THE AUSTRALIAN WORKERS' UNION

v.

THE HONOURABLE SIR JOHN COCHRANE MOORE & ORS.

ORDER

Application for leave to amend notice of motion refused.

Motion dismissed.

THE AUSTRALIAN WORKERS' UNION

v.

THE HONOURABLE SIR JOHN COCHRANE MOORE & ORS.

Application for a writ of certiorari heard by way of notice of motion before a Full Court in Sydney on 25th October, 1976.

Order of the Court given on 26th October, 1976:

Application for leave to amend notice of motion refused.

Motion dismissed.

Publication of Reasons

	Barwick C.J.	
*	Gibbs J.	Refuse leave
*	Stephen J.	to amend.
*	Mason J.	Dismiss motion.
	Jacobs J.	

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& ORS.

JUDGMENT BARWICK C.J.

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Newman is a township near Mt. Whaleback in the Ophthalmia Ranges in Western Australia and approximately 260 miles from the Australian coast. Mt. Newman Mining Co. Pty. Ltd. (Newman Mining) manages the affairs of a group of companies which are beneficially interested in a mining lease granted by the Western Australian Government in the Mt. Whaleback area. Newman Mining has been responsible for the construction of Newman. The purpose of constructing the township was to accommodate persons working in or in connection with the mining operations at Mt. Whaleback. The iron ore won there is transported to Port Hedland for shipment by bulk ore carrier. Approximately 4,800 people live at Newman. Of these, about 1,700 are employed by Newman Mining. The remainder of the population comprises the families and dependants of the employees of Newman Mining, employees of the respondent S.H.R.M. (Aust.) Pty. Limited (S.H.R.M.) and other persons and companies that provide services for the town, as well as their families and dependants.

Married men employed by Newman Mining live with their families in Newman in houses and single men in dormitories. The married men and their families provide their

own food purchased in the town. There is a kitchen and dining mess in the town for the single men. There are other messes at or near the mine site. All the buildings in the township, and the various mess halls at the site of the mine have been provided by Newman Mining. S.H.R.M. under a contract with Newman Mining provides food for persons employed at or about the mine at the cost of Newman Mining. The food is cooked and prepared in the main kitchen and mess in the town. Single men employed by Newman Mining eat their breakfast and evening meal in the mess in the town. S.H.R.M. cooks and prepares a midshift meal in the kitchen of the town and then serves it to the employees of Newman Mining at the mess halls at or near the mine site. The meals are cooked and prepared by staff employed by S.H.R.M. Besides providing food, S.H.R.M. at the cost of Newman Mining, launders sheets, pillow cases and towels used by the single men employed at or about the mine, for which purpose S.H.R.M. employs laundresses; cleans the works offices of Newman Mining, makes beds in the single quarters and cleans the quarters, the kitchen and messes used by persons employed at or about the mine. It also cleans the married quarters when a family leaves Newman and before the next family moves into possession. For this purpose, S.H.R.M. employs cleaners, housekeepers, housemaids and garbage attendants.

S.H.R.M. leases a butcher's shop, a fruit and vegetable shop, cake shop and milk bar from Newman Mining. In the shops it employs persons and sells food to persons employed at or about the mine and to their families and dependants. It also operates a bakery, a warehouse for

dry goods, and for frozen and chilled goods, a laundry and dry cleaning shop, which are used for the purposes of fulfilling its obligations under its contract with Newman Mining. The bakery also sells bread generally to persons living in the town and the laundry and dry cleaning shop is available and used by persons living in the town.

Hamersley Iron Ore Limited (Hamersley) mines iron ore deposits at Mt. Tom Price and Dampier in Western Australia. A township has been built at Mt. Tom Price (Tom Price) by Hamersley to house and service its employees and their families. Hamersley has contracted with the respondent Poon Brothers (W.A.) Pty. Limited (Poon Brothers) to supply services to it and its employees substantially similar to those provided by S.H.R.M. at Newman for Newman Mining. Although there is little evidence on the point, we are to assume that conditions in Tom Price are relevantly similar to those at Newman.

The Australian Workers' Union, the applicant, is a registered organisation of employees whose rules describe the industry in or in connection with which it is registered. Its rules as to the eligibility of persons to become its members, as amended, contain the following relevant provisions:

> "Subject to these Rules every bona fide worker, male or female, engaged in manual or mental labour in or in connection with the following industries or callings, namely ... metalliferous mining ... and ... employees engaged in or in connection with ... all work in laundries."

On 21st August, 1975, the applicant served upon the respondents a log of claims. In consequence, an agreement was reached between the respondents, S.H.R.M. and Poon Brothers on the terms of a consent

award covering the employees of those two respondents in their work for those respondents at Newman and Tom Price respectively. A Commissioner of the Australian Conciliation and Arbitration Commission (the Commission) found that upon the service of the log a dispute arose between the applicant and the respondent companies.

However, before the consent award was made, the Federated Liquor and Allied Industries Employees Union of Australia (the first respondent) intervened to object to the making of this award because, as it submitted, no relevant dispute existed between the applicant and the respondent companies, for the reason that the employees of the respondent companies sought to be covered by the proposed award were not eligible to be members of the applicant.

