

[HIGH COURT OF AUSTRALIA.]

O'KEEFE . . . . . APPLICANT ;  
COMPLAINANT,  
  
AND  
  
THE COUNTRY ROADS BOARD . . . . . RESPONDENT.  
DEFENDANT.

ON REMOVAL FROM THE SUPREME COURT OF  
VICTORIA.

*Constitutional Law—Inconsistency of State law and Commonwealth legislation—Relief by State of unemployment—Rate of wage—Applicability of Federal award—Order nisi to review decision of Court of Petty Sessions—Removal from Supreme Court of State to High Court — Order nisi remitted to Supreme Court — Unemployment Relief Act 1930 (Vict.) (No. 3866), sec. 7—Unemployment Relief Amendment Act 1930 (Vict.) (No. 3948), secs. 6, 8, 9\*—Commonwealth Conciliation and Arbitration Act 1904-1928 (No. 13 of 1904—No. 18 of 1928)—Judiciary Act 1903-1927 (No. 6 of 1903—No. 9 of 1927), secs. 40, 40A, 42 —The Constitution (63 & 64 Vict. c. 12), sec. 109.*

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SYDNEY,  
Mar. 24.  
Gavan Duffy  
C.J., Rich,  
Starke,  
Dixon,  
Evatt and  
McTiernan JJ.

By virtue of the *Unemployment Relief Amendment Act 1930* (Vict.) an Unemployment Relief Works Board was created to deal with unemployment within the State of Victoria, and the Board was empowered (*inter alia*) to fix rates of pay for work done under the scheme. A list of relief works recommended by that Board, and approved by the State Government, was forwarded to the Country Roads Board of the State, and money for wages earned on such

\* The *Unemployment Relief Amendment Act 1930* (Vict.) provides, by sec. 9, as follows :—“(1) The Governor in Council may appoint a board to be called the Unemployment Relief Works Board (hereinafter referred to as ‘the Board’). . . . (6) The daily rate of pay of, and the work allotted to, persons employed on any works for the relief of unemployment shall in all cases be as recommended by the Board but shall not be greater than—(a) In the case of work outside the metropolis the lowest monetary equivalent of the index figure published by the Commonwealth Statistician relating to the cost of living and representing the weighted average for four towns in Victoria (excluding the capital city) in respect of the quarter ended the thirtieth day of September one thousand nine hundred and thirty.”



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works was made available by the former Board from a special fund created for that purpose. A member of a Union, being unemployed, registered at the State Unemployment Relief Bureau, and later was called up for work. He was sent out to one of the said relief works by the engineer of the Country Roads Board. The wages paid to him were as fixed by the Unemployment Relief Works Board in pursuance of sec. 9 (6) of the Act, but were less than the wages prescribed for similar work by an award of the Commonwealth Court of Conciliation and Arbitration to which both the Country Roads Board and the Union were parties. He proceeded against the Country Roads Board in a Court of Petty Sessions for the balance, contending that his employer was that Board, which was bound by the award, but the summons was dismissed by the magistrate. On the return of an order nisi to review such decision the Full Court of the Supreme Court of Victoria was of opinion that the matter involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State, and the matter became removed to the High Court under sec. 40A of the *Judiciary Act* 1903-1927.

*Held*, by the High Court, (1) that such a question was not involved, and that therefore the matter was not automatically before the Court by virtue of sec. 40A of the *Judiciary Act*; (2) that although a question under sec. 109 of the Constitution might be involved the power given by sec. 40 of the *Judiciary Act* ought not to be exercised because facts raising such question had neither been distinctly proved nor admitted; and (3) that in the circumstances the Supreme Court should deal with the order nisi in the ordinary course.

Decision of the Supreme Court of Victoria (Full Court) reversed.

ORDER NISI to review removed from the Supreme Court of Victoria.

Edmond Francis O'Keefe proceeded against the Country Roads Board of Victoria by summons under the *Commonwealth Conciliation and Arbitration Act* 1904-1928 in a Court of Petty Sessions for the recovery of the sum of 11s. for work and labour done by him, a member of the Australian Workers' Union, which was a party to an award of the Commonwealth Conciliation and Arbitration Court, at the request of the Country Roads Board, a respondent bound by the same award. The sum sued for represented the difference between the amount claimed to be due for four days' work at 14s. per day, the rate prescribed by the award for work of the nature performed by O'Keefe, plus 1s. per day casual allowance, and the amount paid by the Country Roads Board in full settlement. The summons came on for hearing before a Police Magistrate at the Court of Petty Sessions, Melbourne, on 2nd March



