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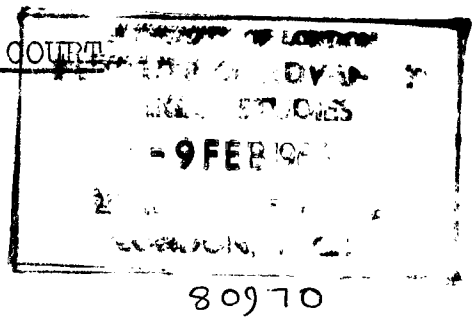
Judgment  
31/1965

No. 3 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT  
OF NEW SOUTH WALES



B E T W E E N:-

GREEN CAB SERVICE PTY, LIMITED,  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON  
(Applicants)

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APPELLANTS

- and -

JOHN EDWARD WHITFIELD and THE  
TRANSPORT WORKERS UNION OF  
AUSTRALIA (NEW SOUTH WALES BRANCH)  
(Respondents)

RESPONDENTS

CASE FOR THE APPELLANTS

INTRODUCTORY

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1. This is an appeal by leave of the Supreme Court of New South Wales finally granted under Order in Council of 1909 on 16th day of December 1964 from an order dated 3rd day of November 1964 of that Court (Clancy, A.C.J., Manning and Asprey J.J.) discharging an order nisi for prohibition granted to the Appellants on 5th day of December, 1963.

Record  
pp. 79  
p. 70

pp. 68-69

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2. The Appellants sought the issue of a Writ of Prohibition to restrain each of the Respondents from further proceeding with an application by the second named Respondent to the first named Respondent for approval of an amendment to the Rules of the second named Respondent whereby it was sought to enlarge the category of persons eligible for membership of the second named Respondent by including persons not under contracts

pp. 1-4

Record

of employment but "deemed" to be employees by virtue of provisions of the Industrial Arbitration Act 1940-1964 (N.S.W.) (hereinafter called "The Arbitration Act").

3. The first named Appellant is a Company duly incorporated in New South Wales and is the owner of approximately thirty two taxi cabs which are driven by some eighty five different persons who are not employees of the said Appellant, but drive such taxi cabs under contracts of bailment. The said Appellant is a member of the Australian Taxi Council which is an Industrial union of employers registered as such under the Arbitration Act.

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4. The second and third named Appellants were at all material times financial members of the second named Respondent and each of them is opposed to the second named Respondent expending its funds securing and protecting the interests of persons who are only "deemed" to be employees.

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5. The first named Respondent has at all material times held the office of Industrial Registrar under the Arbitration Act.

6. The second named Respondent is a registered trade union of employees under the Trade Union Act, 1881-1959 (N.S.W.) (hereinafter called the "Trade Union Act") and is also registered as an industrial union of employees under the Arbitration Act.

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7. The Arbitration Act contains (inter alia) the following provisions:

S.5 "employee" means person employed in any industry, whether on salary or wages or piece-work rates, or as member of a butty-gang, but shall not include a member of a family in the employment of a parent, and the fact that a person is working under a contract for labour only, or substantially for labour only, or as lessee of any tools or other implements of production, or as an outworker, or is working as a salesman, canvasser, collector, commercial traveller, insurance agent or in any other capacity in which he is paid

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wholly or partly by commission shall not in itself prevent such person being held to be an employee. In determining whether a person who, in performing work, drives a motor vehicle, is an employee, if the person would be held to be an employee if the motor vehicle which he was driving in the performance of such work was owned by the person alleged to be his employer then such person shall be held to be an employee of such alleged employer although he is owner or lessee of the vehicle or has the use of the vehicle under a hire purchase agreement or other arrangement whatsoever. (Amended 1964) "(a) By inserting in the definition of "Employee" in subsection one of section five after the words "of a butty-gang," the words "and includes any person who is, pursuant to any provision of this Act, deemed to be an employee for the purposes of this Act,";

"Employer" means person, firm, company, or corporation employing persons working in any industry, whether on behalf of himself or itself or any other persons or on behalf of the Government of the State, and includes the Crown, the Commissioner for Railways, The Commissioner for Road Transport and Tramways, the Maritime Services Board of New South Wales, the Metropolitan Water, Sewerage and Drainage Board, the Hunter District Water Supply and Sewerage Board, and any council of a municipality or shire, and includes for the purpose of constituting a special board, a director, manager, or superintendent of an employer as defined as aforesaid.

