

P.C. →  
~~G.D.H.G.6~~

<sup>Judgment</sup>  
31, 1965

IN THE PRIVY COUNCIL

No. 3 of 1965

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES.

GREEN CAB SERVICE PTY. LIMITED  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON

(Applicants)

APPELLANTS

- and -

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

(Respondents)

RESPONDENTS

---

RECORD OF PROCEEDINGS

---

FRESHFIELDS,  
1 Bank Buildings,  
Princes Street,  
London E.C.2.  
Solicitors for the  
Appellants.

LIGHT & FULTON,  
24, John Street,  
Bedford Row,  
London W.C.1.

Solicitors for the  
First Respondent.

LAWRENCE GRAHAM & CO.,  
6 New Square,  
Lincolns Inn,  
London W.C.2.

Solicitors for the  
Second Respondent.

~~P.C.~~  
~~SD166~~

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
- 9 FEB 1966  
25 RUSSELL SQUARE  
LONDON, W.C.1.

80970

(i)

IN THE PRIVY COUNCIL.

No. 3 of 1965

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES

GREEN CAB SERVICE PTY. LIMITED  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON

(Applicants)

Appellants

- and -

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

(Respondents)

Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
1.	Affidavit of Samuel George Fowler in Support of Rule Nisi for Prohibition	4th December 1963	1
1(a)	Judgment of Mr. Justice McKeon	12th November 1963	4
1(b)	Judgment of Mr. Justice Beattie	12th November 1963	15
1(c)	Judgment of Mr. Justice Sheehy	12th November 1963	40
2.	Affidavit of Charles William Bailes in Support of Rule Nisi for Prohibition	5th December 1963	66
3.	Affidavit of Jack Alexander Anderson in Support of Rule Nisi for Prohibition	5th December 1963	67

(ii)

No.	Description of Document	Date	Page
4.	Rule Nisi for Prohibition made by Mr. Justice Asprey	5th December 1963	68
5.	Rule discharging Order Nisi	3rd November 1964	70
6.	Affidavit of Samuel George Fowler in Support of Application for Leave to Appeal to the Privy Council	13th November 1964	71
6(a)	Annexure "A" to Affidavit of Samuel George Fowler of 13th November 1964		75
7.	Order of Full Court of Supreme Court of New South Wales granting final Leave to Appeal to the Privy Council	16th December 1964	79

EXHIBITS

Exhibit mark	Description of Document	Date	Page
"B"	New South Wales Regulations - Industrial Arbitration Act, 1940, as amended.		Reproduced separately
"C"	New South Wales Regulations - Industrial Arbitration Act, 1940-1961 (1961 No. 238)		"
"D" & "E"	New South Wales Regulations - Industrial Arbitration Act 1940-1961 (1964 No. 163) Rules of the Transport Workers Union of Australia.		"

(iii)

LIST OF DOCUMENTS NOT INCLUDED IN THE RECORD  
OF PROCEEDINGS

No.	Description of Document	Date
1.	Affidavit of Charles William Bailes in Support of Application for Leave to Appeal to the Privy Council	13th November 1964
2.	Affidavit of Jack Alexander Anderson in Support of Application for Leave to Appeal to the Privy Council	13th November 1964
3.	Notice of Motion to the Full Court of the Supreme Court of New South Wales seeking Leave to Appeal to the Privy Council	16th November 1964
4.	Judgment of the Full Court of the Supreme Court of New South Wales granting Conditional Leave to Appeal to the Privy Council	24th November 1964
5.	Rule of Full Court of the Supreme Court of New South Wales granting Conditional Leave to Appeal to the Privy Council	24th November 1964
6.	Notice of Motion to the Full Court of the Supreme Court of New South Wales seeking Final Leave to Appeal	11th December 1964
7.	Affidavit of Samuel David Ratner in Support of Application for Final Leave	15th December 1964

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES

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

APPELLANTS

- and -

10

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

RESPONDENTS

RECORD OF PROCEEDINGS

No. 1.

No. 1.

AFFIDAVIT OF SAMUEL GEORGE FOWLER  
IN SUPPORT OF RULE NISI FOR  
PROHIBITION

Affidavit of  
Samuel George  
Fowler in  
support of  
Rule Nisi for  
Prohibition

IN THE SUPREME COURT  
OF NEW SOUTH WALES

} Term No.496 of 1963

20

EX PARTE

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

4th December,  
1963.

RE

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

30

On the 4th day of December 1963 SAMUEL GEORGE  
FOWLER of 5 Boundary Street Rushcutters Bay in  
the State of New South Wales Company Director  
being duly sworn makes oath and says as follows:-

1. I am the Managing Director of Green Cab  
Service Pty. Limited.

No. 1.  
 Affidavit of  
 Samuel George  
 Fowler in  
 support of  
 Rule Nisi for  
 Prohibition  
 4th December,  
 1963.  
 (continued)

2. The Green Cab Service Pty. Limited is a member of the Australia Taxi Council an Industrial Union of Employers which was included in a number of respondents to applications by the Transport Workers Union of Australia (New South Wales Branch) to the Hire Car and Taxi Drivers (State) Conciliation Committee for an Award to apply to all persons who drive taxi cabs and were deemed to be employees pursuant to Section 88E of the Industrial Arbitration Act 1940-1961. The Company is the owner of approximately 32 taxi cabs which are driven by drivers under contracts of bailment and accordingly would have been affected by any award made by the said Conciliation Committee.

10

3. The Respondent JOHN EDWARD WHITFIELD has at all material times held office of Industrial Registrar under the Industrial Arbitration Act 1940-1961.

4. The Respondent TRANSPORT WORKERS UNION OF AUSTRALIA (NEW SOUTH WALES BRANCH) is a registered Trade Union of employees under the Trade Union Act 1881-1959 and is also registered as an Industrial Union of Employees under the Industrial Arbitration Act 1940-1961.

20

5. The Respondent Union made an application to the Hire Car and Taxi Drivers (State Conciliation) Committee for an Award to encompass all persons who drive taxi cabs and are merely deemed to be employees pursuant to the provisions of Section 88E of the Industrial Arbitration Act 1940-1961.

30

6. On or about the 8th day of May 1963 JOHN JOSEPH CAHILL Senior Conciliation Commissioner and Chairman of the Hire Car and Taxi Drivers (State) Conciliation Committee referred to the Industrial Commission in Court Session the following question or jurisdiction arising in and by virtue of the said application namely, "Whether the said Conciliation Committee has jurisdiction to hear and determine the application before it having regard to the alleged invalidity of the application because of the incompetency of the Applicant Union to legally make it".

40

7. The reference was heard by the Industrial Commission in Court Session composed of McKeon Beattie and Sheehy J.J. who on the 12th November 1963 by a majority (Sheehy J. dissenting) held that the said Committee had no such jurisdiction. In

the course of their Judgments their Honors referred to the rules of the Respondent Union 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. Copies of their Honors' Judgments are exhibited to me at the time of swearing this my Affidavit and respectively marked with the letters "SGW 1", "SGW 2" and "SGW 3".

No. 1.

Affidavit of  
Samuel George  
Fowler in  
support of  
Rule Nisi for  
Prohibition

4th December,  
1963.  
(continued)

10 8. I am informed and verily believe that an application was made by letter bearing date the 24th May 1963 from the Respondent Union to the Respondent Industrial Registrar which omitting formal parts was in the words and figures following:-

20 "In accordance with the rules of the Transport Workers Union of Australia (New South Wales Branch) registered under the Trade Unions Act and Industrial Arbitration Act I am enclosing a copy of the proposed amendment to the rules of the above Union. The amendment is as outlined in the enclosure accompanying this letter.

Hoping to have your approval to discuss the proposed amendment.

Yours faithfully,  
E.A.WIIMOT  
Secretary Treasurer  
Transport Workers Union of Australia  
(New South Wales Branch)"

30 9. The enclosure to the said letter was in the words and figures following:-

"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'".

40 10. I am informed and verily believe that to date the Industrial Registrar has neither approved nor rejected the proposed amendment nor has he taken any action upon it.



No. 1.  
Affidavit of  
Samuel George  
Fowler in  
support of  
Rule Nisi for  
Prohibition

11. Exhibited to me at the time of swearing this  
my Affidavit and marked "SGW 4" is a true copy of  
the Industrial Arbitration Regulations made under  
the Industrial Arbitration Act 1940 as amended.

SWORN by the Deponent on }  
the 4th day of December } S.G. Fowler.  
1963; before me: }

4th December,  
1963.  
(continued)

S.L. Leaver  
Commissioner for Affidavits.

No.1(a)  
Judgment of  
Mr. Justice  
McKeon  
12th November,  
1963.

No.1(a)

10

JUDGMENT OF MR. JUSTICE McKEON

"SGW 1"

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Court Session

CORAM: McKEON J.  
BEATTIE J.  
SHEEHY J.

Tuesday 12th November 1963

No. 128 of 1963

HIRE CAR AND TAXI DRIVERS (STATE) CONCILIATION  
COMMITTEE

20

Reference pursuant to s.30C by Chairman to the  
Commission in Court Session of a question of  
jurisdiction.

JUDGMENT OF MR. JUSTICE McKEON

The application made in this case to the  
conciliation committee is competent only if the  
applicant union may lawfully put forward claims on  
behalf of persons who drive taxi cabs and who, in  
relation to such driving, are not employees in the  
true sense; and it is well settled law that the  
applicant may only put forward such claims if it  
may lawfully enrol such persons as its members.

30

Before dealing with the only point in the case to which I wish to refer at any length I will state briefly the views that I have formed on other matters which must be decided in the case. These are:-

No.1(a)

Judgment of  
Mr. Justice  
McKeon

12th November,  
1963.  
(continued)

- 10 (1) The true effect of s.88 E(1) is to bring about for the specified purposes a deemed relationship of employee and employer in circumstances where, apart from the section, no such relationship exists; and, therefore, the class of persons for whom the union is seeking an award, that is to say, "all persons who drive taxi cabs and are deemed to be employees by virtue of section 88(e) of the Act" - the union means s.88E - are persons who, but for s.88E, are not persons employed to do the work of driving taxi cabs, but who in fact drive taxi cabs registered in the name of some other person;
- 20
- 30 (2) The proper interpretation of sub-s.(4) of the section does not arise in this case because, whatever be its true meaning, the sub-section cannot operate to derogate from the dominant purpose of sub-s.(1) to create a notional relationship of employee and employer where no true relationship of employee and employer exists; and, on that account, it is not desirable that we express, in this case, any opinion as to the proper interpretation of sub-s. (4);
- 40 (3) In view of the state of the records relating to this union that are now available in the registry, it should now be presumed that at or about the time when the trade union eligibility rule was altered to provide for persons "who are working" in or in connection with the industries and occupations specified, namely, 7th February, 1944, the industrial union eligibility rule was similarly altered, and that, in relation to the latter the procedural requirements of the relevant regulations were complied with; and that, if there was in fact any alteration of the industrial union eligibility rule in 1947 or 1948 or 1952, the procedural requirements of the relevant regulations were complied with each time.

No.1(a)

(4) Prima facie the words of the eligibility rule of the union are wide enough to cover persons who drive taxi cabs and who are not employees in the true sense.

Judgment of Mr. Justice McKeon

12th November, 1963.  
(continued)

My reasons for (1), (2) and (4) of those views are the same, in all relevant details, as the reasons of Beattie J. for his opinions on the same points.

That leaves for consideration the question whether the union may lawfully enrol as members persons who drive taxi cabs and who, in relation to such driving, are not employees in the true sense, and that is a question the answer to which depends, not only upon the phraseology of the union's eligibility rule, but also upon the law that governs that rule; and as to that law, the question to be asked is whether this particular industrial union may lawfully include in its membership persons who are not employees at common law.

10

20

Leaving aside for the moment the "deemed to be" provisions of the Industrial Arbitration Act that have been in force from time to time since 1943, I do not think that it is open to doubt that a registered trade union which was not truly a trade union of real employees was never competent to be registered as an industrial union, or that a registered industrial union (of employees) could never lawfully adopt a rule allowing it to enrol as members persons who were not real employees. I am not shaken in that view by the submissions made on behalf of the applicant that the officers of unions - at least, the full time ones - are, while they hold office, usually not employed in the industry with which the particular union is concerned, that unions have, from time to time, members who are out of employment and that the status of members, for example as employees or as employers, fluctuates. Different considerations would apply if one were to inquire what were the consequences of the existence of any of those features, but I do not think that it is necessary to go into those matters here. It is sufficient to say, I believe, that, in my opinion, none of those features is such as to affect the true character of a union as a union of employees. 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

30

40

No.1(a)

Judgment of  
Mr. Justice  
McKeon12th November,  
1963.

(continued)

10 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 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 registered  
under the Trade Union Act, which was a trade union  
20 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 industrial union, it has  
been a trade union of true employees. So far as  
the Industrial Arbitration Act is concerned it is  
equally not open to doubt, I think, that up to  
1943 at least a like situation existed. Section  
30 8(1) then provided, as it now provides:-

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

40 The expression "trade union" was defined as meaning,  
as it is now, "trade union registered under the  
Trade Union Act, 1881-1936, and includes a branch  
so registered"; and, so far as is relevant to  
present considerations, employee was (and still is)  
defined to mean a person employed in any industry.  
It is true that the definitions in the Act were to  
apply "unless the context otherwise indicates",  
but I find nothing in the Act to indicate that the  
words "trade union" and "employees" in s.8(1) bore  
other than their defined meanings. The conclusion  
is reached, therefore, that up to 1943 the type of  
trade union that was capable of being registered  
50 as an industrial union of employees was a trade

No.1(a)  
 Judgment of  
 Mr. Justice  
 McKeon  
 12th No ember,  
 1963.  
 (continued)

union of employees in the true sense. Accordingly, I have no doubt that, up to that year, if a registered industrial union of employees had adopted - whether it had done so pursuant to the approval of the industrial registrar as provided for in the regulations under the Act or not, would not, in my opinion, have mattered at all - an eligibility rule which purported to allow the union to take into membership persons who were not true employees, then, if it was not reasonably capable of being read down, such a rule would have been invalid, or, if it was reasonably capable of being read down so as to preserve some validity, it would have had to be read down so as to exclude from its scope persons who were not real employees. That would have been so in order to give to the rule a construction which would have made it valid in preference to a construction which would have made it void: see Amalgamated Society of Engineers v. Smith ((1913) 16 C.L.R. 537). 10 20

Beattie J., in his reasons for judgment, has indicated the scarcity of judicial authority on the question whether a trade union can be regarded as a trade union of employees if it consists not only of employees but also of persons, not officers, who are not employees. The conclusions I have expressed are founded on the language used in s.8 of the Industrial Arbitration Act, and I take some comfort from the fact that the history of trade and industrial unions in this State shows that those conclusions are in accord with the manner in which the law here has always been applied in practice. It is worth mentioning, however, that some support for the same view is found in the Commonwealth sphere, though the situation under Commonwealth law is not entirely analagous. Section 132 of the Conciliation and Arbitration Act authorises the registration as an organization of, inter alia: 30 40

"Any association of not less than one hundred employees in or in connexion with any industry, together with other persons, whether employees in the industry or not, who are officers of the association and have been admitted as members of the association."

