[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

MOORE AND OTHERS;

EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

H. C. OF A. 1978

SYDNEY, *Aug. 8; Dec. 14.*

Barwick C.J., Gibbs, Stephen, Jacobs and Aickin JJ.

Industrial Law (Cth)—Conciliation and Arbitration—Industrial dispute—Registered organization—Eligibility for membership—Workers involved in labour in or in connexion with metalliferous mining—Engagement of project engineers by uranium mining companies to construct works—Labour employed by engineers—Whether engaged in activities in connexion with metalliferous mining—Conciliation and Arbitration Act 1904 *(Cth)*, s. 4 (1) "*industrial dispute*".

The rules of a union which was registered under the *Conciliation and Arbitration Act* 1904 (Cth) provided that workers engaged in manual or mental labour in or in connexion with, inter alia, metalliferous mining were eligible for membership.

The union served a letter of demand on a number of uranium mining companies and a number of project engineers which the companies had engaged to design and supervise the construction of works for the establishment of uranium mines. The companies did not intend to employ labour, but some of the project engineers did. The construction work would be undertaken principally by independent contractors engaged by the project engineers.

Held, that the project engineers were engaged in activities in connexion with metalliferous mining within the membership rule, and the union accordingly had standing to raise a dispute between the engineers and the workers whom they were to employ.

Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union (1976), 51 A.L.J.R. 266, distinguished.

PROHIBITION AND CERTIORARI.

The Australian Workers' Union ("the A.W.U.") served a letter of demand on Ranger Uranium Mines Pty. Ltd., Queensland Mines Ltd., Pancontinental Mining Ltd., Noranda Australia Ltd., Davey Pacific Pty. Ltd., Wright Engineering Pty. Ltd., Kinhill O'Connor Pty. Ltd., Stearns Roger Incorporated, McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd. relating to the members of the A.W.U. employed or to be employed by them

"in construction work in or in connexion with or incidental to the uranium mining and processing industry". The companies did not accede to the demands. The first four companies were uranium mining companies. The others were project consulting engineers which had been engaged by the mining companies to design and supervise the construction of the various works proposed in relation to the establishment of certain mines in the Northern Territory. It was proposed that the actual construction work would be undertaken primarily by independent contractors employed by the project engineers and that the mining companies would not themselves directly hire labour. The membership rule of the A.W.U. provided that workers "engaged in manual or mental labour in or in connexion with ... metalliferous mining" were eligible for membership. The President of the Australian Conciliation and Arbitration Commission found that the companies' refusal to accede to the demands gave rise to an industrial dispute between the A.W.U. on the one hand and the mining companies and project engineers on the other. The Federated Miscellaneous Workers' Union of Australia, whose membership provisions covered employees engaged in the building and construction industry in the Northern Territory, obtained orders nisi for prohibition and certiorari on the grounds that the Commission had no jurisdiction in the matter in that no industrial dispute had come into existence between the A.W.U. and the companies "for the reason that employees of the companies covered or sought to be covered by the log of claims were not eligible to be members of A.W.U." and "because in relation to persons employed in construction work in or in connexion with or incidental to the uranium mining and processing industry the persons so employed were not eligible for membership of A.W.U.". The orders nisi were made returnable before the Full Court of the High Court.

M. H. McHugh Q.C. and *R. C. Kenzie*, for the prosecutor, in addition to the cases mentioned in the judgments, cited *Reg.* v. *Holmes*; *Ex parte Public Service Association of New South Wales* (1); *Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners' Association* (2).

C. J. Bannon Q.C. and *J. L. Trew*, for the Australian Workers' Union, cited as well *Reg.* v. *Association of Professional Engineers of Australia*; *Ex parte Victoria* (3); *Reg.* v. *Heagney*; *Ex parte A.C.T. Employers' Federation* (4); *R.* v. *Central Reference*

(1) (1978) 140 C.L.R. 63.
(2) (1952) 86 C.L.R. 283, at p. 296.
(3) (1957) 100 C.L.R. 155.
(4) (1976) 137 C.L.R. 86.

