HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — APPELLANT

AND

THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION & ANOR — RESPONDENTS

Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission
[2001] HCA 16
15 March 2001
M12/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 18 June 1999 and in place thereof, order that the application for certiorari and prohibition be dismissed with costs.*

3. *Application for special leave to cross-appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

S C Rothman SC with S J Howells for the appellant (instructed by R L Whyburn & Associates)

No appearance for the first respondents

C N Jessup QC with F Parry for the second respondent (instructed by Freehills)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with S G E McLeish intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission

Industrial Law (Cth) – Australian Industrial Relations Commission – Certified Agreement – Dispute over application of Agreement – Local dispute – Whether s 89A of the WR Act operates to limit the powers exercisable by the Commission in discharging its functions under s 89(b) of the WR Act and s 170MH of the IR Act.

Industrial Law (Cth) – Agreed dispute resolution procedure – Difference between agreed and arbitrated dispute settlement procedures – Certified Agreement containing provision for procedures relating to resolution of disputes – Provisions extend beyond s 170MH of the IR Act – Whether provisions wholly invalid.

Industrial Law (Cth) – Whether certification valid – Unresolved interstate industrial dispute – Negotiations with respect to terms and conditions to replace those contained in Award – Whether industrial situation under s 4 of the IR Act.

Costs – Whether statutory disentitlement to costs under s 347(1) of the WR Act has application to a proceeding for the issue of prohibition under s 75(v) of the Constitution.

Industrial Relations Act 1988 (Cth) s 170MA, s 170MH.

Workplace Relations Act 1996 (Cth) s 89(b), s 89A, s 347(1).

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. On 13 August 1996, the Australian Industrial Relations Commission ("the Commission") certified an agreement ("the Agreement") between the Construction, Forestry, Mining and Energy Union ("the Union") and Gordonstone Coal Management Pty Ltd ("Gordonstone"). The Agreement, which replaced the Gordonstone Coal Mine Consent Award 1993 ("the Award"), specified terms and conditions for production and engineering workers at the Gordonstone Mine in Queensland.

2 The Agreement contained provision, in cll 21 and 22, with respect to procedures to be adopted for the resolution of safety and industrial issues. Clause 22 of the Agreement is in the following terms:

> "AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
>
> (a) In the event of a dispute where resolution cannot be achieved without the assistance of the [Commission], the parties will exchange positions prior to any hearing taking place.
>
> (b) The parties to this Agreement agree to abide by any decision determined by the [Commission] which relates to a dispute at Gordonstone Mine.
>
> (c) Where it is agreed by the parties to resolve the matter with a mediator of the [Commission], both parties agree to abide by the recommendation of the chairman."

3 The questions that now arise are whether the Commission may, pursuant to cl 22 of the Agreement, proceed to determine certain issues in dispute and, if so, by what means. Those questions necessitate a consideration of provisions of the *Industrial Relations Act* 1988 (Cth) ("the IR Act") as it stood in 1996 and, also, provisions of the *Workplace Relations Act* 1996 (Cth) ("the WR Act") which came into force in 1997.

Relevant legislative provisions

4 In 1996, when the Agreement was certified, the IR Act provided for the certification of industrial agreements made by parties to an industrial dispute or

parties to an industrial situation[1]. "Industrial dispute" was relevantly defined in the IR Act to mean an interstate industrial dispute and a situation likely to give rise to an interstate industrial dispute[2]; "industrial situation" was relevantly defined to mean "a situation that, if preventive action is not taken, may give rise to ... an industrial dispute"[3].

5 By s 170MA(1) of the IR Act, the parties to an industrial dispute might agree on terms for the settlement of the matters in dispute or for the prevention of further industrial disputes between them. And by s 170MA(2), the parties to an industrial situation might agree "on terms for preventing the situation from giving rise to an industrial dispute between them". The Commission was empowered by s 170MC of the Act to certify such agreements. However, by s 170MC(1)(c), the Commission was required not to certify an agreement unless satisfied that it

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1 Sections 170MA(1) and (2). Note the WR Act now allows, in s 170LI, for agreements to be made with constitutional corporations or with the Commonwealth and, in ss 170LO and 170LP, for agreements between parties to an industrial dispute and parties to an industrial situation respectively.

