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IN THE MATTER OF AN APPLICATION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION AGAINST THE HONOURABLE MR JUSTICE MICHAEL FRANCIS MOORE, A DEPUTY PRESIDENT OF THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

EX PARTE DAVID INGLES PILLAR

JUDGMENT
(oral)
16/10/1991

DAWSON J.

IN THE MATTER OF AN APPLICATION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION AGAINST THE HONOURABLE MR JUSTICE MICHAEL FRANCIS MOORE, A DEPUTY PRESIDENT OF THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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On 11 September 1991 I granted an application for orders nisi for writs of certiorari and prohibition in this matter to enable the prosecutor to contest the validity of an order made by a designated Presidential Member of the Industrial Commission, Deputy President Moore, pursuant to s.253Q(2) of the *Industrial Relations Act* 1988 (Cth) ("the Act"). I use the word "order" for want of a better word, but there is some contest as to the precise nature of the action taken by the Deputy President which the prosecutor seeks to contest. Section 253Q(2) appears in Div.7 of Pt IX of the Act, which is the Division dealing with the amalgamation of organizations. Section 253Q(1) provides that the scheme of a proposed amalgamation that is approved for the purposes of the Division takes effect in accordance with the section. Sub-section (2) of s.253Q provides that if a designated Presidential Member is satisfied that, amongst other things, there are no proceedings (other than civil proceedings)

pending against any of the existing organizations concerned in the amalgamation in relation to contraventions of the Act "the Presidential Member must, after consultation with the existing organizations, by notice published as prescribed, fix a day (in this Subdivision called the 'amalgamation day') as the day on which the amalgamation is to take effect."

Section 253Q(3) provides that on the amalgamation day, if the proposed amalgamated organization is not already registered, the Registrar must enter its particulars in the register, any proposed alteration of the rules of an existing organization concerned in the amalgamation takes effect and the Presidential Member must deregister the proposed deregistering organizations. Section 253Q(3) also provides that on the amalgamation day the persons who, immediately before that day, were members of a proposed deregistering organization become, by force of the section and without payment of entrance fee, members of the proposed amalgamated organization.

Section 253R(1) provides that on the amalgamation day, all assets and liabilities of a deregistered

organization cease to be assets and liabilities of that organization and become assets and liabilities of the amalgamated organization. Section 253R(2) provides that for all purposes and in all proceedings, an asset or liability of a deregistered organization existing immediately before the amalgamation day is to be taken to have become an asset or liability of the amalgamated organization on that day.

Section 253T provides that on and from the amalgamation day an award or order of the Commission that was previously binding on a proposed deregistering organization and its members becomes, by force of the section, binding on the proposed amalgamated organization and its members.

Section 253V provides that where, immediately before the amalgamation day, "a proceeding to which this Division applies" was pending in a court or before the Commission, the amalgamated organization is, on that day, substituted for each deregistered organization as a party and the proceeding is to continue as if the amalgamated organization were, and had always been, the deregistered organization. A "proceeding to which this Division applies" is defined

in s.234 as a proceeding to which a deregistered organization was a party immediately before the amalgamation day.

A scheme of a proposed amalgamation of the Building Workers' Industrial Union of Australia ("the BWIU") and the Australian Timber and Allied Industries Union ("the ATAIU") was approved and on 2 September 1991 Deputy President Moore fixed the day for amalgamation as 23 September 1991. That day was subsequently published by way of notice as prescribed.

At the time the Deputy President fixed the day for amalgamation (whether by the initial decision or the subsequent publication of the notice) there was in existence a charge and summons in the Magistrates' Court at Melbourne against each of the BWIU and the ATAIU. The charge against the BWIU was that it had committed a breach of s.214(1) of the Act by failing to lodge with the Commission prescribed information in relation to an election in 1991. The charge against the ATAIU was that it had committed a breach of s.268(3) of the Act by failing to lodge with the Commission a statutory declaration certifying that its register of members had been kept and maintained as

required. In addition, there were further charges against the ATAIU under s.268 of the Act.

The prosecutor, a member of the BWIU, submitted to the Deputy President before the latter fixed the amalgamation day that he ought not to take that course because the proceedings in the Magistrates' Court constituted proceedings pending against each of the existing organizations for the purposes of s.253Q. The Deputy President rejected this submission upon the basis that the Magistrates' Court lacked jurisdiction and the proceedings were a nullity. The Deputy President based his conclusion upon s.52(1) of the Act which provides:

> "Subject to this Act, the jurisdiction of the Court in relation to an act or omission for which an organization or member of an organization is liable to be sued, or to be proceeded against for a pecuniary penalty, is exclusive of the jurisdiction of any other court created by the Parliament or any court of a State or Territory."

The "Court", by virtue of s.4(1), means the Federal Court of Australia. The Deputy President took the view that the term "pecuniary penalty" included a fine for a criminal offence committed in breach of the Act. It

was common ground that the two offences with which the BWIU and the ATAIU were respectively charged in the Magistrates' Court were criminal offences for which a fine might be imposed. The Deputy President concluded that the Federal Court had exclusive jurisdiction to entertain proceedings charging those offences and that, therefore, the proceedings in the Magistrates' Court were incompetent. Being satisfied that there were no proceedings pending, he fixed the amalgamation day.

When this matter first came before me on 11 September 1991 upon an application ex parte for orders nisi, the prosecutor referred to a line of authority which, in the words of Northrop J. in *Rowell v. Child*(1) evidenced a "long-established practice that prosecution for criminal offences under the [*Conciliation and Arbitration Act* 1904 (Cth)] ... irrespective of whether the offences required the accused to be an organization or a member of an organization may be brought in courts of summary jurisdiction, a practice which has not been questioned by the High Court, the Australian Industrial Court or the Federal Court". That practice, Northrop J.