H. C. OF A. 1978. THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Board; *Ex parte Thiess (Repairs) Pty. Ltd.* (5) and *Tesco Supermarkets Ltd.* v. *Nattrass* (6).

B. J. Shaw Q.C. and *J. R. Sackar*, for Ranger Uranium Mines Pty. Ltd., Queensland Mines Ltd., Noranda Australia Ltd., Kinhill O'Connor Pty. Ltd. and Stearns Roger Incorporated.

T. E. F. Hughes Q.C., *A. R. Ashburner* and *J. F. Boultbee*, for Pancontinental Mining Ltd.

N. A. Brown, for McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd.

Cur. adv. vult.

Dec. 14. The following written judgments were delivered:—

BARWICK J. In this matter, I have had the advantage of reading the reasons for judgment prepared by my brother Aickin. I am in full agreement with what he has written and with the conclusion at which he arrives. I do not desire to add anything to those reasons.

In my opinion, the application for prerogative writs should be dismissed.

GIBBS J. The question for decision in this case is whether the respondent, the Australian Workers' Union, sought, by the service of its log of claims, to create an industrial dispute as to the conditions of employment of persons who could never become members of that union pursuant to its rules. I have had the advantage of reading the reasons prepared by my brother Jacobs, and the reasons prepared by my brother Aickin, and I agree in their conclusion that the present case is distinguishable from *Re Federated Liquor and Allied Industries Employees' Union of Australia*; *Ex parte Australian Workers' Union* (7) and that the employees as to whose conditions the claims are made are those engaged in labour in or in connexion with metalliferous mining: such employees are covered by the eligibility rule of the respondent union. I need add nothing to the reasons which my brethren have given for this conclusion, since I am in general agreement with them.

The prosecutor, as part of its argument, submitted that the claim of the Australian Workers' Union, made in cl. 5 of the log of claims, that no employer shall permit any of the relevant work to

(5) (1948) 77 C.L.R. 123.
(6) [1972] A.C. 153, at p. 171.
(7) (1976) 51 A.L.J.R. 266.

be done by a contractor except in accordance with the terms of the award, and that no employer shall enter into a contract for the doing of any of the work unless it contains a clause binding the contractor to observe the conditions of the award, did not raise a dispute as to an industrial matter. This submission was based upon the decision in *Reg.* v. *Commonwealth Industrial Court Judges*; *Ex parte Cocks* (8). That case is distinguishable. It decided that a dispute as to whether or not it should be permissible for an employer in a particular industry to employ independent contractors in performing relevant work outside the employer's factory or workshop is not an industrial dispute as defined in the *Conciliation and Arbitration Act* 1904 (Cth), as amended ("the Act"). However the present dispute, in so far as it relates to cl. 5 of the log of claims, is not as to whether contractors should be engaged, but as to whether, if they are engaged, their employees should be entitled to the benefits of the award, assuming that one is made. The evidence has failed to show that in the circumstances prevailing in the industry in question such a clause could not be capable of being regarded as merely incidental to the settlement of the dispute as to the conditions of employment of workers in or in connexion with metaliferous mining. I agree with Jacobs J. that this question should not be finally determined until the facts are fully explored.

The respondent, the Australian Workers' Union, has applied for costs on the ground that the proceeding was instituted by the prosecutor "without reasonable cause" within the meaning of s. 197A of the Act. In my opinion a party cannot be said to have commenced a proceeding "without reasonable cause", within the meaning of that section, simply because his argument proves unsuccessful. In the present case the argument presented on behalf of the prosecutor was not unworthy of consideration and it found some support in the two decisions of this Court to which I have referred. The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs in the face of the prohibition contained in s. 197A.

I would dismiss the application for the issue of prohibition and certiorari but would make no order as to costs.

