The first credit union was formed in Australia in 1905 and it was not until after 1945 that credit unions were formed in significant numbers in this country. Since 1964 their growth has been substantial, rapid and continuous. This rapid rate of growth is likely to continue. Since 1964 the operations of individual credit unions are larger in scope than they were formerly. The small "parish" based unions have given way to larger unions known as mutual credit unions covering separate groups of employees employed by a number of employers in a large geographical area. (at p605)

7. The lending which they undertake takes the form of personal loans. There is a distinct similarity between personal instalment lending in banking institutions and credit unions. In this respect credit unions perform a financial function in competition with banks; indirectly it is a function which supports the community's industrial sector. A characteristic of credit unions is that loans can be made only to members who hold shares, although in most States deposits can be made by persons or bodies who are non-members. The permitted maximum loan which can be made by a credit union to a member has been increased to $5,000 in many unions and in New South Wales in some instances the permitted maximum is $10,000. Profits made are distributed to members or to borrowers or are placed in community development services. Although most loans are made to finance domestic needs or consumer purchases, some members have received finance to set up small business undertakings. Where the amount of a loan made to purchase a motor vehicle or real estate or for any other purpose exceeds the amount of unsecured loans approved by the Registrar the loan is secured by a bill of sale or by a mortgage. Implicit in what has already been said is the notion that credit unions make available finance to purchasers; they do not finance manufacturers or vendors except to the limited extent to which loans are made in connexion with small business undertakings. (at p605)

8. Notwithstanding their recent continuing growth, credit unions provide only a very small percentage of loan capital generated in Australia - it is estimated to be less than 0.05 per cent of that capital. In 1971, it is said, there were 1,072 employees of credit unions in Australia and that number may now have arisen to 1,700, approximately. When the application was heard by the Registrar 529 employees of such unions had become members of the respondent and 183 had become members of the prosecutor. (at p605)

9. These facts are important because by s. 132 of the Act the following associations of employees only may be registered as organizations:

> "(b) Any association the members of which include not less than one hundred employees in or in connexion with any industry and the other members, if any, of which are -
> (i) officers of the association;
> (ii) persons who follow an occupation in or in connexion with that industry; or
> (iii) persons who are employees who are qualified to be employed in or in connexion with that industry,
> but does not include an association that has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members

who are employees in or in connexion with that industry; and
(c) Any association the members of which include not less than one hundred employees engaged in an industrial pursuit or pursuits and the other members, if any, of which are -
(i) officers of the association;
(ii) persons engaged in that industrial pursuit or one of those industrial pursuits otherwise than as employees; or
(iii) persons who are qualified to be engaged as employees in that industrial pursuit or in one of those industrial pursuits,
but does not include an association which has members referred to in sub-paragraph (ii) or (iii) unless the association is effectively representative of the members who are employees engaged in that industrial pursuit or those industrial pursuits."

The regulations make provision for the making of applications by associations for registration, for the filing of objections, for a hearing by the Registrar or Deputy Registrar in which the applicant has a right to be heard and for the giving of evidence (regs. 120-124). Regulation 119 (2) prescribes grounds of objection which may be taken by an objector to an application, including the ground that the association is not one capable of being registered under the Act (reg. 119 (2) (a)). (at p606)

10. A registered organization may change its name and alter its rules but no alteration shall be made to its name or to its rules in so far as they relate to conditions of eligibility for membership or the description of the industry in connexion with which the organization is registered unless the Registrar consents to the change or alteration upon application made to him under s. 139 (1). The Registrar may consent to a change or alteration in whole or in part (s. 139 (2)). The provisions respecting objections to applications for alteration or change and the procedure to be followed on a hearing before the Registrar or Deputy Registrar are similar to those which govern applications made under s. 132. It is specifically provided that the grounds of objection prescribed in reg. 119 are applicable in respect of applications made under s. 139 (reg. 127 (6)). Under s. 88F (1) of the Act an appeal lies by leave from a decision of the Registrar or his Deputy to the Commission. (at p607)

11. Relevant to the prosecutor's argument is the statutory definition of "industry" which is contained in s. 4 of the Act. The word is there defined so as to include -

"(a) any business, trade, manufacture, undertaking, or calling of employers;
(b) any calling, service, employment, handicraft, or industrial occupation or vocation of employees; and
(c) a branch of an industry and a group of industries."