2 Section 4(1) of the IR Act provided:

> "'**industrial dispute**' means:
>
> (a) an industrial dispute (including a threatened, impending or probable industrial dispute):
>
> (i) extending beyond the limits of any one State; and
>
> (ii) that is about matters pertaining to the relationship between employers and employees; or
>
> (b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a);
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> and includes a demarcation dispute (whether or not, in the case of a demarcation dispute involving an organisation or the members of an organisation in that capacity, the dispute extends beyond the limits of any one State)".

3 Section 4(1) of the IR Act.

"include[d] procedures for preventing and settling disputes ... about matters arising under the agreement". And s 170MH provided:

> " Procedures in an agreement for preventing and settling disputes between employers and employees covered by the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:
>
> (a) to settle disputes over the application of the agreement;
>
> (b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes."

6 Section 170MH of the IR Act, in the form set out above, was repealed with effect from 31 December 1996. However, by force of Pt 2 of Sched 8 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), which came into force on 25 November 1996, s 170MH of the IR Act continues to have effect with respect to agreements certified under that Act. This notwithstanding, the functions of the Commission are now to be found in the WR Act. By s 89(b) of that Act, the functions of the Commission include, in addition to its functions with respect to conciliation and arbitration of industrial disputes, "such other functions as are conferred on [it] by [that] or any other Act". Thus, the WR Act authorises the Commission to exercise those functions that it derives from s 170MH of the IR Act.

7 The Commission's powers are also to be found in the WR Act. Section 89A of that Act provides:

> " *Industrial dispute normally limited to allowable award matters*
>
> (1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):
>
> (a) dealing with an industrial dispute by arbitration;
>
> (b) preventing or settling an industrial dispute by making an award or order;
>
> (c) maintaining the settlement of an industrial dispute by varying an award or order."

The matters referred to in ss 89A(2) and (3) have come to be known as "allowable award matters" and it is convenient to refer to them as such. "Industrial dispute" has a defined meaning (except in relation to Pt XA which is not presently relevant) which, leaving aside demarcation disputes, incorporates the need for an industrial dispute to extend beyond the limits of any one State[4].

8 One of the questions that arises in these proceedings is whether s 89A of the WR Act limits the powers which may be exercised by the Commission when discharging the functions derived from s 170MH of the IR Act. To understand how that question arises, it is necessary to recount the history of these proceedings.

History of the proceedings

9 On 27 February 1997, the Union notified the Commission of "an alleged industrial dispute" concerning various matters that were said to be "the subject of the problem resolution procedure in the ... [A]greement". When the proceedings came before Hodder C, on 7 March 1997, it was contended on behalf of Gordonstone that the Commission did not have power to deal with the matter or, perhaps, some of the matters in dispute because of the operation of s 89A of the WR Act. In this regard, it should be noted that the parties accept that at least some of the matters in dispute are not allowable award matters. Because of the public importance of the question raised before Hodder C, the matter was referred to a Full Bench of the Commission pursuant to s 107 of the WR Act[5].

10 Three issues emerged in the proceedings before the Full Bench. The first was whether the Agreement was validly certified; the second was the validity and scope of cll 21 and 22 of the Agreement; the third was the operation of s 89A of the WR Act. The Full Bench held that the Agreement was validly certified and that cll 21 and 22 validly operate to confer functions on the Commission, but, in accordance with s 170MH of the IR Act, only with respect to "disputes over the

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4 The definition is identical with that contained in the IR Act set out at fn 2.

5 Section 107(2) of the WR Act permits "a party ... or the Minister" to apply to have a matter dealt with by the Full Bench of the Commission. Pursuant to s 107(4) all such applications are to be referred to the President.

application of the agreement"[6]. Finally, the Commission held that s 89A of the WR Act does not operate to limit the powers exercisable by the Commission in discharge of the functions derived from the Agreement[7]. Without determining whether the matters in issue were disputes over the application of the Agreement (a question that is still undetermined), the Full Bench referred the proceedings back to Hodder C[8].