The Commissioner, however, affirmed that a dispute did exist and made an award in terms of the draft consent award. The first respondent then appealed to the Full Bench of the Commission pursuant to s. 35 of the Conciliation and Arbitration Act, 1904 as amended (the Act), on the ground that the Commissioner ought not to have found that there was a dispute and consequently had no jurisdiction to make the consent award. On 25th June, 1976, a Full Bench of the Commission upheld the appeal, revoked the findings of the Commissioner that a dispute existed and in purported pursuance of s. 35(9) directed the Commissioner to set aside the award under s. 59 of the Act.

On 13th July last, the applicant sought from this Court an order nisi for certiorari to quash the order of the

Full Bench. My brother Gibbs, who heard the application, directed that the application be made upon notice to a Full Court: see Order 55 Rule 2. The applicant thereupon filed a notice of motion for the issue of a writ of certiorari to quash the orders of the Full Bench on the ground that they were erroneously made because in fact the employees of the respondent companies at Newman and Tom Price were eligible to be members of the applicant organisation.

If there were no dispute at the relevant time between the applicant and the respondent companies, the Commissioner had no jurisdiction to make the consent award. Consent thereto did not confer jurisdiction which otherwise did not exist. Unless the applicant could represent the employees of the respondent companies who were sought to be covered by the proposed award, there could not be a relevant dispute between the applicant and the respondent companies. Thus, the crucial question for the purpose of determining the Commissioner's jurisdiction is whether the applicant could so represent those employees. It was submitted by the applicant that it could do so because those employees were eligible to be members of the applicant organisation.

It is well settled that an eligibility clause expressed in the terms of the eligibility clause of the applicant should be construed as relating to the industry of the employer; that is to say, that persons to be eligible to be members of the organisation must be employed in an industry carried on by their employer which satisfies one or more of the descriptions in the eligibility clause: see e.g. The King v. Hibble & Ors. ex part

Broken Hill Pty. Co. Ltd., 29 C.L.R. 290 at p. 297. In relation to the present circumstances that means that, to be eligible for membership of the applicant, the employees of the respondent companies must be employed by the respondent companies in or in connection with the industry of metalliferous mining. Whether or not they are so employed is a question of fact: see e.g. The King v. Hibble (supra)loc. cit.

The question therefore which will decide the validity of the consent award is whether the respondent companies do in fact carry on an industry of or in connection with metalliferous mining, or put another way, whether the employees of the respondent companies are employed by those companies in or in connection with the industry of metalliferous mining carried out by those companies. It is said that this question should be answered in the affirmative because, though plainly enough the respondent companies carry on business as caterers and suppliers of services such as cleaning, laundering and the like, in so far as they do so at Newman or Tom Price respectively, they carry on an industry of or in connection with metalliferous mining. The reasons advanced for this conclusion seem to be various and are sought to be relied on cumulatively as well as severally. It is said that the work of catering and of supplying the other described services is done by the respondent companies under contract with Newman Mining and Hamersley which unquestionably are concerned with metalliferous mining and only require that work or those services for the purposes of metalliferous mining. It is then said that the persons for whose benefit the work is done, whether by way of the supply of food or of other services, are predominantly either employees of Newman Mining or Hamersley

or the families or dependants of such employees; that the townships of Newman and Tom Price are mining townships having been established by the respective companies in conformity with statutory requirements: see e.g. the Iron Ore (Mount Newman) Agreement Act, 1964-1967, and in any case necessarily in order to carry on metalliferous mining in remote areas; that the sole reason for the presence in the towns of Newman and Tom Price of the persons for whose benefit the food and services are provided by the respondent companies is the work of mining iron ore; that if the mining companies themselves performed the same work of providing food and of services such as the companies give, the persons employed by the mining companies in the performance of that work would be employed in or in connection with metalliferous mining; and that the work done by the employees of the respondent companies at Newman and Tom Price respectively was so intimately related to the working of the mines that it was in fact work done in connection with metalliferous mining.

The Full Court of the Commission answering such submissions said: "We are of the view that although the catering facilities provided by the respondent employers to those engaged in the mining industry are necessary for those people and would not exist in their absence, the catering industry as performed by Poon Bros. and S.H.R.M. is identifiably different from the mining industry and when a mining employer decides to obtain the services of a contractor instead of himself catering, the catering becomes a service and is not part of the mining industry whatever it may have been before".

