[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION AND ANOTHER;

Ex parte

AUSTRALIAN WORKERS' UNION.

H. C. of A. 1957.

SYDNEY, *Dec.* 16-18, 20.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Conciliation and Arbitration—Industrial Dispute—Extending beyond limits of any one State—Dispute as to handling bagged wheat at Queensland port—Order made prescribing stacking of wheat to certain height to be done by waterside workers—Dispute at Tasmanian port between waterside workers and other workers as to area of work and operation of fork lift—Difficulty at West Australian ports as to where work of waterside workers should begin in loading cargoes of bulk wheat—Order made upon basis that three incidents constituted dispute extending beyond limits of one State—Each incident involving separate and unconnected industrial questions—No industrial dispute extending beyond limits of one State—Order made without jurisdiction—Prohibition—The Constitution (63 & 64 *Vict.* c. 12), *s.* 51 (xxxv).

An order made by the Commonwealth Conciliation and Arbitration Commission on the application of the Waterside Workers' Federation of Australia prescribed that the work of stacking bagged wheat discharged from ships at Pinkenba in the port of Brisbane in a shed of the Queensland State Wheat Board adjacent to the wharf should up to a certain height be done by members of the federation. But for the order the board would have employed members of the Australian Workers' Union, a registered organisation of employees, to do the work. The order was expressed to be binding upon the latter organisation and its members and the board as well as the federation and its members. At the hearing of the application which resulted in the making of the order it appeared that there was a dispute at Bell Bay, Tasmania, between the federation on the one hand and the Federated Engine-drivers' and Firemen's Association, the Transport Workers' Union and the Australian Aluminium Commission relating to the point at which cargo (not wheat) discharged from a ship should be transferred from members of the federation to other workers and in

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particular whether waterside workers should operate fork lifts. Further, a difficulty occurred in Albany, W.A., as to where the work of waterside workers should begin in loading bulk cargoes of wheat. The presidential commissioner saw a connexion between the incidents at Pinkenba and those at Bell Bay and Albany and inferred a dispute extending to the three ports at which they took place so as to enable him to deal with the matter at Pinkenba. The Australian Workers' Union objected to the order so made and moved for a writ of prohibition.

Held, that the three incidents mentioned involved separate and unconnected industrial questions depending upon local considerations and did not give rise to a dispute actual, pending or probable, extending beyond the limits of one State. Accordingly prohibition should go.

When a writ of prohibition is sought the burden of showing that there is an excess of jurisdiction rests on those seeking the writ. But once the basis on which jurisdiction is asserted is disclosed, the issue is defined and the existence or want of jurisdiction must depend upon the facts affecting the question thus ascertained and their legal complexion.

PROHIBITION.

On 22nd November 1957 *Taylor* J. on the application of the Australian Workers' Union as prosecutor granted an order nisi calling upon the Commonwealth Conciliation and Arbitration Commission and the Waterside Workers' Federation of Australia to show cause why a writ of prohibition should not issue directed to the respondents prohibiting them from proceeding further upon a certain order made on 19th November 1957 by *Ashburner* J. or alternatively from proceeding further upon the said order so far as it purported to bind the prosecutor or alternatively from proceeding on the said order so far as it purported to bind the Queensland State Wheat Board upon the grounds:—(1) That the Commonwealth Conciliation and Arbitration Commission had no jurisdiction to make the said order; (2) that the Commonwealth Conciliation and Arbitration Commission had no jurisdiction to make the said order so far as it purported to bind the prosecutor; (3) that the Commonwealth Conciliation and Arbitration Commission had no jurisdiction to make the said order so far as it purported to bind the Queensland State Wheat Board; (4) that the said order was not made for the prevention or settlement of any industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1956; (5) that the said order was not made for the prevention or settlement of any industrial dispute or any threatened impending or probable industrial dispute; (6) that the said order was not made for the prevention of any industrial dispute or any threatened impending or probable industrial dispute extending beyond the limits of any one State.