11 Shortly after the Full Bench of the Commission handed down its decision, Gordonstone applied to this Court pursuant to s 75(v) of the Constitution for certiorari to quash the decision of the Full Bench and for prohibition to prevent further proceedings in the Commission. The application, which was based on the same three grounds which had been argued before the Full Bench, was remitted to the Federal Court of Australia. It was held by a Full Court of the Federal Court (Black CJ, Heerey and Goldberg JJ) that prohibition should issue to prevent the Commission proceeding otherwise than on the basis that s 89A of the WR Act applies to the proceedings[9]. From that decision the Union was granted special leave to appeal to this Court.

12 After the proceedings in the Federal Court, Gordonstone ceased to be and Kestrel Coal Pty Limited ("Kestrel") became the manager of the Gordonstone mine. By order of this Court, Kestrel was substituted as second respondent to the appeal. At the hearing of the appeal, Kestrel sought an extension of time and special leave to cross-appeal to contest the validity of the certification of the Agreement and, in the alternative, the validity of cll 21 and 22.

Certification of the Agreement

13 It is convenient to deal first with the contention made on behalf of Kestrel that the Agreement was not validly certified. It was argued in this Court, as it

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6 *Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd* (1997) 75 IR 249 at 258-259, 260.

7 (1997) 75 IR 249 at 262.

8 (1997) 75 IR 249 at 267.

9 *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* unreported, Federal Court of Australia, 18 June 1999 at 2 [4].

had been before the Full Bench of the Commission and, later, before the Full Court of the Federal Court, that the Agreement was made between parties who were neither parties to an industrial dispute nor parties to an industrial situation as required by s 170MA of the IR Act.

14 The application for certification of the Agreement was supported by two statutory declarations which identified two dispute notifications pursuant to s 99 of the IR Act[10], namely, "C No 40206 of 1966, C 40170 of 1996", as "the dispute in settlement, part settlement or prevention of which the agreement [was] made." A statutory declaration filed on behalf of Gordonstone in support of the certification of the Agreement also contains the following question and answer:

> "*Identify the facts on which it is asserted that the agreement is between parties to an industrial situation, and is for preventing the situation from giving rise to an industrial dispute between them:*
>
> NEGOTIATIONS TOOK PLACE BETWEEN THE PARTIES THROUGHOUT 1995 AND 1996 TO DATE IN AN ATTEMPT TO RESOLVE A NUMBER OF CLAIMS AND COUNTER CLAIMS BY THE PARTIES. NO FURTHER CLAIMS ARE PERMITTED FOR THE LIFE OF THE AGREEMENT."

15 The Full Bench of the Commission proceeded on the basis that neither of the dispute notifications referred to in the statutory declarations in support of certification of the Agreement identified an interstate industrial dispute or a situation that was likely to give rise to an interstate industrial dispute but stated that "it would be obtuse for [it] to not accept that the whole of the Agreement could properly be said to be made between the parties to an industrial situation."[11]

16 The finding by the Full Bench that the Agreement had been made by parties to an industrial situation was upheld by the Full Court of the Federal

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10 Section 99 of the IR Act relevantly provided that as "soon as an organisation or an employer becomes aware of the existence of an alleged industrial dispute ... the organisation or employer shall notify the relevant Presidential Member or a Registrar."

11 (1997) 75 IR 249 at 258.

Court[12]. In this regard, the Full Court noted that when the Agreement was certified, there was an interstate industrial dispute arising out of a log of claims served in August 1995 which was still unresolved and considered that, in that context, the Agreement, which replaced the Award, was a "new means for preventing an industrial situation from giving rise to an interstate industrial dispute"[13].

17 In addition to the unresolved interstate dispute of 1995, a number of matters relevant to the question whether there was an industrial situation to which the Union and Gordonstone were parties are to be discerned from the dispute notifications earlier referred to. The first – a notification by Gordonstone on 29 March 1996 – stated that there was "a potential industrial dispute between [it] and its employees, members of the [Union]" and that it involved "the failure of the parties to reach agreement on the operation of the mine site work model in the Coal Preparation Plant." In proceedings before the Commission with respect to that notification, the potential dispute was said to be "part of award discussions ... that commenced on 7 February 1995."