STEPHEN J. I have read the reasons for judgment prepared by Jacobs J. I am in agreement both with his conclusions and with his reasons for those conclusions. I would therefore dismiss the application for prerogative writs.

(8) (1968) 121 C.L.R. 313.

H. C. OF A. 1978. THE QUEEN v. MOORE: EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

JACOBS J. The Australian Workers' Union ("A.W.U.") is entitled under its eligibility rule to enrol as members every bona fide worker, male or female, engaged in manual or mental labour, in or in connexion with a large number of industries, which include road making, water and sewerage, railway construction work, metalliferous mining, smelting, reducing and refining of ores (including all workers engaged in or in connexion with dredging or sluicing work), the prospecting, surveying, exploration and drilling for minerals and metals (except as to members of organizations in the shipping industry), the construction, maintenance and conduct of the Commonwealth Railways, and all kinds of general labour. It served a demand on the companies who are the ten last named respondents by a letter dated 17th March 1978 demanding wages, terms and conditions of employment in accordance with the accompanying document which was in the form of a draft award. That letter was written by the General Secretary of the A.W.U. on behalf of the A.W.U. and its members "now employed or hereafter to be employed by you in all construction work in or in connexion with or incidental to the uranium mining and processing industry". Clauses 4 and 5 of the draft award which accompanied the letter of demand were as follows:

"4. LOCALITY

This Award shall apply in the Northern Territory.

5. WORK DONE THROUGH CONTRACTORS, ETC.

(a) No employer shall permit any operation or function or employment of any of the classes to which this Award is applicable to be carried on or exercised or entered into by any contractor or other person on behalf of the employer, except in accordance with the terms and conditions of this Award as if the contractor or other person were himself a party to and bound by this Award.

(b) No employer shall enter into any contract for the carrying on of any of the work covered by this Award by means of employees unless the contract contains a clause binding the contractor to pay the rates and observe the conditions herein prescribed in respect of the work contracted for, so long as this Award remains in operation."

The demand was not met and the existence of a dispute was duly notified on 6th April 1978.

The applicant, which has coverage inter alios of employees engaged in the building and construction industry in the Northern Territory and which on behalf of its members engaged there in that industry has obtained the Building and Construction Industry (Northern Territory) Award 1972 and other awards,

appeared before the President of the Australian Conciliation and Arbitration Commission on 10th April 1978 and opposed the making of a finding that an industrial dispute existed between the A.W.U. and the respondent companies on the subject matter of the letter and its appended document. From the evidence in support of the present application it appears that the following grounds amongst others were stated:

> "1. None of the respondents to the log of claims were or would be at any time the employers of persons employed or to be employed in construction work in or in connexion with or incidental to the uranium mining and processing industry;
> 2. Having regard to the fact that the identity of the employers of persons to be employed in construction work in or in connexion with or incidental to the uranium mining and processing industry was not yet known, any finding of an industrial dispute would be premature; and
> 3. In any event the respondent Australian Workers' Union was not entitled, pursuant to its registered rules, to have as its members, persons employed 'in all construction work in or in connexion with or incidental to the uranium mining and processing industry' and that any finding of the existence of an industrial dispute would be a finding made without jurisdiction."

A finding of the existence of the dispute was made and the President of the Commission said:

> "It is my view that that notification having been made it is preferable for me to act under s. 24 and to find an industrial dispute which will enable this Commission and the parties who have either appeared or intervened today to apply subsequently to vary or revoke the dispute, or as the matter proceeds to make an application under s. 41. Without such a record of finding it is possible that the Commission should not proceed at all. Therefore, I find that there is an industrial dispute."

