

1985-085

IN THE MATTER OF AN APPLICATION FOR A WRIT OF  
PROHIBITION AND A WRIT OF CERTIORARI AGAINST  
COMMISSIONER McKENZIE (A COMMISSIONER OF THE  
AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION),  
THE AUSTRALIAN WORKERS UNION AND NATIONWIDE FIELD  
CATERING PTY. LTD.

EX PARTE THE FEDERATED LIQUOR AND ALLIED INDUSTRIES  
EMPLOYEES UNION AND THE FEDERATED LIQUOR AND ALLIED  
INDUSTRIES EMPLOYEES UNION (WESTERN AUSTRALIAN  
BRANCH) OF WORKERS

JUDGMENT  
(Oral)  
30/10/1985

DAWSON J.

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On 25 October 1985 I granted an order nisi directed to the respondents to show cause why further proceedings in the Conciliation and Arbitration Commission in Matter C. No. 4190 of 1985 should not be prohibited. That matter is before Commissioner McKenzie, who made a finding on 11 September 1985 that an industrial dispute exists between the second-named respondent, the Australian Workers Union ("the AWU") and the third-named respondent, Nationwide Field Catering Pty Ltd ("Nationwide"). At the same time as I granted an order nisi for a writ of prohibition, I granted an order nisi for a writ of certiorari to show cause why the Commissioner's finding should not be quashed. I declined to grant ex parte a stay of the proceedings before Commissioner McKenzie and the prosecutors now make this application for a stay upon summons. The application is opposed by the AWU and Nationwide.

The dispute found by Commissioner McKenzie arises from a log of claims served by the AWU upon Nationwide, which is

engaged in providing catering services for persons employed at the Argyle Diamond Mine in the Kimberley region of Western Australia. The prosecutors contend that Nationwide employees are not eligible for membership of the AWU, that Commissioner McKenzie was in error in finding the existence of a dispute and that he lacks jurisdiction to proceed in the matter before him. The question which arises in the proceedings in this Court is a question of the construction of the eligibility provisions of the rules of the AWU.

Commissioner McKenzie has already commenced hearing the matter before him and has carried out an inspection of the Argyle Diamond Mine at the request of the AWU. The matter is again listed before him for hearing in Perth later today and he has indicated that he will then hear any application for an adjournment by the prosecutors pending the determination of the applications for prerogative writs.

It may be said at the outset that this application for a stay is for this reason premature and that I ought not to assume that Commissioner McKenzie will refuse an application for an adjournment if it should be appropriate to grant it. However, I think that there are more substantial grounds why the application before me should fail.

Although I have power to grant a stay (see O.55, r.10; Re Marks (1981) 55 A.L.J.R. 395; 34 A.L.R. 208), I have

formed the conclusion that I should not exercise that power for a number of reasons.

In the first place, the only inconvenience arising from a continuation of the proceedings before Commissioner McKenzie to which the prosecutors point is the possibility of an award being made or certified which may have the effect of displacing the Industrial Catering Award 1977 which was made by the Western Australian Industrial Relations Commission. This, it is contended by the prosecutors, would give rise to industrial unrest. However, the material to support this contention, which is contested by the respondents, is inconclusive. In particular, it is not established to my satisfaction that the State award does in fact cover the relevant employees of Nationwide. The contrary is asserted by Nationwide. I should not, on the material before me, be prepared to conclude that the consequences of any award made or certified by Commissioner McKenzie would be as the prosecutors suggest.

In any event, Commissioner McKenzie has, I am informed, yet to consider whether he should exercise his powers under s.41(1)(d) or s.28(2) of the Conciliation and Arbitration Act 1904 (Cth) to refrain from further hearing or determining the dispute on the grounds that it is proper to

be dealt with by a State Industrial Authority or that further proceedings are not necessary or desirable in the public interest or to refuse to certify an award on the ground that it is not in the public interest to do so. He proposes to consider those matters first upon any resumption of the hearing of the proceedings before him. The question of industrial unrest arising from the certification or making of an award will therefore be ventilated before him if he proceeds and I do not think it appropriate that I should interfere with his consideration of that question. He will, no doubt, be in a better position than I am to make a decision and should he decide in favour of the prosecutors, the proceedings will cease. To say the least, this indicates to my mind an additional reason why this application is premature.

Moreover, the jurisdiction to grant a stay is to be exercised with caution and in a case such as the present should be exercised sparingly. As Brennan J. pointed out in Re Merriman (1984) 53 A.L.R. 440, at pp.442-443, it is ordinarily desirable that matters such as this should take their course before the Commission up to and including the prosecution of any appeal if in the public interest an appeal should lie. This is not only because the Commission is the more appropriate forum for the initial determination

of the issues, but also because in the event that proceedings in the Commission are decided in a particular way, proceedings in this Court may be obviated and delay avoided. Furthermore, whilst the question before this Court may ultimately be a question of law, it is a question which can only be determined in a factual setting and it is desirable that this Court have the benefit of the findings of the Commissioner in making any decision.

For all of these reasons, I think that the application should be refused and I find it unnecessary to express any view about the strength of the case which the prosecutors may ultimately have for prerogative relief.