18 The second dispute notification, dated 23 April 1996, was a notification by the Union of "the existence of negotiations on a proposed agreement between [the Union] and ... [Gordonstone] which may give rise to an Industrial Dispute". That notification identified the "issue that may give rise to [a] dispute" as "[t]he inability of the parties to reach agreement on that part of the Gordonstone Agreement relating to the Work Model of the Mine."

19 One other matter relevant to the question whether the Union and Gordonstone were parties to an industrial situation is to be discerned from cl 5 of the Agreement. That clause provides that the Agreement "replace[s] in total the terms and conditions of [the Award]". It is to be inferred from that provision that the claims and counterclaims and the negotiations referred to in the statutory declarations in support of certification of the Agreement related to the terms and conditions which, it was contemplated, might be exhaustive of the industrial

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12 *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153 at 161 [27].

13 (1999) 93 FCR 153 at 161-162 [28].

rights and obligations of Gordonstone and its employees, in the sense that they would wholly replace those for which the Award then provided.

20 Given that Gordonstone and the Union were parties to an unresolved interstate industrial dispute and were negotiating with respect to terms and conditions to replace those contained in the Award, the conclusion is well open that their failure to reach complete agreement might lead to a situation in which the parties differed on all aspects of their industrial relations, which situation might result in an interstate industrial dispute if preventive action were not taken. In other words, it was well open to the Full Bench of the Commission and to the Full Court of the Federal Court to conclude that there was an industrial situation, as defined in s 4 of the IR Act, to which the Union and Gordonstone were parties, and that, in consequence, the Agreement was validly certified. That being so, Kestrel's application for special leave to cross-appeal on this aspect of the Federal Court's decision should be dismissed.

Validity of cll 21 and 22 of the Agreement

21 Two related arguments were put in support of the contention that, even if the Agreement was otherwise validly certified, cll 21 and 22 are invalid. The first was that, by reason of s 51(xxxv) of the Constitution, a certified agreement can only validly provide as to procedures for the resolution of disputes which are within the compass of the industrial dispute or situation which led to its making. And as cll 21 and 22 extend to any dispute, it was said, they are wholly invalid. Additionally, it was put that, because cll 21 and 22 extend beyond disputes over the application of the Agreement, they are not authorised by s 170MH of the IR Act and are, thus, wholly invalid.

22 As s 170MH of the IR Act authorises the Commission to "settle disputes over the application of [an] agreement", it is convenient to first consider the validity of cll 21 and 22 on the basis that those clauses provide only with respect to disputes of that kind. Essentially, that is the same as asking whether s 170MH of the IR Act exceeds constitutional power. Before turning to that issue, however, it is convenient to note what was said with respect to agreements between parties to an industrial dispute or an industrial situation in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[14].

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14 (1996) 187 CLR 416.

23 It was held in the *Industrial Relations Act Case* that it is incidental to the legislative power conferred by s 51(xxxv) of the Constitution for the Parliament to legislate to give effect to agreements by which parties to an industrial dispute or an industrial situation settle matters that are in issue between them, provided that there is a relevant connection between the terms of the agreement and the dispute or situation that gave rise to it[15]. In that context, it was said that s 170MA of the IR Act was to be construed on the basis "that the Commission [could not] certify an agreement if any of its terms lack[ed] a relevant connection with the dispute or industrial situation which [might] otherwise attract [the Commission's] award-making powers."[16] It was further explained that "the Commission [could] certify an agreement if and only if it could have made an award in the same terms."[17]

24 Two matters should be noted with respect to what was said in the *Industrial Relations Act Case*. The first is that that case was concerned with award making powers which were not circumscribed by a provision of the kind now found in s 89A of the WR Act. The second is that the Commission might, under the legislation then in issue, exercise its award making powers to make a consent award[18]. The making of a consent award does not involve the exercise of arbitral power.