(at p607)

12. The prosecutor's argument is that although the word "industry" appears to have been given an extended denotation by s. 4 it must be read in a restricted sense by reference to the constitutional

concept of "industry" as it is expressed in the phrase "industrial disputes" in s. 51 (XXXV.), that it then follows that an activity which does not form part of the production, distribution or transportation of commodities is not an "industry" unless it is "essential" or "indispensable" to industry, and that the function discharged by credit unions in the provision of finance to borrowers does not form any part of production and distribution of commodities and is so limited in scope that it is not essential or indispensable to industry. (at p607)

13. Although I remain to be persuaded of the validity of other propositions advanced in the argument, it is my opinion that the prosecutor's case fails on the grounds that the constitutional concept of "industry" which it proffers is too limited in scope. Mr Shaw relied on the observations of Isaacs and Rich JJ. in the Insurance Staffs' Case [1923] HCA 61; (1923) 33 CLR 517, at p 527 , where their Honours said that because banking and insurance provide for industry the "essential commodity - capital", "they are indispensable portions of the general industrial mechanism" and that therefore disputes between employers carrying on the business of banking and insurance and their employees were industrial disputes. Two comments should be made on this passage in the joint judgment. The first is that the statement there made is positive, not negative, in form, i.e. banking and insurance form part of industry because they are indispensable to it. There is no assertion that banking and insurance would not form part of industry if they were not indispensable to it. The second comment is that, even if the passage is to be regarded as expressing a proposition negative in form, it does not accord with other expressions of opinion in this Court which are in my view to be preferred. (at p607)

14. In the Insurance Staffs' Case (1923) 33 CLR, at p 536 itself, Starke J. said that the industrial mechanism of society included "all those bodies 'of men associated, in various degrees of competition and co-operation, to win their living by providing the community with some service which it requires'". More recently, in the Professional Engineers' Case [1959] HCA 47; (1959) 107 CLR 208, at p 236 , Dixon C.J. (with whom Fullagar and Kitto JJ. agreed) said that

> "employment in a form of business involving neither manual labour nor the production or handling of material things . . . might form the subject of an industrial dispute, because it was found to be ancillary or incidental to the organized production, transportation and distribution of commodities or other forms of material wealth." (at p608)

15. In the same case Windeyer J. said it was sufficient if the employment was "an adjunct of industry" (1959) 107 CLR, at p 267 . See also Reg. v. Clarkson ; Ex parte Victorian Employers' Federation [1973] HCA 57; (1973) 131 CLR 100, at p 114 . (at p608)

16. It is enough, therefore, if the activities carried on by credit unions can accurately be described as incidental to industry or to the organized production, transportation or distribution of commodities or other forms of material wealth, To my mind the evidence admits of no doubt that the activities of credit unions are incidental in this sense. It was objected that lending by credit unions is on a small scale compared with that of established financial institutions. So it is, but that is not to deny any incidental character to the activities. Then it was said that the lending undertaken was consumer lending and that credit unions do not finance the producer, the transporter and the distributor. This statement, if correct, is not an answer to the respondent's case. The volume of production in the community depends upon its capacity to buy. Consumer finance, by assisting the community's capacity to buy, stimulates production. The provision of consumer finance by credit unions is in this

sense incidental to the production and distribution of commodities. No doubt the provision of finance to the producer and the distributor is more closely linked with production and distribution, but this in itself provides no reason for concluding that the provision of consumer finance is not incidental in the sense already discussed. For these reasons I consider that credit unions constitute an industry possessing the "industrial" character to which s. 51 (XXXV.) refers. (at p608)