The application before this Court is one for prohibition and certiorari upon the following grounds:

> "(i) The Commission is acting without jurisdiction in the said matter in that no industrial dispute has come into existence between The Australian Workers' Union and Ranger Uranium Mines Pty. Limited, Queensland Mines Limited, Pancontinental Mining Limited, Noranda Australia Limited, Wright Engineering Davey Pacific Joint Venture, Bechtel McKee and Kinoco Stearns Roger Nabarlek Joint Venture for the reason that employees of the abovementioned Respondents covered or sought to be covered by the log of claims filed in C. No. 3019 of 1978 were not eligible to be members of The Australian Workers' Union.
> (ii) The Commission is acting without jurisdiction in the said matter in that no industrial dispute has come into

H. C. OF A. 1978. THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA. Jacobs J.

existence between The Australian Workers' Union and Ranger Uranium Mines Pty. Limited, Queensland Mines Limited, Pancontinental Mining Limited, Noranda Australia Limited, Wright Engineering Davey Pacific Joint Venture, Bechtel McKee and Kinoco Stearns Roger Nabarlek Joint Venture in relation to persons employed in all [sic] construction work in or in connexion with or incidental to the uranium mining and processing industry as persons so employed are not eligible for membership of The Australian Workers' Union."

The respondent companies Ranger Uranium Mines Pty. Ltd. ("Ranger"), Queensland Mines Ltd. ("Queensland Mines"), Pancontinental Mining Ltd. ("Pancontinental") and Noranda Australia Ltd. ("Noranda") each have extensive existing or prospective uranium mining interests at sites in the Northern Territory. If and when the interests are perfected in their respective sites and necessary permissions are obtained, mining is to be conducted by means of the open-cut method. At each mining site there will be constructed extensive works including a concentrator, tailings dam, retention pond, administration buildings, explosives magazine and housing areas. In addition, at Jabiru and Jabiluka an acid plant and power-house are to be constructed. Roadworks water and sewerage works and wharves with loading facilities will be constructed and a township will need to be built.

The respondent companies other than Ranger, Queensland Mines, Pancontinental and Noranda are described in the evidence as Project Consulting Engineers. One or others of these respondents have been appointed by Ranger, Queensland Mines or Pancontinental. As yet Noranda has not appointed a Project Consulting Engineer. Construction work at the proposed mine sites will be undertaken primarily by independent contractors employed by the Project Consulting Engineers respectively appointed by the named mining companies. In the case of Pancontinental the evidence establishes that the Project Consulting Engineer will construct the uranium mines and associated facilities by acting as manager and agent for the mining company in the letting of contracts for and on behalf of the mining company and by itself directly employing labour. It does not appear that the procedure to be adopted in the case of the other mining companies is likely to be substantially different, though it is not certain that a relationship of principal and agent will exist between the mining companies and the respective Project Consulting Engineers.

In these circumstances, it is submitted, it has not been established that any of the respondent companies is, or is likely

to be, engaged in construction work in or in connexion with or incidental to the uranium mining and processing industry; in the case of the four mining companies because they will not themselves be carrying out the construction work, and in the case of the Project Consulting Engineers because the construction work proposed to be done by them is not work in or in connexion with the industry of metalliferous mining or any industry of which the A.W.U. has coverage under its eligibility rule. It is further submitted that the presence in the log of cl. 5 shows in the circumstances that the basic purpose of the demand was to compel the respondent companies to employ contractors whose employees would be employed on the conditions set out in the present demands.

It is abundantly clear that the four mining companies each wish to have constructed a mine or mines with all ancillary works. It is equally clear that the other companies propose to engage in the work of constructing the mines and all their ancillary works. Nothing could be more closely related to metalliferous mining than constructing or having constructed a metalliferous mine and its ancillary works. It is an integral part of the mining operation. See *Re Federated Liquor and Allied Industries Employees' Union of Australia*; *Ex parte Australian Workers' Union* per Barwick C.J., (9). The facts in the last-mentioned case were quite different. Catering and cleaning services were far removed from any concept of metalliferous mining which was the relevant industry in that case. The decision does not assist the present applicant.