The relevant facts appear sufficiently in the judgment of the Court hereunder.

E. S. Miller Q.C. and *L. K. Murphy*, for the prosecutor.

J. D. Holmes Q.C. and *F. Paterson*, for the respondent Waterside Workers' Federation of Australia.

B. P. Macfarlan Q.C., *W. S. Sheldon* and *V. Watson*, for the Queensland State Wheat Board.

G. Wallace Q.C. and *D. B. Mackenzie*, for the Commonwealth Steamship Owners' Association and other interveners.

Cur. adv. vult.

Dec. 20

THE COURT delivered the following written judgment:—

This order nisi for prohibition raises for consideration the question whether an order dated 19th November 1957 and made by *Ashburner* J. as a presidential member of the Commonwealth Conciliation and Arbitration Commission is within jurisdiction and valid.

The order was made on the application of the Waterside Workers' Federation of Australia, an organisation of employees, which is a respondent upon this proceeding. Very briefly stated the purport of the order is to prescribe that the work of stacking bagged wheat discharged from ships at Pinkenba in the port of Brisbane in a shed of the Queensland State Wheat Board adjacent to the wharf shall, up to a certain height, be done by members of that organisation. But for the order the State Wheat Board would employ members of the Australian Workers' Union, also a registered organisation of employees to do the work. The order is accordingly expressed to be binding upon the latter organisation and its members and the State Wheat Board as well as the Waterside Workers' Federation and its members. The term of the order, which in truth is an award, is for five years from its commencement and its commencement was fixed, presumably by special direction under s. 57 of the *Conciliation and Arbitration Act* 1904-1956 as 21st November 1957.

The Australian Workers' Union objected to the validity of the order and moved for a writ of prohibition as prosecutor but it received the support of the State Wheat Board of Queensland which appeared at the hearing of the order nisi, having been served and afterwards added as a party, and on behalf of which it was contended on many grounds that the order was beyond the power

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of the learned presidential commissioner. The board is a governmental agency of the State of Queensland established by the *Wheat Pool Acts* 1920-1930 and continued by Proclamations made under s. 3 of that legislation. The State Board acts in co-operation with the Australian Wheat Board in the arrangements from time to time for dealing with the Australian wheat crop. A shed, No. 1, at Pinkenba belongs to the Commonwealth and is occupied, under lease it is stated, by the State Wheat Board. On the wharf side the entrance to the shed is about fifty feet from the wharf itself. Bagged wheat would be stacked in the shed, awaiting shipment, in normal years when there was an exportable surplus of wheat in Queensland. The stacking has been done by members of the Australian Workers' Union and they have been employed by the State Wheat Board. Apparently in the season of five to six years ago it was necessary to import wheat at Pinkenba. The ships carrying the wheat discharged at the wharf, the slings of bagged wheat were conveyed by gooseneck crane from the ship's side into the shed and stacked. It seems that using such a crane only the height of a stack would be limited to eleven or twelve bags. By the use of elevators however, the stacks were taken even as high as thirty bags. In that season the work was divided between members of the Waterside Workers' Federation and members of the Australian Workers' Union at the point where the bags were taken from the slings. The former loaded the bags upon the elevators at the foot, the latter took them from the elevators at the top and built up the stacks. No dispute arose then between the two classes of workers. It was not until February 1957 that a ship again discharged bagged wheat at Pinkenba. In that month two ships did so. As to the first nothing need be said but difficulties arose over the second. Motor trucks, and not gooseneck cranes, moved the bagged wheat to the place of stacking in the shed. A dispute arose as to whose work it was or where the division should be but it was settled on the footing that the waterside workers took the bags from the trucks and placed them on the elevators and the men of the Australian Workers' Union took the bags from the elevators and stacked them. Another ship carrying bagged wheat arrived at Pinkenba in July. Again difficulties arose but they were adjusted. The adjustment involved a mode of operation which *Ashburner* J. has characterised as grossly inefficient and when in October 1957 another ship arrived there was a refusal by the stevedore and by those representing the State Wheat Board to follow the method. This led to the calling of a board of reference. After that there was a cessation of work. *Ashburner* J. as a presidential commissioner intervened in the hope

