CASE IN RE MOORE AND OTHERS; EX PARTE NEW SOUTH WALES PUBLIC SERVICE PROFESSIONAL OFFICERS' ASSOCIATION AND ANOTHER[1]

Industrial Law (Cth) — Restraint of State industrial commission jurisdiction — Validity of restraining order — Necessity to specify what matter is removed from State jurisdiction — Requirement of interstate industrial dispute for valid restraining order — Relationship between matter and parties — Validity of empowering Commonwealth provision — Conciliation and Arbitration Act 1904 (Cth) s 66

The Facts

The case arose out of an application for an industrial award made by the New South Wales Public Service Professional Officers' Association and the Public Service Association of New South Wales (the NSW unions) to the New South Wales Industrial Commission (the State Commission). The application concerned the rates of pay for State Government engineers and claimed preference in employment for the NSW union members.

Without intervening in the State Commission proceedings, the Association of Professional Engineers, Australia (the APEA) sought an order from the Commonwealth Conciliation and Arbitration Commission (the Federal Commission) restraining the State Commission from dealing with these matters. The membership of the APEA included engineers who were also represented by the NSW unions. The Federal Commission granted the restraining order, referring to the matters only by their numbers of application and the names of the parties involved.[2] The Federal Commission relied upon s 66 of the *Conciliation and Arbitration Act* 1904 (Cth) which provides that State Commissions may be restrained from dealing with disputes or matters that are provided for in Federal awards or are the subject of proceedings before the Federal Commission. The Federal Commission reserved its judgment as to the finding of a dispute and the question of jurisdiction. The NSW unions then applied to the High Court for writs of prohibition and certiorari in relation to the restraining order.

The Judgments

The High Court Bench was unanimous in the belief that an order under s 66 must clearly specify the dispute with which the State Commission may not deal. As Deane J argued:

> [I]f the Commonwealth Commission decides to make a restraining order, the scope of any order must be limited to restraining the State Industrial

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[1] (1984) 54 ALR 11; (1984) 58 ALJR 405; (1985) 8 IR 107; High Court of Australia; Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ.

[2] *Re Association of Professional Engineers, Australia* (1983) 7 IR 242.

> Authority from dealing with the whole or part of the particular identified matter which is the subject of proceedings before the Commonwealth Commission . . . A State Industrial Authority and the parties to proceedings before it are entitled to be told "with substantial precision", in any order under s 66, "just what 'matter' " is removed from the jurisdiction of the State Industrial Authority . . .[3]

The judgment of Deane J faithfully followed the jurisdiction solution proposed by Isaacs J in the *Western Australian Timber Workers'* case[4] and approved in the *Australian Timber Workers'* case.[5]

While it is clear that this approach is justified by precedent, it appears that the High Court adopted a narrow view of the specificity required for the purposes of s 66. While the claims made by the NSW unions over salary and preference were not specifically referred to in the restraining order, it becomes obvious upon a reading of the decision of the Federal Commission that the restraining order could have only applied to those matters.[6] It is useful to remember that "parliament has unequivocally sought to avoid frustration of the conciliatory-arbitral machinery by excessive legalism . . .".[7] Unfortunately it seems that excessive legalism has again frustrated the machinery of conflict resolution.

Gibbs CJ, Deane and Dawson JJ held that the matters which had proceeded to the State Commission were not matters which could have been the subject of orders of restraint made under s 66. They reasoned that there was no interstate industrial dispute as was needed to attract the jurisdiction of the Federal Commission under Part III of the *Conciliation and Arbitration Act* 1904 (Cth).

It is submitted that this assertion is incorrect. Part III of the Act refers to the powers and functions of the Federal Commission. Its phraseology is extremely broad and if reference is also had to s 51(xxxv) of the Constitution, it is clear that the powers of the Federal Commission refer to both the settlement and the prevention of interstate industrial disputes. It is at least arguable that the Federal Commission was acting to prevent the occurrence of an interstate industrial dispute. Furthermore it is myopic in the extreme to think that the NSW union claims could be divorced from the alleged multi-state industrial campaigns of the APEA.

All justices referred to the fundamental differences in jurisdiction between the Federal and State Commissions. Commonwealth powers are limited by s 51(xxxv) of the Constitution to the prevention and settlement of interstate industrial disputes. The jurisdiction of the State Commission is not so limited. Therefore, it was argued, a general restraint on State proceedings would restrain the hearing of matters which would lie within State but not

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[3] (1984) 54 ALR 11, 20-21.