Although, so it would seem, in the application of that provision considerations could arise

which could not arise in the application of s. 8 (1) of the State Act, nevertheless it is a matter of record that the industrial registrar under the Commonwealth Act has refused to register as an organization under that Act an association, claiming to be an association of employees, the eligibility for membership rule of which, as interpreted by the registrar, made the association "eligible to take in as members persons who are not and who cannot be employees": see Re Australian Football Players Union ((1956) 84 C.A.R. 675).

No.1(a)  
Judgment of  
Mr. Justice  
McKeon

12th November,  
1963  
(continued)

For the reasons stated it is my opinion that the applicant union in the present appeal could not, in any manner whatever, have lawfully taken into its membership before 1943 persons who were not real employees.

Of course, up to 1943 the union never sought to provide for the eligibility as members of persons who were not real employees. After the amendment of the law in 1943, however, the union does seem to have attempted to do so by an alteration of its industrial union rules, which, as I have said, I have presumed it made on 7th February, 1944, or thereabouts, in accordance with the statutory procedural requirements applicable in that regard, and it would not be unreasonable to assume that it did so as a result of the amending legislation of 1943. However, the question is, did the union's alteration of its eligibility rule, which purported to allow the union to take into membership persons "who are working" in or in connection with the industries and occupations specified - meaning, it is now claimed, whether as employees or not - have legal sanction?

As at 1943, s. 5 of the Industrial Arbitration Act provided, inter alia:

"'Employee' means person employed in any industry, whether on salary or wages or piece-work rates, or as a 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 any vehicle used in the delivery

No.1(a)

Judgment of  
Mr. Justice  
McKeon

12th November,  
1963  
(continued)

of goods, shall not in itself prevent such person being held to be an employee."

(The italics are mine). By the Industrial Arbitration (Amendment) Act, No. 25 1943, the definition of "employee" was amended by deleting from it the words in italics. At the same time the following new sub-section was inserted in s.5:-

"(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 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".

Again, it is a historical fact that at the time of that amendment taxi cab drivers were persons who were engaged in plying for hire with a vehicle the use of which had been obtained by the driver under a contract of bailment (other than a hire purchase agreement) in consideration of the payment of a share in the earnings. It is also the fact that, at that time, there was in existence an award which fixed a rate for persons performing the work of driving taxi cabs plying for hire. Accordingly, new sub-s. (2) purported to bring about, in some cases, a deemed employee-employer relationship between the taxi cab driver and the person from whom the use of the taxicab had been thus obtained. The sub-section specified that,

for the purposes of the Act, the driver was deemed to be the employee of that person, and that that person was deemed to be the employer of the driver. But not in all cases was there such a deemed relationship. There was none where the cab was obtained by the driver under a hire purchase agreement; there was none where the work in which the cab driver was so engaged was work for which a price or rate was not fixed by an award or industrial agreement for persons performing such work; and there was none where the driver and the other person or either of them established to the satisfaction of the tribunal in which proceedings for a breach of an award or industrial agreement were 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. The sub-section itself excluded those situations from its operation. Immediately after that amendment, therefore, one question that may have been asked was (and it may be asked now): in what way, if at all, did that amendment affect s.8(1)?

10

20

30

Let it be said here and now that if, in 1943, the legislature had wished to provide that a trade union of employees registrable under s. 8(1) as an industrial union could have been a trade union of real employees or of fictional (deemed) employees or of both, it could lawfully have done so. But no question as to that arises. The only question that does arise is whether, at that time, the legislature did that. In considering that question two matters must be kept in mind. First, a thing that is deemed to be something else does not become that something else. A trade union of fictional employees deemed to be a trade union of real employees is never the latter.

40

"...generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing": R. v. The County Council of Norfolk (1891) 60 L.J.Q.B. 379, per Cave J., at pp.380-381.

No.1(a)

Judgment of  
Mr. Justice  
McKeon

12th November,  
1963.  
(continued)



No.1(a)  
 Judgment of  
 Mr. Justice  
 McKeon  
 12th November,  
 1963.  
 (continued)

learned author, when referring to the word "deemed", says, in relation to Cave J.'s reasons in the case just mentioned:-

"When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else."

Secondly, and as a corollary of the first, the precise purpose of the statutory fiction must be ascertained, for, seemingly, only to that extent is it effective. 10

"The word 'deemed'.... is more commonly used for the purpose of creating ... a 'statutory fiction' ... that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced": Muller v. Dalgety & Co. Ltd. (1909), 9 C.L.R. 693, per Griffith C.J., at p. 696. 20

"When a statute enacts that something should be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to": Ex parte Walton, (1881) 17 Ch. D. 746, per James L.J. at p. 756. 30

And referring to the decision in Robert Batcheller & Sons Ltd. v. Batcheller, (1945) 1 Ch. 169, the author of Stroud says:-

"An article of association under which, in certain circumstances, a director is deemed to have been re-elected can operate only when the circumstances of the case are such as sensibly and legitimately to admit of its application." 40

I think that what the purpose of the statutory fiction introduced by the 1943 amendment of s. 5 was is quite clear. In my opinion, it was to entitle, in the circumstances stated, taxi cabs drivers who were not true employees

to the benefits prescribed by an award or industrial agreement made under the Industrial Arbitration Act for taxi cab driver employees, with the consequential right to enforce that entitlement by the processes of law available under the Act to real employees; and there was no other purpose - I am of that opinion for two reasons. The first reason is that I think that the language of s. 5(2) clearly indicated that to be so. The fiction could have been operative only where, for the work of taxi cab driving, a price or rate was fixed by an award or industrial agreement, and even where there was such a price or rate the only way in which it could have been decided whether there was such a fiction operating in the particular case was in proceedings before a tribunal for a breach of the award or agreement - meaning, in my opinion, not only proceedings for a penalty but also proceedings for the recovery of any balance of wages due, because the mere fact that wages due had not been paid constituted a breach in that there had been failure to observe the award or agreement. The whole of the language of the sub-section, so it seems to me, was directed, and directed only, to circumstances to which ss. 92 and 93 of the Act were applicable in respect of real employees. The second reason is the absurd situation which could have arisen if s. 5(2) had had any effect on s. 8(1), as is well illustrated in this way: if s. 8(1) was affected by s. 5(2), a trade union which was composed of drivers of taxi cabs and who were not real employees could have obtained registration as an industrial union if, at the time, a price or rate for the work of persons so engaged was fixed by an award or industrial agreement under the Act, but could not have obtained such registration if such a price or rate was not so fixed. In other words, whether, for the purposes of s. 8(1), a trade union of taxi cab drivers was a trade union of employees or was not would have depended on the existence of such an award or industrial agreement. It seems to me that that would have been absurd. The Act would have thus disqualified a trade union of taxi cab drivers which was composed wholly or partly of fictional employees from obtaining registration as an industrial union solely because there was not in existence an award or industrial agreement fixing a price or rate of wage for the work of driving taxi cabs, an absurdity that would have been high-lighted by the very fact that one of the

No.1(a)

Judgment of  
Mr. Justice  
McKeon12th November,  
1963.

(continued)

No. 1(a)  
 Judgment of  
 Mr. Justice  
 McKeon  
 12th November,  
 1963.  
 (continued)

principal purposes a trade union of employees had (as trade unions have now) for obtaining registration as an industrial union was to qualify itself to apply for an award on behalf of its members. In my view, notwithstanding that sub-s. (2) of s. 5 said that that which it deemed to be something which it was not was so deemed "for the purposes of this Act", it meant such purposes of the Act as to which it was reasonable to say the sub-section "sensibly and legitimately" admitted of its application, and it did not mean every purpose which was discoverable in the Act. I am firmly of the view that s. 5(2) had no effect whatever on s. 8(1). In the result, it was not lawful for a trade union - any trade union, although we are here concerned only with a trade union embracing taxi cab drivers - which was not a trade union of true employees to obtain registration as an industrial union under the latter section; and it was not lawful for a trade union of employees which had been registered as an industrial union under the section to adopt an eligibility rule which purported to permit it to enrol as members persons who were not true employees. In 1944, therefore, it was not lawful for the applicant union to enrol as members other than real employees. It follows that the eligibility rule of the applicant union as adopted in 1944 was either partially or wholly invalid, according to whether it was reasonably capable of being read down or was not reasonably capable of being read down. In my opinion, the rule was reasonably capable of being read down and, therefore, in light of the decision in Amalgamated Society of Engineers v. Smith (*supra*) it had to be so read down. The reasonable reading down would have resulted in those persons of the categories mentioned in the rule being eligible for membership who were working in or in connection with the industries and/or occupations and/or avocations and/or industrial pursuits of the types specified as employees. In the result, the applicant was competent on its 1944 rule to make an application for an award only for persons who were real employees; it was not competent to make such an application for persons who were not real employees.

If the fact is that the union obtained a new eligibility rule in 1947 or 1948 or 1952 - as I have presumed it may have done - nevertheless, as any such new rule was in no different

terms, so far as concerns this case, from the 1944 rule, and as in those later years the law was no different in any relevant respect from what it was in 1944, the union's eligibility rule in 1947, 1948 and 1952 was limited in its application to persons who were employees in the true sense; and any amendment made by the Industrial Arbitration (Amendment) Act, No. 29, 1959, has no bearing in this case on the true meaning and effect of the present eligibility rule, whenever it was adopted.

No.1(a)

Judgment of  
Mr. Justice  
McKeon12th November,  
1963  
(continued)

10

In my opinion, the question of jurisdiction referred to the Commission in Court Session by the senior conciliation commissioner should be decided by the Commission's holding that the conciliation committee has no jurisdiction to hear and determine application No. 286 of 1962 now before it. This and the preceding 11 pages is the Judgment of Mr. Justice McKeon marked "SGW1" exhibited to SAMUEL GEORGE FOWLER at the time of swearing his Affidavit on the 4th day of December 1963, at Sydney, Before me:-

20

S.L. Leaver  
Commissioner for Affidavits

No.1(b)JUDGMENT OF MR. JUSTICE BEATTIE

"SGW 2"

INDUSTRIAL COMMISSION OF NEW SOUTH WALESCOMMISSION IN COURT SESSION

CORAM: McKEON J.  
BEATTIE J.  
SHEEHY J.

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.

30

No. 128 of 1963

Tuesday 12th November 1963

HIRE CAR & TAXI DRIVERS (STATE) CONCILIATION  
COMMITTEE

Reference pursuant to s. 30C by Chairman to the Commission in Court Session of a question of jurisdiction.

No.1(b)

JUDGMENT OF MR. JUSTICE BEATTIE

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963  
(continued)

Application to the Hire Car and Taxi Drivers (State) Conciliation Committee was made on 18th September last by "the Transport Workers' Union of Australia, an industrial union of employees", to determine the matter set forth in an annexed claim. The applicant seems in fact to have been the Transport Workers' Union of Australia, New South Wales Branch. The claim made was for an award to apply "to all persons who drive taxi cabs and are deemed to be employees by virtue of section 88E of the Act and to all persons who are deemed to be employers of drivers of taxi cabs by virtue of the said section". When the application came before the Committee on 6th May last, counsel for the Australian Taxi Council, an industrial union of employers, and for certain companies operating in the taxi industry challenged the competence of the Transport Workers' Union of Australia, New South Wales Branch, to make an application for an award for such persons, and the chairman of the committee, Mr. Senior Conciliation Commissioner J.J. Cahill, acting pursuant to s. 30C of the Industrial Arbitration Act, 1940-1961, referred to the Commission in Court Session the following question -

"Whether the said conciliation committee has jurisdiction to hear and determine the application before it having regard to the alleged invalidity of the application because of the incompetency of the applicant union to legally make it."

When the question was debated before us, it was common ground that the application to the committee should be regarded as competent only if the applicant union can lawfully enrol as members persons of the class for whom an award was sought. Thus it became necessary for us to consider what classes of persons are eligible for membership of the union under its rules and whether the persons of the class for whom an award was sought fell within any of such classes. The persons for whom an award was sought were taxi drivers deemed to be employees by virtue of s. 88E and, if we are to understand who they are, we must understand what the section means. In Feldman v. Stewart (1961 A.R. 462) the Commission

10

20

30

40

in Court Session found it unnecessary to decide whether, as it had been claimed on behalf of a taxi proprietor, sub-s. (1) (a) of S.88E operates to bring about a deemed employee-employer relationship between a driver of a taxi cab and the person in whose name the cab is registered only if a real relationship of employee-employer relating to the driving of the cab by the driver exists between the driver and some other person, or whether, on the other hand, as had been argued for a taxi driver, the sub-section operates to create a deemed relationship of employer and employee only where a driver of a taxi cab concerned is not in fact employed by any other person to drive the cab. But in In re Hire Car and Taxi Drivers (State) Conciliation Committee (1962 A.R. 195), Sheehy J. held that the true interpretation of the section was in accordance with the latter view. As, in the proceedings before us, counsel for the taxi proprietors indicated that, with respect to Sheehy J., his clients did not accept his Honor's view as correct, it seemed to us that we could answer the question referred by the chairman only after deciding as a court of three members whether the persons referred to in the opening words of sub-s. (1) of s. 88E were persons employed in the ordinary sense to do work or persons not so employed. If they were the former, then the union was plainly entitled to commence proceedings on their behalf; if they were the latter, the competence of the union was a debatable matter. We informed counsel of the view which we had reached and the argument accordingly related both to the interpretation of the section and to the union rules.

The argument concerning s. 88E advanced by Mr. Holmes, senior counsel for the taxi proprietors, was to the same effect as that put forward for the appellant in Feldman v. Stewart as recorded at pp. 466 and 467 of 1961 A.R. It has left me quite unconvinced that the section is concerned with persons who are employees in the common law sense and that it is designed to assist persons so employed to ascertain the identity of their employer. The opening words of sub-s. (1) together with par. (a) thereof are as follows:-

"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

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.

(continued)

10

20

30

40

50

No.1(b)  
 Judgment of  
 Mr. Justice  
 Beattie

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:-

12th November,  
 1963.  
 (continued)

(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.

10

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."

20

The language of the opening part of sub-s.(1) must be tortured to produce the interpretation for which Mr. Holmes contended. Counsel submitted that the words were to be interpreted as if punctuated:-

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 . . ."