25 The distinction between arbitral power, on the one hand, and, on the other, the Commission's award making power is important because the question whether the Parliament may authorise the Commission to participate in agreed dispute resolution procedures does not raise the same issues that arise when a

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15 (1996) 187 CLR 416 at 537-538 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

16 (1996) 187 CLR 416 at 537 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

17 (1996) 187 CLR 416 at 537 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

18 See s 111(1)(b) of the IR Act. The same is true under the WR Act: see s 111(1)(b).

party to an industrial dispute seeks the making of an arbitrated award with respect to procedures of that kind.

26 So far as concerns arbitrated provisions with respect to dispute resolution procedures, it should be noted that a dispute as to the powers the Commission should, but does not have, is not an industrial dispute and will not ground an award by which the Commission gives itself power to do that which it is not otherwise authorised to do[19]. Moreover, an arbitrated dispute resolution provision will be invalid to the extent that it purports to confer judicial power on the Commission or any one else[20]. For present purposes, it is sufficient to note that a power to make a binding determination as to legal rights and liabilities arising under an award or agreement is, of its nature, judicial power.

27 Although the Commission may not arbitrate to give itself either powers or functions that the Parliament has not authorised or to provide for procedures which would involve the exercise of judicial power, it may exercise its arbitral power to provide for dispute resolution procedures. And that is so notwithstanding that the disputes or differences which are the subject of those procedures are not, themselves, interstate industrial disputes. So much follows from *R v Hegarty; Ex parte City of Salisbury*[21].

28 *Hegarty* concerned an award made in settlement of an interstate dispute, which award provided for the review of classifications applicable to individual employees and also provided for the establishment of a Board of Reference to perform various functions, including "to inquire into and if possible settle differences between [the Union party to the award] and any respondent [to the award]"[22]. It was held in that case that it did not matter that the difference there in question, namely the reclassification of a single employee, was not "in itself an interstate [industrial] dispute ... [if] the [dispute resolution] provisions

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19 See *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312.

20 See *R v Gough; Ex parte Meat & Allied Trades Federation of Australia* (1969) 122 CLR 237. See also *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 625 per Mason J, 632-633 per Murphy J.

21 (1981) 147 CLR 617.

22 (1981) 147 CLR 617, cited by Mason J at 624.

constitute[d] the settlement of an interstate industrial dispute and ... the procedures and machinery ... [were] designed to ensure that the settlement of that dispute is effective and enduring."[23]

29 What was said in *Hegarty* applies, but with some modification, to an agreement by parties to an industrial situation. As already indicated, it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial situation to agree on the terms on which they will settle the matters in issue between them conditional upon their agreement having the same legal effect as an award[24]. So, too, it is incidental to that power for the Parliament to give legal effect to agreed procedures for maintaining a settlement of that kind and, also, for it to authorise the Commission to participate in those procedures.

30 There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.

31 Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.

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23 (1981) 147 CLR 617 at 629 per Mason J.

24 (1996) 187 CLR 416 at 538.

32 To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, it merely authorises the Commission to exercise a power of private arbitration. And procedures for the resolution of disputes over the application of an agreement made by parties to an industrial situation to prevent that situation from developing into an industrial dispute are clearly procedures for maintaining that agreement. Parliament may legislate to authorise the Commission to participate in procedures of that kind. Accordingly, s 170MH of the IR Act is valid.

33 Although it is by no means clear, it may be assumed, for present purposes, that cll 21 and 22 are designed to ensure more than the maintenance of the Agreement. That, however, does not have the consequence that those clauses are wholly invalid. Nor does it follow that they are wholly invalid because they extend beyond what is authorised by s 170MH of the IR Act.

34 The parties to an industrial situation are free to agree between themselves as to the terms on which they will conduct their affairs. Their agreement has effect according to the general law. If their agreement is certified, it also has effect as an award. To the extent that an agreement provides in a manner that exceeds what is permitted either by the Constitution or by the legislation which gives the agreement effect as an award, it cannot operate with that effect. But the underlying agreement remains and the validity of that agreement depends on the general law, not the legislative provisions which give it effect as an award.