The argument of the applicant has the extraordinary result that the metalliferous mines and their ancillary works would be constructed without anybody engaged in that construction being engaged on work in or in connexion with metalliferous mining. It seems to me that the proposition has only to be stated in order that it may be seen how untenable the argument is. Construction work cannot be looked at apart from what is being constructed. The connexion is so close as to be inseparable. The mine owner is engaged in or in connexion with the industry of metalliferous mining when it has its metalliferous mining installations and associated works constructed. The constructor is engaged in work in connexion with metalliferous mining when it constructs the mining installations and associated works.

There remains the argument depending on cl. 5 of the draft award. As I understand it, it is not submitted that such a clause

(9) (1976) 51 A.L.J.R., at p. 268.

H. C. OF A. 1978.

THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Jacobs J.

can never be part of an award. Whether or not it can be depends upon whether *Reg.* v. *Commonwealth Industrial Court Judges*; *Ex parte Cocks* (10) has a wider application than the question actually decided in that case, namely, that an issue whether employers should have work done by independent contractors outside their factory or workshop was not an industrial matter within the definition of those words in the *Conciliation and Arbitration Act*. It is said that in the circumstances of this case, where most, almost all, of those employed in the construction of the mining installations and associated works will be employed by contractors and not by the respondent companies, the insertion of such a clause in the award would be without jurisdiction. However, the presence of a claim in a log of claims, even if it be one which does not involve an industrial matter, does not provide a reason for the grant of prohibition or certiorari. That is sufficient to dispose of the argument based on cl. 5. But it cannot be assumed that under no circumstances could the insertion of such a clause in an award settle a dispute as to an industrial matter. Here the evidence shows that the construction works will be large and extensive. It cannot be assumed that the respondent companies—both the mining and the project companies—will not be exercising continued supervision and co-ordination. It may well be that if the Commission considered it proper in order to achieve a settlement of existing or threatened disputes between the companies and their employees that the same award conditions should apply throughout the work of constructing the mines and their associated installations, it would be open to it to achieve that result by the insertion in the award of a clause along the lines of cl. 5. If the Commission could not do so, it would mean that the respondent companies could largely avoid the effective imposition on what will be in substance their activities of award conditions considered appropriate to construction work in or in connexion with the uranium mining and processing industry. The question should not be determined until the facts are fully explored and the basis of the Commission's decision (if it should be its decision) is known.

I would dismiss the application in respect both of prohibition and certiorari. I do not find it necessary to rely in reaching this result upon the fact that substantial parts of the works ancillary to the construction of the mines and processing plants consist of road-making and water and sewerage works and other works involving the use of many kinds of general labour, and that

(10) (1968) 121 C.L.R. 313.

workers engaged in these works are on any view of the matter eligible to be members of the A.W.U.

Nor do I find it necessary to rely upon s. 60 (2) of the *Conciliation and Arbitration Act* and the fact that no question of constitutional power arises since the finding of the existence of an industrial dispute was the finding of an industrial dispute existing wholly within a territory of the Commonwealth.

AICKIN J. This is an application for a writ of prohibition or alternatively certiorari directed to the President of the Australian Conciliation and Arbitration Commission in a matter in which he made a finding of the existence of an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904, as amended ("the Act"). That finding is said to have been made without jurisdiction.

The Australian Workers' Union ("the A.W.U.") served a letter of demand dated 17th March 1978 on the following companies: Ranger Uranium Mines Pty. Ltd. ("Ranger"), Queensland Mines Ltd. ("Queensland Mines"), Pancontinental Mining Ltd. ("Pancontinental"), Noranda Australia Ltd. ("Noranda"), Davey Pacific Pty. Ltd., Wright Engineering Pty. Ltd., Kinhill O'Connor Pty. Ltd., Stearns Roger Incorporated, McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd. That letter was expressed to be on behalf of the A.W.U. and the members thereof ". . . now employed or hereafter to be employed by you in all construction work in or in connexion with or incidental to the uranium mining and processing industry, to demand that all employees, whether members of the Union or not, be paid for all work to be performed by them hereafter at the rates set out in the Schedule hereto applicable to the respective occupations and classes of labour, or such higher rates as may from time to time to the Commission or Commissioner appear just, and that such employment shall be upon the terms and conditions and subject to the provisions as stated in the said Schedule or such terms and conditions more advantageous to the employee as may from time to time appear just to the Australian Conciliation and Arbitration Commission. . . ." Attached to that letter was a log of claims in the form of a proposed award, the terms of which are not currently material, save that it must be noted that the log is expressed to be in respect of "the employment by such employers of all employees whether members of The Australian Workers' Union or not performing work in the following: All construction work in or in connexion with or incidental to the uranium mining and processing industry."

