CASE SECTION

THE JUDICIAL POWER OF THE COMMONWEALTH
THE QUEEN v. *THE COMMONWEALTH INDUSTRIAL COURT AND SHEARER: EX PARTE AMALGAMATED ENGINEERING UNION*

Effective exercise of many of the powers conferred on the Commonwealth Parliament by s.51 of the Constitution has been found to require the use of the federal judicial power in conjunction with non-judicial powers.[1] Especially is this true of the industrial power,[2] the power to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".[3] But it was decided in the *Boilermakers' Case*[4] that it is not competent for the Federal Parliament to combine in the one body both judicial and non-judicial powers, notwithstanding that this body is called a court and that it is constituted in a manner which would otherwise satisfy s.72 of the Constitution.[5] In the light of this decision the Commonwealth Conciliation and Arbitration Act was amended in 1956[6] to vest the arbitral powers in the Conciliation and Arbitration Commission while leaving all other powers of the old Arbitration Court to the Industrial Court.[7] The result was that while certain clearly "judicial" powers were given to the Industrial Court,[8] it also obtained other powers which could not be so easily characterized as "judicial".

One such function was the control of industrial organizations, which extends to the supervision of their rules and to the de-registration of organizations not satisfying the requirements of the Act.[9] In particular, the Court was, by s.140, empowered to disallow organization (union) rules in the circumstances specified in that section.[10]

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[1] E.g., the power of enforcement; committal for contempt; decision of questions of law.

[2] It is true also of, e.g., the taxation power (s. 51 (ii)), the bankruptcy power (s. 51 (xvii)), the copyright, patents and trade marks power (s. 51 (xviii)), and probably will be true in the future of the pensions, etc., power (s. 51 (xxiii) and (xxiiiA)) and the divorce power (s. 51 (xxii)).

[3] Section 51 (xxxv) of the Australian Constitution.

[4] *Reg.* v. *Kirby; ex parte Boilermakers' Society of Australia* (1955-56) 94 C.L.R. 254.

[5] Section 72. The Justices of the High Court and of the other courts created by the Parliament—(i) shall be appointed by the Governor-General in Council; (ii) shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity; (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

[6] By Act No. 44 of 1956.

[7] Certain administrative powers were vested, as before, in the Registrar.

[8] E.g., penal powers; interpretation of awards; determination of questions of law.

[9] These functions were held to be non-judicial in *Consolidated Press Limited and Penton* v. *Australian Journalists' Association* (1947) 73 C.L.R. 549.

[10] Section 140 of the Conciliation and Arbitration Act 1904-1956 provided as follows—
(1) The Court may, upon its own motion or upon application made under this section, disallow any rule of an organization which, in the opinion of the Court—
(a) is contrary to law, or to an order or award;
(b) is tyrannical or oppressive;
(c) prevents or hinders members of an organization from observing the law or the provisions of an order or award; or

Section 140 was challenged in the *Builders' Labourers' Case*[11] as an attempt to confer non-judicial power on a federal court, and the High Court held the provision invalid. In consequence of this decision, the Act was once more amended, a new s.140 being substituted.[12] It was this new section which was tested in *Shearer's Case*.[13] The matter arose out of the election of the respondent, Shearer, to an office in the Amalgamated Engineering Union. Following the election, the Commonwealth Council of the Union disqualified Shearer for an alleged breach of Rule 2 of the Union Rules. On Shearer's application an order *nisi* was made by the Industrial Court, calling on the Union to show cause why Rule 2 should not be declared to contravene the new s.140(1). An order *nisi* for prohibition issued to prohibit the Industrial Court from proceeding further on the order. On the application to make the order for prohibition absolute, it was argued that s.140 purported to confer a power which was non-judicial on the Industrial Court and was therefore void. The High Court unanimously rejected this contention.

