HIGH COURT OF AUSTRALIA

RE CRAM AND OTHERS; EX PARTE NSW COLLIERY PROPRIETORS' ASSOCIATION LIMITED AND OTHERS.

Mason, Wilson, Brennan, Deane and Dawson JJ
Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ

1987 :CANBERRA *Feb.* 3; *March* 18, 19; SYDNEY, *July* 16

Industrial Law — Coal industry in New South Wales — Commonwealth-State legislative scheme — Coal Industry Tribunal established by Commonwealth and State Acts — Tribunal empowered to constitute Local Authorities — Whether members of Tribunal and Authorities officers of Commonwealth — Dispute as to manning and recruitment — Whether "industrial matters" — The Constitution (63 & 64 *Vict. c* 12), *s* 75(v) — *Coal Industry Act* 1946 (*Cth*), *ss* 4 *"industrial matters"*, 5, 30, 37, 38 — *Coal Industry Act* 1946 (*NSW*), *ss* 4 *"industrial matters"*, 5, 36, 43, 44.

The Coal Industry Tribunal was constituted by the *Coal Industry Act* 1946 (Cth) and the *Coal Industry Act* 1946 (NSW). The preamble to the Commonwealth Act recited that it had been agreed that the Commonwealth Government and the State Government would jointly establish authorities with power to take action to secure and maintain adequate supplies of coal throughout Australia and in trade with other countries. By s 30(1) the Governor-General was empowered to enter into an arrangement with the Governor of the State for the constitution of a Coal Industry Tribunal and for a person to constitute that Tribunal. Section 34(1) empowered the Tribunal to determine, inter alia, industrial disputes extending beyond the limits of any one State and industrial disputes in the State. Section 37(1) empowered the Tribunal to appoint persons to be Local Coal Authorities in the State. The State Act contained provisions in substantially the same terms as the Commonwealth Act.

Held, (1) that the Tribunal and the Authorities were not required to exercise powers derived from the State Act in isolation from powers derived from the Commonwealth Act.

(2) That the joint operation of the Commonwealth and State Acts created a single tribunal rather than separate Commonwealth and State tribunals.

Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd. (1983), 158 CLR 535, *applied*.

(3) That the persons who constituted the Tribunal and the Authorities were officers of the Commonwealth within the meaning of s 75(v) of the Constitution, and remained so notwithstanding that they exercised or purported to exercise powers conferred by the State Act and even when a particular power was identifiable as having been conferred by the State Act.

The Commonwealth Act and the State Act conferred on a Local Coal Authority power to "settle any dispute as to any local industrial matter likely to affect the amicable relations of employers in the coal-mining industry of the State and their employees where such dispute is not pending before the Tribunal" (ss 38(1)(a) and 44(1)(a) respectively). "Industrial matters" was defined as "all matters pertaining to the relations of employers and employees in the coal mining industry, and, without limiting the generality of the foregoing, includes ... (h) the mode, terms and conditions

of employment; (i) the employment of young persons or of any persons or class of persons; (j) the preferential employment or the non-employment of a particular person or class of persons being or not being members of an organization; (k) the right to dismiss or to refuse to employ ... a particular person or class of persons": s 4 of each Act.

Held, (1) that a dispute about manning and recruitment, in particular a dispute about mode of recruitment, was a dispute as to "industrial matters" within the opening words of the definition and within pars (h), (i) and (j).

Reg. v Commonwealth Conciliation & Arbitration Commission; Ex parte Melbourne & Metropolitan Tramways Board (1966), 115 CLR 443, at pp 451-452, *disapproved*.

(2) That a dispute arising out of an employer's refusal to employ a number of persons because it had no job vacancies to fill was an "industrial matter" within par (k) and within the opening words of the definition.

Orange City Bowling Club Ltd v Federated Liquor & Allied Industries Employees' Union [1979] AR 90, at pp 96-97, *applied*.

Per curiam. If a dispute about a matter which lies outside the concept of "industrial matters" as defined escalates to the point that there is a threatened, impending or probable dispute involving the withdrawal of labour, it is possible that a dispute about an industrial matter may come into existence, notwithstanding its origins.

PROHIBITION.

