

P.C.
G.D.T. G.L

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

UNIVERSITY OF LONDON
INSTITUTIONAL ADVISORY
REGISTRATION
- 9 FEB 1966
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LONDON, W.C.1.

~~THE~~ GREEN CAB SERVICES PTY
LIMITED CHARLES WILLIAM
BAILLES AND JACK
ALEXANDER ANDERSON

80970

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APPELLANTS

and

~~THE~~ JOHN EDWARD WHITFIELD
AND TRANSPORT WORKERS
UNION OF AUSTRALIA (NEW
SOUTH WALES BRANCH)

RESPONDENTS

CASE FOR THE SECOND RESPONDENT
INTRODUCTORY

Record

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1. This is an appeal from the Judgment of the Supreme Court of New South Wales dated 3rd November, 1964 whereby there was discharged with costs a Rule Nisi for common law prohibition granted on the motion of the Appellant and directed to the Industrial Registrar appointed pursuant to the provisions of the Industrial Arbitration Act, 1940-1964 (hereinafter referred to as "the Act") and to the Transport Workers' Union of Australia (New South Wales Branch) (hereinafter referred to as "the Union").

p. 70

p. 68-69

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2. The Appellant had applied to make absolute the said Rule Nisi directed to the said Industrial Registrar and to the Union to restrain them from proceeding with an application to the said Industrial Registrar by the Union for approval to an amendment of Rule 5 of the Union's rules.

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3. At all material times the Appellant was a member of the Australian Taxi Council, an industrial Union of employers and the Appellant was the owner of a number of taxi cabs which were driven by drivers under contracts of bailment.

p. 2, 1.2
p. 71, 1.25
p. 2, 1.10

p. 72, 1.12

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p.2, 1.20
p.71, 1.33

4. The Union at all material times was a registered trade Union of employees under the Trade Union Act, 1881-1959 and was registered as an industrial union of employees under the Act.

p.2, 1.24
p.72, 1.12

5. The Union had applied to a Conciliation Committee constituted under the Act for an award to apply to all persons who drive taxi cabs and who were deemed to be employees pursuant to Section 88E of the Act. The said Australian Taxi Council was included as a Respondent to such application and consequently the Appellant may have been affected by any award made pursuant to the said application.

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p.2, 1.34
p.72, 1.33

6. The Senior Conciliation Commissioner appointed under the said Act referred to the Industrial Commission in Court Session the following question of jurisdiction arising in and by virtue of the said Application for an award, namely "Whether the said Conciliation Committee has jurisdiction to hear and determine the Application for it having regard to the alleged invalidity of the Application because of the incompetency of the applicant's union to legally make it".

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Ex.E

7. At the time of the said reference Rule 5 of the rules of the Union so far as is material hereto was in terms following:

"5. QUALIFICATION FOR MEMBERSHIP

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

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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.

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

- 10 8. The said reference was heard by the Industrial Commission in Court Session which by majority judgment held that the said Conciliation Committee had no jurisdiction to hear the said Application and the majority expressed the view that the rules of the Union did not permit it to make an application on behalf of persons who were merely deemed to be employees. p.2, 1.43
p.4 - p.65
(p.15, 11.11-16
(p.40, 11.1-6
p.72, 1.36
- 20 9. Shortly after the said reference the Union applied to the Industrial Registrar for approval to amend rule 5 of the Union's Rules by adding to the description of those persons who may be members of the Union 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 occupations and/or avocations and/or industrial pursuits. (p.3, 1.11
(p.72, 11. 46-47
(p.73, 11. 1-4
- 30 The said Application was made pursuant to Regulation 16 of the Regulations made under the Act.
10. Shortly after the Judgment of the Commission in Court Session was delivered on the said reference the Appellant sought and obtained the said Rule Nisi directed to the Industrial Registrar and the Union. p.68
p.73, 1.16
- 40 11. The issue which arose for determination in the Application to make absolute the said Rule Nisi involved the construction of Section 8(1) of the Act as amended which provides as follows:- p.76, 1.36
- "8. (1) The registrar may, on application made as hereinafter provided, register under this Act any trade union of employees. On such registration the

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trade union shall be an industrial union until such registration is duly cancelled".

p.77, 1.22

and of Section 5 (the definition section of the Act) which provides so far as is material to this appeal that in the Act, unless the context otherwise indicates, the word "employee" means:

"Employee" means person employed in any industry, whether on salary or wages or piece-work rates, or as members of a butty-gang, and includes any person who is, pursuant to any provision of this Act, deemed to be an employee for the purposes of this Act, 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 wholly or partly by commission, shall not in itself prevent such person being held to be an employee.