McTiernan, J.[14] referred to the mandatory language of s.140, subs. (1) and observed that a rule which contravened it was unlawful and therefore unenforceable in any court. But s.140 has a wider purpose, to rid the organisation of such a rule, and provides a particular procedure for this purpose. Where an application is made under the section, the Court must examine the rule under the tests laid down in subs. (1), and make a declaration that the rule contravenes (if that be the case) subs. (1). This is a judicial procedure, the declaration being made only after hearing the organisation, and being only a declaration and not purporting itself to perform the administrative act[15] of annulling

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(d) imposes unreasonable conditions upon the membership of any member or upon any applicant for membership, and any rule so disallowed shall be void.

(2) Any member of an organization shall apply to the Court for the disallowance of any rule of the organization on any of the grounds specified in the last preceding subsection.

(3) The Court may, in its discretion, instead of disallowing the rule, direct the organization concerned to alter that rule, within a specified time, so as to bring it into conformity with the requirements of this Act, and, if, at the expiration of that time, the rule has not been so altered, the Court may then disallow the rule, and the rule shall be void.

[11] *The Queen* v. *Spicer and others; ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277.

[12] Section 140 of the Conciliation and Arbitration Act 1904-1959 provides as follows—

(1) A rule of an organization—

(a) shall not be contrary to a provision of this Act, the regulations or an award or otherwise be contrary to law or be such as to cause the rules of the organization to fail to comply with such a provision;

(b) shall not be such as to prevent or hinder members of the organization from observing the law or the provisions of an award; and

(c) shall not impose upon applicants for membership, or members, of the organization conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organizations under this Act, are oppressive, unreasonable or unjust.

(2) A member of an organization may apply to the Court for an order declaring that the whole or a part of a rule of the organization contravenes the last preceding subsection.

(3) Subject to the next succeeding subsection the Court has jurisdiction to hear and determine an application under the last preceding subsection.

(4) An organization in respect of which an application is made under this section shall be given an opportunity of being heard by the Court.

(5) An order under this section may declare that the whole or a part of a rule contravenes subsection (1) of this section and, when such an order is made, the rule, or that part of the rule, as the case may be, shall be deemed to be void from the date of the order.

(6) The Court may, without prejudice to any other power of the Court to adjourn proceedings, adjourn proceedings in relation to an application under this section for such period and upon such terms and conditions as it thinks fit for the purpose of giving the organization an opportunity to alter its rules.

[13] *The Queen* v. *The Commonwealth Industrial Court and Shearer, ex parte the Amalgamated Engineering Union* (1960) 34 A.L.J.R. 155.

[14] (1960) 34 A.L.J.R. 155, 156.

[15] *Penton* v. *Australian Journalists' Association, supra* n. 9.

the rule. This latter step is carried out by direct legislative action upon any rule as to which the Court makes a declaration.

Fullagar, J. expressed a similar view. After briefly reviewing the history of the section,[16] he examined subsections (1) to (4), and concluded that these, considered alone, conferred what was clearly a judicial power. It was a power merely to determine a question depending on antecedently existing law and fact, and if the answer were that the rule contravened subs. (1), the Court was bound to declare accordingly, and had no power to do more. In all these respects (he thought) the power differed from that conferred by the old section.[17] When such a declaration was made it became the factum for a legislative act through subs. (5) which extended to all the world the effect of an order which would of itself bind only the parties to the action. This extension did not alter the character of the process which led to the making of the order, nor the character of the order itself.[18] He could not accept the argument that subs. (5) indicated that the Court had no duty, but a discretion, to make the order and that the exercise of this discretion involved a consideration of matters of industrial or administrative policy.[19]

Menzies, J.[20] delivered a shorter judgment, expressing a substantially similar view of the section, and contrasting its provisions with those of the former enactment.[21]

