

THE STATUTORY LIMITATION OF SINGLE-INDUSTRY UNIONISM: A TIMELY REMINDER TO THE CRAFT UNION

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A. INTRODUCTION

Nineteen eight-three has heard a number of proposals for reform of our private sector wage-fixing system. One proposal currently is to tie award settlements to the ability of individual industry to pay. "Industry-based bargaining is very appropriate," says the Minister of Labour, "and would be welcomed by the Government."¹ "It's a sensible and logical system," he explains: "An industry is negotiating for that industry and is conscious of the capacity for that industry to meet wages demands."²

What is here advocated in truth is the abolition of New Zealand's established craft unions, and whether this Government will retain its zeal for industrial reform beyond the voluntary unionism-youth rates package³ will remain to be seen. However, the question which this article addresses is whether craft unions registered under the Industrial Relations Act 1973 are not already exceeding their statutory warrant by claiming representation rights over workers in employer-based industries beyond the craft or vocational industry in which the union obtained registration. Whilst in 1937 worker organisations were extended the option of registering in an industry common to either employers or workers,⁴ single-industry unionism remains the foundation principle on which union organisation and worker representation depend under our industrial legislation. Certain craft unions however, having once opted for a worker-based industry, would seem now to prefer the benefits and freedoms of a more open-ended jurisdiction. The legal question these unions pose is whether certain awards to which they are party are not defective on jurisdictional grounds and could not be declared invalid *in toto*.

The 1981-82 Books of Awards contain several current examples under the auspices of one national union, the New Zealand Federated Clerical, Administrative and Related Workers' Industrial Association of Workers. Although not the only craft union in recent years intent on growth and expansion, the question can be confined to this national Union and, for convenience, to one instrument to which it is named as party: New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners' Workers Award, dated 10/6/82.⁵ It is submitted that the jurisdictional requisite for the making of a valid award in this instance remains

¹ Christchurch Press, 9 July 1983.

² *Ibid.*

³ Introduced in the Industrial Law Reform Bill on 16 September 1983.

⁴ Industrial Conciliation and Arbitration Amendment Act 1937.

⁵ (1982) 82 Book of Awards 4931.

unfulfilled. It is in settlement of a "dispute" as defined by the Act⁶ that an award is made: here it is difficult to appreciate how the New Zealand Federated Clerical, Administrative and Related Workers I.A.W. could, as a matter of law, have been party to any "dispute" in the Law Practitioners' Workers Industry from which a valid Law Practitioners' Worker Award could have been made.

B. SINGLE-INDUSTRY UNIONISM: A STATUTORY CONCEPT

(a) Registration

Section 163 is colloquially known as the "statutory objects clause" of the registered union:

163. *What societies may be registered* — (1) Subject to the provisions of this Act, any society of persons lawfully associated for the purpose of protecting or furthering the interests of employers or, as the case may be, of workers, engaged in any specified industry or related industries in New Zealand may be registered as an industrial union. . . .

Although it has never been obligatory for employer or worker groups to register under the Industrial Conciliation and Arbitration statute, those who elect to do so must comply strictly with this provision. Hence the early ruling of the Full Court of the Supreme Court in *McDougall v Wellington Typographical I.U.W.*,⁷ holding the defendant Union's financial assistance to striking workers of a different union in an unrelated industry to be *ultra vires* and restrainable at the suit of an individual member. Following upon Stout CJ's terse rebuke, ". . . it [the Union] is not formed for the purpose of aiding workers in other industries",⁸ Chapman J explained: "I think the plain meaning of [section 163(1) of the Industrial Relations Act 1973] confines the operations of an industrial union to protecting or furthering the interest of workers in or in connection with the specified industry to which the constitution [of the Union] relates".⁹

Observe also the decision of Northcroft J in *Auckland Freezing Works I.U.W. v New Zealand Freezing Works I.A.W.*¹⁰ Adding upon those dicta in *McDougall*, Northcroft J issued an injunction against the defendant Association restraining it from continuing its affiliation with the Trade Union Congress on the ground that it was *ultra vires* the Association's statutory objects. Although a registered industrial association enjoined here, these organisations are no less confined in their activities under the Act to the one industry or related industries common to their member unions. Consequently, once observing the objects of the Trade Union Congress to embrace all workers in all industries, it was not necessary for decision that his Honour distinguish registered unions from industrial associations. Affirming the precedent adopted in *McDougall*:

⁶ See the Industrial Relations Act 1973, s.2.