[4] *Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)* v *Western Australian Sawmillers' Association* (1929) 43 CLR 185, 201.

[5] *Australian Timber Workers' Union* v *Sydney and Suburban Timber Merchants' Association* (1935) 53 CLR 665, 675.

[6] *Re Association of Professional Engineers, Australia* (1983) 7 IR 242.

[7] LW Maher and MG Sexton, "The High Court and Industrial Relations" (1972) 46 ALJ 109, 109.

Commonwealth jurisdiction. Such a result could have been prevented by analysis of the particular matters before the Federal Commission; matters which were actually within Commonwealth jurisdiction.

Gibbs CJ, Deane and Dawson JJ approached the question of the validity of s 66 with some caution. Gibbs CJ saw "no reason to doubt the validity of s 66".[8] Deane J was not persuaded that there existed any proper ground for questioning the validity of s 66.[9] Dawson J said that the validity of s 66 was "not beyond question".[10] However, none of the three found it necessary to decide the matter.

The bench failed to reach unanimity over the applicability of s 66 in a situation where different unions claimed to represent the same members in separate industrial commissions. Gibbs CJ quoted the *Australian Timber Workers'* case[11] with approval when saying that " 'a matter ... the subject of proceedings' connotes parties as well as a subject for decision ...".[12] Since the parties before both Commissions were different, the Federal Commission had no right to restrain the State Commission from dealing with a dispute that was distinct from the matter before it. Dawson J held likewise that the Federal Commission could not restrain a State Commission from dealing with persons who were not parties to the federal dispute. However he did make the curious assertion that correspondence between the separate parties may justify the use of a restraining order by the Federal Commission.[13]

Murphy J relied upon the wording of s 66 to come to the conclusion that "matter" in that section refers only to subject matter.[14] Furthermore he outlined the practical problems that would ensue were there a need for unionists to be represented by the same party at both State and Federal levels before s 66 could be invoked. It should be remembered that since *Moore* v *Doyle*[15], unions that register under State systems develop a separate legal identity from their federal counterparts. It would be impossible therefore for the same union appearing before both Commissions to be treated as the same party. A view of the meaning of "matter" in s 66 which embraced parties, would in the words of Murphy J render that section "virtually a dead letter ...".[16] On practical grounds, the opinion of Murphy J should be preferred if the relationship between the State and the Federal Commissions is not to be "technical, productive of artificialities and in urgent need of the attention of the law reformer".[17]

Unfortunately no member of the High Court referred to the reasons for the decision of the Federal Commission. President Moore there referred to the history of APEA representation of Government engineers before the Federal Commission, the fact that the N.S.W. Public Service Board had

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[8] (1984) 54 ALJ 11, 13.
[9] *Ibid* 20.
[10] *Ibid* 25.
[11] (1935) 53 CLR 665, 674.
[12] (1984) 54 ALR 11, 13.
[13] *Ibid* 25-26.
[14] *Ibid* 16.
[15] (1969) 15 FLR 59.
[16] (1984) 54 ALR 11, 16.
[17] *Moore* v *Doyle* (1969) FLR 59, 123.

followed Federal awards in relation to its engineers and the fact that both Commissions applied different standards in relation to wage fixation.[18] He also referred to the fact that the New South Wales Public Service Board had supported the APEA application to the Federal Commission.[19]

The case highlighted the absurdity of the Federal/State dichotomy of power in relation to dispute regulation. In the Federal Convention Debates of 1898, Mr Isaacs (as he then was) argued that "if there were in existence here a distinct and powerful enactment on the part of the state for the constitution of [an industrial] tribunal, both sides having confidence in its capacity to decide satisfactorily and in the wisdom of its decisions, we should, by constituting such a court, avert a national danger that might face us at any time".[20] The provisions of the *Conciliation and Arbitration Act* 1904 (Cth) clearly give the Federal Commission the right to make a restraining order in relation to proceedings before the State Commission. Despite the breadth of these provisions, the unwillingness of the High Court to look at legislative intent and practical reality remains manifest. It seems that yet again "[t]he [High] Court has emphasised matters of form and refrained from substantial analysis of industrial conflict".[21]

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[18] *Re Association of Professional Engineers, Australia* (1983) 7 IR 242, 243.
[19] *Ibid.*
[20] *Australasian Federal Convention Debates*, Third Session (1898) Vol 1, 188.
[21] L W Maher and M G Sexton, *op cit* 110.

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