of bringing the parties to an agreement. Eventually, on 21st October 1957, the Waterside Workers' Federation filed an application to the commission for an order that when bagged wheat being discharged from a vessel berthed at Pinkenba is being stacked in No. 1 shed, members of the Waterside Workers' Federation of Australia should be employed to perform the work of stacking the bags in the shed. Grounds in support of the application were stated but they went to the propriety of the order sought rather than to the jurisdiction to make it. Two of the grounds, it is true, end by asserting that the employer concerned, presumably the State Wheat Board, had refused to accede to the claim. This language may be the outcome of a desire to suggest the existence of an industrial dispute, but if so, obviously it was a purely local one. It would seem that the particular powers of the commission under Div. 4 of Pt. III of the *Conciliation and Arbitration Act* 1904-1956 were in view when the application was made. These powers relate to the stevedoring industry and rest in part upon the legislative power with respect to trade and commerce with other countries and among the States and in part upon the industrial arbitration power. *Ashburner* J. however, rejected the view that under Pt. III Div. 4 he obtained any power which would enable him to make the order sought by the application. Before he could exercise either of the powers conferred by s. 82 there must be an " industrial matter " and by definition (s. 81 (1)) that required " employers " in the defined sense and " waterside workers " in the defined sense. The definitions of the terms in s. 81 (1) throw you back on the definitions of the *Stevedoring Industry Act* 1956. The definition of " waterside worker " could not include members of the Australian Workers' Union and these were the persons employed by the State Wheat Board and the definition of " employer " would not reach the State Wheat Board. In this Court the correctness of the view adopted on this point by *Ashburner* J. has not been impugned. The basis upon which his Honour placed his jurisdiction to make the order complained of was the general power over industrial disputes conferred upon the Commonwealth Conciliation and Arbitration Commission by Div. 1 of Pt. III of the Act. In support of the application for a writ of prohibition the possibility in a matter concerning waterside workers of the commission falling back on Div. 1 of Pt. III was contested. It was said that it is a purpose of Div. 4 of Pt. III and the *Stevedoring Industry Act* 1954-1956 to state exhaustively the powers and authorities that may be exercised with respect to the work of waterside workers. It was also said that the extent to which members of the Waterside Workers'

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Federation (together with any other body brought within the definition of " union " in s. 7 (1) of the *Stevedoring Industry Act* 1956) are to have exclusive occupation of a field of work is defined or plotted out by the *Stevedoring Industry Act* 1954-1956 and the commission could not add to it, at all events in the exercise of any power lying outside Div. 4 of Pt. III.

Again it was said that the order made by *Ashburner* J. and now in contest made it incumbent upon the State Wheat Board to employ waterside workers for what, if they did such work, would fall within the definition of stevedoring operations notwithstanding that the State Wheat Board was not registered as an employer under s. 28 and probably could not qualify for registration. This would involve a difficulty to say the least of it under s. 41 of the Act of 1956. (It should perhaps be stated that the definition of " wharf " in s. 7 (1), a material term in s. 41, includes a shed adjacent to a wharf, as *Ashburner* J. held the shed in question to be).

These contentions raise some difficulties in the way of the validity or the operation of the order; but we do not think that they really arise in this case. The reason is that, even if Div. I of Pt. III was available to *Ashburner* J. as a source of power to make an order of the kind in question, the order could only be made in order to determine an industrial dispute extending beyond the limits of any one State.