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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."

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p.75-p.78

12. In its judgment the Supreme Court of New South Wales held that the word "employees" where found in Section 8(1) of the Act was to be given the meaning ascribed to it by the definition contained in Section 5 and consequently discharged the said Rule Nisi.

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Ex.B

THE INDUSTRIAL ARBITRATION ACT, 1912-1940

13. The Act is a consolidation of the Industrial Arbitration Act, 1912 as amended up

to 1940.

The principal purpose of the Act is to provide for the regulation of industrial relations by conciliation and arbitration and this is achieved by providing machinery whereby awards or agreements may be made fixing rates of wages and conditions of employment and whereby the rights and obligations provided in the awards or agreements may be enforced.

10 Important features of such machinery are:

(a) the establishment of arbitral tribunals
(part II of the Act)

(b) the conferring of power on such
tribunals to make awards

(Parts III, VII & VIII of the Act)

20 (c) provisions for the creation of
representative bodies of employers
and employees for the purposes of
the Act by the registration as
industrial unions of trade unions
already registered under the Trade
Union Act of the State of New South
Wales and for the rights and liabilities
of such bodies and for their control.

(Parts I, X & XI of the Act)

30 (d) statutory methods of enforcing the
awards and the rights and
obligations given by awards to
individuals and to the representative
bodies

(Part IX of the Act)

(a) The establishment of arbitral
tribunals.

The tribunals established, so far as they are relevant to this case, are the Industrial Commission of New South Wales and Conciliation Committees.

The Industrial Commission of New South Wales consists of persons appointed

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to be members of the Industrial Commission of New South Wales by the Governor of the State of New South Wales. The Commission is a superior court of record and its members have the same status etc. as have puisne judges of the Supreme Court of New South Wales (s.14).

The Commission has exclusive jurisdiction in certain matters and then sits as the Commission in Court Session and is constituted by not less than three judges. In other matters the jurisdiction of the Commission is exercisable by the Commission constituted by a single member of the Commission (s.14 and s.30 B).

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A Conciliation Committee is established by the Minister for Labour & Industry on the recommendation of the Industrial Commission to exercise jurisdiction in respect of specified industries or callings. It comprises such number of representatives of employers and employees as the Commission may recommend and the Minister prescribe. Such representatives are appointed by the Minister upon the recommendation of the Commission from persons nominated by such employers and/or industrial unions or employers and employees as the Commission may recommend. (s.18).

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A Conciliation Committee is presided over by a Chairman who is a Conciliation Commissioner (s.15). The Conciliation Commissioners are appointed by the Governor of the State of New South Wales for specified periods.

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In addition to these bodies the Act makes provision for the appointment of an Industrial Registrar to have powers and duties prescribed, which powers and duties are prescribed in Regulation 24 of the Regulations made under the Act (s.125). Provision is also made for the appointment of an Industrial Magistrate whose powers and duties include the hearing and determination of proceedings brought for the enforcement of awards (s.126).

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(b) The powers of arbitral tribunals referred to in paragraph (a) to make awards.

The Conciliation Committees are given power

to make awards including the power to make an award, fixing the prices for work done by employees, and the rates of wages payable to employees, other than aged, infirm or slow workers; fixing the number of hours and the times to be worked in order to entitle employees to the wages so fixed; fixing the rates for overtime and holidays and other special work, including allowances as compensation for overtime, holidays, or other special work; determining any industrial matter. "Industrial matters" is defined by Section 5 of the Act as meaning matters or things affecting or relating to work done or to be done or to privileges, rights or duties of employers or employees in any industry and including all or any matters relating to (inter alia)

(a) the wages, allowances or remunerations of any persons employed or to be employed in any industry.