"Industrial union" means industrial union registered as an industrial union under this Act.

"Trade union" means trade union registered under the Trade Union Act, 1881-1936, and includes a branch so registered.

S.8 (1) The registrar may, on application made as hereinafter provided, register under this Act any trade union of employees. On such registration the trade union shall

Record

be an industrial union until such registration is duly cancelled.

(2) Such application shall be in writing as prescribed by the committee of management of the trade union, and shall be signed by a majority in number of the members of such committee.

Notice of any such application shall be published as prescribed. The registrar may require such proof as he thinks necessary of the authority of the said members to make the said application.

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(3) Any such application may be refused by the registrar if he is of opinion that the organization applying is not a bona-fide trade union, or if registered under this Act would not be a bona-fide industrial union, or to the extent to which in his opinion the interests under this Act of persons represented by the applicant union may be protected by a previously registered industrial union.

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(4) The registrar shall fix a day for considering any objections on the above ground to the granting of the application, and shall notify the same as prescribed.

S.88 B(1) This section applies to any contract -

(d) under which a person (in this section referred to as "principal") - 30

(i) leases or agrees to lease to any other person any premises for the purpose of or with a view to such other person carrying out or performing, or causing to be carried out or performed, or arranging for the carrying out or performance of, the work (in this section referred to as "contract work") of hairdressing in or on such premises; or 40

(ii) grants to any other person a license or permit entitling such other person to occupy or use any premises or part of any premises or a chair in any premises, such license or permit having been granted for the purpose of or with a view to such other person carrying out or performing, or causing to be carried out or performed, or arranging for the carrying out or performance of, the work (in this section referred to as "contract work") of hair-dressing in or on such premises or part, or using, or causing to be used, or arranging for the use of such chair for the purpose of the work (in this section referred to as "contract work") of hairdressing; or

(e) which is one of a prescribed class of contracts, where the contract work is of a class or type in respect of which a price or rate is for the time being fixed by an award or agreement for employees engaged therein, but does not apply to any such contract under or in pursuance of which the contract work is to be carried out or performed by employees of the principal and by such employees only.

The Governor may make regulations prescribing for the purposes of paragraph (e) of this subsection any class of contracts by reference to any description of that class specified in the regulations, and in particular but without limiting the generality of the foregoing provisions of this paragraph, by reference to any one or more matters similar to any one or more of the matters by reference to which any of the contracts referred to in paragraph (a) or (d) of this subsection is described.

Any such regulation shall specify in relation to any class of contracts so prescribed the party to contracts of that class who, for the purposes of this section, shall be regarded as the principal and the work which, for the purposes of this section, shall be regarded as contract work.

(2) (a) A contract to which this section

Record

applies shall not be entered into unless -

- (i) the commission; or
- (ii) the committee established for the industry or calling in connection with which the contract work is to be carried out or performed, or if no committee is established for that industry or calling, such committee as may be nominated for the purpose by the registrar,

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has approved, either absolutely or subject to conditions, of the terms and conditions of such contract.