⁷ (1913) 16 G.L.R. 309 (Full Ct of the S. Ct).

⁸ *Ibid.*, at 310.

⁹ *Ibid.*

¹⁰ [1951] N.Z.L.R. 341.

“It was decided that the principle laid down [by the House of Lords] in *Amalgamated Society of Railway Servants v Osborne* ([1910] AC 87) applied to unions in New Zealand created under the Industrial Conciliation and Arbitration Acts, and that the activities of a union were limited to the industry with which the union was concerned. . . .As the Industrial Conciliation and Arbitration Act. . . limited the functions of unions and associations of workers to industrial matters in their own particular industries, there cannot be implied an extension [of jurisdiction or powers] to other industries such as involved in this affiliation. . .”¹¹

It is noteworthy that his Honour did not confine his dictum to the specific matter of union affiliation in issue there (only by way of afterthought in fact was any reference appended). Addressing simply the “activities” and “functions” of unions and associations,¹² his Honour averred to the jurisdictional limitation for all purposes of the Act — without exception, that is, for award proceedings.

(b) Award proceedings

Awards are made in settlement of “disputes” which the Act defines¹³ and deems must be in existence to clothe the Court or a conciliation council with jurisdiction.¹⁴ For there to exist a “dispute” there must be parties to it: “dispute” is defined as one “arising between one or more employers or unions or associations of employers and one or more unions or associations of workers. . .”¹⁵ This requirement as to parties so broadly defined might appear permissive; but implicitly the Act is more exacting. Explicit to our earlier industrial legislation was this stipulation:

“27. (1) An industrial dispute may relate either to the industry in which the party by whom the dispute is referred for settlement to a Council or the Court. . . is engaged or concerned, or to any industry related thereto.”¹⁶

Section 109 of the Industrial Conciliation and Arbitration Act 1954 abbreviated this provision to read simply “An industrial dispute may relate to a particular industry or to two or more related industries”. This simplified version did not survive, in as many words, the repeal of the 1954 Act, yet its omission did not extinguish the principle on which the legislation was founded: that to be a party to a dispute the union in question must be engaged in the industry to which the dispute relates (or at least engaged in what the Act decrees is an industry related thereto¹⁷), to which the ensuing award will apply by way of settlement of the dispute. How, then, is one to discern whether a particular union is a party to a dispute? By reference to the specified industry or related industries in which the union applied for and was granted registration under the Act as an industrial

¹¹ *Ibid.*, at 348.

¹² *Ibid.*

¹³ Industrial Relations Act 1973, s.2.

¹⁴ For the technical requirements pertaining to “dispute” see *The Cromwell and Bannockburn Colliery Co Ltd v Otago Conciliation Board* (1906) 25 N.Z.L.R. 986 per Cooper J.

¹⁵ Industrial Relations Act 1973, s.2.

¹⁶ From the Industrial Conciliation and Arbitration Act 1925.

¹⁷ See the Industrial Relations Act 1973, s.162 (discussed *infra*).

Union or Association of Workers.¹⁸ Ideally, the union's actual membership rule should be consulted. However, not always should this be necessary since section 184 of the Act stipulates that the recorded name of every registered union "shall contain. . .the name of the industry or related industries indicative of the scope of membership".

At this juncture observe the following section 2 definitions; these confirm that parties to industrial disputes within the meaning of the Act must be engaged in the particular industry or related industries to which the dispute refers.

"Dispute" means any dispute arising between one or more employers, . . .and one or more unions or associations of workers *in relation to industrial matters*: . . .

"Industrial matters" means all matters affecting or relating to work done or to be done by workers, or the privileges, rights and duties of employers or workers *in any industry* . . .