(b) the hours of employment, sex, age, qualification or status of employees and the mode, terms and conditions of employment.

The Industrial Commission has in respect of these matters the powers and may exercise the jurisdiction conferred by the Act on Conciliation Committees (s.30).

(c) Provision for the Registration and Control of industrial unions of employees and employers for the purposes of the Act.

The Act provides for the registration of industrial unions, for the deregistration in certain circumstances of such industrial unions and for control of industrial unions by, for example, requiring the approval of the Industrial Registrar prior to the making of any amendment to the rules of an industrial union (Regs. 16-18).

The Trade Union Act, 1881-1959 of the State of New South Wales provides for the registration of trade unions. In that Act a trade union is defined by Section 31 in the

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following terms:-

"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 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 -

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- (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.
- (3) Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession trade or handicraft".

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A trade union may consist of employees only, employers only or be a mixed body.

The industrial Arbitration Act provides that a trade union of employees may be registered as an industrial union of employees (s.8). The Industrial Arbitration Act also provides for the imposition of penalties on industrial unions of employees in certain cases where illegal strikes are occurring.

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An application for the establishment of a Conciliation Committee or for an award to be made by either the Industrial Commission or a Conciliation Committee may be made only by an employer or employers of not less than 20 employees in an industry or calling or by an industrial union whose members are employers or whose members are employees in an industry or calling and an application to vary an award again may be made only by the same bodies (s.74).

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(d) Provision of machinery for the enforcement of awards.

10 The Act provides for the appointment of Industrial Magistrates (s.126) and then further provides that where an employer employs any person to do any work for which the price or rate has been fixed by an award made under the Act he shall be liable to pay in full in money to such person the price or rate so
20 fixed without any deduction except such as may be authorised by the award (s.92). The Act further provides for proceedings to be taken by either the person employed or in certain circumstances by an officer of an industrial union. Industrial Magistrates are also given the power to impose penalties on any person who commits a breach of an award and for proceedings to be taken by, among others, the Secretary of an industrial union concerned in the industry covered by the award (s.93).

14. THE EXTENSION OF THE PROVISIONS OF THE ACT TO PERSONS DEEMED TO BE EMPLOYEES

(a) The history of the growth of such classes of persons.

30 (i) The facts set out in paragraphs (a) (i) and (b) (i) hereof have been summarised from the judgments of the Industrial Commission of New South Wales which form part of the record of proceedings herein. Prior to the year 1930 taxi cabs plying for hire in the State of New South Wales were in the main driven by persons who were employed by the owners of such taxi cabs. Awards had been made from time to time pursuant to the Industrial Arbitration Act whereby the
40 terms and conditions of employment of such employees were fixed. By virtue of the provisions of the said Act employers and employees bound by the award were required to

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comply with its provisions notwithstanding any agreement to the contrary. The last such award was made in December, 1948 for a period of 3 years but its provisions have been continued in force thereafter by virtue of the provisions of the Industrial Arbitration Act.

- (ii) Thereafter a practice developed whereby persons formerly employed to drive taxi cabs became bailees of the cabs under various contracts of bailment and were remunerated for the services they rendered either by deducting from the takings some portion thereof agreed upon with the owner of the cab or by being paid some proportion of such takings. Eventually there ceased to be any drivers of taxi cabs who were employees in the ordinary sense of the word. 10
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(b) The history of Legislation dealing with the problem

- (i) in 1943 by the Industrial Arbitration Amendment Act No. 25 of 1943 the Industrial Arbitration Act was amended by inserting the following provision as Section 5 Subsection 2: 30

"(2) A person who is engaged in plying for hire or in the delivery of goods with any vehicle or vessel the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement) in consideration of the payment of a fixed sum or a share in the earnings or otherwise shall, where the work in which such person is so engaged is work for which, by an award or industrial agreement, a price or rate has been fixed for persons 40

10 performing such work, be deemed,
for the purposes of this Act, to be
an employee employed by the person
from whom the use of the vehicle
or vessel is so obtained, and
such last mentioned person shall,
for the purposes of this Act,
be deemed to be the employer of
such employee unless such
persons or either of them establishes
to the satisfaction of the tribunal
in which proceedings for a breach
of the award or industrial agreement
are instituted that the contract of
bailment was a bona fide contract
and was not entered into for the
purpose of avoiding the operation of
the award or industrial agreement".