(b) The commission or committee shall refuse to approve of the terms and conditions of any such contract unless it is satisfied -

- (i) that the contract will be a bona fide contract and will not be entered into for the purpose of avoiding the operation of an award or agreement;
- (ii) that the benefits that might reasonably be expected to accrue under the contract, or in the course of the carrying out or performance of the contract work to be carried out or performed under or in pursuance of the contract, to the persons actually engaged in carrying out or performing such work would not be less favourable to them than the benefits provided for employees by an award or agreement applicable to work of the same class or type as such contract work and by the Annual Holidays Act, 1944, and the Long Service Leave Act, 1955, and any Act amending or replacing either of those Acts; and
- (iii) that it would be in the best interests of the persons who would be actually engaged in carrying out or performing the contract work to be carried out or performed under or in pursuance of the contract, that the contract be entered into.

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(3) Where a contract to which this section

applies is entered into without the approval of the commission or a committee or contrary to any conditions contained in any such approval -

Record

- 10 (a) every person who is a party to the contract shall be liable to a penalty not exceeding one hundred pounds;
- (b) the contract shall be void; and
- 20 (c) every person actually engaged in the carrying out or performance of the contract work to be carried out or performed under or in pursuance of the contract shall, for the purposes of this Act, be deemed to be an employee employed by the party to the contract who is the principal and, for the purposes of the Annual
- 30 Holidays Act, 1944, the Long Service Leave Act, 1955, and the Workers' Compensation Act, 1926, and any Act amending or replacing any of those Acts, be deemed to be a worker employed by that party and that party shall, for the purposes of any such Act, be deemed to be the employer of such person.

S.88E (Added by 1959 amending Act)

40 (1) The following persons if not otherwise employees employed to do the work hereinafter referred to shall, for the purposes of this Act be deemed to be employees and for the purposes of the Annual Holidays Act, 1944, the Long Service Leave Act, 1955, and any Act amending or replacing any of those Acts be deemed to be workers:-

- 50 (a) Any person not being the person in whose name a taxi cab, motor omnibus, private hire car or public motor vehicle respectively is registered who drives such taxi cab, motor omnibus, private hire car or public motor vehicle. In such case the employer shall be deemed to be the person in whose name such vehicle is registered.

Record

The expressions "taxi cab", "motor omnibus", "private hire car" and "public motor vehicle" and "registered" shall have the meanings respectively ascribed to them in the Transport Act, 1930, as amended by subsequent Acts.

(b) Any person not being registered as a milk vendor to sell milk or cream from a vehicle or any other description of conveyance who sells or delivers for the purpose of sale milk or cream from any vehicle. In such case the employer shall be deemed to be any person whose milk or cream is so delivered or who supplies the milk or cream so delivered. 10

(c) Any person, other than a common carrier who, under any kind of contract lease license or arrangement whatsoever, drives a motor lorry when the same is being used for deliveries of goods to the customers of a retail trader of such goods. In such case the employer shall be deemed to be the retail trader. 20

The expression "motor lorry" shall have the meaning ascribed thereto in the regulations under the Motor Traffic Act, 1909, as amended by subsequent Acts. 30

(d) Any person (other than the owner or occupier of the premises or a bona fide cleaning contractor employing labour for the purpose) who performs any work of cleaning premises or part thereof for which work if performed by an employee a price or rate is for the time being fixed by an award or agreement. In such case the owner or where there is an occupier other than the owner then the occupier of the premises shall be deemed to be the employer. 40

(e) Any person (other than the owner or where the owner is not occupying the building or premises then the occupier of any building or premises or a bona fide contractor employing labour for that purpose) who performs carpentry or joinery or brick-laying 50



10 work upon any building or premises the erection, construction, repair, alteration or maintenance of which is being carried out under a contract between the owner or occupier and a contractor. In such case the last mentioned contractor shall be deemed to be the employer: Provided that this shall not apply to work of repair, alteration or addition to existing premises used as residences.