H. C. OF A. 1978.

THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Aickin J.

That demand was not acceded to by any of the companies to which it was addressed.

The respondent companies fall into two groups. The first group comprises Ranger, Queensland Mines, Pancontinental and Noranda which are mining companies in the sense that they hold authorities to prospect, or interests in such authorities to prospect, for uranium in the Northern Territory at various locations where substantial deposits of uranium have been discovered. I refer to those companies collectively as "the mining companies". It appears that Ranger proposes to commence extraction of ore within approximately thirty months of receiving the appropriate approvals from the Government of the Commonwealth. Pancontinental's expectation is that the construction period will take about three years and that up to 900 workers will be directly engaged in construction work. Noranda expects that extraction of uranium will commence within approximately thirty months of the obtaining of approval and Queensland Mines expects that production of uranium will commence within twelve months of the receipt of such approval.

The remaining respondents to the demand are described as "project consulting engineers" who have been appointed by the mining companies to design and supervise the construction of the various works proposed in relation to the establishment of the relevant mines. The actual construction work will be undertaken primarily by independent contractors employed by the project consulting engineers appointed by each of the mining companies. Thus, Ranger has appointed as its project consulting engineer a partnership or joint venture using the business name "Wright Engineering Davey Pacific Joint Venture", comprising Wright Engineering Pty. Ltd. and Davey Pacific Pty. Ltd. Pancontinental has appointed a partnership or joint venture using the business name "Bechtel-McKee" comprising McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd. Queensland Mines has appointed a partnership or joint venture using the business name "Kinoco-Stearns Roger Narbarlek Joint Venture" comprising Kinhill O'Connor Pty. Ltd. and Stearns Roger Incorporated. Noranda apparently had not up to the date of the proceedings appointed a project consulting engineer. I refer to these companies and partnerships collectively as "the project engineers". I use the expression "partnership or joint venture" because it is not clear in all cases what the precise nature of the business organization is, but in at least one case, namely, Bechtel-McKee, it is said that "McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd. are partners in the joint

venture known as Bechtel-McKee". However, the distinction appears not to be material for present purposes.

The material placed before the Court, and statements made by counsel in the course of argument, showed that three of the mining companies do not intend to engage in construction work, but that, in the case of Pancontinental, there was a "distinct possibility that it will be employing some employees who would come within the ambit of this log". It also appeared that, of the three project engineers, two would probably not employ labour, and the third, Bechtel-McKee, would employ "construction labour on direct hire" and that it also had an obligation to complete works of any subcontractor who failed, which would involve direct employment of labour.

The A.W.U. in its registered rules has an eligibility clause and a description of the industry in connexion with which the organization is registered which comprises a lengthy list of miscellaneous callings and industries which it is not necessary or useful to set out in full.

The membership rule of the A.W.U. provides (so far as material) that the following persons are eligible for membership:

> "Subject to these Rules, every bona fide worker, male or female, engaged in manual or mental labour in or in connection with any of the following industries or callings, namely: ... metalliferous mining, smelting, reducing and refining of ores including all workers engaged in or in connection with dredging or sluicing work, ... the prospecting, surveying, exploration and drilling for minerals and metals (except as to members of organizations in the shipping industry); ... and all kinds of general labour ..."