The other members of the Court took a different view of the section. Kitto, J.[22] referred to the history of the section, and stated its substance. The Court's power was limited to making a declaration that the rule contravened subs. (1) (if that were the case). In his view, contravention of subs. (1) was not *per se* a cause of invalidity: "From the provision that when the order is made the rule (or part of a rule) is to be deemed to be void from the date of the order, the implication seems to me to be clear that until that date the rule (or part) is not intended to be void for contravention of subs. (1)".[23] The whole function of subs. (1) was to establish prohibitions, breach of which would render a rule *liable to be* annulled by subs. (5), and not to lay down absolute prohibitions intended to have a separate and independent invalidating effect. He rested this conclusion on the language of subs. (2) which says nothing about invalidity—and on the nature of the prohibitions themselves, e.g. para. (b) which might well produce different results at different times "having regard to the terms of the awards in force for the time being and the industrial situations to which they relate". This seemed to him inconsistent with an intention that breach of subs. (1) should itself render a rule invalid.[24]

Kitto, J. then compared the new section with the old, and recognised that on his interpretation there was some similarity between them.[25] But he noted several "striking" differences, and concluded that by the new section, "a typically judicial procedure is laid down".[26] He considered and rejected the argument that the "degree of vagueness" of the standards set up by subs. (1), coupled with the requirement that the Court should have regard to the objects of the Act and the purposes of the registration of organisations under it, indicated an intention to confer a discretion of an administrative character.[27]

Thus, all the members of the Court distinguished (at least to their own satisfaction) the *Builders' Labourers' Case*.[28] Yet, in the substantial results

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[16] (1960) 34 A.L.J.R. 155, 157-8.
[17] *Id.* 158.
[18] *Id.* 159.
[19] *Id.* 158.
[20] With whose observations Taylor, J. agreed.
[21] (1960) 34 A.L.J.R. 155, 162-3.
[22] With whose judgment Dixon, C.J. agreed.
[23] (1960) 34 A.L.J.R. 155, 160.
[24] *Ibid.* Windeyer, J. adopted a similar interpretation. He agreed that the power conferred was judicial, but gave no reasons for so holding.
[25] *Ibid.* [26] *Ibid.* [27] *Id.* 161. [28] *Supra.* n. 11.

which they achieve, it may also be thought that the two sections are in no way different; and accordingly it may be fruitful to examine the distinctions made by the High Court, in the hope that we may derive some conclusions which will throw light on the still obscure question of the nature of judicial power.

The first point of distinction was that the old section used the word "may" in the grant of power, and this was read as permissive, whereas in the new section a duty was cast upon the Court to determine the question raised before it.[29] So far as the Court in *Shearer's Case* was concerned, this was a valid differentiation—but it is open to us to ask whether in fact it is a distinction of substance. The answer to this depends on whether the word "may" in the old section was to be construed as permissive or imperative. *Prima facie*, of course, "may" is permissive,[30] but it may import a duty. Whether it does so is to be ascertained "from the context, from the particular provision, or from the general scope and objects, of the enactment conferring the power".[31] A decision on this point must therefore wait till we have looked at the other parts of the section: suffice it here to note that in itself the word alone is colourless on the particular point at issue.

The members of the Court relied heavily on the omission from the new section of the power given by the old section for the Industrial Court to act "upon its own motion" to disallow a rule.[32] This power was regarded in the *Builders' Labourers' Case* as telling strongly[33] against the power being judicial power. Webb, J., who dissented, was prepared to sever and omit the words, by the application of s.15A of the Acts Interpretation Act,[34] but like the members of the majority regarded such a power as an improbable concomitant of judicial power. Williams, J. (who also dissented) thought this power unusual but "not sufficient to prevent the powers conferred on the Court by (the old) s.140 from being judicial".[35] The meaning of the words was nowhere discussed, though Dixon, C.J. apparently assumed that the power was analogous to the power of committal for certain contempts.[36] and Williams, J. thought it might be used "in cases where a member of an organization might hesitate to apply to the Court himself".[37] While the power conferred might have been intended to be of this nature, the present writer respectfully submits that this is not necessarily so. Bearing in mind that the Industrial Court is a judicial body,[37a] and that any such power as Dixon, C.J. and Williams, J. contemplated would be completely novel (except in the case of contempts — which are "special cases"),[38] it is suggested that a restricted interpretation may be justified.