20 (f) Any person (other than the owner or where the owner is not the occupier then the occupier of any building or premises or a bona fide contractor employing labour for that purpose who has entered into a contract with such owner or occupier or with a bona fide contractor who has contracted to erect, renovate, repair or maintain such building or premises) who performs the work of house or general painting. In such case the owner or occupier shall be deemed to be the employer: Provided that this shall not apply to work of repair, alteration or addition to existing premises used as residences

30 (g) Any person, not being a bread manufacturer, who performs the work of delivery of bread or bread rolls on any bread round from a vehicle, conveyance or receptacle, unless such work is performed outside the counties of Cumberland and Northumberland and the City of Greater Wollongong. In such case the employer shall be deemed to be the bread manufacturer who manufactured, prepared or baked the bread or bread rolls: Provided that nothing in this paragraph shall apply to any contract approved pursuant to subsection two of section 88B of this Act.

40 (h) any person who is one of a prescribed class of persons.

(2) The Governor may make regulations prescribing for the purposes of paragraph (h) of subsection one of this section any class of persons by reference to any description of that class specified in the regulations and in particular

Record

but without limiting the generality of the foregoing provisions of this paragraph by reference to any one or more matters similar to any one or more of the matters by reference to which any of the classes of persons referred to in paragraphs (a) to (g) of subsection one of this section is described.

Any such regulation shall specify in relation to any class of persons so prescribed the person who for the purposes of this section shall be deemed to be the employer and the work which for the purposes of this section shall lead such person to be deemed to be the employer.

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(3) This section shall not operate so as to require a person to be deemed to be the employer by virtue of this section -

(a) of his spouse or a member of the family of whom he is the parent;

(b) of any person who performs any work as a bona fide act of charity.

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(4) It shall be a defence to any prosecution in proceedings for a breach of this Act or for the recovery of monies under this Act brought against any person deemed by virtue of this section to be an employer, if such person deemed to be an employer joins in the manner prescribed as a party to the proceedings some other person whom he alleges to be the employer and proves in the course of the proceedings that apart from the operation of this section, such person was at the relevant time the employer. Such person shall have the right to make full answer and defence to the allegation by the person deemed to be an employer and, if held to be the employer, shall have the same rights and shall be liable to the same penalties and to have the same orders made against him and otherwise be in the same position as if the proceedings had been originally instituted against him at the time they were instituted against the person alleged to be the employer.

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8. The Trade Union Act contains (inter alia) the following provisions:

S.6 Any seven or more members of a trade union may by subscribing their names to the rules of the union and otherwise complying with the

provisions of this Act with respect to registry register such trade union under this Act provided that if any one of the purposes of such trade union be unlawful such registration shall be void.

14. With respect to the registry under this Act of a trade union and of the rules thereof the following provisions shall have effect -

(Added by 1959 amending Act)

10 (7) An application to register the trade union may, where such trade union in the opinion of the Registrar holds itself out to be or purports to be a trade union of employees, be refused by the Registrar -

(a) if he is of the opinion that such trade union is not a bona-fide trade union of employees, or

20 (b) to the extent to which, in his opinion, the persons entitled to become and remain members of the trade union may conveniently belong to an industrial union of employees registered under the Industrial Arbitration Act, 1940, as amended by subsequent Acts.

15. No certificate of registration of a trade union shall be withdrawn or cancelled otherwise than by the Registrar and in the following cases -

(Added by 1959 amending Act)

30 (3) On proof to his satisfaction that a certificate of registration would not have been obtained had the provisions of paragraph (7) of section fourteen of this Act been in force at the time when the application for such registration was made.

31. In this Act -

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40 The term "Trade Union" means any combination whether temporary or permanent for regulating the relations between workmen and employers or between workmen and workmen or between employers and employers or for imposing restrictive

Record

conditions on the conduct of any trade or business whether such combination would or would not if this Act had not been passed have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. Provided that this Act shall not affect -

- (1) Any agreement between partners as to their own business.
- (2) Any agreement between an employer and those employed by him as to such employment. 10
- (3) Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession trade or handicraft.