Ashburner J. was of opinion that a dispute extending beyond one State did exist giving him sufficient warrant for the order he made. No formal finding was recorded and probably there is nothing upon which to base the application of s. 60 (2), but in any case s. 60 (2) can have no bearing on the existence of an industrial dispute without which the case would not fall under the constitutional power and that is the matter in question here. The formal order itself begins with a recital of the making to the commission of a notification under s. 28. None however was produced and it seems clear enough that the application by the Waterside Workers' Federation was treated as a sufficient notification. We do not therefore begin with any specification of the supposed two State industrial dispute. So far as the application is concerned that plainly is confined to the dispute or dislocation at Pinkenba. In the course of the discussion however before *Ashburner* J. it appeared that there was a dispute at Bell Bay, Tasmania, between the Waterside Workers' Federation and on the other side the Federated Engine Drivers' and Firemen's Association, the Transport Workers' Union and the Australian Aluminium Commission. The character of the dispute was described somewhat vaguely but it seemed to relate

to the point at which cargo (not of course wheat) discharged from a ship should leave the hands, so to speak, of members of the federation and go into the hands of other workers. The dispute, it was suggested, was whether waterside workers should operate fork lifts.

Then a difficulty occurred in Albany, Western Australia, as to where the work of waterside workers should begin in loading bulk cargoes of wheat. The wheat, so it appears, is conveyed by endless rubber belting from silos to gantries on the wharf and thence by means of spouts or booms to the ship's hold. These spouts are operated by switches on the gantries and the claim of the waterside workers was that the work on the gantries belonged to them.

In these two incidents and that at Pinkenba *Ashburner* J. saw a connexion and inferred a dispute extending to the three ports at which they took place.

Except for this there was nothing suggested on which an inference that an inter-State industrial dispute existed could be founded.

It is true that when a writ of prohibition is sought the burden of showing that there is an excess of jurisdiction rests on those seeking the writ. But once the basis on which jurisdiction is asserted is disclosed the issue is defined and the existence or want of jurisdiction must depend on the facts affecting the question thus ascertained and their legal complexion.

It may at once be conceded that the three incidents evidence a tendency on the part of the members or officers of the federation to seek to engross the work connected with the loading or discharge of ships for some distance so to speak along the line of the operations involved. But that is hardly more than a question of policy, if indeed it goes beyond a mere natural tendency. The three incidents have no other connexion and from their very nature must involve separate and unconnected industrial questions. This is shown by the very order itself. It deals with the situation at Pinkenba on its own footing, entirely ignoring any question at Bell Bay or Albany. The three matters are necessarily local questions depending on local considerations. The topographical features, the nature of the shed, the character of the cargo, these make the controversy at Pinkenba. To try to read into it some dispute, actual, pending or probable, extending beyond the limits of one State is artificial and unreal. It is perhaps worth noting that the parties to the questions at Bell Bay and at Albany are entirely different and are not defined. There is nothing brought forward in relation to those incidents that could have any bearing upon the dispute at Pinkenba.

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The fact is that except for the chance emergence during the discussion before *Ashburner* J. of the matters they would not have been heard of in relation to the question arising at Pinkenba. Further it may be observed that the circumstances of the whole incident at Pinkenba show that inherently it is a local matter. The reality of the dispute there is not in question. But equally plainly it does not extend elsewhere.

We are therefore under the necessity of holding that the order of 19th November 1957 was made without jurisdiction. The order nisi must accordingly be made absolute.

Order absolute for a writ of prohibition prohibiting the Commonwealth Conciliation and Arbitration Commission from proceeding further with or upon the order made by it on 19th November 1957 in the matter of C. No. 650 in the Commonwealth Conciliation and Arbitration Commission.

Costs of the prosecutor to be paid by the respondent federation.

Solicitors for the prosecutor, *J. J. Carroll, Cecil O'Dea & Co.*

Solicitors for the respondent Waterside Workers' Federation of Australia *C. Jollie Smith & Co.*

Solicitors for the Queensland State Wheat Board, *Dowling & Dowling*, Brisbane, by *J. W. Maund & Kelynack.*

Solicitors for the Commonwealth Steamship Owners' Association and other interveners, *Malleson, Stewart & Co.*, Melbourne, by *Allen, Allen & Hemsley.*

R. A. H.