It may well be argued, from this viewpoint, that what the section means is that the power to disallow a rule should be exercised by the Court only in proceedings commenced in the Court by a person either under s.140(1) specifically to achieve the disallowance of a rule, or for some entirely different purpose under the Act. In the latter case, if a rule of an organisation was in any way relevant to the issue before the Court, for example, as having been set up as justification for some act or conduct challenged in the proceedings, the Court might form the opinion that the rule in question was affected by one of the qualities mentioned in s.140(1); in such circumstances, the Court

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[29] See *per* Fullagar, J., (1960) 34 A.L.J.R. 155, 157, 158; *per* Kitto, J., *id.* 160-1; *per* Menzies, J. *id.*, 162.

[30] *Ward* v. *Williams* (1955) 29 A.L.J.R. 183, 184, *per* Dixon, C.J.

[31] *Julius* v. *Bishop of Oxford* (1880) L.R. 5 A.C. 214, 234, *per* Lord Selbourne.

[32] See *per* Fullagar, J., (1960) 34 A.L.J.R. 155, 158; *per* Kitto, J., *id.* 160; *per* Menzies, J., *id.* 162.

[33] (1957) 100 C.L.R. 277, 289, *per* Dixon, C.J. And at 310, *per* Taylor, J.

[34] *Id.* 303-4; but this seems to be an unwarranted use of that provision. *Cf.* Dixon, C.J., at 290.

[35] *Id.* 301. [36] *Id.* 289. [37] *Id.* 301.

[37a] See later, for discussion of the dissenting judgment of Williams, J., in the *Builders' Labourers' Case*, which proceeded entirely upon this ground.

[38] *Per* Dixon, C.J. (1957) 100 C.L.R. 277.

could "upon its own motion" (in this sense) disallow the rule which would then be void. It is submitted that no greater power than this was intended. On this view, there would be no substantial difference between the position (in this regard) under the old section, and that under the new (at least as interpreted by the majority in *Shearer's Case)* and in that case the giving of authority for the Court to act "upon its own motion" was no ground for regarding the power conferred by the old section as non-judicial.

The word "disallow" was used in the old section but omitted from the new. In the *Builders' Labourers' Case*, McTiernan, J.[39] regarded its presence as decisive, and in *Shearer's Case,* he attached much weight to the omission.[40] The other judgments also relied on this alteration in the section,[41] for the word "was peculiarly appropriate to the exercise by the Court of a choice as to whether or not a rule should be left in force".[42] Fullagar, J., indeed, regarded this as the crux of the case—

"The fundamental difference between the old s.140 and the new s.140 may be expressed by saying that under the old section the Court by its own Act—the act of "disallowance"—nullifies the rule, whereas under the new section it determines judicially whether the rule is antecedently nullified by subs. (1). And this difference is the difference between a judicial power and a non-judicial power."[43] Undoubtedly, the word is indicative rather of an administrative or legislative than of a judicial act; and so it was held to be, in *Penton's Case.*[44] Yet it is still a function "not insusceptible of a judicial performance",[45] and the present submission is that the Court should have regarded the word as at least colourless, for the reason given by Williams, J.:

> In that period (i.e., during the time when the Commonwealth Court of Conciliation and Arbitration could not exercise judicial powers) it may have been possible to construe the powers now contained in the ss.140 and 143 as intended to confer upon the Commonwealth Court of Conciliation and Arbitration the only class of functions which it then had jurisdiction to entertain.[46] In the *Consolidated Press Case* (1947) (73 C.L.R. 549) that construction was followed in the period when that Court had been reconstituted and was believed to have both arbitral and judicial functions. But now that the functions under the Conciliation and Arbitration Act have been divided between the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court there is every reason for construing the functions conferred upon the commission as arbitral and those conferred upon the Court as judicial so far as these respective functions are capable of such a construction.[47]

If this be a correct view, and the word "disallow" is to be construed consistently with the idea of judicial power, it would not only follow that the majority of the High Court in the *Builders' Labourers' Case* were in error in regarding the word as decisive against the validity of the old s.140, it would also follow that the actual functions performed by the Court under the two provisions are practically identical.