35 It was not suggested that the general law operates to render cll 21 and 22 of the Agreement wholly invalid. Nor does s 170MH proceed on the basis that an agreed dispute resolution procedure is valid only if it is confined to disputes over the application of an agreement. That being so, there is no reason why cll 21 and 22 should not operate so far as it is concerned with disputes of that kind. Accordingly, this aspect of Kestrel's argument for special leave to cross-appeal should also be dismissed.

Section 89A of the WR Act

36 It was held by the Full Court of the Federal Court that the Commission's powers which derive from s 170MH of the IR Act are confined by s 89A of the

WR Act because of the "arbitral character" of those powers[25]. For present purposes, it may be accepted that those powers are arbitral in character. Even so, s 89A is not concerned to limit powers which are arbitral in character. Rather, it is concerned to limit the matters which, although the subject of an industrial dispute, may be the subject of arbitration or of an award or order, including the variation of an award or order. It does so by providing that, for specific purposes, an industrial dispute is taken to include only allowable award matters.

37 As earlier noted, the purposes specified in s 89A(1) are:

> "(a) dealing with an industrial dispute by arbitration;
>
> (b) preventing or settling an industrial dispute by making an award or order;
>
> (c) maintaining the settlement of an industrial dispute by varying an award or order."

And as also earlier noted, "industrial dispute" is a defined term which incorporates the need for an interstate element.

38 The disputes with which the Commission is now asked to concern itself are disputes over the application of the Agreement. Because the Agreement applies only at the Gordonstone mine, they are, necessarily, local disputes to which pars (a) and (b) of s 89A(1) can have no application. Similarly par (c) has no application because the Commission is not being asked to vary an award or order.

39 Section 89(b) of the WR Act authorises the Commission to exercise those functions under cl 22 of the Agreement which the Commission derives from s 170MH of the IR Act. Section 89A does not limit the powers which may be exercised by the Commission in discharging those functions. Accordingly, the Full Court of the Federal Court erred in issuing prohibition.

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25 (1999) 93 FCR 153 at 164 [43].

Conclusion

40 Kestrel's application for special leave to cross-appeal should be dismissed. The Union's appeal should be allowed.

Costs

41 It was submitted for the Union that, because of s 347(1) of the WR Act, this Court has no power to award costs in this matter. Section 347(1) provides:

> " A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause."

42 Where the right or duty in issue in proceedings is one that owes its existence to an enactment of the Parliament, the matter is properly described as a matter arising under that enactment[26]. Thus in *Re Polites; Ex parte Hoyts Corporation Pty Ltd*, an application for mandamus to compel compliance with a duty imposed on the Industrial Relations Commission by the IR Act was held to constitute a matter arising under that Act. That was because the duty in question owed its existence to the IR Act[27]. However, it does not follow that all applications under s 75(v) of the Constitution with respect to the powers and duties of the Commission involve matters arising under the legislation by which its powers and duties are governed.

43 It was pointed out in *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* that relief by way of prohibition is not relief for the enforcement of a right or duty created or conferred by statute[28]. Rather, the right

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26 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 per Latham CJ; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 93.

27 (1991) 173 CLR 78 at 93.

28 (1997) 189 CLR 654 at 657.

in issue when relief is sought by way of prohibition is the right conferred by s 75(v) of the Constitution to compel an officer of the Commonwealth to observe the limits of that officer's power or jurisdiction. The corresponding duty to observe those limits also derives from s 75(v). And that is so even if the asserted limits derive from statute. Accordingly, it was correctly held in *McJannet* that s 347(1) of the IR Act has no application to a proceeding for the issue of prohibition under s 75(v) of the Constitution[29].

44 Although the Union contended that there was no power in this Court to award costs in the present matter, in the event that its argument in that regard was unsuccessful it sought costs. In accordance with the principles in *McJannet*, it is entitled to its costs.

Orders

1. Dismiss the application for special leave to cross-appeal with costs.

2. Allow the appeal with costs, set aside the orders of the Full Court of the Federal Court of 18 June 1999 and, in lieu thereof, order that the application for certiorari and prohibition be dismissed with costs.

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29 (1997) 189 CLR 654 at 657.