17. I should not wish it to be thought from what I have said that I am necessarily of the view that the observations of Isaacs and Rich JJ. in the Municipalities Case (1919) 26 CLR 508, at pp 553 - 554 , and in the Insurance Staffs' Case (1923) 33 CLR, at pp 526 - 527 , now provide an acceptable definition or definitive statement of what is "industrial" for the purposes of s. 51 (XXXV.). My own inclination would be to adopt a somewhat wider view, more akin to the opinions expressed by Griffith C.J. and O' Connor J. in the Jumbunna Coal Mine Case (1908) 6 CLR 309, at pp 333, 365-368 , as appropriate to the nature and scope of the power and the underlying purpose which it was designed to achieve, although I acknowledge that a more restricted view has thus far prevailed. (at p609)

18. Although I do not propose to examine the relationship which exists between the "industrial" character which a dispute is required by s. 51 (xxxv.) to possess and the statutory concept of "industry" as expressed in s. 4 of the Act, one aspect of that relationship should be mentioned. No doubt it is right to say, as the prosecutor submitted, that the Act should be read in the light of the constitutional power; yet it does not follow that if the statutory definition of "industry" travels beyond the constitutional concept of "industrial", the definition should itself be read down. The correct approach is to give the definition an unrestricted operation in relation to those provisions of the statute whose application, when understood in the defined sense, does not trespass beyond the limits of constitutional power. (at p609)

19. The question whether, quite apart from the outcome on the substantive issue, relief by way of certiorari is available to the prosecutor, raises other considerations. When it is recalled that the Registrar is required to hear and decide an objection taken on the ground that an association is not capable of being registered and that on an application for registration no question arises as to the existence of an industrial dispute, the jurisdictional fact on which the exercise of the power conferred by s. 51 (xxxv.) depends, it might be thought that the question was one which falls within the Registrar's jurisdiction to determine and that this Court should not grant certiorari to quash the registration of an association. Yet this is what was done in Pitfield v. Franki [1970] HCA 37 [1970] HCA 37; ; (1970) 123 CLR 448 , where it appears that the Court took the view that the Registrar's authority to register an association was necessarily confined by limitations deriving from s. 51 (xxxv.) to an association which in truth (as distinct from in his opinion) answered one of the descriptions contained in pars. (a), (b) and (c) of s. 132 (1) and that this circumstance, possibly taken in conjunction with a bona fide claim for prohibition, gave the Court jurisdiction, despite the absence of any reference to certiorari in s. 75 (v.) of the Constitution. (at p609)

20. Whether certiorari should go to quash the registration or an alteration of the rules of an organization when such an alteration has the effect of taking the organization outside the descriptions contained in s. 132 (1) is another question. The decision in R. v. Taylor; Ex parte Professional Officers' Association - Commonwealth Public Service [1951] HCA 1; (1951) 82 CLR 177 is not to my mind decisive of the question because there much seemed to turn on the effect of the deletion of the proviso (1951) 82 CLR, at pp 184, 185, 187 . If the order made in Pitfield v. Franki (33) (1970) 123 CLR 448 was correctly made, and no attack upon it has been made in this case, I am unable to perceive any persuasive reason why a distinction should be drawn between the

Registrar's power to register an association initially and his power to consent to an alteration in its rules which would affect the class of persons eligible to become members of it. In each instance we are concerned with the representative capacity of an organization and if there are constitutional considerations which inhibit the registration of an association which does not fall within s. 132 (1) they must likewise inhibit the conversion of an existing organization into one which would, if its rules were altered, also fall outside the sub-section. (at p610)

21. I would discharge the order nisi. (at p610)

JACOBS J. I agree that the order nisi should be discharged for the reasons expressed by Mason J. (at p610)

ORDER

Order nisi discharged.

No order as to costs.

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