The next alteration in the section which the High Court regarded as significant was the insertion of subs. (4)—"An organisation in respect of which an

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[39] *Id.* 293-4, following *Penton* v. *Australian Journalists' Association* (1947) 73 C.L.R. 549.

[40] (1960) 34 A.L.J.R. 155, 157.

[41] See *per* Fullagar, J., *id.* 157; *per* Kitto, J., *id.* 160; *per* Menzies, J., *id.* 162.

[42] *Id.* 160, *per* Kitto, J.

[43] *Id.* 158, *per* Fullagar, J.

[44] *Penton* v. *Australian Journalists' Association* (1947) 73 C.L.R. 549.

[45] *Per* Kitto, J., (1957) 100 C.L.R. 277, 305.

[46] Williams, J., is referring here to the decision in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1925) 36 C.L.R. 442.

[47] (1957) 100 C.L.R. 277, 300-301. The passage above quoted states clearly Williams, L's approach to the question which was before the Court in the *Builders' Labourers' Case.*

application is made under this section shall be given an opportunity of being heard by the Court."[48] The duty to hear both parties to a dispute is undoubtedly a strong indication that the function in question is a judicial function—but it by no means follows that the absence of *the expression of* such a duty is conclusive against the function being termed judicial. In any event, it is by no means clear that no such duty arose under the provisions of the old s.140. Whether or not the power conferred by that section was judicial power, the body exercising that power would be required to act judicially;[49] and insofar as that implies that the Court's decision shall not be arbitrary or capricious, it could be taken to require that both sides be heard, so that the insertion of the new subs. (4) would not seem to have made any great difference in substance.

Subsection (3) of the old section was replaced by the new subs. (6). The Court in the *Builders' Labourers' Case* did not attach much significance to subs. (3),[50] but in *Shearer's Case* it was argued that by reason of its power to adjourn proceedings conferred by subs. (6), it was for the Court to decide whether or not it would make an order under the section. This argument was rejected, the Court being of opinion that such a discretion as was conferred by subs. (6) was not foreign to judicial power.[51] This is consistent with the view taken of the old subs. (3).[52] In the present submission, the difference in the verbal formulae used does not correspond to any difference in effect.

The majority in the *Builders' Labourers' Case* were impressed by the nature of the criteria laid down for the disallowance of a rule. Dixon, C.J. thought they gave "much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial decision".[53] Yet Williams, J. thought the questions raised by these standards "not so undefined as to be incapable of solution by judicial process"; and he drew attention to the experience courts have had in the determination of questions according to such standards.[54] This was, of course, a dissenting judgment—yet this view found favour also with McTiernan, J.[55] And Kitto, J., discussing these standards in 1960, recognised that they were "not so indefinite as to be insusceptible of strictly judicial application", and that it was only due to the context of the former section that any inference could be drawn from these standards of the non-judicial nature of the process in which they were to be applied.[56] In the passage referred to, Kitto, J. acknowledged the general similarity between the two sets of standards when lifted from their context, and it is submitted that the amendment of the verbal formula has not significantly altered the criteria which will bring the section into action.

If there is no substantive difference between the two sections apparent from an examination of the particular parts of each, nevertheless there may be a difference which is revealed by a consideration of the totality formed by the

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His decision, in favour of the validity of the old s. 140, rested squarely on the judicial nature of the body in which the ambiguous functions were vested. The approach is similar to that taken by the whole Court in *Reg.* v. *Davison* (1954) 90 C.L.R. 353, though Williams, J. here places perhaps a little more weight on the doctrine than it can properly bear. Whether or not this is so, it is here submitted that the statement quoted in the text is correct.