20 (ii) In the year 1951 by the Industrial
Arbitration Amendment Act No. 10
of 1951 the said section was
amended in the following Manner:-

By inserting after the words
"delivery of goods" in the
second line of the subsection
the words "or in the
transportation of passengers".

30 In appeals from orders made in
proceedings brought before an
Industrial Magistrate pursuant
to the Industrial Arbitration
Act alleging breaches of the award
referred to in paragraph 14 a (1)
hereof these sections were
considered by the Industrial
Commission of New South Wales and
it was then held that a person
engaged in plying for hire with
a vehicle the use of which was
40 obtained under a contract of
bailment was to be deemed to be
an employee employed by the
bailor only where it was not
established in proceedings to
enforce the award that the
contract of bailment was a bona
fide contract and was not
entered into for the purpose

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of avoiding the operation of the award
(Platt v. Trewenick 1953 Industrial
Arbitration Reports (N.S.W.) P. 624 at
656/7)

- (iii) In the year 1957 the Industrial
Arbitration Act was further amended by
Act No. 23 of 1957 which inserted in
the Act Section 88 (B) in the following
terms so far as is relevant to this
appeal -

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

(c) between the owner (in this
section called "principal") of a
motor vehicle and any other person -

- (i) under which such other person
agrees to carry out or perform
or to cause to be carried out
or performed, or to arrange
for the carrying out of or
performance of, the work (in
this section referred to as
"contract work") of driving,
in the course of or for
the purposes of any business
carried on by such principal,
such motor vehicle; or

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- (ii) under which such principal
gives possession of such
motor vehicle to such other
person 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 of or performance of, the
work (in this section referred
to as "contract work") of
driving, in the course of or
for the purposes of any
business carried on by such
principal, such motor vehicle;

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- (e) which is one of a prescribed class of contracts,

10 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.

- (2) (a) A contract to which this section applies shall not be entered into unless -

- 20 (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,

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

- 30 (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;
- 40 (ii) that the benefits that might reasonably be expected to accrue under the contract, or in the course of the carrying out or

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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

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(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 -

(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

(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 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.

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(4) Proceedings for a breach of this section may be taken and prosecuted by the Minister, or an employer, or the Secretary of an industrial union whose members are employed in the industry or calling in connection with which the contract work is carried out or performed.

(5) In this section -

10 "Contract" means contract, agreement or arrangement, whether verbal or in writing.

"Motor vehicle" and "registered" have the meanings respectively ascribed thereto in the Motor Vehicles (Third Party Insurance) Act, 1942-1951.

20 "Owner" means, in relation to a motor vehicle which is registered, the person in whose name the vehicle is registered".

(iv) In the year 1959 the said Act was further amended by Act No. 29 of 1959 which repealed certain provisions relating to drivers of vehicles of Section 88B inserted in the said Act as set out in the preceding paragraph and inserted Section 88E in the said Act in the following terms so far as is relevant to this appeal:-

30 "88E (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
40 deemed to be workers:-

(a) Any person not being the person in whose name a taxi cab, motor omnibus, private

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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.

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. 10

(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; 20
- (b) of any person who performs any work as a bona fide act of charity.

(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, if such person deemed to be an employer joins in the manner prescribed as a party to the proceedings some other person who 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". 30 40

(c) Effect of Section 88E

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10 (i) In proceedings brought before the Industrial Commission of New South Wales the effect of Section 88E was considered by the said Commission in Court Session, comprising Mr. Justice McKeon, Mr. Justice Beatty and Mrs Justice Sheehy (in re Hire Car and Taxi Drivers State Conciliation Committee). The Commission in Court Session there held that the effect of the amendment made by Act No. 29 of 1959 was to create for the purposes of the said Act a class of notional employees, namely those persons who were not otherwise employees employed to do the work of driving taxi cabs and who were not the persons in whose name the taxi cab was registered but who drove such taxi cab.