Prior to March 1985 there were in existence in the coal industry in the Upper Hunter region of New South Wales employment arrangements under which employers engaging labour to perform work under the Engine Drivers and Firemen's Award recruited that labour through the Federated Engine Drivers and Firemen's Association of Australasia from a register of unemployed union members and members seeking employment in the industry. Between March and August 1985 in the course of a dispute at Mt Thorley, labour was recruited by Coal and Allied Operations Pty. Ltd and R W Miller & Co Pty. Ltd. without reference to the employment arrangements. The union notified the Local Coal Authority (Northern District), constituted pursuant to the *Coal Industry Act* 1946 (Cth) and the *Coal Industry Act* 1946 (NSW), of the existence of a dispute concerning manning and method of employment of labour at the Hunter Valley No 1 Open Cut Mine. On 16 October 1985 the Authority, constituted by Robert Matthew Cram, ordered and directed that the employers abide by the employment arrangements. The Coal Industry Tribunal, created by the Commonwealth and the State Acts, and constituted by David Anthony Duncan, granted leave to review the Authority's order, and on 7 November 1986 made an interim order that current vacancies should be filled in accordance with the decision of the Authority. NSW Colliery Proprietors' Association Ltd, Coal and Allied

Operations Pty. Ltd and R W Miller & Co Pty. Ltd obtained orders nisi for prohibition directed to the Authority, the Tribunal and the union, on the ground that the orders made by the Authority and the Tribunal were made without jurisdiction in that they did not involve the settlement, consideration or determination of an industrial dispute or an industrial matter. The orders nisi were returnable before the Full Court.

C S C Sheller QC

3 February 1987 (with him *J N West*), for the prosecutors. An "industrial matter" is one which by definition pertains to the relations of employers and employees: *Federated Clerks Union of Australia v Victorian Employers' Federation* 1 ; *Re Manufacturing Grocers Employees' Federation of Australia; Ex parte Australian Chamber of Manufactures and Victorian Employers Federation* 2 . What is demanded must have a relevant connexion with the relationship of employer and employee. The relationship of employer and employee must be directly involved. It is not enough that there is a dispute between employers and employees, even about an industry practice, unless that relationship is directly involved. It is not enough that the dispute may have an indirect, consequential or remote effect upon the relationship. Directness is the test used to prevent the power of the arbitration authority being extended to the regulation and control of businesses and industries in every particular: *Clancy v Butchers Shops Employees' Union* 3 ; *R v Kelly; Ex parte Victoria* 4 . Management of the enterprise is not itself a subject-matter of an industrial dispute: *Reg. v Conciliation & Arbitration Commission; Ex parte Melbourne & Metropolitan Tramways Board* 5 . Decisions as to the source of recruitment for vacancies are matters of management or of a management nature. Preference as commonly understood has nothing to do with sources or methods of recruitment. At most a time embargo may be imposed before a non-unionist is employed, to enable those preferred to have an opportunity to seek engagement: *Reg. v Holmes; Ex parte Altona Petrochemical Co Ltd.* 6 . Preference does not limit the source of recruitment to union-selected members from amongst members generally or from amongst those prepared to become members. If a dispute is not as to a matter pertaining to the relations of employer and employee as such, it does not become so by reason

of the lettered paragraphs in the definition of "industrial matters". They are illustrative, and designate a great many of the incidents of such relationship and of the work to be done pursuant to such relationship: *Reg. v Hamilton Knight: Ex parte Commonwealth Steamship Owners' Association* 7 ; *Reg. v Commonwealth Industrial Court: Ex parte Cocks* 8 . In particular, a dispute as to a practice or usage is not an industrial dispute unless the practice or usage pertains to the relations of employers and employees, e.g. work-face practices such as job demarcation. A dispute is not an industrial dispute simply because it is about customs or usages. The Authority's order was beyond jurisdiction, and hence the Tribunal has no jurisdiction to review. Prohibition should issue.