[48] See *per* McTiernan, J., (1960) 34 A.L.J.R. 155, 157; and *per* Kitto, J., *id.* 161.

[49] For the classic elaboration of this distinction, see *per* Rich, J., in *Rola Co. (Aust.) Pty. Ltd.* v. *The Commonwealth* (1944) 69 C.L.R. 185, 203-204.

[50] See *per* Dixon, C.J., (1957) 100 C.L.R. 277, 289-90; *per* Kitto, J., *id.* 307; *per* Taylor, J., *id* 310-311.

[51] See e.g. *per* Menzies, J. at (1960) 34 A.L.J.R. 155, 160.

[52] See, e.g. *per* Taylor, J. (1957) 100 C.L.R. 277, 310-11.

[53] *Id.* 290. And *cf.* Kitto, J., *id.* 306; and Taylor, J., *id.* 310.

[54] *Id.* 300.

[55] *Id.* 292.

[56] (1960) 34 A.L.J.R. 155, 161.

coincidence of those particular parts. It has been suggested that "law" should not be defined but should be viewed as a series of "clusters of attributes".[57] So, perhaps, "judicial power" might be considered as a "cluster of attributes" rather than as a precisely defined concept to be identified by reference to one particular attribute. The analysis of Kitto, J. tends in this direction.

Kitto, J., as we have seen, was of opinion that by the new section "a typically judicial procedure is laid down".

> An application must be made; it must be made by a member, that is to say, a person who has an interest to procure the elimination of any legally objectionable provision from the rules of his organisation, whether the provision has a direct disadvantageous impact upon him or not. The Court's function is described as a jurisdiction. The process which it is to follow is described as hearing and determining an application. The organisation must be given an opportunity of being heard. And the process is confined to the ascertainment of a pre-existing state of affairs, the question for decision being only whether a rule is or is not contrary to provisions of the Act or regulations or of the law as found elsewhere, or whether its operation is or is not of one of the described kinds. The order to be made is in terms merely declaratory, and does not purport to effect any change in the legal situation.[58]

It may be, in short, that there is no single attribute for testing judicial power and that the quest should be for the typical "cluster of attributes". The "cluster" found by Kitto, J. in the new s.140 is very much the sort of "cluster" which earlier courts have found in earlier powers which have been held to be judicial.[59] But difficulties would still remain. For, at the same time, it is not markedly different from the "cluster" detectable in the old s.140, which laid down a procedure of which with equal justice it might be said, "This is a typically judicial procedure". The truth is that "the typical", "the average", affords no precise scale for measuring the difference between two concrete quantities.

Mere comparison of the two "clusters of attributes" respectively presented by the old and new versions of s.140 seems to reveal no clear basis for distinguishing the old from the new section. By this approach, as by our earlier analysis, we are led to the conclusion that, so far as concerns the nature of judicial power, the alterations made to s.140 by the 1958 amending Act were verbal merely and did not go to the substance of the section. If this be so, it follows that there was (with respect) no warrant for distinguishing the two provisions, and that the *Builders' Labourers' Case* and *Shearer's Case* cannot stand together. In the apparent absence of any other basis for distinguishing the *Builders' Labourers' Case*, we may be led to speculate upon the possible reasons, of policy or otherwise, which led to the inconsistent decision in *Shearer's Case*. That matter, however, goes beyond the scope of the present note.

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OCCUPIER'S LIABILITY FOR INJURY TO PROPERTY
DRIVE-YOURSELF LESSEY'S PTY. LTD. v. *BURNSIDE & OTHERS*

Does the law distinguish between injury to person and injury to property

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[57] See K. N. Llewellyn, "The Normative, the Legal, and the Law Jobs: the Problem of Juristic Method" (1940) 49 *Yale L.J.* 1355. Discussed with approval, J. Stone, *The Province and Function of Law* (1950) 717-721.

[58] (1960) 34 A.L.J.R. 155, 160-161.

[59] See, e.g., *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1925)