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(1) (1983) 77 F.L.R. 87, at p.94.

observed, "is consistent with the view that s.147 is limited to civil proceedings including civil proceedings for the recovery of a pecuniary penalty." The *Conciliation and Arbitration Act* is the predecessor of the *Industrial Relations Act* and s.147 is the predecessor of s.52. Northrop J. referred to *Federated Clerks' Union of Australia v. Hills*(2) and *Gapes v. Commercial Bank of Australia Ltd.*(3) He also drew attention to the observations of Menzies J. in *Williams v. Hursey*(4).

I reached the conclusion that the case which the prosecutor made out was sufficiently arguable to warrant the grant of orders nisi. In reaching that conclusion, I bore in mind the submission of the prosecutor that there was some doubt, having regard to the nature of the Deputy President's action in fixing the amalgamation day, whether an appeal lay against that action to the Full Bench of the Commission under s.45 of the Act.

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(2) (1981) 54 F.L.R. 251.
(3) (1979) 38 F.L.R. 431.
(4) (1959) 103 C.L.R. 30, at p.113.

The prosecutor sought a stay of the "order" of the Deputy President upon the basis that, unless a stay were granted, the operation of the Act would be such that the amalgamation would take place and the proceedings which he sought to pursue would be rendered nugatory. With some hesitation I acceded to the application for a stay. Clearly, in view of the relevant statutory provisions, a stay of proceedings under O.55, r.10 was likely to be ineffective and, in the exercise of the inherent jurisdiction of the Court, I ordered, in addition to a stay of proceedings, a stay of the "order" itself: see *Re Marks and Federated Ironworkers' Association; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*(5).

The first application now before me is by the BWIU and the ATAIU to be joined as respondents. Those two organizations submit in the alternative that the stay granted by me was ineffective to prevent the amalgamation taking place on the amalgamation day and that the amalgamated organization should be joined. I do not think it is necessary to determine in this

(5) (1981) 34 A.L.R. 208.

application the question which that submission raises. It is sufficient at the present stage if I order that the BWIU and the ATAIU be joined as respondents, leaving any further application in relation to parties to be dealt with, if necessary, at a subsequent stage. That order is not opposed by the prosecutor and, accordingly, I make the order.

The application made by the BWIU and the ATAIU which occasions greater difficulty is the application that the stay which I granted ex parte upon the application of the prosecutor be lifted. As Mason J. observed in *Re Marks*, at p.212, the grant of a stay of an order in the exercise of the inherent jurisdiction of the Court is an exceptional course. Ultimately the power to grant a stay is to be found only where it is necessary to preserve the subject-matter of the litigation or, perhaps, where the refusal of the stay would make it difficult in the determination of the proceedings in this Court to grant the relief sought: see *Jennings Constructions Ltd. v. Burgundy Royale Investments Pty. Ltd.*(6); *Manfal Pty. Ltd. (in liq.)*

(6) (1986) 69 A.L.R. 265, at p.266.

v. Trade Practices Commission(7). I think too that in these proceedings it is permissible in the exercise of the discretion to grant or withhold a stay to have regard to the fact that it is not possible to be entirely confident, given the relevant provisions of the Act, of the precise effect which a stay may have. But, as was observed by Toohey J. in *Manfal Pty. Ltd. (in liq.) v. Trade Practices Commission*, at p.257, such a consideration is truly peripheral to the central issue. Nevertheless, it is undesirable, particularly in the area of industrial relations, that there should be any more uncertainty than is necessary concerning the position of the parties pending the determination of proceedings by this Court: see *Re Merriman; Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation*(8).

In the end, however, I am not persuaded after argument that, if the stay which I granted were to be lifted, the prosecutor would effectively be denied the relief which he seeks in the event that he is successful in this Court. What he seeks by means of

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(7) (1990) 65 A.L.J.R. 256, at p.257.
(8) (1984) 53 A.L.R. 440, at p.443.

one or other of the prerogative writs is to stop the consequences which the Act prescribes upon the fixing of an amalgamation day. He bases his claim to relief upon the invalidity of the amalgamation day fixed by the Deputy President. But if he establishes the invalidity of the amalgamation day, and his argument is sound, the consequences prescribed by the Act will not have taken place. The subject-matter of these proceedings - the validity of the amalgamation day fixed by the Deputy President - is a question which remains alive whether or not there is a stay. No doubt it is the prosecutor's contention that if the two organizations proceed upon the basis that the amalgamation day has been validly fixed and has passed and it is ultimately established that the day was not validly fixed, there may be consequences which are irreversible. However, that does not mean that the proceedings would prove to be futile. In particular, whether or not amalgamation had occurred would not be an empty issue. Furthermore, I am not satisfied that the consequences which the Act prescribes as flowing from amalgamation, or any steps which the parties might take upon the basis that amalgamation has occurred, would prove irreversible. It does not appear to me that the two organizations could not be restored, or

substantially restored, to their former position, even with regard to those matters likely to be most affected, namely, membership and assets, if the Court were eventually minded to grant relief.

For these reasons, I do not think that the prosecutor has established any basis upon which I might properly allow the stay granted in the exercise of the inherent jurisdiction of the Court to remain in place. The stay against further proceedings is similarly not justified and, in any event, serves little purpose. Accordingly, I must accede to the application of the two organizations and order the removal of the stay of the order and the stay upon further proceedings in the matter. I so order.