30

Such a punctuation would result in a meaning that persons actually employed to do certain work are to be deemed to be employees for the purposes of the Industrial Arbitration Act. But, as they would be employees for the purposes of the Act without any assistance from s. 88E, such an interpretation would suggest that the legislature had indulged in a piece of superfluous law-making. To say that a thing is to be deemed to be something means generally that, notwithstanding that a thing is not a particular thing, nevertheless it is deemed to be that thing: see per Cave J. in R. v. Norfolk County Council (1891) 60 L.J. Q.B. 379 at p. 380. I cannot accept the argument that Parliament was saying in s. 88E that persons who are employees for the purposes of the

40

Industrial Arbitration Act are to be deemed to be employees for the purposes of that Act and that Parliament was adding parenthetically (and cryptically) "if not otherwise employees". If the opening words of s. 88E are punctuated thus:-

No.1(b)

Judgment of  
Mr. Justice  
Beattie

The following persons (if not otherwise employees employed to do the work herein-after referred to) shall, for the purposes of this Act be deemed to be employees . ."

12th November,  
1963.  
(continued)

10 a sensible interpretation, avoiding the absurdities to which I have referred, results; and I think that it is the correct interpretation.

20 The only matter that created any doubt in my mind as to correctness of the view which I have reached is that the ordinary meaning of the language used in sub-s. (4) of s. 88E seems to be consistent only with the view that, by virtue of sub-s. (1) of the section, a person can be deemed to be the employer of a person who is in fact an employee of some other person. I have had the advantage of reading the judgment of my brother Sheehy in the present case and it may be that the interpretation of sub-s. (4) which commends itself to his Honor provides the solution to the problem. For myself I would prefer to leave undecided at this stage the question of the proper interpretation of sub-s. (4). That question does not arise in this case. True it is that the section must be construed as a whole and, so far as possible, so as to permit a consistent interpretation of the whole. But the dominant provision of the section is that contained in sub-s. (1); that sub-section in my view, is clearly designed to create a notional relationship of employer and employee where no true relationship of employer and employee exists; and whatever be the true meaning of sub-s. (4), the provisions of that subsection cannot derogate from that intention.

30

40 In so far as it relates to taxi drivers, s. 88E is designed, I believe, to bring about for the specified purposes a deemed relationship of employee and employer in circumstances where, apart from the section, no such relationship exists. The draughtsman, therefore, bearing in mind that some taxi drivers might be employees in the ordinary sense, had to exclude actual employee taxi drivers from the section. He therefore wrote the words "if not otherwise employees". If



No.1(b)  
 Judgment of  
 Mr. Justice  
 Beattie  
 12th November,  
 1963.  
 (continued)

he had stopped the phrase at that point, he would not have succeeded in excluding from the section a person who for part of his time drove a taxi on a bailor-bailee contract but for the rest of his time worked as an employee in another occupation. He therefore continued the phrase so that it read "if not otherwise employees employed to do the work hereinafter referred to", and by so doing achieved the purpose of excluding from the section all persons actually employed to drive taxi cabs, whether or not they are also employed in another occupation. 10

The conclusion which I have reached as to the proper interpretation of s. 88E is based primarily on the language of the section, but other considerations support it. We were informed that, in earlier proceedings before the committee last October, counsel for the Australian Taxi Council and other taxi proprietors had told the committee that his clients knew of no case where a taxi was being driven under a master and servant relationship. Reference to cases decided by the Commission suggests that for many years taxi driving in Sydney has been done under contracts of bailment with drivers being remunerated by a share of the takings. See In re New South Wales Taxi Drivers' Association (1937 A.R. 18); In re New South Wales Taxi Drivers' Association (1938 A.R. 303); In re New South Wales Taxi Drivers' Association No. 2 (1938 A.R. 714); Platt v. Treweneck and Green Cab Service Pty.Ltd. v. Platt (1953 A.R. 642). It would indeed be strange if, there being no employment in the industry, Parliament had set out to provide in s. 88E a remedy for a non-existent problem, the problem of taxi drivers being unable to identify their employer. I cannot believe that that was the legislature's intention. The legislative history supports the view that s. 88E was designed to create a notional status of employer and employee in cases where no real status of employer and employee existed. The 1959 Act repealed provisions of s. 88E inserted in the principal Act by Act No. 23 of 1957, whereby, in the absence of the approval of the Commission or a committee to the terms of a relevant contract, a person driving a motor vehicle for the purposes of a business carried on by the owner of the vehicle was to be deemed an employee of the owner for the purposes of the Industrial Arbitration Act and certain other Acts. The 1957 Act had repealed 20  
30  
40  
50

No.1(b)  
Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

s. 5(2) of the principal Act, which had been inserted in the Act by Act No. 25 of 1943 and amended by Act No. 10 of 1951. That section, 5 (2) provided that, in certain circumstances, a person engaged in plying for hire with any vehicle under a contract of bailment was, for the purposes of the Act, to be deemed to be an employee employed by the person from whom the use of the vehicle was obtained. It was the provision considered in

10 Platt v. Treweneck and Green Cab Service Pty.Ltd. v. Platt (1953 A.R. 642). These various provisions antecedent to s. 88E suggest that it is unlikely that in 1959 Parliament was abandoning the attempt to create a notional status of employer and employee for persons driving vehicles in the taxi-cab industry. The preamble of the 1959 Act states in part that it is "An Act relating to . . . the status of certain persons as employees for the purposes of certain Acts . . . ." In my view,

20 everything points to the conclusion that s. 88E was intended to create a notional status of employer and employee in cases where, but for the section, no such status would exist.

I would therefore hold that the class of persons for whom the union is seeking an award are persons who, but for s. 88E, are not persons employed to do the work of driving taxi cabs, but who in fact drive taxi cabs registered in the name of some other person. It remains then to consider

30 whether, under its rules, the union can lawfully enrol as members persons in such class. So far as is material, r. 5, Qualification for Membership, of the union's rules provides:-

"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:-

40 (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 . . .

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

No.1(b)

Union.

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

(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 . . . ."

Mr. Holmes submitted that, because the union was an industrial union of employees, the conditions of eligibility had to be interpreted in light of that fact. He claimed that it had been a basic feature of the Acts relating to industrial arbitration from 1901 onwards that a union registered as an industrial union of employees had to be a trade union of employees registered under the Trade Union Act. He traversed the various Acts in force over the period and claimed that they showed a legislative intention to provide for a dichotomy of trade unions registrable for the purposes of the Industrial Arbitration Act: on the one hand there were unions of employers, on the other hand, unions of employees. To obtain registration as an industrial union of employees an applicant had to be a trade union of employees, and it followed, counsel argued, that the eligibility rule of the union now in question had to be interpreted as referring to persons who were employees in fact. If the rule was apt to include persons who were not employees, it would have been invalid; the Commission should read it down, if necessary, to bring it within the law rather than hold it bad. The rules of the union should be construed, Mr. Holmes submitted, by ascertaining the meaning which they bore at the time when the union put them forward for registration; they were not to be interpreted, as a constitution would be, as designed to cover changing circumstances, such for example, as the creation by the legislature of a notional class of employees. Counsel referred to the fact that Act No. 29 of 1959 amended not only the Industrial Arbitration Act but also the Trade Union Act, and said that it was significant that no provision had been made that for the purposes of the last named Act any persons should be deemed to be employees, but provision to that effect had been made in relation not only to the Industrial Arbitration Act, but the Annual Holidays Act and the Long Service Leave Act.

10

20

30

40

Mr. Sweeney, senior counsel for the union, claimed on the other hand that the union rules disclosed an intention to cover persons working not only in connection with existing and future modes of transport of goods and persons but persons working under existing and future modes of employment. It was his submission that union rules were drawn to endure and meet changing circumstances and that they should be interpreted in the way in which the courts had interpreted the Commonwealth Constitution in cases such as James v. The Commonwealth (1936) 55 C.L.R. 1 at p. 43, and other cases to which he referred. So interpreted, he argued, the language of the membership rule was wide enough to cover taxi drivers deemed notional employees pursuant to s.88E. If such persons were deemed to be employees for the purposes of the Industrial Arbitration Act, then they should be regarded as employees for the purposes of the section of that Act which dealt with the registration as industrial unions of trade unions of employees. Counsel submitted that a trade union seeking registration as an industrial union of employees did not have to be entirely composed of actual employees; it could include, for example, persons who had ceased to be employed and also officers not employed in the industry concerned. The status of some persons fluctuated; thus, lorry owner drivers might be employees or might become employers, carpenters might be employees or sub-contractors, either employing labour or not. So far as the new s. 14 of the Trade Union Act was concerned, registration could be granted if the general purpose, character and conduct of a union made it a bona fide trade union of employees.

I have found that, in order to deal with these competing arguments, it has been necessary for me to refer to the history of the union's rules. Records kept by the registrar relating to the union as a trade and industrial union were put in evidence before the committee but the earliest document in the files tendered was dated 31st August, 1942, the date on which an application was made by the Transport Workers' Union of Australia, New South Wales Branch, and the Newcastle and District Trolley, Draymen and Carters' Union to record in the register of industrial unions an amalgamation and change of name. An examination of the records which were before the committee failed to satisfy me with

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.

(continued)

No.1(b)  
Judgment of  
Mr. Justice  
Beattie  
12th November,  
1963.  
(continued)

any certainty as to what the rules of the amal-  
gamated union were at the time of the amalgamation.  
The registrar was accordingly asked to produce the  
earlier records relating to each of the unions  
which amalgamated and I have examined those records.  
Unfortunately some uncertainty still remains. The  
salient facts disclosed, however, are these:-

- (1) On 12th March, 1942, an application was made to the industrial registrar on behalf of the industrial union styled "New South Wales Branch of the Amalgamated Road Transport Workers' Union of Australia" to record in the register of industrial unions a change of name to "New South Wales Branch of the Transport Workers' Union of Australia". To the application was attached, as the regulations required, a copy of rules in force at the date of the application. Rule 3, Qualification for Membership, provided (quoting only the material part and with italics added):- 10

"3. The Union shall consist of an unlimited number of persons who are or may be employed, in or in connection with the industry or industries and/or occupations and/or callings and/or avocations and/or industrial pursuits of:-

- (a) The transport on land 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 . . . ." 30

- (2) Industrial union file, Miscellaneous U.E. 415, shows that on 31st August, 1942, an application was made to the industrial registrar "to record the amalgamation and/or change of name of trade unions of employees registered as industrial unions". The signatories to the application were described as "a majority of the Members of the Committee of Management of the respective Industrial unions the name or style of which respectively hereinafter appears above our respective signatures and which have amalgamated under the name 40

or style of the Transport Workers' Union of Australia, New South Wales Branch". Signatures appearing under two headings

No.1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

(a) "Transport Workers' Union of Australia, New South Wales Branch" and

(b) "Newcastle & District Trolley, Draymen and Carters' Union". The application stated that the applicants enclosed therewith, inter alia, "a copy of the rules of the amalgamated union as at date of application", but no such copy appears in the records relating to the application. Under s. 8(6) of the Act, a record which the registrar makes in the register of industrial unions of a change of name or an amalgamation is deemed to be a re-registration of the applicant unions in the changed name or as amalgamated. Accordingly, on 21st January, 1943, the registrar issued a certificate of registration which certified that on that date the trade union styled "New South Wales Branch of the Transport Workers' Union of Australia" was duly registered as an industrial union of employees in pursuance of the Industrial Arbitration Act, 1940, under the style of "New South Wales Branch of the Transport Workers' Union of Australia". The registrar apparently regarded the reference in the application to "Transport Workers Union of Australia, New South Wales Branch" as being an error for "New South Wales Branch of the Transport Workers' Union of Australia".

10

20

30

40

(3) As had been explained, the application for amalgamation just referred to does not now have attached to it a copy of the rules of the amalgamated union. It is probable, however, that the very first document in the trade union file (T.U. 778) of the amalgamated union is a copy (filed in the wrong place) of such rules at the date of the amalgamation. The document purports to be a full set of rules of "the New

No. 1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

South Wales Branch of the Transport Workers' Union of Australia" (r.1). Rule 68 provides "A conference shall be held between the Transport Workers' Union of Australia, New South Wales Branch, and the Newcastle and District Trolley, Draymen and Carters' Union, to set up a provisional Committee of Management for the Branch . . . . The Committee of Management so elected shall have power to carry on until the first general election to be held not later than 30th April, 1943". Signatures on the final page of the document include four by persons who signed the application for amalgamation as committee members of the Newcastle union. Rule 7, Qualification for Membership, provided in part, italics again added:-

10

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

20

(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 . . . ."

30

(4) The next document in the trade union file (T.U. 778) is an application to the registrar of trade unions to register amendments of the rules of the New South Wales Branch of the Transport Workers' Union of Australia. It is dated 21st December, 1943. A complete set of amended rules is attached and bears a certificate by the registrar that it was certified as such on 7th February, 1944. Rule 7, Qualification for Membership, provided so far as relevant, with italics again added:-

40

"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:-

No.1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

10 (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 . . . ."

20 (5) Except that the signatures on it are those of officers of the New South Wales Branch, the first document in the industrial union file (U.E. 415) of the amalgamated union is identical with that referred to in para.(3) above as probably being the rules of the union upon amalgamation. The document was filed on 27th January, 1943, as an official stamp discloses. Another stamp of the registrar on the top of the first page bearing date "7.2.1944" provides something of a mystery. It was on that date that the registrar had certified the amendment referred to in para. (4) above of the trade union rules, but the rules so certified differed from the rules which are the first document in the industrial union file and it would seem that the stamp on that document was put on in error. The industrial union file contains no copy of the amended trade union rules which were certified on 7th February, 1944.

40 (6) The industrial union file shows that an application dated 3rd November, 1947, to record the change of name of the industrial union styled New South Wales Branch of the Transport Workers' Union of Australia from that name to Transport Workers Union of Australia, New South Wales Branch, was lodged on 26th October, 1948 (sic.). An unsigned "Certificate of Registration" dated 27th November, 1948, states that a corresponding change of name was registered under the Trade Union Act on 31st October, 1947. The file does not



No.1(b)

show whether the change sought was recorded.

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

(7) Item 4 in the industrial union file is a printed copy in booklet form of the rules of Transport Workers' Union of Australia, New South Wales Branch, bearing the stamp of the registrar and date "31.10.1947". At the back of the booklet is what purports to be a copy of a certificate by the registrar given under the Trade Union Act that on 31st October, 1947, the rules had been registered as a complete amendment. Rule 8, Qualification for Membership, of these rules was in the same terms as Rule 7 referred to in par. (4) above. There is nothing in the file to show that, before an alteration to the rules was made, the approval of the registrar was sought.

10

(8) The qualification for membership rule was not altered in any material respect in a further complete amendment of the rules registered under the Trade Union Act on 14th July, 1952, a copy of which appears as item 8 in the industrial union file.

20

The important points that arise from this examination of the rules of the union are these:

(a) In all probability, at the time of the amalgamation and re-registration of the union as an industrial union on 21st January, 1943, the qualification for membership rule provided for the eligibility of persons "who are or may be employed" in or in connection with the industries and occupations specified.

30

(b) By 7th February, 1944, the trade union qualification for membership rule had been altered to provide for the eligibility of persons "who are working" in or in connection with the industries and occupations specified; and, while it does not appear from the records that the industrial union complied with the regulations relating to the alteration of the rules of an industrial union, it should now be presumed that the alterations to the qualification rule as recorded in copies of rules filed in 1947 and 1952 were regularly made. As the trade union and the industrial union are necessarily the same body of persons with the one set of rules, it follows that the rules of the

40

union registered as an industrial union must be regarded as having provided, as from 7th February, 1944, for the eligibility of persons "who are working" in or in connection with the specified industries and occupation.