"Dispute of interest" means a dispute created with intent to procure a collective agreement or award settling terms and conditions of employment of workers *in any industry*. . ."¹⁹

Sections 67 and 68 might also be noted. The former states that no dispute of interest shall be referred to the Court for arbitration unless it has first been referred to a conciliation council (a conciliated settlement is in form a collective agreement but it enjoys the same blanket coverage as an award of the Court,²⁰ and indeed is deemed to be an award²¹). The latter provides for the initial setting in motion of the Act's machinery for the settlement of interest disputes. Section 68 reads:

68. *Application to refer dispute to conciliation council* — (1) Any union, association, or employer, *being a party to a dispute of interest*, may apply in the prescribed form to the Court for the dispute to be heard by a conciliation council.²²

Coupled with the above section 2 definitions, this preserves the principle which the earlier sections, quoted above,²³ formerly made explicit.

Consider now the definition of "industry" and our specimen award, the New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners' Workers Award, dated 10/6/82. For all purposes of the Act:

"Industry" means —

- (a) Any business, trade, manufacture, undertaking, or calling of employers; or
- (b) Any calling service, employment, handicraft, or occupation of workers — and has the extended meaning assigned to it by subsection (2) of this section: [which is not pertinent to the instant matter]²⁴

¹⁸ Cf. The Industrial Relations Act 1973, s.163, quoted *supra*.

¹⁹ Emphasis added.

²⁰ See the Industrial Relations Act 1973, ss.83 and 89.

²¹ Industrial Relations Act 1973, s.82(9).

²² Emphasis added.

²³ *Viz.*, the Industrial Conciliation and Arbitration Act 1925, s.27(1) and the Industrial Conciliation and Arbitration Act 1954, s.109.

²⁴ Industrial Relations Act 1973, s.2.

The industry to which the above award relates, and applies by way of settlement of the dispute that gave birth to it, is the Law Practitioners' industry, based in this instance on the employers' vocation pertaining to paragraph (a) of the above definition. This is apparent from the scope and application of the Award. Clause 1 declares that the Award shall apply to and bind "all legal practitioners practising in the Wellington, Marlborough . . . [etc.] Industrial Districts and. . . all their workers. . ." (that is, regardless of employee vocation or job function). Yet the Union of workers party to the Award is the New Zealand Federated Clerical, Administrative and Related Workers' I.A.W.; a craft union constituted solely on the basis of the worker's vocation, whose registration as an industrial association of workers pertains to paragraph (b) of the definition without regard to employer classifications.

The Registrar of Industrial Unions explains²⁵ that there were at one time nine separate Legal Practitioner Employee Unions registered under the legislation. He informs that with the exception of the Legal Employees' Unions in the Northern and Taranaki Industrial Districts the certificates of registration of the remaining seven were cancelled during the years 1941-75²⁶ and their memberships taken over by the respective Clerical Workers' Unions for each District. Accordingly the Clerical Workers' umbrella organisation, the New Zealand Clerical Administrative and Related Workers' I.A.W., acceded to negotiating on behalf of all law practitioner employees outside of the Northern and Taranaki Industrial Districts; the national Award concluded, the unqualified preference provision thereupon made membership of the Clerical Workers Union a condition of the legal employee's employment.

But ". . . it [the Union]", to repeat Stout CJ, "is not formed for the purpose of aiding workers in other industries".²⁷ The following confirms that the Clerical Workers' I.A.W. could not, by reason of the Act, have been engaged in the industry to which the Law Practitioners' Workers Award applies so as to be capable of conferring jurisdiction *qua* party to the dispute.

C. THE AUTHORITIES

The present definition of "industry" was inserted immediately following the Court of Appeal decision in *Re Otago Clerical Workers' Award* in 1937, the Court quashing the then current Clerical Workers' Award owing to the defective registration of the Clerical Workers' Union named as party

²⁵ Letter to the writer, dated 16 December 1982.

²⁶ The dates of cancellation are as follows:

- (a) Blenheim Legal Employees 25 August 1941;
- (b) Invercargill Legal Employees 15 June 1957;
- (c) Nelson Law Practitioners Employees 24 June 1960;
- (d) Canterbury Law Practitioners Employees 1 June 1968;
- (e) Wellington Legal Employees 2 March 1972;
- (f) Otago Law Practitioners Employees 16 January 1975;
- (g) Greymouth Law Practitioners Employees 13 February 1975.