K R Handley QC (with him *W R Haylen*), for the third respondent. The dispute concerned the operation of a scheme of preference to members of the union in employment. The scheme of preference that existed before the dispute has been found by the Authority and the Tribunal to be a scheme supported by custom and usage. Accordingly the dispute was "a dispute as to" a custom or usage within par (j) of the definition of "industrial matters". There was a dispute as to the existence of such a custom. The findings of fact about the custom therefore did not go to jurisdiction, but to the merits, and could not be challenged: *Reg. v Alley; Ex parte NSW Plumbers & Gas Fitters Employees' Union* 9 . Furthermore, the dispute was an industrial dispute because it was about the preferential employment of particular persons or a class of persons being members of the union on the current list maintained by the union under the custom. Hence it was a dispute as to a matter within par (j) of the definition. [He referred to *Reg. v Commonwealth Conciliation & Arbitration Commission; Ex parte Transport Workers' Union* 10 .] It was also a dispute as to "the non-employment" of particular persons or classes of persons being members who are not on the current list maintained by the union under the custom, and other persons who are not members of the union at all. On that basis too it was a dispute as to a matter within par (j). It was also a dispute as to the right of the employer to refuse to employ particular persons or class of persons, arising from the union's claim that the employer should refuse to employ persons except in accordance with the custom, and the employer's claim that it has the right to refuse to employ persons in accordance with the

custom. On this basis it was a dispute as to a matter within par (k). There is no requirement that there be an existing relationship of employer and employee before an industrial dispute can arise. [He referred to *Reg. v Findlay; Ex parte Commonwealth Steamship Owners' Association* 11 ; *Reg. v Wright; Ex parte Waterside Workers' Federation* 12 ; *Reg. v Gaudron; Ex parte Uniroyal Pty. Ltd.* 13 .] An award authorizing employers to notify casual waterside workers by newspaper or radio announcements that they were required to report for work was held to be in respect of an industrial matter: *Reg. v Wright; Ex parte Waterside Workers' Federation* 14 . An effective scheme of preference depends upon giving an opportunity to unionists to seek the position before it is filled by a non-unionist: *Reg. v Holmes; Ex parte Altona Petrochemicals Co Ltd.* 15 . Preference in employment is to be interpreted liberally so as to confer a substantial rather than an illusory advantage on members of the union: *Reg. v Gaudron; Ex parte Uniroyal Pty. Ltd.* 16 . Neither Cram nor Duncan is an officer of the Commonwealth within s 75(v) of the Constitution. This Court therefore has no original jurisdiction.

[MASON J. The question you raise falls within s 78B of the *Judiciary Act* 1903 (Cth). The Court will adjourn the matter generally so as to allow the third respondent to give notice under the section. The Court will reserve the question of relisting.]

Argument resumed before a Bench of seven Justices.

[Toohey J and Gaudron J did not participate in the earlier hearings in the matter. The Court is proceeding on the footing that there is no objection by any parties to their reading the transcript of the materials and participating in the decision of all the issues that arise in the case.]

K R Handley QC.

18 March 1987 The second respondent is not an officer of the Commonwealth. His appointment operated and took effect as a joint appointment. He can only be removed from office by the joint action of both Governments. The first respondent was appointed by the second respondent and is removable by him. [He referred to *Australian Iron & Steel Ltd v Dobb* 17 ; *Reg. v Lydon; Ex parte*

Cessnock Collieries Ltd. 18 .] The second respondent is not an officer of the Commonwealth because he is not appointed, paid, and removable solely by the Commonwealth: *R v Murray and Cormie; Ex parte The Commonwealth* 19 ; *R v Drake Brockman; Ex parte National Oil Pty. Ltd.* 20 . [He also referred to *In re Churston* 21 and *Commissioner of Estate Duties v Bowring* 22 .] The jurisdiction under s 75(v) to issue prohibition to an officer of the Commonwealth is a jurisdiction to restrain action by such an officer in excess of his authority under federal law: *Bank of New South Wales v The Commonwealth* 23 ; *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Whybrow* 24 . The jurisdiction exercised here by the first respondent was necessarily State. The dispute was local. Section 50 of the State Act bars prohibition in respect of orders or awards of the Authority and the Tribunal: *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* 25 ; *R v Hickman; Ex parte Fox and Clinton* 26 ; *Ex parte Australian Iron & Steel Ltd.; Re Dobb* 27 . Whereas a privative clause such as s 44 of the Commonwealth Act will be invalid, or at least largely ineffective, if invoked against an attempted exercise of the Court's jurisdiction under s 75(v), there is no similar difficulty in invoking s 50 of the State Act against an attempted exercise of the supervisory jurisdiction to prohibit excess of authority under State law.