The list of industries (so far as material) includes the following:

> "Pastoral, agricultural, horticultural, viticultural (which includes employees in wineries), dairying, fruit growing, sugar growing, cane cutting, milling and refining, the growing, cutting and treatment of flax and tobacco, rabbit trapping, timber and sawmilling, ... road making, water and sewerage, railway construction work, ... applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt, (Other than tar paving or asphalt work in connection with building operations), metalliferous mining, smelting, reducing and refining of ores, dredging or sluicing work, ... the prospecting, surveying, exploration and drilling for minerals and metals (except as to members of organizations in the shipping industry); ... timber getting for mining purposes, stone quarrying, land surveying, ... and all kinds of general labour ..."

H. C. OF A. 1978.

THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Aickin J.

It was not disputed that uranium mining was "metalliferous mining".

The prosecutor, the Federated Miscellaneous Workers' Union of Australia, absorbed the North Australia Workers' Union whose registration was cancelled in 1972 and now has an amended description of industry and an amended eligibility clause which were approved by the Industrial Registrar and the Commission. At all material times since the amalgamation the registered rules of the prosecutor have provided for the enrolment of employees in the building and mining industries in the Northern Territory and the details of the description of industry and eligibility are not presently material.

The President of the Commission found that there was an industrial dispute between the A.W.U., on the one hand, and the mining companies and the project engineers on the other, the subject matter being the appendix to the letter of demand from the A.W.U. of 17th March 1978.

At each mine site the mining operations will be conducted by the open cut method. The works to be carried out during the construction period on each site will include the removal of overburden, the construction of a concentrator, a tailings dam, a retention pond, administration buildings, explosives magazine, water supply, housing areas and internal roads. In one case a major road to the coast will be constructed as well as wharves and loading facilities. Although, to the extent stated above, there will be direct employment by the mining companies and the project engineers, the works will primarily be undertaken by independent contractors.

There were two principal objections taken against the finding of a dispute. The first was that the A.W.U. was seeking to create a dispute in respect of persons who were not, and could not, be members of the A.W.U. in respect of the work involved in the construction period. The second argument was that the project engineers, who were the only respondents who would employ labour, would be engaged in the construction industry and not the metalliferous mining industry, which was said to be the only relevant category of industry. It was also argued that the demand was an endeavour to bind the employers as to the terms on which their sub-contractors would employ labour, and that accordingly, there was no "dispute" within the meaning of the Act. Reliance was placed on *Reg.* v. *Commonwealth Industrial Court Judges*; *Ex parte Cocks* (11), but the facts in the present case do not raise the question which was there decided. There is no room here for the application of that decision.

(11) (1968) 121 C.L.R. 313.

It was acknowledged that the *Metal Trades Case* (*Metal Trades Employers' Association* v. *Amalgamated Engineering Union*) (12) established that a union may effectively create a dispute by making a demand (which is refused or not acceded to) on employers who do not and never have employed any members of the union, if the demand is that they shall not employ any person, whether a member of the union or not, save upon the terms and conditions of the demand. The demand in the present case is expressed in those terms.

The principal argument which was pressed was that the demand was made on employers who had no present intention of employing persons covered by the eligibility clause, because the only prospective employers (the project engineers) were not engaged in the mining industry, but in the construction industry. It is desirable to deal with this argument in relation to the project engineers, merely noting that Pancontinental is plainly engaged in the mining industry and in its case no problem of "coverage" could arise. It does not, in my opinion, follow from the fact that it may be said that an employer is engaged in construction work that he may not also properly be regarded as engaged in activities in or in connexion with metalliferous mining. The question is whether the activity of the project engineers is "in or in connection with metalliferous mining".