²⁷ *Supra*, note 7, at 310.

to the Award.²⁸ The ground for decision was that at that time the legislation made no provision for registration of a craft union. The then definition of "industry" was confined solely to the industry in which the employer was engaged: it meant "any business, trade, manufacture, undertaking, calling, or employment in which workers are employed".²⁹ Consequently clerical work could not, of itself, constitute an industry within the meaning of the Act and, so held the Court of Appeal, there could be no separate Clerical Workers' Award. These are some of the Court of Appeal dicta endorsing the basic principle circumscribing the Arbitration Court's award-making jurisdiction. Per Ostler J:

"[T]he whole scheme of the Act was to authorise the registration of unions of employers and workers *in an industry* and the making of awards *in each separate industry*."³⁰

"The scheme of the Act was for the settlement of *industrial disputes* between employers or industrial unions of employers, on the one hand, and industrial unions of workers, on the other. . . . It will thus be seen that an industrial dispute must refer to matters in dispute between the parties *in an industry as defined*."³¹

"The typical industrial dispute is between the employers *in an industry*, on the one part, and the union or unions of workers engaged *in that industry* but the Court has further power to entertain a dispute between the employers in two or more industries and the unions of workers engaged in those industries, *but only if those two or more industries are related to each other*. Beyond that, there cannot be found one word in the Act extending its power."³²

"The definition of 'industrial matters'. . . still refers to matters *in an industry*. . . .

[I]t was. . . the intention of Parliament. . . that the Court's jurisdiction to make an award *only in respect of a specified industry and related industries* should not be enlarged."³³

"Workers in an industry who desire. . . to refer an industrial dispute for settlement under the Act, must do so by their union, and to make the provisions of the Act effective *it is necessary that the members of the union should be limited to workers engaged in the industry concerned or in related industries*. To hold otherwise would lead to absurd results'. "³⁴

Per Kennedy J:

". . . an industrial dispute may be referred to a [conciliation] Council or the Court *by a party who is engaged or concerned in the industry to which the dispute relates or in any industry related thereto*."³⁵

²⁸ [1937] N.Z.L.R. 578, Callan J dissenting.

²⁹ Industrial Conciliation and Arbitration Act 1925, s.2. Cf. now paragraph (b) inserted in the definition as a result of the Court of Appeal decision, *ibid*.

³⁰ *Supra*, note 28, at 616. (Emphasis added.)

³¹ *Ibid.*, at 615. (Emphasis added.)

³² *Ibid.*, at 621. (Emphasis added.)

³³ *Ibid.*, at 625. (Emphasis added.)

³⁴ *Ibid.*, at 623, quoting from *in re The Industrial Conciliation and Arbitration Act, 1908, and its Amendments* [1916] G.L.R. 839, at 842 per Stringer J. (Emphasis added.)

³⁵ *Ibid.*, at 642. (Emphasis added.)

“This may be done [that is, have the dispute referred] by an industrial union which is concerned in a dispute in the specified industry or related industry for the protection or furtherance for which the union is constituted.”³⁶

“If desirous of using the machinery of the Industrial Conciliation and Arbitration Act, . . . for the settlement of industrial disputes, they must in each particular industry in which they are employed seek through the industrial union of workers in that industry or in related industries for the protection and furtherance of their interests.”³⁷

Per Myers CJ:

“. . . it is essential for the Court of Arbitration to see in every case that it has jurisdiction. . . . Before it can exercise jurisdiction, there must be an industrial dispute, and such a dispute must be in an ‘industry’.”³⁸

The object of the definition of “industry” inserted following that decision was to legitimate the craft union³⁹ (Both Ostler J and Callan J, dissenting, referred to the increasing numbers of craft unions securing registration and obtaining awards from the Court dating from 1908 and possibly earlier⁴⁰). The effect of the amendment was that an association of workers could henceforth seek registration on the basis that it was engaged in the industry common to the employers’ undertaking or in the industry common to the workers’ vocation. There are, in other words, now employers’ and workers’ industries. Observe, however, that each of the two limbs of the definition is exclusive of the other, such that they must be read disjunctively. For this reason a union registered on a vocational basis in the workers’ industry cannot later claim representation rights on the basis of the employer’s industry, for this would be to read the conjunction “or” separating the two limbs as though it were “and”.