No.1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

10            Prima facie the words "who are working in or in connection with", read with words which follow in the rule - "The transport on land . . . of persons and/or passengers . . . . by or on vehicles" are wide enough to cover persons who drive taxi cabs but are not employees in the ordinary sense. In my opinion, other provisions of the rules to which Mr. Holmes referred as indicating that only persons employed in the ordinary sense were to be eligible for membership do not have the effect for which counsel contended. The question then is whether the meaning of the words used is to be restricted on the reasoning that, if an unrestricted meaning is given to them, the law would have been infringed when the union was registered as an industrial union. As has been pointed out, s. 8(6) provides that the recording by the registrar in the register of industrial unions of a change of a union's name is to be deemed to be a re-registration of the union concerned, so that, assuming that effect was given to the application which the union made that year, it may be that the point of time at which any question of validity of registration should be considered is 1948. However, there would seem to be no material difference if the post amalgamation alteration of rules registered in February 1944, was regarded as providing the material point of time.

20

30

40            At either point, the union which could be registered under s. 8 of the Industrial Arbitration Act was a trade union of employees registered under the Trade Union Act. It was not until 1959 that the term "trade union of employees" found a place in the Trade Union Act. By s.15 of the Industrial Arbitration (Amendment) Act, 1959, a new paragraph was inserted in s. 14 of the Trade Union Act in the following terms:-

(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 -

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

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

10

Prior to the enactment of par. (7), when an application was made by a trade union for registration under the Trade Union Act, the registrar was not concerned to inquire whether the trade union concerned was a trade union of employees. A union was registrable whether it comprised employees or employers or both. In his judgment in a case in the Supreme Court of New South Wales reported as In re Bank Officers (State) Board (1921 A.R. 252), Cullen C.J. quoted that part of the definition contained in s. 31 of the Trade Union Act which described a trade union as "any combination, whether temporary or permanent, for regulating the regulations between workmen and employers, or between workmen and workmen, or between employers and employers", and went on to say:-

20

"Stopping there, it will be noticed that it does not lay down any direction as to what persons should be eligible for membership in these trade unions. One would naturally suppose, and the history of associations of the kind would bear it out, that workmen's associations - I mean associations in the interests of workmen - would be composed of workmen, and employers' associations of employers. But there is nothing in the language which would take out of the definition an association of persons interested in those matters, whether they should happen to be employers or employees; or to exclude a kind of combined association having for its object the regulation of relations between employer and employee."

30

40

However, it has always been the position that, when a trade union came to make an application for registration under the Industrial Arbitration

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

Act as an industrial union of employees, the industrial registrar was concerned to satisfy himself that the applicant was a trade union of employees registered under the Trade Union Act, for it was only such a union that s. 8(1) of the Industrial Arbitration Act authorized him to register. In order to satisfy himself, the registrar had to direct himself as to what a "trade union of employees" was. The word "employee" was defined in the Industrial Arbitration Act and that Act provided that the definition was to apply unless the context otherwise indicated. I can see nothing in s. 8 to indicate that the word "employees" in the phrase "trade union of employees" should be read in any other than the defined sense.

In any event, if my understanding of the history of the rules is correct, the amalgamated union which was deemed to be re-registered on 21st January, 1943, was a trade union of employees in the defined sense. The rules, as then put forward, provided for the eligibility of "persons who are or may be employed" in or in connection with the industries and occupations specified.

It was on 21st December, 1943, that the union propounded a new set of rules for registration under the Trade Union Act, and it was the qualification for membership rule in this set which introduced the important new wording, "persons . . . who are working in or in connection with the industry . . .". A comparison of the old and the new conditions of eligibility suggests unmistakably that the draftsman of the amendment was aiming at widening the field of membership. The words he used are wide enough, I believe, to include persons driving taxi cabs under contracts of bailment entered into with persons in whose name the vehicle is registered. The question is whether the words he used are to be read down, as they are reasonably capable of being read, so that they apply only to persons who are employees in the sense of the definition in the Industrial Arbitration Act. The reason which Mr. Holmes has put forward for reading the words down is that s. 8 of the Industrial Arbitration Act requires an industrial union of employees to be a union of persons employed in the true legal sense, the sense in which the definition uses the word "employed". The law which would justify such a reading down is stated in the headnote to

No.1(b)

Amalgamated Society of Engineers v. Smith ((1912)  
16 C.L.R. 536) as follows:-Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

"Where substantial effect can be given to a rule of a society registered as a trade union by an interpretation which will not involve a breach of the law, that interpretation will be adopted".

Would it then have been contrary to law if, pursuant to reg. 17 of the regulations under the Industrial Arbitration Act, the registrar had in 1944 given his approval to an amendment of the rules having the effect of making eligible for membership in the union persons who worked in the transport industry but otherwise than as employees in the ordinary sense of the term? As Webb J. said in In re United Labourers Protective Society of New South Wales (1933 A.R. 199):-

10

"the action of an industrial union of employees in submitting for the Registrar's approval a proposed alteration of its rules in order to extend the scope of its membership rule to include employees not hitherto covered by the union, is analogous to the action of a trade union of employees not registered as an industrial union making an original application for registration as an industrial union. And I think that when determining whether or not approval should be given to such an alteration of rules, the Registrar or the Commission should act upon the same principles as are applied when considering an original application under section 8 of the statute."

20

30

It may be added that, in any such case, it would not be lawful for the registrar to approve of an alteration of rules proposed by an industrial Union of employees if the effect of an alteration would result in the union concerned ceasing to be an industrial union of employees.

So far as I am aware, the only cases where consideration has been given to the question whether valid registration as an industrial union of employees can be granted to a trade union whose rules provide for the admission to membership of persons who may not be employees are two cases concerning the United Bank Officers Association where the point was dealt with in 1920 by a Full

40

Court of the Court of Industrial Arbitration (1920 A.R. 49) and a year later by the Full Court of the Supreme Court of New South Wales in the case already referred to, In re Bank Officers (State) Board (1921 A.R. 252). The following statement as to the rules of the association is taken from the judgment of Rolin J. (1920 A.R. at p. 58).

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

10

"The body in question here is in a sense undoubtedly a trade-union of employees, namely, of bank clerks, and has applied for registration under the Industrial Arbitration Act; but by its rules it has expressly provided that its officers - president, general secretary, general treasurer, and editor - may be elected from persons not in the banking service, and being elected, may be members of the association."

20

In each of the cases referred to, a question for decision was whether, having regard to the rule relating to officers, the association was a trade union of employees validly registered under s. 8 of the Industrial Arbitration Act. In the Arbitration Court, Edmunds J. was of the opinion that it was; he regarded the rule about officers as evidence that the association was not a trade union of employees, but said that there was other evidence that the association was a trade union of employees of the banking business; in his view, as the registrar had evidence pro and con on the question the evidence "was sufficient in law to support his determination of the fact in issue". Rolin J. stating that the question was whether a trade union, which by its rules provides for the admission to membership of persons not employees, could be considered a union of employees; said:-

30

40

"I confess I feel a considerable difficulty in coming to a conclusion on the question, and would prefer to see the rule excised. But on the bare legal question, as I have above stated, I cannot say that the inclusion of some non-employees is enough to bar the union from coming within the words of the Act as a union of employees. It then becomes a question, Is the union substantially a union of employees? And I agree with the Registrar that in this case the union is substantially a union of employees - bank

No.1(b)

clerks."

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

Curlewis J. held a contrary view. His Honour  
said:-

"The rules of the union provide that membership is to be open to employees in banks, but certain important offices, the holders of which are, by the constitution of the association, members of the association, may be held by persons who may not be employees at all. The constitution, therefore, provides for a membership of employees, together with an unknown quantity. Now, what is a union of employees may be a very difficult question, and I have no intention of attempting to answer the question in all the forms which it may assume. I merely say that I do not think at present that if the constitution of the union provided for a membership of employees in a particular industry, the fact that some members had obtained admission by falsely pretending to be employees in that industry, or the fact that some members had been thrown out of work, and thereby ceased to be employees, would affect the validity of the union. But it is a totally different thing when the very constitution of the union provides for a membership of persons who may not be employees in any industry whatever, still less in the industry of which the union seeks regulation. In this case the number of outsiders is small, but I feel considerable hesitation in basing my opinion on that consideration. That would lead in future cases to the necessity for laying down the permissible proportion between employees and non-employees, a course which seems to me highly undesirable, if not impossible. 10  
20  
30  
40

But, apart from that, I think that the policy of the Act was that the unions should be composed of those whose interests are affected by the conditions of employment laid down for the industry for which the union is constituted".

In the case in the Supreme Court, Cullen C.J. said:-

"The next ground put forward was this:

that even assuming the association to be a legally constituted trade union, still its registration as an industrial union would be invalid, inasmuch as it is not a trade union of employees, since three of its officers - the president, the secretary, and the treasurer - though members of the union are not employees in the industry . . . . .

No.1(b)  
 Judgment of  
 Mr. Justice  
 Beattie  
 12th November,  
 1963.  
 (continued)

10

It does not seem to me that the mere fact that a trade union or industrial union employs persons as its officers who are not members of the union would be a ground for challenging the legal status of the union. Otherwise, that particular kind of association might never be able to get the advantage of employing specially skilled persons. A secretary and treasurer, for instance, though not members of the union, might be admitted to its meeting because of their office. There could be no more objection to the admission of a non-member to the meetings of the union than to the admission of a solicitor or a practical adviser of some other kind. Does the case become any stronger, then, because these three officials were admitted as members of the union? I doubt whether the matter has any practical importance, because I do not see that it differs very much in substance from the employment of officials of this kind who are not members of the union at all. A consideration of this kind was urged: that the introduction of men from outside the particular industry with which the union is concerned would lead to a thwarting of the intentions of the Act by introducing persons who, having no interest in the industry themselves, might not feel the same responsibility, and might stir up strife and defeat the lawful objects of such an association. On the other hand, an unrestricted right of dismissal in the employer might deprive the union of the advice and assistance of skilled persons unless it could get them from outside his own employees."

20

30

40

Of the other members of the court, Pring J. did not find it necessary to deal with the point and Wade J. agreed with the Chief Justice.



No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

These cases are authority for the proposition that a trade union which consists of employees does not cease to be a trade union of employees within the meaning of s. 8 of the Industrial Arbitration Act if its rules permit it to enrol as members persons who are officers of the trade union. It would be a tenuous logical inference to draw from the decision that a trade union can be regarded as a trade union of employees if it consists not only of employees but of persons not officers and of some status other than employees; but, in any event, under our system of law, a decided case is an authority only for what it actually decides as a matter of principle and not for any proposition which may logically appear to flow from the decision: see per Earl of Halsbury L.C. in Quinn v. Leathem (1901) A.C. 495 at p. 506. 10

In my view it is correct, as Mr. Holmes submitted, that the Industrial Arbitration Act has always provided for a dichotomy of the unions registrable under the Act as industrial unions: unions of employees on the one hand, unions of employers on the other. I would think that a trade union the rules of which provided for the admission to membership both of employees and employers could not be said to be a trade union of employees. A bag of potatoes and onions cannot be described as a bag of potatoes, even if there are not many onions in it. By the same reasoning, a trade union the rules of which provided for the admission to membership both of employees and of persons not employees but of some other status, such as that of independent contractor, also could not be said to be a trade union of employees. The validity of that conclusion is not affected, I believe, by the fact that the rules of employees' trade unions usually make provision whereby members who become unemployed may maintain their membership. It puts no strain on language at all to regard as an employee for the purpose of trade union membership a person who is normally an employee but who happens to be out of work. So far as the other class mentioned by Mr. Sweeney is concerned - persons whose status fluctuates, sometimes being that of an employee, at other times that of an employer - I would think that the position simply was this, that, if a trade union is a trade union of employees and as such has been registered as an industrial union of employees, persons cease to be eligible for membership when they put off the mantle of 20  
30  
40  
50

employee and put on the mantle of employer, and no conclusion of law can be drawn from the fact that neither the person nor the union takes any step to terminate the union membership.

No1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

10 It was on 21st December, 1943, that the union applied to the registrar to register the amendments which included the one substituting in the qualification for membership rule "persons . . . who are working in or in connection with the industry" for "persons . . . who are or may be employed in or in connection with the industry". Just two months previously, an amendment to the law of some importance to persons concerned with the transport industry had been made. Section 2 (a)(iii) of the Industrial Arbitration (Amendment) Act, 1943, amended the Principal Act by inserting in s. 5, the definition section, a new subsection as follows:-

20 "(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 performing  
30 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  
40 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." (Italics added).

It is not fanciful to suppose that the draftsman of the 1943 amendments to the union rules had this subsection in mind when he altered the old qualification for membership rule and that he intended to provide that membership in the union would be

No. 1(b)  
Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.  
(continued)

open to a person referred to in the subsection who was not an employee in the ordinary sense but who, by force of the subsection, was "deemed, for the purposes of this Act, to be an employee . . ."

The draftsman may have had in mind that one of the purposes of the Industrial Arbitration Act was to provide for the registration of industrial unions of employees empowered to invoke the procedures available under the Act, and that a person deemed by force of s. 5 (2) to be an employee for the purposes of the Act was to be regarded as an employee for the purposes of that section of the Act, s. 8 (1), which authorized the registration as an industrial union of a trade union of employees. But, if those were his thoughts, I think they were mistaken. In my view s. 5(2) did not have any effect on s. 8(1).

In the Green Cabs Case (1953 A.R. 642 at p. 656), a Full Bench said that it found s. 5(2) "most difficult to construe, not only standing by itself, but in relation to the whole scheme of the Industrial Arbitration Act", an observation with which I would agree. But I think that the principal purpose of the Act - possibly the only purpose - for which persons doing the work referred to in the subsection were to be deemed employees was the purpose of enforcing the terms of an award or industrial agreement. The concluding part of the subsection commencing "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" is strongly indicative of that fact. The conditions which the subsection prescribed as those to be fulfilled before its deeming provisions operated were such as to make it impossible to apply those provisions generally to other purposes of the Act. A person doing the work referred to in the subsection was not to be deemed to be an employee for the purposes of the Act unless the work was work for which by an award or industrial agreement a price or rate had been fixed for persons performing such work, and he was not to be deemed to be such an employee if either he himself or the person from whom he obtained the use of the vehicle or vessel used in the performance of the work established to the satisfaction of a tribunal in which proceedings

10

20

30

40

for a breach of the award or industrial agreement were instituted that the contract of bailment was a bona fide contract and one not entered into for the purpose of avoiding the operation of the award or industrial agreement. It would seem plain enough that, as the existence of an award or industrial agreement providing a price or rate for persons performing the work in question was a prerequisite to the operation of the deeming provisions, those purposes of the Act which are concerned with the making of awards were not purposes for which the bailees were to be deemed employees. And it is a little too much to accept the view that the subsection had the effect of constituting as employees for the purpose of the phrase in s. 8(1) "a trade union of employees bailees of vehicles or vessels used in the performance of work for which an award fixed a price or rate but only if such bailees were working under a contract which was not a bona fide contract but a contract entered into for the purpose of avoiding the operation of an award or industrial agreement.