20 (d) History subsequent to union's application to amend its rules.

By Act No. 37 of 1964 the Industrial Arbitration Act, 1940-1961 was amended in the following manner:-

30 "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";

Upon such amendment the definition of "employee" in the said Act was in the terms set out in paragraph 11 hereof.

SUBMISSIONS OF APPELLANTS BEFORE
THE SUPREME COURT.

15. On the hearing of the application to make absolute the Rule Nisi for prohibition the Appellants submitted -

40 (a) That the phrase "trade union of employees" used in Section 8 of the said Act was a composite phrase and that the word

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"employees" used in such phrase meant "employees" in the common law sense and did not include persons of the class created by Section 38E of the said Act.

- (b) That the effect of the proposed amendment to the rules would be to make the industrial union a body other than a trade union of employees and liable to have its registration as a trade union cancelled under Section 15 (3) of the Trade Union Act, 1881-1959. If that registration were cancelled the registration as an industrial union of employees would be cancelled. 10
- (c) That by reason of these matters the Industrial Registrar had no jurisdiction to approve the proposed alteration of rules. 20
- (d) The context in which the word "employee" was used in Section 8 of the Act required the word to be given a meaning other than that assigned to it by Section 5 of the Act in that -
 - (i) otherwise persons who were not only deemed to be employees but were also employers of employees in the same industry might become members of the Industrial Union and become members of the conciliation committee representing employees. 30
 - (ii) otherwise the industrial union would cease to be a trade union of employees within the meaning of the Trade Union Act and would become liable to have its registration as a trade union cancelled and as a consequence thereof its registration as an industrial union cancelled. 40

and that the word employee used in Section 8 therefor meant employee in the ordinary sense of the word and the Industrial Registrar had no power to approve an alteration to rules which would enable an industrial union to enrol persons not employees in the ordinary meaning of the word.

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SUBMISSIONS OF RESPONDENTS BEFORE
THE SUPREME COURT

The Respondents submitted -

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- (a) That on the ordinary interpretation of the word "employees" in Section 8 of the said Act the word included both "employees" in the common law sense and persons deemed to be employees by virtue of Section 88E.
- (b) Nothing in the context in which the word "employees" was used required that any meaning other than the defined meaning should be given to the word "employees".

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- (c) That unless the word "employees" as used in Section 8 of the Act included persons deemed to be employees for the purposes of the Act under Section 88E there existed no method by which the principal purpose of the Act, namely the making of an award, could be brought about and the intention of the legislature as clearly disclosed by Section 88E would be frustrated.

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- (d) That this view of the meaning of the word "employees" was strongly reinforced by the amendment made by Act No. 37 of 1964, the clear purpose of which was to ensure that persons deemed to be employees under Section 88E might be enrolled as members of industrial unions and have awards made for them.

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- (e) That this view was the only view consistent with the history of the relevant legislation which disclosed an increasing trend towards enabling the wages and conditions of employment of persons driving taxi cabs, the possession of which they had secured under contracts of bailment of various types, to be determined by an arbitral tribunal, the Industrial Commission of New South Wales or a Conciliation Committee. 10
- (f) That it was an intentional and common place feature of the making of awards that they interfered with and in some cases nullified contractual arrangements which had been made between persons or classes of persons and the fact that an award might have this effect made it merely of the same type as any other award which might be made governing wages and working conditions 20
- (g) That these views were consistent with the Judgments of the Industrial Commission of New South Wales in re Hire Car and Taxi Drivers State Conciliation Committee and such judgments were correct.
- (h) An amendment to the rules of an industrial union entitling it to enrol as members persons deemed to be employees would not cause it to cease to be an industrial union of employees or to cease to be a bona fide trade union within the meaning of the Act. (s.8). Such an amendment would not render the industrial union liable to have its registration as a Trade Union cancelled under Section 15 of the Trade Union Act, 1881-1959 because the test under that section is the position and nature of that trade union at the date of its registration as such. 30 40

- (i) There is nothing in the Act which precludes the appointment of employees in an industry as members of a Conciliation Committee to represent employers or vice versa and such appointments have been made in the past.