The disjunctive nature of the definition was emphasised by the decision in *Attorney General v Smith*⁴¹ at a time when the conjunction preferred was indeed “and”, not “or”.⁴² The issue here arose from the Wellington District Hotel, Hospital, Restaurant and Related Trades Employees’ I.U.W.’s attempt to extend its membership by broadening its membership rule and by inserting in the registered name of the Union the word “Hospitals” after the word “Hotel”. “The question,” said Hutchison J, “is whether the amendment now made is one rendering eligible for membership workers engaged in or in connection with any specified industry or related industries’, having regard to the industry or related industries in respect of which the Union was originally incorporated and registered.”⁴³ To answer

³⁶ *Ibid.* (Emphasis added.)

³⁷ *Ibid.*, at 639. (Emphasis added.)

³⁸ *Ibid.*, at 607. (Emphasis added.)

³⁹ See the Industrial Conciliation and Arbitration Amendment Act 1937, s.2.

⁴⁰ *Supra*, note 28, at 640 and 645 *et seq* (respectively).

⁴¹ [1950] N.Z.L.R. 680 per Hutchison J (reversed by the Court of Appeal on different grounds, sub nom. *Wellington Hotel etc Employees’ I.U.W. v Attorney General, ex rel Just* [1951] N.Z.L.R. 1072).

⁴² See the Industrial Conciliation and Arbitration Amendment Act 1937, s.2; “or” was preferred to “and” upon the enactment of the Industrial Conciliation and Arbitration Act 1954, s.2.

⁴³ *Supra*, note 41, at 685.

his question it was thus necessary that his Honour first determine the industry in which the Union initially obtained registration.

His Honour held, first, the Union had always been in substance a domestic workers' union pertaining to para (b) of the definition of "industry"⁴⁴ — that is, as being engaged in the industry to which the workers' vocation related. It was explained:

"The effect of the present amendment. . . is, I think, that the Union, having in 1938 extended its scope in one direction, by virtue of s.2(1)(b) [that is, as a vocational union], to include domestic workers in hospitals, now claims the right. . . to extend its scope in another direction, by virtue of s.2(1)(a) [that is, on the basis of the employer's industry], to include all members of hospital staffs. I do not think that that may be done. . . it seems to me that. . . s.2(1). . . [must be] read disjunctively to the extent that the scope of the membership of a Union must be determined by reference either to para (a) or to para (b), including in each case related industries;. . .".⁴⁵

Likewise, the Clerical Workers' Union is a vocational union engaged in the workers' industry pertaining to para (b) of the definition. But in claiming the right to embrace and represent all employees of legal practitioners⁴⁶ the Union is attempting to straddle paras (a) and (b) of the definition contrary to what Hutchison J explained was permissible. His Honour rightly acknowledged that the Union could legitimately represent domestic workers employed in hospitals; but more importantly, the mere fact that hospitals employed domestic workers within the scope of the Union's membership rule did not convert the provision of hospitals into an industry related to the Union's domestic workers' industry. Otherwise His Honour noted:

". . . a Clerical Workers' Union embracing workers engaged in clerical work in many diverse undertakings (to take the same example as before of a Union constituted by reference to the vocation of the workers) could then extend its scope throughout all those undertakings, taking in many employees engaged in other vocations, which would result in a membership so wide as to go far beyond the words 'specified industry or related industries'. . .".⁴⁷

(The example is the Judge's.)

The Judge further held that the word "Hospitals" denoted a paragraph (a) industry pertaining to the employer's calling and therefore should not have been inserted in the Union's name.

D. THE REPRESENTATION PRINCIPLE

"It is axiomatic that a union cannot negotiate outside its charter — its membership rule."⁴⁸ Mazengarb's *Industrial Law* cites some thirteen decisions of the Court of Arbitration affirming this basic principle of union

⁴⁴ *Ibid.*, at 687-8.

⁴⁵ *Ibid.*, at 688.

⁴⁶ See cl. 1 of the Award, quoted *supra*, declaring the scope and application of the Award.

⁴⁷ *Supra*, note 41, at 688.