9. There is not now and never has been any award made under the Arbitration Act, prescribing remuneration and conditions of work in respect of persons engaged in the driving of taxi cabs who are not employees but merely deemed to be employees pursuant to the provisions of Section 88E of the Arbitration Act. Such persons are not and have never been covered by the provisions of the Annual Holidays Act, 1944-1958 or the Long Service Leave Act, 1955 1963 or entitled to the benefits thereof. An illustration of the foregoing is to be found in Feldman v. Stewart; Birdsall v. James (1961) A.R. 462; Platt v. Treweneck, Green Cab Service Proprietary Limited v. Platt (1953) A.R. 642; Yellow Cabs of Australia Limited v. Colgan (1930) A.R. 137. 20 30

10. The second named Respondent made an application on or about 18th day of September 1962 for an award to cover persons deemed to be employees by virtue of Section 88E of the Arbitration Act, and by this application apart from seeking award rates and conditions of employment for such persons, sought the benefit of payment of annual leave at the rate of a minimum of twenty five pounds (£25) per week for a period of three weeks per annum to each deemed employee. On the 12th day of November, 1963 by a majority the Industrial Commission of New South Wales in Court Session held that no jurisdiction existed for entertaining the application because the rules of the second named Respondent did not permit it to enrol 40

amongst its members persons who were merely deemed to be employees by virtue of the provisions of Section 88E of the Arbitration Act, and accordingly was not entitled to make application for an award on their behalf.

Record

11. On the 24th day of May, 1963 the second named Respondent applied to the first named Respondent for his approval to a proposed amendment to Rule 5 of its registered rules which is in the following terms:

pp.3

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" The Union shall consist of an unlimited number of persons (males and females) who are working in or in connection with the industry or industries and/or occupations and/or avocations and/or industrial pursuits of:

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(a) The transport on land or by air of persons and/or passengers and/or goods, wares, merchandise or any other material whatsoever by or on vehicles or animals or by motor, steam, oil, electric or other mechanically propelled contrivances; drivers, assistants and conductors of same, and stable and yard work wherever performed, including the work of attendance on vehicles, horses and other beasts of burden, whether in stables or otherwise; training and breaking in of horses, loading and unloading on to and/or from any vehicles; shunting by horse power, sanitary carting and work connected therewith, excepting railways, tramways or lifts, bread carters, pastry carters, milk, ice and ice cream carters, retail butchers' carters, storemen and packers.

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(b) All persons elected and/or appointed as officers and/or paid officials of the Union.

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(c) Should any member cease to actively work in the Transport Industry for a period of six months or more, such member shall notify the Branch Committee of Management in writing of same. The Branch Committee of management shall have power to cancel or endorse the continuance of membership.

(d) The words "persons," "workers," "members,"

Record

"youths," etc., where used in these Rules, shall include and mean males and females."

The proposed amendment sought to add after Rule 5 the following:

Add after the words "storemen and packers" the following

"Including persons who are by virtue of the Industrial Arbitration Act 1946-1960 deemed to be employees in or in connection with the aforesaid industry or industries and/or occupation and/or avocations and/or industrial pursuits."

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12. The application to the first named Respondent was made pursuant to Regulations 16 and 17 of the Regulations made under the Arbitration Act, which are in the following terms:

16. Every industrial union contemplating altering its rules shall lodge with the Registrar a copy of the intended alteration at least three weeks before submitting it to the vote of the members, or in any other way adopting or effecting the alteration, with such explanation thereof, and of the reasons and objects of its introduction as the Registrar may require. The Registrar may, if he thinks it advisable, submit any such proposed alteration to the Commission which may call for such further explanation and information from the industrial union as it thinks fit.

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17. The Commission or Registrar may disallow any such proposed alteration, or may approve thereof with or without amendment or addition, and if so approved the union shall only make or adopt the proposed alteration as so approved.