No.1(b)

Judgment of  
Mr. Justice  
Beattie12th November,  
1963.  
(continued)

In the result, it is my opinion that the enactment in 1943 of s. 5(2) did not effect any alteration in that provision of the Act contained in s. 8(1) which required that the type of union which could be registered as an industrial union of employees was a trade union of persons who were employees in the true sense, the sense referred to in the definition of "Employee". I think it follows that to the extent that the language adopted in the amendment to the union's qualification for membership rule effective from 7th February, 1944, was wide enough to have embraced persons who were not employees in the true sense, it would have been proper to read it down to limit its application to persons who were employees in the true sense. It is proper to construe the rule in light of the state of the law dealing with the registration of trade and industrial unions at the time when the rule was brought into its present form, but the ambit of the rule cannot in my view be affected by any amendments to the law made subsequent to that time. The amendments made in 1959 to the principal Industrial Arbitration Act and to the Trade Union Act throw no light on the meaning of the phrase "any trade union of employees" in s. 8(1) of the Industrial Arbitration Act, 1940-1943 at the critical point of time when the union rules were altered in 1943.

No.1(b)

Judgment of  
Mr. Justice  
Beattie

12th November,  
1963.

(continued)

For these reasons I would answer the question submitted as follows:- The conciliation committee has no jurisdiction to hear and determine the application before it because the applicant union is not competent to apply for an award for the persons to whom the application relates.

This and the preceding 24 pages is the Judgment of Mr. Justice Beattie marked "SGW 2" exhibited to SAMUEL GEORGE FOWLER at the time of swearing his Affidavit on the fourth day of December 1963 at Sydney, Before me:

10

S.L. Leaver  
Commissioner for Affidavits

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.

No.1(c)

JUDGMENT OF MR. JUSTICE SHEEHY

"SGW 3"

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

COURT SESSION

CORAM: McKEON J.  
BEATTIE J.  
SHEEHY J.

20

Tuesday 12th November 1963

No. 128 of 1963

IN RE HIRE CAR AND TAXI DRIVERS (STATE) CONCILIATION  
APPLICATION FOR AWARD - REFERENCE BY SENIOR  
CONCILIATION COMMISSIONER.

JUDGMENT OF MR. JUSTICE SHEEHY

These proceedings arise from a reference from the senior conciliation commissioner under s. 30C of the Industrial Arbitration Act, 1940-1961 in the following terms:-

30

In pursuance of Section 30C of the Industrial Arbitration Act, 1940 as amended, I, JOHN JOSEPH CAHILL, Senior Conciliation Commissioner, Chairman of the Hire Car and Taxi Drivers (State) Conciliation Committee do hereby refer to the Commission in Court Session the following question of jurisdiction arising during the hearing of matter No. 286/62 by the said Conciliation Committee:-

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.

(continued)

10

Whether the said conciliation committee has jurisdiction to hear and determine the application before it having regard to the alleged invalidity of the application because of the incompetency of the applicant union to legally make it.

Dated at Sydney this 8th day of May, 1963.

20

Matter No. 286 of 1962 above referred to was an application by the Transport Workers' Union of Australia, New South Wales Branch, to the Hire Car and Taxi Drivers (State) Conciliation Committee for a Taxi Drivers (State) Award to apply to persons deemed to be employers and employees respectively under s. 88E of the Industrial Arbitration Act. The application followed an alteration of the industries and callings assigned to this committee to cover the new class of notional employees and was recommended by Sheehy J. in In re Hire Car and Taxi Drivers (State) Conciliation Committee (1962 A.R. 195).

30

40

The main issue arising in the present proceedings involves the question whether the union has the right to make an application for these persons who are not employees in the real sense. Another issue involves the interpretation of s. 88E which, according to Mr. J.D. Holmes of Queen's Counsel for the employers, was not intended to create a new class of employee but dealt with persons who already were employees so as to assist in the identification of their employer. This interpretation was opposed by Mr. J.B. Sweeney of Queen's Counsel, for the union, and had already been rejected by me in the case above mentioned. After hearing the matter re-argued in these proceedings my view that s.88E has created a new class of employee for the purposes of the Industrial Arbitration Act (and the other Acts therein mentioned) has remained

No.1(c) unchanged.

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

To some extent sub-s. (4) of s. 88E has proved to be a barrier to the proper understanding of the section and I propose therefore to set out more fully my views as to its correct interpretation. This sub-section reads as follows:-

(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.

10

20

30

The difficulty appears to lie in the apparent contradiction involved in its terms - how can it apply to a notional employer when it provides for proof that some other person is the true employer? It might seem that if a driver was an employee in the true sense notional employment could not arise because s. 88E (on the interpretation claimed by the union) applies only to persons who are "not otherwise employees employed to do the work hereinafter referred to ...."; in that case the sub-section would be consistent only with the more limited interpretation of s. 88E posed by the employers.

40

In ascertaining the real intent of the sub-section it must be remembered that it deals only with legal proceedings in which the question whether the respondent was a person deemed by virtue of the section to be an employer could be

an issue as to which the court would have to form a conclusion. Until that happened there would be simply an allegation to that effect before the court and the status of the respondent would be dependent on the final determination. In the course of the proceedings the respondent is enabled by the sub-section to join another person and prove that such person is the true employer. If he succeeds in that course then it would be established that he never was a person deemed to be an employer and that the allegation to that effect was incorrect.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

10

It seems, therefore, that where the sub-section speaks of a person deemed to be an employer it means alleged to be deemed to be an employer. When the sub-section is read as a whole this interpretation does no violence to the literal sense because in the latter part of the sub-section the respondent is described as "person alleged to be the employer". The sub-section equates this with the phrase "person deemed by virtue of this section to be an employer" and so it seems quite clear that in respect of the latter phrase it is not speaking in absolute terms but is dealing with proceedings in which the nature of the relationship between the parties may be tested, providing a means of exculpation for a person prosecuted as a notional employer.

20

30

One of the main purposes of the Industrial Arbitration Act is that awards should be made to regulate the working conditions of employees and it seems that the fulfilment of this purpose in respect of notional employees would have been intended by the legislature in enacting s. 88E. Awards may be made by a variety of procedures, the most common of which involves an application by an industrial union of employees and is regulated by s. 74 of the Act which so far as is relevant provides:-

40

(1) Proceedings before a committee shall be commenced by --

(a) .....

(b) application to the committee by employers or employees in the industries or callings for which the committee has been established.



No.1(c)  
 Judgment of  
 Mr. Justice  
 Sheehy  
 12th November,  
 1963.  
 (continued)

- (2) Any such application shall be in the form, and shall contain the particulars prescribed, and shall be signed by --
- (a) .....
- (b) an industrial union whose members are employers or whose members are employees in any such industry or calling.

It is a well settled principle that an industrial union can only act on behalf of persons who are de jure members and Mr. Holmes submitted that the rules of the union could not be construed to cover persons deemed to be employees because the history of the legislative scheme of registration of industrial unions of employees showed that it was intended to apply only to true employees there being a recognised division between employers and employees and their respective organisations. 10

Rule 5, Qualification for Membership, of the rules of the union provides:- 20

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:-

- (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 30 40

butchers' carters, storemen and packers.

No.1(c)

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

Judgment of  
Mr. Justice  
Sheehy

(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.

12th November,  
1963.  
(continued)

10

(d) The words "persons", "workers", "members", "youths", etc., where used in these Rules, shall include and mean males and females.

Mr. Holmes submitted that the words "working in or in connection with the industry" must be construed as covering only persons who are employees in the strict sense of that term and that consequently the union could apply for an award only for such employees. He referred to In re Hairdressers, &c. Females (State) Award (1931 A.R. 286) where it was held that the provision in cl. 7(ii) of the award that "No person shall accept a premium .... for teaching any person the business of a hairdresser ....." must be construed as "No employer shall accept a premium ..... for teaching any employee, etc."  
However, this case was not decided on any ground concerning the incompetence of the applicant or the scope of the rules of the union but on the different ground that a committee or the Commission could only make an award with regard to persons who are employers and employees.

20

30

The determination of the issue involves a consideration of the Trade Union Act, 1881-1959, the Industrial Arbitration Act, 1940-1961 and the interpretation of the union rules, particularly r. 5 above quoted.

40

Taxi drivers who operate taxi cabs under a system of bailment of the cab and a share in the takings form a definable class of workers for whom the union has over the years made efforts designed to bring them within the protection of the Industrial Arbitration Act and to improve their working

No.1(c) conditions. (See In re New South Wales Taxi Drivers' Association (No. 2) (1938 A.R. 714 at pp. 719-721); Hughes Motor Service Ltd. v. Platt (1946 A.R. 451); Platt v. Treweneck; Green Cab Service Proprietary Ltd. v. Platt (1953 A.R.642)).)

Judgment of Mr. Justice Sheehy

12th November, 1963.  
(continued)

Other action by the union has led to the making of awards for owner drivers of trucks and employee hire car and taxi drivers and in In re Carters and Motor Waggon Drivers (State) Award (1962 A.R. ) Cook J. referred to the fact that regularly during the past 10 years at least, and probably for a much longer period, the union had claimed the right to negotiate contract rates to be paid to ownerdrivers who were contracting to the Commissioner for Main Roads and had actually negotiated such rates on their behalf although these contractors were not employees in the true sense according to his Honor's finding.

10

These activities on their behalf are consistent with the interpretation of the rules put by Mr. Sweeney, i.e. that the word "persons ..... who are working in or in connection with the industry ....." are quite wide enough to include this class of worker and would be well chosen to comprehend owner drivers and other persons working in the industry but not always under a contract which could be readily identified as one of employment. I do not consider that these words are ambiguous but if they were thought to be capable of bearing more than one interpretation, then, on the basis that the rules constitute a contract between the members, recourse might be had to the rule of construction of contracts laid down by the Supreme Court in Busby and another v. Clarke and another ((1914) 14 S.R. 189) indicated by the head note - "an expression in a written document may, if the whole of the contract is looked at, be found to be ambiguous and therefore explainable by extrinsic evidence ... The conduct of the parties subsequent to the execution of the contract may be looked at to ascertain what meaning the parties have placed upon the expression."

20

30

40

Confirmation of this principle is to be found in Chitty on Contracts (General Principles) 22nd Edn. at p. 279 where the following appears:-

The principle of contemporanea expositio is primarily applicable to ancient documents.

Evidence of user, and of acts done in pursuance of an instrument, is admissible to explain what passed by a grant. The rule has, however, been extended to cases where the document is modern and the ambiguity patent. The acts and conduct of the parties under the agreement are therefore admitted to show its true meaning in the same way as their acts and conduct before or at the time of its execution. Coke considered the principle to be a very strong factor in the law, but it seems a somewhat unreliable guide. It should be applied with caution and only where the wording of the instrument is otherwise ambiguous or uncertain.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

10

20

30

There may be dangers inherent in an approach which allows the actions of a union to serve as a guide to the interpretation of its rules but in this case the consistent course of conduct of the union over a long period must have some significance in determining whether it was its intention to cover this class of workers under its rules. In In re Carters, &c. Brick (Cumberland) Conciliation Committee (1930 A.R. 344 at p. 359) the Full Bench, Street and Cantor J.J., the President Piddington J. dissenting, took into account the past actions of the Master Brick Carters' Association in treating themselves as employers under the Act and, although not deciding any question of interpretation of the rules of the union, rejected its claim to approach the committee as an industrial union of employees for the purpose of obtaining an award. At p. 359 Street J. (Cantor J. concurring) said:-

40

..... they in the past have definitely identified themselves with this association of master brickcarters, which has always taken up the attitude that it was composed of employers banded together to protect their own industrial interests. Their whole attitude shows that they have always recognised that they were in fact what they called themselves in name, and that is master brickcarters. That being so, I do not think that it is open to the association to approach the Committee as an applicant industrial union of employees for the purpose of getting the award claimed in this industry.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

For those reasons, therefore, I think that the Chairman came to a correct conclusion, and that the appeal must be dismissed.

Mr. Holmes contended that other clauses in the rules supported the proposition that only true employees were within its scope. He referred to pars. (b) and (c) of r. 2, Objects, which provides:-

The objects of this Branch shall be to endeavour by all lawful means to uphold the rights of the combination of labor and to promote, foster and maintain the industrial organisation of all transport workers in one Union; and to promote the best industrial interests of all the members; and 10

(a) To raise funds by subscription, levies, fines, interest from loans on money invested, interest on bank deposits, and/or interest on debentures or shares, or by other means as shall be hereinafter determined by the Branch Committee of Management from time to time; 20

(b) To secure for the members improved conditions of employment;

(c) To secure for the members preference of employment; 30

(d) To afford assistance in cases of industrial oppression;

(e) To give power to Sub-Branches to take whatever steps they may deem necessary subject to the approval of the Branch Committee of Management to assist members in cases of accident, sickness, death, distress or unemployment;

(f) To provide for the social and intellectual advancement of the members; 40

(g) To obtain for the members a

- greater share of the product of their labour;
- (h) To establish Sub-Branches throughout the State;
- (i) To further political objects as defined in the Industrial Arbitration Act, 1940;
- (j) To produce on behalf of and distribute to members of the Branch a Union Journal;
- (k) To provide superannuation and long service leave for the benefit of paid officers and/or employees of the Union;
- (l) Permit Sub-Branches (subject to the approval of the Branch Committee of Management) to conduct an annual picnic on behalf of its members;
- (m) To assist members in whatever manner the Branch Committee of Management may determine from time to time.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

He also referred to r. 6, Admission, which contains a specified application form requiring the applicant to state the name of his employer and 4. 40, Register of Members, which provided for registration of certain particulars including details of the employers of members.

As the Trade Union Act, 1881-1959 and the Industrial Arbitration Act, 1940-1961 provide only for registration of pre-existing rules of a combination or union the rules of this union may be examined, in the first place, as a document standing apart from the statutes. On this footing and reading the rules as a whole I consider that there is nothing in the rules which would require the scope of r. 5, Qualification for Membership, to be restricted to persons who are employees in the true sense and that the rule would apply to bailee taxi drivers. I consider also that the rule is not to be construed as Mr. Holmes argued so that the meaning of the words is fixed as at the time they were used but that they should

No.1(c)  
 Judgment of  
 Mr. Justice  
 Sheehy  
 12th November,  
 1963.  
 (continued)

rather be construed as ambulatory to give effect to the wide sense intended. In this connection the rule would plainly not be restricted to persons actually working in the industry as par. (c) deals with the power of the Branch Committee of Management to cancel or endorse the continuance of membership of members who cease to actively work in the transport industry for a period of six months or more. Nor could the rule be confined to persons who were members at the time of the original combination or registration of same and it must be regarded as applicable also to future members who may join as the result of the organising activities of the union. On this point the objects set out in r. 2 are relevant particularly those stated in these words "to promote, foster and maintain the industrial organisation of all transport workers into one union."