1931. The evidence for the complainant showed that, being unemployed, he registered at the Unemployment Relief Bureau and, later, was called up for work. He was sent out from the Bureau by the engineer of the Country Roads Board, whom he had not seen prior to registration, to some works at Fyansford, and he worked there as a "pick and shovel" labourer for four days under the supervision of an overseer, for which he received the sum of £2 9s. as wages. A witness for the defence produced a communication, bearing date a few days prior to O'Keefe's employment, received by the Country Roads Board from the Premier of Victoria, as Chairman of the Unemployment Relief Works Board, for works to be carried out (*inter alia*) at Fyansford. At the commencement of the communication, in large type, appeared the following:—  
*"Unemployment Relief Amendment Act 1930, No. 3948. List of Relief Works recommended by the Unemployment Relief Works Board and approved by the Government"*; and it concluded with the words "Forwarded by direction to the Chairman, Country Roads Board." The list included earthworks at Fyansford. The ruling rate of wage was 12s. 3d. per day, as fixed by the Unemployment Relief Works Board in accordance with the provisions of sec. 9 (6) of the *Unemployment Relief Amendment Act 1930* (Vict.). The money for such work was supplied by the State Government from the Unemployment Relief Fund, which was a special fund created by the *Unemployment Relief Act 1930* (Vict.). On a form ordinarily in use by the Country Roads Board and bearing thereon in large type the words "Wages Returns Country Roads Board" the signature of O'Keefe appeared in acknowledgment of the sum of £2 9s. "being, in full," his "wages for the period" of the said four days. The Magistrate dismissed the summons holding that the Country Roads Board was not the actual employer of O'Keefe, and expressed the opinion that the employment in question did not come within the scope of the award.

O'Keefe obtained an order nisi calling upon the Country Roads Board to show cause why the Magistrate's decision should not be reviewed. On the return of the order nisi the Full Court of the Supreme Court of Victoria was of opinion that the matter involved

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a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State.

The matter thereupon became removed to the High Court under sec. 40A of the *Judiciary Act* 1903-1927, and now came on for hearing.

*Lazarus*, for the applicant. Both parties to the application are bound by an award of the Commonwealth Court of Conciliation and Arbitration covering work of the nature performed by the applicant, and the latter is, therefore, entitled to be paid the wages prescribed by the award irrespective of the provisions of a State Act purporting to authorize payment of a lesser amount. The work on which the applicant was engaged was being carried out by the Country Roads Board as part of its ordinary and proper functions.

[DIXON J. The statutory functions of the Country Roads Board do not appear to include the construction directly of permanent works connected with roads: such works are actually carried out by the various local councils. His Honor referred to secs. 23, 28, 38, 72 and 78 of the *Country Roads Board Act* 1928.]

The applicant's employer was the Country Roads Board, and not the Unemployment Relief Works Board: the source from which the money for wages earned on such work comes is immaterial.

[EVATT J. referred to *Holloway v. Forestry Commission of New South Wales* (1) and *Waterside Workers' Federation of Australia v. Gilchrist, Watt & Sanderson Ltd.* (2).]

The "wages return" is that of the Country Roads Board and is no different from other "wages returns" prepared by that Board in connection with its ordinary works. Although the allocation of the work is under the control of the Unemployment Relief Works Board, the supervision of such work is under the Country Roads Board. The employer is the Country Roads Board, which pays the wages to the employee and supervises the work.

[DIXON J. It would seem that sufficient facts are not before the Court upon the question whether the works were within the corporate powers of the Board, and whether moneys were lawfully available to pay award rates, as well as upon the question whether the Board as a corporation was the employer.]

*De Baun*, for the respondent, said that he was instructed to leave the matter in the hands of the Court, the respondent taking up the position that the requirements of the relevant statutes of the State of Victoria have been complied with, and that he made neither any submission nor admission.

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THE COURT delivered the following judgment :—

We are satisfied that this cause does not involve any question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State. It therefore is not before us automatically pursuant to sec. 40A of the *Judiciary Act*.

If the cause involved a question under sec. 109 of the Constitution, as it may do, we should have power to remove it under sec. 40 of the *Judiciary Act*. We think we ought not to exercise that power, because the facts which would raise any such question have not been distinctly proved, and are not admitted. Scant evidence was given as to the employment, and none as to the character of the works upon which the complainant was employed, and their relation to the funds and general powers of the Country Roads Board. The result is that the Supreme Court will deal with the order nisi in the ordinary course.

*Order nisi remitted to the Supreme Court.*

Solicitor for the applicant, *Mark Lazarus*.

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for the State of Victoria, by *J. V. Tillett*, Crown Solicitor for the State of New South Wales.

J. B.