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13. Every application for the extension of the constitution rule of an industrial union of employees so as to extend its membership to include persons not hitherto covered by the constitution of the union must be treated and

dealt with by the Industrial Registrar or the Industrial Commission of New South Wales on reference to it of the application, as an original application by a trade union of employees for registration as an industrial union of employees. The foregoing principle was enunciated and applied by the Industrial Commission of New South Wales in In Re United Labourers' Protective Society of New South Wales (1933 A.R. 199; In Re National Union of Railwaymen of Australia, New South Wales Branch, 1955 A.R. 838; In Re New South Wales Nurses' Association, 1962 A.R. 136.

Record

14. Regulations numbered 6 to 12, inclusive of the Regulations made under the Arbitration Act, provide the following procedure for the registration of trade unions of employees as industrial unions of employees:

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6. Application for registration as an industrial union of employees by a trade union of employees shall be made in or to the effect of Form 6 hereto.

7. The applicant shall cause notice of any such application for registration as an industrial union of employees to be published in one metropolitan daily newspaper within fourteen days from the time of filing such application. Such notice shall be in or to the effect of Form 7 hereto. Where the registered office of the trade union is situate more than twenty miles distant from the General Post Office, Sydney, the applicant shall also cause such notice to be published within the said period, in a provincial newspaper (if any) circulating in the district. The applicant shall, not later than the date of such publication, also serve a copy of such notice upon every industrial union of employees affected by such application.

Proof of such publication and service and a statement also of the industries and callings and of every industrial union of employees affected by or embraced in the constitution of the

Record

applicant trade union shall be given and made by affidavit in or to the effect of Form 8 hereto by the secretary of the applicant trade union. Such affidavit shall be filed with the Registrar.

8. Within fourteen days from the date of the publication of the notice of application for registration, any person, on his own behalf or on behalf of an industrial union, may file with the Registrar in or to the effect of Form 9 hereto, notice of objection to the proposed registration, and stating such of the grounds mentioned in section 8 of the Act as are relied upon, together with affidavits in support thereof. Such person shall, within the said period, serve copies of the notice of objection and of the said affidavits on the secretary of the applicant trade union. 10
9. Within seven days after service of such notice of objection and affidavits, the secretary of the applicant trade union may file with the Registrar affidavits in answer to the notice of objection, and shall, within the said period, serve copies thereof on the objector. 20
10. The Registrar, on fixing a day for considering the objection, shall give notice thereof to the objector and the applicant trade union in Form 10 hereto. 30
11. Upon grant of any such application for registration as an industrial union of employees, the Registrar shall issue a certificate of registration in or to the effect of Form 11 hereto.
12. An appeal from a decision of the Registrar, pursuant to subsection (7) of section 8 of the Act, shall be made within twenty one days thereafter by motion upon notice.

pp. 68

15. On the 5th day of December, 1963 before the first named respondent dealt with the application referred to in paragraph 11 hereof, a Rule Nisi for Prohibition was granted by a Justice of the Supreme Court of New South Wales calling upon the Respondents to show cause why a Writ of Prohibition should not issue to restrain them from further proceeding with the said 40



application for approval.

Record

CONTENTIONS BEFORE THE FULL COURT OF  
THE SUPREME COURT OF NEW SOUTH WALES

16. The Appellants submitted:

(a) That the application for alteration of the rules of the second named Respondent required to be treated in accordance with accepted principles of industrial law referred to in paragraph 13 hereof.

10 (b) That the jurisdiction of the first named Respondent was limited in cases of applications for approval to alteration of rules enlarging membership of industrial unions to entertaining such alterations as admitted persons who could validly be members of "a trade union of employees" as prescribed by s.8(1) of the Arbitration Act.

20 (c) That the phrase "trade union of employees" must be construed having regard to the other provisions of the Act and of the Trade Union Act and could not be given the extended meaning provided for by the definition of "employee" in S. 5 of the Arbitration Act.

(d) That persons deemed to be employees by virtue of section 88E of the Arbitration Act cannot validly be members of a "trade union of employees".