10

It is necessary to construe the rule in the light of the relevant statutes and I will now consider whether they have any effect which could lead to the reading down of the rule in the manner claimed by Mr. Holmes.

20

Section 31 of the Trade Union Act, 1881-1959 provides:-

In this Act -

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 -

30

40

- (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 good-will of a business or of instruction in any profession trade or handicraft.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

In Hardie and Lane Ltd. v. Chiltern ((1928 1 K.B. 663) some relevant provisions of the English legislation were considered by the Court of Appeal and Lord Hanworth M.R. said at p.696:-

12th November,  
1963.  
(continued)

10

By s. 4 of the Trade Disputes Act, 1906, "an action against a trade union, whether of workmen or masters, or against any members or officials thereon on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." The words of the section appear to be clear and direct and to prevent the Courts from taking cognizance of any proceedings for tort against a trade union, or against its members or its officials. Indeed that construction has been placed upon them, and in Vacher & Sons. Ltd. v. London Society of Compositors ((1913) A.C. 107)

20

it was determined by the House of Lords that an action which was begun against a trade union for damages for tort ought to be summarily dismissed, because the section prevents any Court from entertaining it. In the same case, it was held that the section is not limited to tortious acts committed in contemplation or furtherance of a trade dispute, but extends to all torts. It is to be read simpliciter and free from any ambiguity or embarrassment derived from a study of other sections: see per Lords Macnaghten and Moulten.

30

40

But Sir Henry Slesser has presented an ingenious argument to limit the effect of the section. He contents that the words "whether of workmen or masters" are words of limitation and confine the trade unions which are entitled to ask for the immunity which the section gives to those which are formed of workmen or masters, and does not include such a one as the Motor Trade Association, whose object is "the imposing of restrictive conditions



No. 1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

on the conduct of any trade or business." Such an object is a "statutory object" under s. 1, sub-s. 2, of the Trade Union Act, 1913, and the definition of "trade union" under s. 2 of that Act is that it "means any combination ... the principal objects of which are under its constitution statutory objects." That definition applies now to a trade union under the Act of 1906. Hence, unless the words above, 10  
relied on by Sir Henry Slessor, are effective to restrict the meaning of "trade union" under s. 4 of the Act of 1906, the Motor Trade Association is within it, and is entitled to the immunity from actions for tort given by that section.

In the plain meaning of the English used, I find great difficulty in construing the words "whether of workmen or masters" as words of limitation. They are embracing 20  
words. The test of a trade union, whether under s. 16 of the Act of 1876, or s. 2 of the Act of 1913, is its objects, not its personnel. (*Italics mine*).

It is to be noted that s. 16 of the Trade Union Act of 1876 above referred to was in terms similar to s. 31 of the New South Wales Trade Union Act, 1881-1959. It seems, therefore, that the remarks of Lord Hanworth M.R. (*italicised*) would be equally applicable to s. 31 of the Trade Union Act 1881-1959 and that the test of the 30  
nature of a trade union under this section would, likewise, lie in its objects and not in its personnel.

In the case concerned the objects of the union set out in r. 2 could be said to include both the regulation of relations between workmen and employers and the imposing of restrictive conditions on the conduct of a trade or business in the sense that it is intended to limit the freedom of employers and other operators in the various branches of the transport industry to impose their conditions as to the use of the labour of members of the union. In this 40  
connection it was held by the Supreme Court in Bank of New South Wales v. United Bank Officers' Association and the Court of Industrial Arbitration ((1921) 21 S.R. 59) that an association of bank clerks, though clerks are not "workmen",

came within the latter part of the definition in s. 31 and were entitled to be registered as a trade union.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

The following paragraph was added to s.14 of the Trade Union Act by the 1959 amendment:-

12th November,  
1963.  
(continued)

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 -

20

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

By the same amending Act an additional power to cancel or withdraw the certificate of registration of a trade union under s. 15 was granted to the registrar on proof to his satisfaction that a certificate would not have been obtained had the provision of par. (7) of s. 14 been in force at the time when the application for registration was made.

30

Section 8 of the Industrial Arbitration Act provides in sub-ss. (1) and (3) :-

40

(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 be an industrial union until such registration is duly cancelled.

(2) ....

(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

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

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.

12th November,  
1963.  
(continued)

Accordingly it becomes necessary to consider the expression "trade union of employees" as used in both Acts. Certain possibilities are suggested, for example, the expression might comprehend only a trade union of employees in the ordinary sense or it might have to be construed according to the purposes of the Industrial Arbitration Act which now includes notional or deemed employees; it could conceivably relate only to a union composed wholly of employees or it might apply to a union substantially composed of employees. The problem arises also as to whether it bears the same or a different meaning in the two Acts.

10

Some guidance to the meaning is provided by the fact that s. 6 of the Industrial Arbitration Act permits the registration as an industrial union of employers of any person, company or association of same and it appears to be the intention to separate industrial unions according to whether they represent employers or employees for the general purposes of the Act which seem to require the drawing of a clear line between the rights and obligations of the two groups. As the general purposes of the Act are contemplated by this division it seems reasonable to suppose that "employee" in s. 8 just as "employer" in s. 6 would be used in the respective sense contemplated by the Industrial Arbitration Act. Section 31 of the Trade Union Act does not speak of trade unions of employees, instead it refers to four classes of combinations which in practice would usually be limited to combinations for regulating the relations between workmen and employers or for imposing restrictive conditions on the conduct of any trade or business. Section 8 of the Industrial Arbitration Act is not concerned with the purpose of the combination but only that an applicant for registration should be a trade union registered under the Trade Union Act and, further, that it should be one of "employees"; this latter limitation seems to relate to the purposes of the Industrial Arbitration Act under which the union seeks to act rather than any purpose under the Trade

20

30

40

50

Union Act and it is an important purpose of the former act to provide for registration of trade unions of employees as industrial unions so that they may be able to invoke the machinery provided to allow for the peaceful regulation of industry by conciliation and arbitration.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

10 In United Bank Officers' Association  
(1920 A.R. 49) Edmunds J. considered s. 8(1) of  
the Industrial Arbitration Act 1912 and although  
he concluded that the word "employees" as used in  
this section was to be construed otherwise than  
as limited in the definition clause (s. 5), his  
Honor said at p. 56 "But as the words, in my  
opinion, refer to trade unions in existence  
before, and at the passing of, the Act, so as to  
enable them to become persons having access to  
the Court, the section did not, in my opinion,  
by designating them 'trade union of employees',  
purport to place any limitation upon the constitution  
20 of the trade unions so intended".

Although the same expression is now found  
in s. 14(7) of the Trade Union Act since the 1959  
amendment it seems unlikely that it could mean a  
trade union restricted to real employees in this  
Act and yet also comprehend notional employees  
under the Industrial Arbitration Act when it is  
used in s. 8 of that Act. In ascertaining the  
meaning under the Trade Union Act it is necessary  
to consider the terms and effect of the Industrial  
30 Arbitration (Amendment) Act, 1959. This Act amends  
the Principal Act, inter alia, by inserting next  
after s. 88D the following:-

40 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 deemed to be workers:-

- (a) Any person not being the person  
in whose name a taxi cab, motor  
ombibus, private hire car or  
public motor vehicle respectively  
is registered who drives such  
taxi cab, motor omnibus, private  
hire car or public motor vehicle.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

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

Although this section creates a class of notional employees for the purposes of certain acts it does not refer expressly to the Trade Union Act but nevertheless that Act is amended by the same statute in the respects already mentioned. It is proper, therefore, to have regard to the purposes of the Industrial Arbitration Act (being referred to in s. 88E) and considering s. 8 thereof it is seen that it effects a purpose of the Act by providing for restrictions on registration designed to prevent a multiplicity of industrial unions in the one field and to ensure that registered industrial unions should be bona fide. Similar provisions have been carried over into the Trade Union Act by the 1959 amendments which are clearly directed to the registration of trade unions as industrial unions under the former Act, supplementing the provisions of s. 8.

20

30

It seems, therefore, that the expression "trade union of employees" contained in s. 14(7) of the Trade Union Act should be given the same meaning as in s. 8 of the Industrial Arbitration Act with which it is in pari materia.

There is some analogy with the rule set out in Maxwell on Interpretation of Statutes (11th Edn.) at p. 33 where the learned author quotes with approval remarks by Lord Blackburn in Mayor of Portsmouth v. Smith ((1885) 10 App. Cas. 364 at p. 371) to the effect that where a single section of an act is introduced into another statute it must be read in the sense which it bore in the original act from which it is taken, and consequently, that it is legitimate to refer to all the rest of that act to ascertain what the section means although one section only is

40

incorporated in the new act.

No.1(c)

It appears therefore that since s. 88E took effect bailee taxi drivers must be deemed to be employees for the purposes both of s. 8 of the Industrial Arbitration Act and s. 14(7) of the Trade Union Act with the consequence that a bona fide trade union of such employees could be validly registered under the Industrial Arbitration Act and be entitled to apply for an award of the type now sought.

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

10

However, the argument was not confined to the existing situation and it is necessary to refer to the history of the union's rules and the earlier statutes.

20

Reference to the records kept by the industrial registrar shows that a trade union entitled the "New South Wales Branch of the Amalgamated Road Transport Workers' Union of Australia" had been registered on the 12th July, 1901, and that this body, later named "New South Wales Branch of the Transport Workers' Union of Australia", amalgamated with another body which had been registered as a trade union on the 21st July, 1908, as "The Newcastle and District Trolly, Draymen and Carters' Union". The amalgamation was registered on the 21st January, 1943 under the Trade Union Act 1881-1936, the name of the amalgamated trade union being recorded as "New South Wales Branch of the Transport Workers' Union of Australia". This body was registered as an industrial union of employees on the same date and is identical with the industrial union now known as "Transport Workers' Union of Australia, New South Wales Branch", a change of name having been registered subsequently.

30

40

Unfortunately the records of the registrar appear to be incomplete and there is no information available as to the precise content of the rules as at the date of the registration of the amalgamation. However, the case was presented on the basis that at the time when the application for an award was made r. 5, Qualification for Membership, was in the form previously quoted.

Even prior to 1959 the Industrial Arbitration Act made certain provisions for persons deemed to be employees and employers subject to various conditions. The concept was first introduced into

No.1(c)  
 Judgment of  
 Mr. Justice  
 Sheehy

12th November,  
 1963.  
 (continued)

the 1940 Act by the Industrial Arbitration  
 (Amendment) Act 1943 which became operative on  
 8th November, 1943. This Act added the following  
 sub-section to s. 5:-

(2) A person who is engaged in plying  
 for hire or in the delivery of goods  
 with any vehicle or 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 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.

10

20

30

The amending Act also added a new section  
 in the following terms:-

88B (1) Where by an award a price or  
 rate is fixed for persons performing  
 work in any industry the commission or  
 a committee may, on an application or  
 reference to it in that behalf, prescribe  
 by award that no contract to which this  
 section applies shall be valid unless  
 the consent of the commission or the  
 committee is obtained.

40

(2) If any person acting or  
 purporting to act in the execution of  
 any contract which is rendered invalid  
 by this section, performs any work for  
 which by an award a price or rate has  
 been fixed for persons performing such  
 work, then for the purposes of this Act

the person so performing such work shall be deemed to be an employee, and the person with whom the contract so rendered invalid was made shall be deemed to be the employer of such employee.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

10

(3) This section shall apply to any contract made by two or more persons being or alleging themselves to be partners working in association in any industry whereby such persons undertake the performance of work for which by an award a price or rate has been fixed for persons performing such work, and under which such persons or any of them engage personally in the performance of the work whether with or without the assistance of other persons employed by them.

20

It is not necessary to consider in detail the effect of these provisions and subsequent amendments thereto because of the view I have formed as to the ambulatory and comprehensive meaning which should be attributed to r. 5, Qualification for Membership, but there may be some doubt as to the position as at 21st January, 1943 (the date of the registration of the amalgamation) for then a trade union composed only of bailee taxi drivers could not have secured registration as an industrial union of employees, even if there was no objection from some other union, as it could not be said then to be either a trade union of true employees or deemed employees.

30

40

A similar situation was presented in In re New South Wales Taxi Drivers' Association (1937 A.R. 18) when the Commission Webb J., dismissed an appeal from the registrar's decision refusing registration of the association on the ground that if registered it would not be a bona fide industrial union of employees. However, the situation in the present case is different and, assuming that the membership rule was in the present form at the date of the registration of the amalgamation, what happened was that a trade union, the rules of which comprised true employees but included some non-employees, applied for and was granted registration. The question remains whether such a union could then have been regarded properly as a trade union of employees.

The point arose In re United Bank Officers'



No.1(c)

Association (1920 A.R. 49) and Edmunds J. said  
at p. 56:-Judgment of  
Mr. Justice  
Sheehy12th November,  
1963.  
(continued)

The question raised by section 8, which the Registrar has to determine upon an application to him for registration under that section, is whether in fact the applicant association is a trade-union of employees. The evidence which would have supported an affirmative finding upon that issue in the case of a trade-union registered before the passing of the Industrial Arbitration Act, would, in my opinion, be that the union was formed by employees of the class in question, and that it had for its objects the advancement of the interests of such employees, the regulation of their relations to their employers, and/or the imposing of restrictive conditions in the business. It may be that the fact that the constitution provided for a membership of persons other than such employees should be taken into account by the Registrar in the determination of this question as some evidence to the contrary effect. But this fact has, in my opinion, no greater force than of some evidence to the contrary.

Rolin J. said at p. 59:-

Next on this argument it would be an objection to a union filing a claim that some, even one, of its members was not at the time an employee in the industry. Counsel hesitated to press the argument so far, and had to admit that the fact that some one or more members were out of employment, or even in other employment, could not be held to make the union something other than a union whose members are employed in the industry. Where, then, is the line to be drawn?

This particular association is, by its rules, an association of persons employed on the salaried staff of a bank; but they may elect to fill the four offices named any person employed or not.

I confess I feel a considerable difficulty in coming to a conclusion on the question, and would prefer to see the rule excised. But on the bare legal question,

as I have above stated it, I cannot say that the inclusion of some non-employees is enough to bar the union from coming within the words of the Act as a union of employees. It then becomes a question, Is the union substantially a union of employees? And I agree with the Registrar that in this case the union is substantially a union of employees - bank clerks.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

10 Curlewis J. said at P. 64:-

The constitution, therefore, provides for a membership of employees, together with an unknown quantity. Now, what is a union of employees may be a very difficult question, and I have no intention of attempting to answer the question in all the forms which it may assume. I merely say that I do not think at present that if the constitution of the union provided for a membership of  
20 employees in a particular industry, the fact that some members had obtained admission by falsely pretending to be employees in that industry, or the fact that some members had been thrown out of work, and thereby ceased to be employees, would affect the validity of the union. But it is a totally different thing when the very constitution of the union provides for a membership of persons who may not be employees in any industry whatever,  
30 still less in the industry of which the union seeks regulation. In this case the number of outsiders is small, but I feel considerable hesitation in basing my opinion on that consideration. That would lead in future cases to the necessity for laying down the permissible proportion between employees and non-employees, a course which seems to me highly undesirable, if not impossible.