⁴⁸ *Inspector of Awards v Waikato Metal Supplies* (1974) 74 Book of Awards, per Mr Donnell (dissenting).

representation.⁴⁹ Blair J in *New Zealand Timber Workers' I.U.W. v Hutt Timber Co Ltd* expressed it thus: "It is a fundamental precept of our industrial law that a union of workers registered under the IC & A Act can validly negotiate for an instrument such as an award or industrial agreement only on behalf of workers who are eligible for membership in terms of its membership rule. . .".⁵⁰

The cases thus hold that an award is void to the extent that it purports to cover persons who, in terms of the worker's job-function, do not fall within the scope of the union's membership rule. This is not the same ground for invalidity advocated here. It is narrower since that portion of the award covering workers who are eligible for membership remains valid and intact. It is similar, however, in that the industry or related industries to which a union's constitution relates — on which the present ground turns — is determined in the same way by reference to the union's membership rule. The rationale shared by both grounds is that a registered union only has jurisdiction to negotiate on behalf of those workers for whom the union was formed in the first place.

Consider even on this narrower ground therefore those provisions of the New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners' Workers Award extending coverage beyond the scope of the Clerical Workers' membership rule. Could it be said, for instance, that qualified Chartered Accountants and Barristers and Solicitors of the High Court in the employ of legal practitioners are clerical workers within the confines of the Clerical Workers' membership rule?⁵¹ It is submitted not. The membership rule of the Canterbury Clerical Workers I.U.W., most of which is reproduced in clause 2 of the New Zealand Clerical Workers' Award declaring the scope and application of the national Award, defines "clerical worker" thus:

5.(b). . .the term "clerical worker". . .shall be deemed to include Clerks, Typists, Bookkeeping Machine Operators, Cashiers, Telephone attendants, Advertising Copywriters and Electronic Data Processing Machine Operators, being employees

⁴⁹ (1975, 4th ed. Smith, Szakats, Schellevis), citing in the commentary on s.82 of the Industrial Relations Act 1973: *Re Southland Building Trade I.U.W.* (1913) 12 Bk of Awards; *Re Auckland Laundry Employees* (1939) 39 Bk of Awards 210; *Re New Zealand (except Westland) Freezing Workers' Award* (1940) 40 Bk of Awards 2352; *Re New Zealand Freezing Workers* (1940) 40 Bk of Awards; *Re Northern Industrial District Retail-Shop Assistants Award* (memorandum) (1942) 42 Book of Awards, 546; *Berryman v Mayor, etc of Wellington* (1942) 42 Bk of Awards 1377; *Inspector of Awards v Wellington City Corporation* (1943) 43 Bk of Awards 329; *Re New Zealand Private Hotels Employees' Award* (1950) 50 Bk of Awards 56; *Inspector of Awards v CNL Assurance Society Ltd* (1953) 53 Bk of Awards 855; *New Zealand Timber Workers' I.U.W. v Hutt Timber Co Ltd* (1972) 72 Bk of Awards 3308; *Re Northern Builders' Labourers etc Award and New Zealand General Drivers' Award* (1972) 72 Bk of Awards 3134; *Re Taranaki Wellington and Canterbury Cool Store, etc. Employees' Award* (1974) 74 Bk of Awards; *Re New Zealand Racing etc. Clubs Attendants' Dispute of Interest* (1974) 74 Bk of Awards.

⁵⁰ *Ibid.*, at 3310.

⁵¹ Cf. cls. 3(e) (prescribing minimum weekly wages for Chartered Accountants) and 3(f) (prescribing minimum weekly wages for Barristers and Solicitors). *Quaere* also whether qualified Legal Executives covered by cl. 3(a) fall within the Clerical Workers' membership rule.

principally engaged in any one, or any combination of, the following types of work: Writing, typing, shorthand writing, bookkeeping and/or any other office machine operating, receiving or paying out of cash and/or giving change. . .attending or operating a telephone switchboard, advertising copywriting or the reading or checking of such copy, operating or programming Electronic Data Processing equipment, or any other form of clerical work. . .in relation to the correspondence, accounts, records or office administration of any establishment: . . .

With respect, the professional status of the qualified lawyer and Chartered Accountant is sufficient itself to distinguish these persons from the above animal, the clerical worker *simpliciter*.

E.

CONCLUSION

For the reasons above the New Zealand Federated Clerical, Administrative and Related Workers I.A.W. could not, as a matter of law, be party to a "dispute" in the law practitioners' industry.⁵² Subject to the presumption of validity prevailing in the absence of judicial decision, this means that the national Law Practitioners' Workers Award is technically of no legal effect leaving only the general Clerical Workers' Award governing the employment of legal practitioner employees properly falling within the scope of the Clerical Workers' membership rule. The practical result of a court ruling would be that clerical workers would be forced to accept slightly less favourable terms and conditions⁵³ whilst Chartered Accountants and Barristers and Solicitors (and possibly also trained Legal Executives within the definition of the Award⁵⁴) would be deprived of award coverage.