30 17. The second named Respondent submitted:

That accepting the correctness of the Appellants' submissions in paragraph 16(a) and (b), the expression "trade union of employees" was to be interpreted in the light of the extended definition of the word "employee" contained in section 5 of the Arbitration Act.

DECISION OF THE FULL COURT

40 18. The Full Court held that nothing appeared in the context of the Act to justify displacing the extended definition of employee in the phrase "trade union of employees" and accordingly the

pp. 75-  
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Record

second named Respondent could validly embrace deemed employees within its membership and the first named Respondent had jurisdiction to entertain the application.

SUBMISSIONS

19. The Appellants respectfully submit that:

(i) By reason of Section 8 of the Arbitration Act registration as an industrial union of employees may only be granted to a "trade union of employees". 10

(ii) A "trade union of employees" within the meaning of s. 8 of the Arbitration Act may be constituted only by a trade union registered as such under the Trade Union Act (Arbitration Act s. 5) which is restricted in its membership solely to employees in the common law sense of that term. 20

(iii) Prior to the amendment of the Trade Union Act in 1959 by the Industrial Arbitration (Amendment) Act, 1959 a union was registerable as a trade union simpliciter whether it comprised employers or employees or both. The phrase "trade union of employees" found no expression in this Act until 1959. However in the words of McKeon J. in Hire Car and Taxi Drivers (State) Conciliation Committee (unreported):- 30

"Under the Trade Union Act a trade union is registered as a trade union simpliciter, and is not registered as a trade union of employees or as a trade union of employers or as a trade union of both employees and employers or as a trade union composed in some other way. That has always been so. Nevertheless, it is a historical fact that trade unions registered under the Act have always been divisible into two 40

10 classes only, namely, trade unions  
which were in fact composed of  
employees and trade unions which  
were in fact composed of employers.  
An employee is a person (a servant)  
working under a contract of employment  
with another person (a master),  
and the latter is the employer of  
that employee. At common law a  
trade union of employees is, and  
always has been, a trade union  
composed of persons who work as  
employees in the employment of other  
persons who are the employers of  
those employees; a trade union of  
true employees. As I have just  
pointed out, it has always so  
happened that a trade union  
20 registered under the Trade Union  
Act, which was a trade union of  
employees as distinct from a trade  
union of employers, has been a trade  
union of employees in the common  
law sense, and never anything else.  
Ergo, whenever a trade union  
registered under that Act has come  
forward as a trade union of  
employees to be registered as an  
30 industrial union, it has been a  
trade union of true employees."

(iv) The 1959 amendment to the Trade  
Union Act by providing for refusal  
of registration as a trade union of  
a trade union purporting to be a  
trade union of employees but which  
is not a bona fide trade union of  
employees has given legal sanction  
to the established position that  
40 membership of a registered trade  
union also registered as an  
industrial union of employees must  
be confined to true employees in  
the common law sense of that term.  
At the same time provision was  
made for de-registration of an  
already registered trade union  
which offended against the same  
requirement.

(v) Registration of a registered trade  
50 union as an industrial union of  
employees under the Arbitration Act

Record

does as a consequence of registration confer certain rights and privileges (Arbitration Act Ss. 11, 24, 25A, 36, 74, 89, 92, 93, 100, 113, 114, 115). Notwithstanding the registration under the Arbitration Act the continued existence and registration under the Trade Union Act of the trade union body is also necessary. (In Re National Union of Railwaymen of Australia, New South Wales Branch (1955) A.R. 838).

10

The Arbitration Act manifests an intention to maintain an identity of composition of membership. The Arbitration Act itself is indiscriminate in the selection of the entity in relation to which it regulates industrial conditions, because in some provisions of the Act the liability or power is vested in the industrial union of employees whilst in others the trade union is so invested.

