

111-027

HIGH COURT OF AUSTRALIA

BRENNAN, GAUDRON AND McHUGH JJ.

RE THE HONOURABLE MR DEPUTY PRESIDENT
COLIN GEORGE POLITES AND ANOR

RESPONDENTS

EX PARTE THE HOYTS CORPORATION
PTY. LIMITED AND ORS

PROSECUTORS

[No.2]

O R D E R

No order as to costs.

14 August 1991
F.C. 91/027

Solicitors for the Second
Respondent:

Ryan Carlisle Thomas

Solicitor for the Prosecutors: *Mark G. Caldwell*

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

BRENNAN, GAUDRON AND MCHUGH JJ. In this matter, the prosecutors successfully applied for an order directing Mr Deputy President Polites, the first-named respondent, to hear and determine, as a member of a Full Bench of the Australian Industrial Relations Commission, the proceedings in certain matters pending before the Commission. Their application for the costs of the proceeding in this Court is opposed by the Australian Theatrical and Amusement Employees Association, the second respondent, which relies on s.347(1) of the *Industrial Relations Act* 1988 (Cth) ("the Act"). That provision reads:

" A party to a proceeding (including an appeal) in a matter arising under this Act 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 excuse."

The matters pending before the Commission and being heard by a Full Bench are clearly matters arising under the Act, but the prosecutors submit that the proceeding in this Court was not a proceeding "in" the matters pending before the Commission. In our view, it is unnecessary to determine that question, because the proceeding in this Court was a proceeding in a matter that was itself a matter arising under the Act. The duties of a member of the Australian Industrial Relations Commission are created, expressly or impliedly, by the Act. When the President of the Commission, in exercise of his power to establish a Full Bench of the Commission (s.30) appoints a member to sit as a member of a Full Bench to hear and determine an industrial dispute, Pt VI Div.2 of the Act imposes on that member a duty to hear and determine the industrial dispute as a member of the Full Bench accordingly. The order made in this case was an order to enforce that statutory duty. As the duty owes its existence to the Act, the controversy between the parties as to the enforcement of the duty is a matter arising under the Act: *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 C.L.R.141, at p.154; *L.N.C. Industries Ltd. v. B.M.W. (Australia) Ltd.* (1983) 151 C.L.R.575, at p.581; and see *Poulos v. Waltons Stores (Interstate) Ltd.* (1986) 68 A.L.R.537, at p.543; *Thompson v. Hodder* (1989) 21 F.C.R.467, at p.469. The jurisdiction of this Court conferred by s.75(v) of the Constitution was invoked to determine that matter. It follows that the proceeding in this Court was itself a proceeding in a matter under the Act. It follows that s.347(1) of the Act is applicable to the proceeding in this Court, albeit the jurisdiction of this Court invoked in that proceeding is conferred by s.75(v) of the Constitution.

No challenge is made to the power of the Parliament legislatively to direct this Court as to the award of costs when it is exercising its jurisdiction under s.75(v) of the Constitution. Accordingly, in conformity with s.347(1) of the Act, we would refuse an order for costs.