40 The matter was further considered by the Supreme Court in In re Bank Officers (State) Board (1921 A.R. 252). This was an application by the Bank of New South Wales to make absolute a rule nisi granted by the Supreme Court for a writ of prohibition, or, in the alternative, for a writ of certiorari, directed to the Court of Industrial Arbitration to restrain further proceedings upon an award made by Rolin J. (ibid p. 138), upon the grounds: (1) That the Court of Industrial Arbitration had no jurisdiction to

No.1(c)  
 Judgment of  
 Mr. Justice  
 Sheehy  
 12th November,  
 1963.  
 (continued)

entertain the application or make the award; (2) that the award was not an award determining or relating to an industrial matter; (3) that the United Bank Officers' Association was not validly registered as an industrial union of employees, and that, therefore, the Court of Industrial Arbitration had no jurisdiction to hear the application for the award.

Affirming the decision of Rolin J., Cullen  
 C.J. said at p. 258:-

10

The next ground put forward was this: that even assuming the association to be a legally constituted trade union, still its registration as an industrial union would be invalid inasmuch as it is not a trade union of employees, since three of its officers - the president, the secretary, and the treasurer - though members of the union are not employees in the industry. Perhaps it might have been sufficient in answer to that contention to say that the Court of Industrial Arbitration, having full jurisdiction on appeal from the registrar, who had refused cancellation of registration on this and other grounds, has decided that this is a validly constituted industrial union, and that that decision of theirs stands unimpaired and unchallenged, supposing it to be challengeable, by way of prohibition. But assuming that the question can be raised on the ground that a court of limited powers cannot give itself jurisdiction by an erroneous decision upon facts, I do not think that it is disputable at all that that would not be within their power. It does not seem to me that the mere fact that a trade union or industrial union employs persons as its officers who are not members of the union would be a ground for challenging the legal status of the union. Otherwise, that particular kind of association might never be able to get the advantage of employing specially skilled persons. A secretary and treasurer, for instance, though not members of the union, might be admitted to its meeting because of their office. There could be no more objection to the admission of a non-member to the meetings of the union than to the admission of a solicitor or a practical adviser of some other kind.

20

30

40

50

Does the case become any stronger, then, because these three officials were admitted as members of the union? I doubt whether the matter has any practical importance, because I do not see that it differs very much in substance from the employment of officials of this kind who are not members of the union at all.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

10 The balance of judicial opinion in these cases appears to favour the proposition that in ascertaining whether a body registered under the Trade Union Act is entitled to registration under the Industrial Arbitration Act as an industrial union of employees it would be necessary to have regard to a number of factors but the circumstance that the rules provided for the membership of some persons who were not employees in the industry concerned would not necessarily prevent its registration or affect its status as a union of  
20 employees.

Further support is found in In re Young and Others (1905 A.R. 202) when the President, Cohen J. considered the meaning of s. 12 of the Industrial Arbitration Act, 1901, which provided:-

30 Every dispute between a member of an industrial union and such union shall be decided in the manner directed by the rules of such union; and the president of the court, on the application of the trustees or other officers authorised to sue on behalf of such union, may order the payment by any member of any fine, penalty, or subscription payable in pursuance of the rules aforesaid, or any contribution to a penalty incurred or money payable by the union under an award or order of the court:

Provided that no such contribution shall exceed the sum of ten pounds.

40 The proceedings arose from action taken by the Hairdressers and Wigmakers Employees' Union against the respondents who had leased chairs in hairdressing saloons contrary to the rules and resolutions of the union. His Honor said at p.203, making the assumption that non-employees could be members of an industrial union, "One point taken by Mr. Kemmis is that I have no jurisdiction in this matter, because under these leases the

No.1(c)  
 Judgment of  
 Mr. Justice  
 Sheehy  
 12th November,  
 1963.  
 (continued)

relation of employer and employee did not exist as between the owner of the saloon and the men who leased the chairs from the owner. I am of opinion that I have jurisdiction, and that under s. 12 it is not a question of employer and employee. The jurisdiction conferred upon the President is 'to enforce payment by the members of the union of fines, penalties, and subscriptions which are imposed by the rules of the union.' That is a matter altogether independent of the relation of employer and employee, it is simply a question of membership, and a question whether the rules of the union, - apart from considerations I shall submit directly - authorise the imposition of the fines or penalties, and the subscriptions." 10

If it was assumed that as at the date of the registration of the amalgamation the rules were confined expressly to true employees additional support would be given to the view that the later rules were intended to have a wider effect by reason of the change of terminology. In this connection it is noticed that a document purporting to be the rules of the union appears in the official records in the section relating to documents filed pursuant to the Industrial Arbitration Act and is stamped and dated 7th February, 1944. In this document r. 7, Qualification for Membership, refers to persons "who are or may be employed ...." in the industries etc. However, as the rules lodged in connection with the Trade Union Act and stamped by the industrial registrar on the same day contain a membership rule referring to persons "who are working in or in connection with the industries...." the wording of the former document appears to have been an error but not one which discloses the true content of the earlier rules which should have been lodged with the application to register the amalgamation. 20 30 40

In my view, therefore, there is nothing in either Act or the amendments which could have had the effect of limiting the scope of the constitution rule in the manner suggested by Mr. Holmes, irrespectively of the point of time at which his argument is considered.

Some submissions were also directed to s. 7 of the Industrial Arbitration Act 1940-1961 which provides:-

Any person or body whose registration under the Acts hereby repealed or the Trade Unions Re-registration Act, 1920, as an industrial union is at the commencement of this Act in force, shall, unless and until such registration is cancelled and subject to such conditions as may have been imposed upon the registration thereof, be deemed to be an industrial union.

No.1(c)

Judgment of  
Mr. Justice  
Sheehy

12th November,  
1963.  
(continued)

10 In the light of the history of the union's registration it is doubtful whether s. 7 would have any effect in this case and having regard to the limited purposes of this section I do not consider that the use of the expression "industrial union" in contrast to the expression "industrial union of employees" used in s. 8 has any relevance to the issues.

20 Section 88E of the Industrial Arbitration Act has removed the restrictions which formerly prevented the union from invoking the protection of the Act for members who are bailee taxi drivers and there is now no jurisdictional bar to the hearing and determination of the application by the conciliation committee. I hold, therefore, that the question referred by the senior conciliation commission must be answered in the affirmative.

30 This and the preceding 25 pages is the Judgment of Mr. Justice Sheehy marked "SGW 3" exhibited to SAMUEL GEORGE FOWLER at the time of swearing his Affidavit on the fourth day of December 1963 at Sydney, Before me:

S.L. Leaver

Commissioner for Affidavits.

---

No. 2.

No. 2.

Affidavit of  
Charles William  
Bailes in  
support of Rule  
Nisi for  
Prohibition

AFFIDAVIT OF CHARLES WILLIAM  
BAILES IN SUPPORT OF RULE NISI  
FOR PROHIBITION

5th December,  
1963.

IN THE SUPREME COURT } Term No. 496 of 1963  
OF NEW SOUTH WALES }

EX PARTE

GREEN CAB SERVICE PTY.  
LIMITED, CHARLES WILLIAM  
BAILES and JACK  
ALEXANDER ANDERSON

10

RE

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

On the 5th day of December One thousand nine  
hundred and sixty-three CHARLES WILLIAM BAILES  
of 9 Moore Street Coogee in the State of New  
South Wales driver being duly sworn makes oath  
and says as follows:-

20

1. I am one of the abovenamed Applicants and  
I am a member of the Transport Workers Union of  
Australia (New South Wales Branch) holding  
membership No. 16428 and my Union dues are paid  
up to the 31st December, 1963.

2. I am opposed to the said Union expending  
its funds securing and protecting the interests  
of persons who are not "real employees".

SWORN by the Deponent on }  
the day and year first } Chas. W. Bailes.  
hereinbefore mentioned }  
at Sydney before me }

30

S.L. Leaver

Commissioner for Affidavits.



AFFIDAVIT OF JACK ALEXANDER ANDERSON  
IN SUPPORT OF RULE NISI FOR PROHIBITION

Affidavit of  
Jack Alexander  
Anderson in  
support of  
Rule Nisi for  
Prohibition.

IN THE SUPREME COURT  
OF NEW SOUTH WALES

} Term No. 496 of 1963

EX PARTE

GREEN CAB SERVICE PTY.  
LIMITED, CHARLES WILLIAM  
BAILLES and JACK ALEXANDER  
ANDERSON

5th December,  
1963.

10

RE

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

20

On the 5th day of December One thousand nine  
hundred and sixty-three JACK ALEXANDER ANDERSON  
of 117 Archer Street Chatswood in the State of  
New South Wales driver being duly sworn makes  
oath and says as follows:-

30

1. I am one of the abovenamed Applicants and I am a member of the Transport Workers Union of Australia (New South Wales Branch) holding membership No. 12077 and my Union dues are paid to the thirty-first December 1963.
2. I am opposed to the said Union expending its funds securing and protecting the interests of persons who are not "real employees".
3. Exhibited to me at the time of swearing this Affidavit and marked "JAA 1" is a true copy of the Rules of the said Union.

SWORN by the Deponent on }  
the day and year first }  
abovementioned at Sydney }  
before me: }

J.A. Anderson

S.L. Leaver

Commissioner for Affidavits.



No. 4.

No. 4.

Rule Nisi for  
Prohibition  
made by Mr.  
Justice  
Asprey

RULE NISI FOR PROHIBITION MADE  
BY MR. JUSTICE ASPREY

5th December,  
1963.

IN THE SUPREME COURT  
OF NEW SOUTH WALES

) Term No. 496 of 1963

EX PARTE

GREEN CAB SERVICE PTY.  
LIMITED, CHARLES WILLIAM  
BAILES and JACK  
ALEXANDER ANDERSON

10

RE

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

The 5th day of December 1963

Upon Motion made this day WHEREUPON AND UPON  
READING the Affidavits of SAMUEL GEORGE FOWLER  
sworn on the fourth day of December 1963, CHARLES  
WILLIAM BAILES sworn on the fifth day of December  
1963 and JACK ALEXANDER ANDERSON sworn on the  
fifth day of December 1963 AND UPON HEARING Mr.  
A.J. Rogers of Counsel and Mr. K.A. Cohen of Counsel  
for the Applicants I DO ORDER that the abovenamed  
JOHN EDWARD WHITFIELD and TRANSPORT WORKERS UNION  
OF AUSTRALIA (NEW SOUTH WALES BRANCH) do shew cause  
before this Court on Monday the 10th day of February  
1964 at the hour of 10 o'clock in the forenoon or  
so soon thereafter as the business of the Court  
permits why a Writ of Prohibition should not issue  
out of the Court directed to JOHN EDWARD WHITFIELD  
and TRANSPORT WORKERS UNION OF AUSTRALIA (NEW  
SOUTH WALES BRANCH) to restrain them from further  
proceeding with the Application by the TRANSPORT  
WORKERS UNION OF AUSTRALIA (NEW SOUTH WALES BRANCH)  
to the said JOHN EDWARD WHITFIELD the Industrial  
Registrar for approval to an amendment to Rule 5  
of the Rules of the TRANSPORT WORKERS UNION OF  
AUSTRALIA (NEW SOUTH WALES BRANCH) in terms of  
an Application dated 24th May, 1963, on the grounds  
that:

20

30

40

1. The TRANSPORT WORKERS UNION OF AUSTRALIA

(NEW SOUTH WALES BRANCH) being a registered Trade Union of Employees, and a registered Industrial Union of Employees is not entitled as a matter of law to adopt a rule allowing it to enrol as members persons who are not bound by contracts of employment.

No. 4.

Rule Nisi for  
Prohibition  
made by Mr.  
Justice  
Asprey

10 2. JOHN EDWARD WHITFIELD as Industrial Registrar has no jurisdiction to approve of a rule permitting a registered Trade Union of employees or Industrial Union of Employees to enrol as members persons who are not employees but merely deemed to be employees by virtue of the provisions of Section 88E of the Industrial Arbitration Act 1940-1961.

5th December,  
1963.  
(continued)

20 3. Any rule permitting a registered Trade Union of employees which is also registered as an Industrial Union of Employees to enrol as members persons who are not employees but merely deemed to be employees by virtue of the provisions of Section 88E of the Industrial Arbitration Act 1940-1961 is contrary to the provisions of the Industrial Arbitration Act 1940-1961 and the Trade Union Act 1880-1959.

K.A. Asprey J.

JUDGE

---

No. 5.

No. 5.

Rule  
discharging  
Order Nisi

RULE DISCHARGING ORDER NISI

3rd November,  
1964.

IN THE SUPREME COURT }  
OF NEW SOUTH WALES } Term No. 496 of 1963

EX PARTE GREEN CAB SERVICE PTY. LIMITED  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON

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

10

The 3rd day of November, 1964.

This application coming on to be heard on the  
Second day of November, 1964 and this day  
WHEREUPON AND UPON READING the Order Nisi made  
on the Fifth day of December 1963 by His Honor  
Mr. Justice Asprey, the Affidavits of SAMUEL  
GEORGE FOWLER sworn on the Fourth day of December,  
1963, and of CHARLES WILLIAM BAILES and JACK  
ALEXANDER ANDERSON sworn respectively on the Fifth  
day of December, aforesaid AND UPON HEARING Mr.  
J.W. Holmes of Queen's Counsel, Mr. K.A. Cohen and  
Mr. A. Rogers of Counsel for the applicants and Mr.  
J.B. Sweeney of Queen's Counsel and Mr. N. Wran of  
Counsel for the Respondent the Transport Workers  
Union of Australia (New South Wales Branch) and  
Mr. J.S. Withington for the Crown Solicitor for  
the State of New South Wales on behalf of the  
abovenamed Respondent John Edward Whitfield IT IS  
ORDERED that the Rule Nisi herein be and the same  
is hereby discharged AND IT IS FURTHER ORDERED  
that the Respondents costs of and incidental to  
this application be paid by the Applicant.

20

30

BY THE COURT

E. E. Lennon (L.S.)  
FOR THE PROTHONOTARY.  
CHIEF CLERK.

-----

71.

No. 6.

No. 6.

AFFIDAVIT OF SAMUEL GEORGE FOWLER IN  
SUPPORT OF APPLICATION FOR LEAVE TO  
APPEAL TO PRIVY COUNCIL

Affidavit of  
Samuel George  
Fowler in  
support of  
application  
for leave to  
Appeal to  
Privy Council

IN THE SUPREME COURT  
OF NEW SOUTH WALES

} Term No. 496 of 1963

EX PARTE

GREEN CAB SERVICE PTY LIMITED,  
CHARLES WILLIAM BAILLES and  
JACK ALEXANDER ANDERSON

13th November,  
1964.