THE JUDGMENT OF THE SUPREME
COURT OF NEW SOUTH WALES

- 10 17. The Supreme Court held in its Judgment -
- (a) That the issue depended on the true construction of Section 8(1) of the Act. Assuming that an application to extend a class of persons eligible for membership of an industrial union should be treated in the same way as if it were an application for the registration of a new union and that
20 the jurisdiction of the Registrar was limited to approving an application only if the class of persons to be made eligible would still be within the expression "trade union of employees", that the word "employees" as used in Section 8 (1) covered the class whom it was proposed to make eligible and consequently the Registrar had jurisdiction.
- 30 (b) That there was nothing in the context in which the word "employees" was used in Section 8 to justify the word being given any meaning other than the defined meaning.
- (c) That therefore the application to make absolute the Rule Nisi should be dismissed and the Rule discharged.

RESPONDENTS SUBMISSIONS
ON THIS APPEAL

- 40 18. The Respondents therefore submit that the Appeal should be dismissed for the reasons (among others) hereafter set out.

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- (a) The effect of the insertion of Section 88E in the Act was to create a class of persons who were deemed to be employees for all purposes of the Act.
- (b) Hence such persons are deemed to be employees for the purpose of being enrolled as members of an industrial union of employees and for the purpose of an award being made to cover their work since otherwise the principal purpose of the Act would be frustrated. 10
- (c) That on the ordinary interpretation of the word "employees" in Section 8 of the said Act the word included both "employees" in the common law sense and persons deemed to be employees by virtue of Section 88E.
- (d) This view is put beyond doubt by the amending Act No. 37 of 1964 whereby the definition of employee was amended to include persons deemed to be employees by virtue of Section 88E of the Act. Nothing in the context in which the word "employees" is used in Section 8 of the Act requires any meaning other than the defined meaning to be given to the word. 20
- (e) An amendment to the rules of an industrial union entitling it to enrol as members persons deemed to be employees would not cause it to cease to be an industrial union of employees or to cease to be a bona fide trade union within the meaning of Section 8 of the Act. Such an amendment would not render the industrial union liable to have its registration as a trade union cancelled under Section 15 of the Trade Union Act 1881-1959 because the test under that section is the position and nature of that trade union at the date of its registration as such. 30 40
- (f) There is nothing in the Act which precludes the appointment of employees in an industry as members of a

Conciliation Committee to represent employers or vice versa and such appointments have been made in the past.

- (g) That this view is the only view consistent with the history of the relevant legislation which disclosed an increasing trend towards enabling the wages ~~and~~ conditions of employment of persons driving taxi cabs, the possession of which they had secured under contracts of bailment of various types, to be determined by an arbitral tribunal, the Industrial Commission of New South Wales or a Conciliation Committee. -
- (h) That this construction was that adopted by the Industrial Commission in Court Session in its Judgments in In re Hire Car and Taxi Drivers State Conciliation Committee and that such judgments are correct.
- (i) The judgment of the Supreme Court of New South Wales was correct.

J.B. Sweeney

N.K. Wran

COUNSEL FOR THE SECOND
RESPONDENT

IN THE PRIVY COUNCIL

ON APPEAL

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

No. 3 of 1965

~~RESPONDENTS~~ GREEN CAB SERVICES
PTY LIMITED
CHARLES WILLIAM BAILLES
AND JACK ALEXANDER
ANDERSON

and Appellants

~~RESPONDENTS~~ JOHN EDWARD WHITFIELD
AND TRANSPORT WORKERS
UNION OF AUSTRALIA
(NEW SOUTH WALES BRANCH)
Respondents

CASE FOR THE SECOND RESPONDENT

MESSIEURS LAWRENCE GRAHAM & CO.,
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