In my opinion, this was a correct view. The business of the respondent companies was quite distinct and separate from that of the mining companies engaged in metalliferous mining. True it is that the respondent companies served the mining companies and provided them with commodities and services the provision of which was desirable if not indeed necessary for the maintenance of the workforce to carry on the mining operations. But that does not mean that in contracting to provide and in providing these commodities and services the respondent companies entered into the business of the mining companies so as themselves to be carrying on metalliferous mining; nor were their employees employed in connection with that industry. Their businesses remained distinct. Though serving the mining industry, the respondent companies did not carry on metalliferous mining or a business or industry in connection with metalliferous mining. Although employees of the mining companies who provided food or services of the kind furnished by the respondent companies might have been held to be working in the industry of metalliferous mining, such work done by an independent contractor has a different nature or quality. It cannot be said to be done as an integral part of the metalliferous mining operation. Sir Owen Dixon in R. v. Central Reference Board & Ors., ex parte Thiess (Repairs) Pty. Ltd., 77 C.L.R. 123 at p. 141, thought that the separateness of the establishments in point of control, organisation, place, interest, personnel and equipment might furnish a relevant discrimen in deciding the question of fact. Sir John Latham in the same case, at p. 135, thought that the substantial character of the industrial enterprise in which the employer and employee were concerned was decisive

of the question whether the employee was engaged in an industry of given description. Here the substantial character of the industrial enterprise in which the respondent companies are engaged is that of catering and of providing cleaning, etc. services. That they should at a particular place perform such work exclusively for mining companies and under contract with them does not require or permit the conclusion that in doing so the respondent companies carry on an activity in or in connection with metalliferous mining or that their employees are employed in or in connection with such an industry. None of the reasons put forward by the applicant for a contrary conclusion, whether taken separately or cumulatively, warrant such a conclusion.

In my opinion, subject to a possible qualification which I shall mention, the employees of the respondent companies working at Newman or Tom Price in the performance of the work I have briefly described were not eligible to become members of the applicant. Consequently, the applicant had no standing to represent them industrially or to raise on their behalf a dispute with the respondent companies as to their, the employees', terms and conditions of employment at Newman and Tom Price respectively. That being so, no relevant dispute arose consequent upon the service on the respondent companies of the log of claims. In my opinion, the conclusion of the Full Bench that the applicant did not have "constitutional coverage to create the dispute" was correct. The ground of the notice of motion therefore is not made out.

It is possible that some of the employees of the respondent companies may have been engaged "in or in connection with ... work in laundries" within the meaning of the eligibility clause. I find no need to decide whether such employees were so eligible. But, if they were, the applicant would only have had standing to raise a dispute on their behalf. But the applicant sought to raise a dispute on behalf of the employees generally, and the award which was made by the Commissioner dealt with employees such as cooks, kitchen-hands, stewards and stewardesses, housekeepers, housemaids, garbage attendants and snack bar attendants as well as laundresses. It appears both from the reasons given by the Commissioner and from the judgment of the Full Bench that in the proceedings in the Commission the provisions of the eligibility clause thought to be relevant were those which covered workers engaged in labour "in or in connection with ... metalliferous mining", and that no reliance was placed on the provision relating to "work in laundries". It will be remembered that the first respondent is the Federated Liquor and Allied Industries Employees Union of Australia. The suggestion that the words relating to "laundries" were relevant was first raised during the course of argument in this Court, but it is apparent that the fact that the respondents employed some laundry workers did not entitle the applicant to represent all the workers employed by the respondents and to obtain an award on behalf of the employees whose work was unconnected with laundries.

Having reached this conclusion, there is no need to pursue other questions which might in other circumstances have arisen. Suffice it to say that, in my opinion, the Commissioner

lacked authority to make the consent award because no relevant dispute in fact existed. Thus good ground exists to prohibit the implementation of the consent award.

There is no need to consider whether certiorari was either an appropriate or an available remedy in case the award had been validly made.

The applicant sought leave to amend the notice of motion filed pursuant to the direction of my brother Gibbs. By the proposed amendment, the applicant intended to challenge the constitutional propriety of the decision of the Full Bench as to the validity of the consent award. But, as in my opinion the consent award was not validly made - and its validity is the substantial matter in issue between the parties - and because if need be this Court could prohibit the Commissioner and the parties to the consent award from proceeding upon it, it is unnecessary in this case to enter into the question whether the Full Bench had jurisdiction to decide that there was no dispute and in consequence of its decision to direct the setting aside of the award made by the Commission without jurisdiction. In my opinion, leave to make the proposed amendments to the notice of motion should be refused.

The motion should be dismissed.

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JUDGMENT GIBBS J.

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I have had the advantage of reading the reasons prepared by the Chief Justice, agree with them and have nothing to add.

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JUDGMENT

STEPHEN J.

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I agree.

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JUDGMENT MASON J.

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I would refuse leave to make the amendments to the notice of motion sought by the applicant and I would dismiss the motion for the reasons given by the Chief Justice.

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JUDGMENT JACOBS J.

I agree that the application for a writ of certiorari should be refused and that the request to amend the notice of motion in order to claim prohibition should also be refused. I agree with the reasons expressed by the Chief Justice. The question was not argued whether s. 60(2) of the Act which by s. 35(11) is applied to proceedings under s. 35 constitutes an obstacle to the grant of the relief which was sought. This question is not concluded by The King v. Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust.) Ltd. (1949), 78 C.L.R. 389. See per Fullagar J. in The King v. Blakeley and others; ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia (1950), 82 C.L.R. 54, at pp. 88-89.

IN THE HIGH COURT OF AUSTRALIA

THE AUSTRALIAN WORKERS' UNION

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REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY 17 NOVEMBER 1976