K Mason QC, Solicitor-General for the State of New South Wales, (with him *F L Wright*), for the Attorney-General for the State of New South Wales, intervening. "Officer of the Commonwealth" is confined to a person appointed by and answerable to the Commonwealth. The mere fact that the person exercises Commonwealth powers is irrelevant: *R v Murray and Cormie; Ex parte The Commonwealth* 28 ; *Re Anderson; Ex parte Bateman* 29 ; *R v Governor of South Australia* 30 ; *R v Bevan; Ex parte Elias and Gordon* 31 ; *R v Drake-Brockman; Ex parte National Oil Pty. Ltd.* 32 . If Messrs. Duncan and Cram are officers of the Commonwealth,

prohibition under s 75(v) does not lie in respect of powers exclusively referable to the State Act. The powers vested by the respective Acts do not blend into an undifferentiated mass, but retain their incidents and character as federal or State powers. Although the Tribunal is a single body, it is capable of exercising State and federal powers concurrently, or merely its supplementary State or federal powers. Section 75(v) should be confined to restraining officers of the Commonwealth in the exercise of their Commonwealth powers: *Bank of New South Wales v The Commonwealth* 33 . If s 75(v) were not so restricted, the Commonwealth Parliament, acting under s 77(ii), could deprive State courts of jurisdiction to control State officers by prerogative writs. That would be an interference with the State judiciary's exercise of its constitutional functions. [He referred to *Queensland Electricity Commission v The Commonwealth* 34 .]

C S C Sheller QC Both the Authority and the Tribunal are offices constituted under ss 37 and 30 of the Commonwealth Act. The persons appointed hold single offices even though they are appointed by agreement with the State and pursuant to complementary State legislation: *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* 35 . Both bodies are constituted to attain objectives stated in the preamble of the Commonwealth Act, namely to take measures for securing and maintaining adequate supplies of coal to meet the need for that commodity throughout Australia and in trade with other countries, and for providing for the regulation and improvement of the coal industry in New South Wales. These are objects of the Commonwealth. The Authority is "a Commonwealth officer on whom State power as well as federal power is conferred": *Reg. v Lydon; Ex parte Cessnock Collieries Ltd.* 36 . [He referred to *Australian Iron & Steel Ltd v Dobb* 37 .] In exercising power derived from federal and State sources the Authority and the Tribunal act as Commonwealth officers, the power in each case being derived from s 32 of the Commonwealth Act. That section operates to grant to each of the powers and functions specified in the Commonwealth Act in relation to that authority, sustained so far as constitutionally possible by the Commonwealth powers, and by State legislative power to the extent to which Commonwealth power falls short: *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* So far as State-derived powers are concerned, s 32(1) of

the Commonwealth Act permits the State Act to repose State powers in the Tribunal: *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* Even if it could be said that the particular dispute was not related to a matter which extended beyond the limits of any one State, such a dispute was threatened, impending or probable. [He referred to *Reg. v Turbet; Ex parte Australian Building & Construction Employees' and Building Labourers' Federation* 38 and *Reg. v Conciliation & Arbitration Commission; Ex parte Melbourne & Metropolitan Tramways Board* 39 .]

G Griffith QC, Solicitor-General for the Commonwealth, (with him *A R Robertson*), for the Attorney-General for the Commonwealth, intervening. Relevant considerations when determining whether a person is an officer of the Commonwealth are whether he holds an office established by the Commonwealth; whether he is appointed to the office by the Commonwealth; whether he is paid by the Commonwealth; and whether he is subject to removal from office by the Commonwealth: *The Tramways Case [No 1]* 40 ; *R v Murray and Cormie; Ex parte The Commonwealth* 41 ; *R v Drake-Brockman; Ex parte National Oil Pty. Ltd.* 42 . The Tribunal and the Authority are created jointly by the Commonwealth and the State. There is only one Tribunal and one Authority, and one person constitutes each. Each is a single office with one officer: *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* The officer at present constituting the Tribunal was appointed jointly by the Governor-General and the Governor of New South Wales. He is an officer of the Commonwealth even if he is also an officer of the State. The officer at present constituting the Authority was appointed by the Tribunal. The costs of the Tribunal and the Authorities are paid through the Joint Coal Board. The Commonwealth and the State meet the costs of the Board equally: *Coal Industry Act* 1946 (Cth), s 37 and *Coal Industry Act* 1946 (NSW), s 43. Each body is established by Commonwealth law. The capacity of each to exercise its powers from whatever source is derived from the Commonwealth Act: *Australian Iron & Steel Ltd v Dobb* 43 ; *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.*; *Broken Hill Pty. Co Ltd v National Companies & Securities*