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(vi) The validity of the foregoing submissions is in no way affected by the introduction in 1959 of new categories of notional employees for the purpose of the Arbitration Act (s. 88E) or by the amendment of the definition of "employee" in 1964, as there were no corresponding amendments made in the provisions of the Trade Union Act and furthermore the amendments made contemporaneously to the Trade Union Act in 1959 clearly indicated an intention to maintain the requirement that a trade union of employees be constituted by true employees. By contrast it may be noted that the 1959 amendment to the Arbitration Act creating the new notional classes of employees specifically provided that they shall be employees not only for the purposes of that Act but also for the purposes of the Annual Holidays Act 1944 and the Long Service Leave Act 1955.

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(vii) The new enlarged definition of "employee" provided for by the 1964

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amendment applies "unless the context otherwise requires". For the reasons already submitted the context does otherwise require. Additionally there are further reasons why the extended definition should be not applied to the words of s. 8(1) of the Arbitration Act.

- 10 (viii) A person or thing deemed to be something it is not is never that person or thing and where a Statute creates such a notional or fictional class of persons for the purpose of the Statute itself then the words "for the purposes of the Act" require to be construed as meaning such provisions of the Act as to which it is reasonable to say that the fiction sensibly or
- 20 legitimately admits of its application and not every purpose of the Act.
- (ix) To construe the phrase "trade union of employees" by importing the expanded definition of employee contained in the 1964 Amendment would do violence to the whole structure on which the Arbitration Act is based and the ensuing results would
- 30 verge on the absurd. The scheme of the Act has at all times been to place employers and employees on different sides of the record in proceedings under the Act, in the constitution of Conciliation Committees and in other matters provided for by the Act. However by reason of the fact that by (inter alia) Ss. 88B and 88E certain persons, who themselves may be employers of one or even a substantial number of employees, are to be deemed employees, such "deemed" employees could become members of an industrial union of employees which could result in a Conciliation Committee being constituted on which the employees' representative is a "deemed" employee, himself a substantial employer; a
- 40 "deemed" employee may simultaneously belong to the appropriate employers'
- 50

Record

organisation or, even, if he has sufficient employees may register as an industrial union of employers under s. 6. Another result that would ensue would be to change the character of trade unions of employees and industrial unions of employees so that they would become trade unions comprised of a mixture of employers and employees and industrial unions comprised of a mixture of employers and employees. As examples of other absurd results that would ensue are the following:

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(a) employees would belong to the same unions as their employers,

(b) notional employees would be entitled to preference of employment in appropriate circumstances over true employees, 20

(c) by fulfilling the same duties and following the same occupation a person may at one and the same time be both a notional employee and an employer in the same business.

In considering this matter attention is respectfully drawn to the fact that the category of notional employees is not closed (S.88E(1)(h)) and indeed the power to extend the class has been exercised by regulation more than once.

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(x) The Order of the Full Court of the Supreme Court of New South Wales discharging the rule nisi for prohibition should be reversed and set aside and the Writ should be made absolute and the second named Respondent ordered to pay the Appellant's costs.

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REASONS

20. Because the first named Respondent has no jurisdiction to entertain an application to approve of a rule permitting a registered trade

union of employees and industrial union of  
employees to enrol as members persons who are  
not employees but merely deemed to be employees  
by virtue of s. 88E of the Arbitration Act.

Record

K. A. COHEN

Counsel for the Appellants.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME  
COURT OF NEW SOUTH WALES

No. 3 of 1965

EX PARTE GREEN CAB SERVICE PTY,  
LIMITED, CHARLES WILLIAM  
BAILLES and JACK  
ALEXANDER ANDERSON  
(Applicants)

APPELLANTS

RE <sup>and</sup> JOHN EDWARD WHITFIELD and  
TRANSPORT WORKERS UNION  
OF AUSTRALIA (NEW SOUTH  
WALES BRANCH)  
(Respondents)

RESPONDENTS

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CASE FOR THE APPELLANTS

FRESHFIELDS,  
Solicitors,  
1, Bank Buildings,  
Princes Street,  
LONDON, E.C.2.