Much reliance was placed on the decision of this Court in *Re Federated Liquor and Allied Industries Employees' Union of Australia*; *Ex parte Australian Workers' Union* (13). In that case two companies (the "catering companies") entered into contracts with two mining companies which carried on iron ore mining operations in the North-West of Western Australia to supply and perform catering, cleaning, laundry, housekeeping and garbage services in respect of buildings and housing provided by the mining companies for their employees and their families. The A.W.U. served a log of claims on the catering companies and a consent award was made. However, the Federated Liquor and Allied Industries Employees' Union of Australia applied for a writ of prohibition or alternatively certiorari. It was held by the Court that the employees of the catering companies were not employees in, or in connexion with, an industry of metalliferous mining, and that accordingly no dispute arose in respect of which the Commissioner had any authority to make an award. The applicable principles are stated in the judgment of the Chief Justice, with whom the other members of the Court agreed (14):

(12) (1935) 54 C.L.R. 387.
(13) (1976) 51 A.L.J.R. 266.
(14) (1976) 51 A.L.J.R., at pp. 268-269.

H. C. OF A. 1978. THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA. Aickin J.

"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 connexion 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 connexion 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*; *Ex parte Thiess (Repairs) Pty. Ltd.* (15), thought that the separateness of the establishments in point of control, organization, place, interest, personnel and equipment might furnish a relevant discrimen in deciding the question of fact. Sir John Latham in the same case (16), 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 connexion with metalliferous mining or that their

(15) (1948) 77 C.L.R. 123, at p. 141.

(16) (1948) 77 C.L.R., at p. 135.

> employees are employed in or in connexion 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."

I have quoted that passage in full because it appears to me to determine the present matter. By way of contrast, the activities of the project engineers in the present case cannot, in my opinion, be said to be "quite distinct and separate from that of the mining companies engaged in metalliferous mining". Here what they are doing is itself part of the business of metalliferous mining, and at the very least it is "in connexion with" that industry. It is, I think, equally clear that there is no "separateness of establishments" in the sense referred to in the passage quoted because on the facts here in question the "establishment" of each project engineer is in truth that of the mining company for the purpose of carrying out the latter company's mining operations during both the construction and the mining stages. Applying the other test quoted, the substantial character of the industrial enterprise in which the project engineers and their employees will be engaged will be in the metalliferous mining industry, notwithstanding that all, or some, of it may properly be called construction work.

In these circumstances it is not necessary to rely on an argument put on behalf of the A.W.U. that at least Bechtel-McKee is engaged in the uranium mining industry because the partnership was formed expressly for that very purpose. It was objected that the partnership was not a corporation and that the employers would be two companies who were principally engaged in the construction industry. If it mattered, I would regard that answer as based on too narrow a view. The employer would be the two partners jointly and their joint activity is confined to the uranium mining industry, including the construction period, whatever they might each do when operating individually.

If it is right to say that the project engineers are engaged in the metalliferous industry, so far as their performance of their contracts to act for the mining companies are concerned, then it must follow that the A.W.U.'s demand was made upon employers engaged in an industry in respect of which its members were eligible under its rules to work.

In my opinion, these considerations are sufficient to dispose of the question whether there is a dispute which the A.W.U. is competent to raise not only against the mining companies, but also against the project engineers. Separate questions may perhaps arise with respect to the kind of award which may be made, but that is not presently relevant.

H. C. OF A. 1978. THE QUEEN v. MOORE; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Because of the view which I have expressed above, it is not necessary to consider the application of that part of the eligibility clause which refers to "all kinds of general labour".

Accordingly, I am of opinion that the application should be refused.

Application for prerogative writs dismissed.

Solicitor for the prosecutor, *Steve Masselos & Co.*

Solicitors for the Australian Workers' Union, *Commins & Co.*

Solicitors for Ranger Uranium Mines Pty. Ltd., Queensland Mines Ltd., Noranda Australia Ltd., Kinhill O'Connor Pty. Ltd. and Stearns Roger Incorporated, *Mallesons.*

Solicitors for Pancontinental Mining Ltd., *Perkins, Stevenson & Linton.*

Solicitors for McKee Pacific Pty. Ltd. and Bechtel Pacific Corporation Ltd., *Moule, Hamilton & Derham.*

R.A.S.