Also for the reasons above, the impediment to the Clerical Workers' Union representing legal practitioner employees *qua* legal practitioner employees could not be overcome simply by the Union amending its membership rule so as to expressly embrace these employees: the ratio of *Attorney General v Smith*⁵⁵ precludes this, as does Parliament's endorsement of this decision when, in 1954, it inserted "or" for "and" in the section 2 definition of "industry".⁵⁶ Obviously the surest way of saving those awards violating the principle of single-industry unionism would be by legislating retrospectively as in 1937 following the Court of Appeal decision

⁵² *Contra* the opinion of the Registrar of Industrial Unions, letter to the writer of 16 December 1982, expressing the view that the Clerical Workers' and Legal Practitioners' Employees industries are related as satisfying the statutory test contained in s.162(1) of the Industrial Relations Act 1973. But see the decision in *Attorney General v Smith*, *supra*, note 41. The Registrar further informs that there has never been any express declaration by notice in the *Gazette* (within the contemplation of s.162(2)) deeming the industries to be related for purposes of award proceedings.

⁵³ Eg., see the markedly different provisions for computing overtime under the Clerical Workers' and Law Practitioners' Workers Awards (respectively). Whereas under the general Clerical Workers' Award overtime is time worked in excess of or outside the normal 7½/8 hour day or 37½/40 hours per week (whichever was the custom prior to the coming into force of the Award), the Law Practitioners' Workers Award fixes overtime as any time worked in excess of or outside ordinary working hours "to be worked between 8 a.m. and 5.30 p.m." (see cls. 2 and 7).

⁵⁴ See cl. 3(a) of the Law Practitioners' Workers Award.

⁵⁵ *Supra*, note 41.

⁵⁶ See the Industrial Conciliation and Arbitration Act 1954.

in *Re Otago Clerical Workers Award*.⁵⁷ Short of that it might be possible to obtain the Governor General's intervention under section 162(2) and have the respective workers' and employers' industries declared to be related for purposes of award proceedings. Whilst section 162(2) is couched in broad terms ("The Governor General may from time to time, by notice in the *Gazette*, declare any specified industries to be related to one another, . . .") one commentator has questioned whether this power exists independently of subsection (1), or whether it is dependent upon the industries in question first satisfying the statutory test considered in *Attorney General v Smith*.⁵⁸ Whether there is in truth any substance to the question, that writer inclines to the view — rightly it is submitted — that subsection (2) is a "deeming" provision existing independently of subsection (1), which at least leaves open an avenue to cure the jurisdictional defect for future Law Practitioners' Workers Award without need to resort to Parliament.

Yet, on a practical note, is there reason to anticipate that things will not continue exactly as they are at present? Whatever the legal technicality, will it not simply be ignored? It is interesting to reflect that for something like 26 years prior to the Court of Appeal decision in *Re Otago Clerical Workers Award* it was known to the Department of Labour as well as employers in New Zealand that the many awards granted to craft unions during this period were beyond the Court's jurisdiction. The Minister of Labour in 1937 reflected upon this when Parliament that year finally had to intervene to nullify the decision on the Clerical Workers' Award.⁵⁹ He defended the Government's retrospective legislation by noting that neither the Department of Labour nor employers during this time had been desirous of upsetting the established practice; but that following the test case on the Clerical Workers' Award many unions would suffer "in exactly the same way", citing general labourers, drivers, engine-drivers, cleaners, caretakers, storemen, shop-assistants, "and possibly a good many others".⁶⁰ Perhaps, then, even for a country disposed towards excessively legal responses to labour disputes, legal principle is better ignored on occasion.

⁵⁷ *Supra*, note 28.

⁵⁸ D. L. Mathieson, *Industrial Law in New Zealand* (1970), at 71-2.

⁵⁹ N.Z.P.D. Vol. 248 (1937), at 408-409 per the Hon. Mr Armstrong citing 1911 as the year the jurisdictional issue became "well known".

⁶⁰ *Ibid.*