10

Appellants. (Applicants)

RE

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

Respondents (Respondents)

On the 13th day of November One thousand nine  
hundred and sixtyfour

20

SAMUEL GEORGE FOWLER of 5 Boundary Street,  
Rushcutters Bay in the State of New South Wales  
Company Director being duly sworn makes oath and  
says as follows:-

1. I am the Managing Director of Green Cab  
Service Pty. Limited the first named appellant  
herein.

2. Green Cab Service Pty. Limited is a member  
of the Australian Taxi Council which is an  
Industrial Union of Employers.

30

3. John Edward Whitfield is and at all material  
times had been the Industrial Registrar appointed  
pursuant to the provisions of the Industrial  
Arbitration Act, 1940-1964.

4. The Transport Workers Union of Australia  
(New South Wales Branch) is a registered Trade  
Union of employees under the Trade Union Act,  
1903-1959 which is also registered as an Indus-  
trial Union of employees under the Industrial  
Arbitration Act.

No. 6.  
 Affidavit of  
 Samuel George  
 Fowler in  
 support of  
 application  
 for leave to  
 Appeal to  
 Privy  
 Council.  
 13th November,  
 1964.  
 (continued)

5. There is not now and never has been any award covering persons engaged in the driving of taxi cabs who are merely "deemed" to be employees pursuant to the provisions of Section 88E of the Industrial 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, 1956-1963 or entitled to the benefits thereof.

6. On or about the 18th day of September One thousand nine hundred and sixtytwo the respondent Union made application for an award to cover persons referred to in paragraph 5 hereof and by this application apart from award rates and conditions of employment sought the benefit of payment of Annual Leave at the rate of a minimum of Twentyfive Pounds (£25) per week for a period of three weeks per annum to each "deemed" employee. 10

7. The Australian Taxi Council which has a membership of approximately One thousand one hundred (1100) owners of taxi cabs was one of the respondents to the application referred to in paragraph 6. 20

8. Green Cab Service Pty. Limited is itself the owner of approximately Thirtytwo (32) taxi cabs which are driven by approximately Eighty-five (85) different persons who are not employees of the company but bailees of the taxis and "deemed" to be employees pursuant to the statutory provisions referred to. 30

9. On the application coming on for hearing the Senior Conciliation Commissioner referred to the Industrial Commission in Court Session the question of jurisdiction arising from the application. By a majority the Commission held in Judgment bearing date the Twelfth day of November One thousand nine hundred and sixtythree that no jurisdiction existed for entertaining the application because the rules of the respondent Union did not permit it to enrol amongst its members and make application on behalf of persons who were merely "deemed" to be employees by virtue of the provisions of the Industrial Arbitration Act. 40

10. I am informed and verily believe that by letter bearing date the Twentyfourth day of May

No. 6.

Affidavit of  
Samuel George  
Fowler in  
support of  
application  
for Leave to  
Appeal to  
Privy  
Council

13th November,  
1964.  
(continued)

10 One thousand nine hundred and sixtythree the respondent Union applied to the respondent Industrial Registrar for his approval to a proposed amendment to the rules of the Union whereby it was sought to include amongst persons eligible to be members of the Union "persons who are by virtue of the Industrial Arbitration Act, 1946-1960 deemed to be employees in or in connection with "the Industries previously referred to in the rules which would have included inter alia, taxicab drivers driving the vehicles of Green Cab Service Pty. Limited.

20 11. On the Fifth day of December One thousand nine hundred and sixtythree before the Industrial Registrar dealt with the application thus made a rule nisi for Prohibition was obtained from this Honourable Court seeking to restrain the Respondents from further proceeding with the proposed amendment. On the Third day of November One thousand nine hundred and sixtyfour the Full Court of the Supreme Court constituted by the Acting Chief Justice, Mr. Justice Manning and Mr. Justice Asprey discharged the rule nisi. Exhibited to me at the time of swearing this my Affidavit and marked with the letter "A" are copies of the Judgments of their Honours and of the order made on the said application.

30 12. The first named Appellant fears that upon the first named Respondent approving the proposed amendment to the rules of the Union a fresh application will be made for an award in respect of "deemed" employees and the effect of such an award would be to require the first named appellant to pay to its drivers (inter alia) three weeks annual leave at the rate of at least the basic wage of Fifteen pounds fifteen shillings (£15.15.0) per week which in respect of eightyfive (85) persons involves an annual committment substantially in excess of Five hundred pounds sterling (£500stg).

40 13. The first named appellant submits that the Judgment of Decision of the Full Court involves indirectly a claim or question to or respecting the sum of Five hundred pounds sterling (£500stg) or upwards.

14. It is further submitted that the questions involved in this matter are of great general and public importance and are otherwise fit and proper matters to be submitted to Her Majesty in Council

No. 6.

for decision.

Affidavit of  
Samuel George  
Fowler in  
support of  
application  
for leave to  
Appeal to  
Privy  
Council

13th November,  
1964.  
(continued)

15. Within the taxi Industry alone taxi cab owners numbering approximately One thousand one hundred (1100) persons avail themselves of the services of persons numbering more than One thousand one hundred (1100) who are "deemed" to be employees by virtue of the provisions of Section 88E. The result of the making of any award in respect of these persons would involve the payment by taxi owners of many thousands of pounds annually over and above payments presently made and would restrict by industrial regulation the operation of the taxi services, provided in the City of Sydney and substantially effect the taxi services provided in the State of New South Wales.

10

16. In addition to the drivers of taxi cabs there are considerable numbers of other persons embraced by the provisions of Sections 88B and 88E of the Act and by virtue of the regulations making power within that section the coverage of the section has already been extended to persons not specifically referred to and enumerated therein. Exhibited to me at the time of swearing this affidavit and marked with letters "B", "C", "D" and "E" are some of the regulations referred to. If all such persons may validly become members of Unions appropriate to their industry or calling the whole of the system of work in these industries will be substantially effected by reason of the preference that is required to be given to members of Unions the rights conferred on Union Officials as against employers, their books and premises and it may result in the enrolment in Unions of persons who do not otherwise desire to be members of a Union of employees.

20

30

17. The decision of this Court involves the consequence that many "deemed" employees who at the same time are employers of one or of a considerable number of other persons may be members of the same Union as their employees and entitled to sit on conciliation Committees established under the Industrial Arbitration Act either as employers representatives or as employees representatives. This would effect a complete change in the award making structure for the State of New South Wales, and may result in detriment to the general public.

40

10 18. Industrial Unions of employees enrolling within their membership "deemed" employees would cease to be bona fide Trade Unions of employees and lay themselves open to cancellation or withdrawal of such registration which would involve cancellation of their registration as an industrial union of employees and could result in a destruction of the conciliation and arbitral machinery in operation in the State of New South Wales and in great detriment to the public.

19. The supply of services and industry within the State would be substantially affected by the occurrence of any of the events in the foregoing paragraphs of this affidavit.

20. It is respectfully requested that leave be granted for the appellants to appeal to Her Majesty in Council against the decision of this Honourable Court.

20 SWORN by the Deponent on the day and year first hereinbefore mentioned, at Sydney, Before me: } S.G. Fowler

T.B. Graham  
A Justice of the Peace

No. 6.

Affidavit of Samuel George Fowler in support of application for leave to Appeal to Privy Council.

13th November, 1964.  
(continued)

No.6(a)

ANNEXURE "A" TO AFFIDAVIT OF SAMUEL GEORGE FOWLER OF 13TH NOVEMBER, 1964.

"A"

IN THE SUPREME COURT OF NEW SOUTH WALES }

Term No. 496 of 1963

30

CORAM: CLANCY, A.C.J.  
MANNING, J.  
ASPREY, J.

Tuesday, 3rd November, 1964.

EX PARTE GREEN CAB SERVICE PTY. LIMITED & ORS : RE WHITFIELD & ANOR.

JUDGMENT.

CLANCY, A.C.J.: This is an application to make

No.6(a)

Annexure "A" to Affidavit of Samuel George Fowler of 13th November, 1964.



No.6(a)  
Annexure "A"  
to Affidavit  
of Samual  
George Fowler  
of 13th  
November, 1964.  
(continued)

absolute a rule nisi for a common law prohibition directed to the Industrial Registrar of the Industrial Commission and the Transport Workers Union of Australia (New South Wales Branch) to restrain them from proceeding with an application to the first-named respondent by the second-named respondent for approval to an amendment of Rule 5 of the respondent union's rules.

In essence the application is founded upon the contention that there is no jurisdiction for such an application to be entertained.

10

The Union has applied under Rule 16 of the Regulations made under the Industrial Arbitration Act 1940 (as amended) to the Industrial Registrar to add to the description of 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."

20

The Language used in the proposed amendment leaves much to be desired. The words cited follow a list of exceptions of those who may be admitted as members. It is by no means clear that the word "including" governs the exceptions or the classes of persons who may be admitted to membership. However the case has been argued before us on the basis that the proposed amendment extends the classes of persons who may be members, and we are content to deal with it on that basis.

30

Reduced to its most simple terms, the question depends upon the true construction of s. 8(1) of the Industrial Arbitration Act, 1940 (as amended) which provides as follows:

"The Registrar may, on application made as hereinafter provided, register under this Act any trade union of employees...."

40

We are prepared to assume, as has been contended for the applicants, that an application to extend the class of persons who are eligible for membership should be treated in the same way as if it were an application for the registration

of a new union.

No.6(a)

Thus, according to the contentions of the applicants, the jurisdiction of the respondent Registrar is limited, in the sense that any extension of the eligibility provisions can be granted only if the class of persons whom it is proposed to make eligible can be comprised within the expression "trade union of employees".

Annexure "A"  
to Affidavit  
of Samuel  
George  
Fowler of  
13th November,  
1964.  
(continued)

10 The applicants contend that this is a composite expression and that persons who, for the purposes of the Industrial Arbitration Act, are to be "deemed" to be employees, cannot be said to be "employees" when considering eligibility for membership of a trades union registered under the Trades Union Act 1881 (as amended). Such persons, so it was said, must be "employees" within the ordinary meaning of that word.

20 On the other hand, it was contended for the respondent union that when s.8 speaks of a trade union of employees the word "employees" is to be given the meaning ascribed to it by the definition contained in s. 5. In this regard questions may have arisen when the rule nisi was granted in this case on 5th December, 1963, but the fact is that the definition was extended by Act No. 37 of 1964.

30 We have come to the conclusion that this extended definition is in terms which leave no doubt that the word "employees", if it is to be construed as so defined, covers the class to whom eligibility is proposed to be extended. Furthermore, we can see nothing in the context to justify our giving this word any other meaning.

It is not disputed that, in considering the matter, we must have regard to the provisions of the amending Act of 1964 because the question must be viewed in the light of the law which the respondent Registrar will be required to apply when the matter comes before him for consideration.

40 In these circumstances we have concluded that the application fails. The matter will be dealt with by the Industrial Commission on its merits.

Before disposing of the matter we desire to advert to two other matters. Firstly we are not to be taken as acceding to the appellant's contention that this is a case where the lack of

No.6(a)  
Annexure "A"  
to Affidavit  
of Samuel  
George Fowler  
of 13th  
November,  
1964.  
(continued)

jurisdiction appears on the face of the record, but in the light of our own conclusions; it is not necessary to say anything more in this regard.

Secondly, it may be doubted whether, if we had arrived at a different conclusion we would necessarily, as a matter of discretion, have made the rule absolute. In this regard counsel for the respondent union indicated that his client was content to allow the matter to be dealt with forthwith and elected to make no submissions on the point. We think it desirable to leave the question open for determination, if it should later arise.

10

We order that the rule be discharged with costs.

MR. HOLMES: Your Honour says, "with costs". So much of your Honour's determination turns upon this recent amendment in 1964 after the rule nisi was granted; that would not be a ground perhaps for anything more than each side paying their own costs. I just draw that to Your Honours' attention.

20

CLANCY, A.C.J.: No, we propose to make no order to that effect.

I certify that this and the 3 preceding pages are a true copy of the reasons for judgment herein of His Honour The Acting Chief Justice of New South Wales.

30

E. McDowell  
Associate

Dated 9th November 1964.

This and the preceding three pages are the annexure marked "A" referred to in the Affidavit of SAMUEL GEORGE FOWLER sworn at Sydney on the 13th day of November, 1964, Before me:

L.B. Graham  
J.P.

ORDER OF FULL COURT OF SUPREME COURT  
OF NEW SOUTH WALES GRANTING FINAL  
LEAVE TO APPEAL TO PRIVY COUNCIL.

Order of Full  
Court of  
Supreme Court  
of New South  
Wales granting  
final leave to  
Appeal to  
Privy Council

IN THE SUPREME COURT }  
OF NEW SOUTH WALES } Term No. 496 of 1963

EX PARTE GREEN CAB SERVICE PTY. LIMITED  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON

16th December,  
1964.

10 Appellants (Applicants)

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

Respondents (Respondents)

THE Sixteenth day of December, 1964.

20 UPON MOTION made this day pursuant to the Notice  
of Motion filed herein on the Eleventh day of  
December, 1964 WHEREUPON AND UPON READING the  
said Notice of Motion the affidavit of SAMUEL  
DAVID RATNER sworn on the Fifteenth day of  
December, 1964, and the Prothonotary's Certificate  
of Compliance, AND UPON HEARING what is alleged  
by Mr. K.A. Cohen of Counsel for the Appellants  
and Mr. N.K. Wran of Counsel for the Respondent  
30 IT IS ORDERED that final leave to appeal to Her  
Majesty in Council from the judgment of The Full  
Court of the Supreme Court of New South Wales  
given and made herein on the Third day of November,  
1964, be and the same is hereby granted to the  
Appellants AND IT IS FURTHER ORDERED that upon  
payment by the Appellants of the costs of pre-  
paration of the Transcript Record and despatch  
thereof to England the sum of Twentyfive pounds  
(£25. 0.0) deposited in Court by the Appellants  
as security for and towards the costs thereof be  
paid out of Court to the Appellants.

40

BY THE COURT  
FOR THE PROTHONOTARY,  
(L.S.)  
CHIEF CLERK.

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES.

GREEN CAB SERVICE PTY. LIMITED  
CHARLES WILLIAM BAILES and  
JACK ALEXANDER ANDERSON

(Applicants)

APPELLANTS

- and -

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

(Respondents)

RESPONDENTS

---

RECORD OF PROCEEDINGS

---

FRESHFIELDS,  
1 Bank Buildings,  
Princes Street,  
London E.C.2.  
Solicitors for the  
Appellants.

LIGHT & FULTON,  
24, John Street,  
Bedford Row,  
London W.C.1.

Solicitors for the  
First Respondent.

LAWRENCE GRAHAM & CO.,  
6 New Square,  
Lincolns Inn,  
London W.C.2.

Solicitors for the  
Second Respondent.