Commission 44 . The person constituting each body does not cease to be an officer of the Commonwealth within the meaning of s 75(v) when exercising powers granted solely by the State Act, just as an "officer of a State" does not become an "officer of the Commonwealth" when exercising powers conferred by Commonwealth legislation. Further, the power exercised by each officer is a single power deriving where necessary from two sources: *R v Murray and Cormie; Ex parte The Commonwealth* 45 ; *Australian Iron & Steel Ltd v Dobb* 46 ; *Reg. v Lydon; Ex parte Cessnock Collieries Ltd.* 47 . In many cases, even the exercise of powers in relation to a "local industrial matter" by a Local Authority will be attributable to the Commonwealth Act. The "local industrial matter" may relate to mining for export or for interstate trade. Section 51(i) of the Constitution interacting with s 32 of the Commonwealth Act would result in the dispute being covered by the Commonwealth Act. Power in relation to other "local industrial matters" may be attributable to s 51(xxxv) of the Constitution. The State Act would operate only where the Commonwealth Act did not extend. Section 75(v) should not be construed to make jurisdiction depend on the determination of complex issues of fact and law about whether particular action by an officer depends on Commonwealth or State legislation: *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* If each officer is an officer of the Commonwealth within s 75(v), the application and operation of s 50 of the State Act is the same as the application and operation of s 44 of the Commonwealth Act. [He referred to *Houssein v Under Secretary of Industrial Relations & Technology (NSW)* 48 and *Reg. v Coldham; Ex parte Australian Workers' Union* 49 .] The High Court has jurisdiction to decide non-severable claims having their origin in State law. The accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution: *Philip Morris Inc. v Adam P Brown Male Fashions Pty. Ltd.* 50 ; *Fencott v Muller* 51 ; *Stack v. Coast Securities (No 9) Pty. Ltd.* 52 .

Cur adv vult

16 July 1987

THE COURT delivered the following written judgment:—

The *Coal Industry Act* 1946 (Cth) ("the Commonwealth Act") and the *Coal Industry Act* 1946 (NSW) ("the State Act") were enacted following an agreement made between the Governments of the Commonwealth and of New South Wales as recorded in the preamble to the Commonwealth Act, that they should " ... jointly establish authorities vested with power to take action designed to attain [certain] objectives". The objectives recorded in the preamble include:

" ... securing and maintaining adequate supplies of coal to meet the need for that commodity throughout Australia and in trade with other countries, and for providing for the regulation and improvement of the coal industry in the State of New South Wales ... "

The authorities jointly established by the Commonwealth and State Acts are the Joint Coal Board (s 5 of the Commonwealth Act; s 5 of the State Act), the Coal Industry Tribunal ("the Tribunal") (s 30 of the Commonwealth Act; s 36 of the State Act) and Local Coal Authorities: s 37 of the Commonwealth Act; s 43 of the State Act.

The present proceedings concern the Tribunal, constituted by David Anthony Duncan, the second respondent, and the Local Coal Authority, Northern District ("the Authority") constituted by Robert Matthew Cram, the first respondent. The prosecutors seek to have made absolute an order nisi prohibiting each of Mr Cram, Mr Duncan and the Federated Engine Drivers & Firemen's Association of Australasia ("the Union") from proceeding further in matter ND No 99 of 1985 which was the subject of a hearing and decision by the Authority and in matter ND No 267 of 1985 which was a review of that decision by the Tribunal. It will be necessary to return to those proceedings and the orders made therein. The first question for determination is whether Mr Cram and Mr Duncan are "officer[s] of the Commonwealth" against whom writs of mandamus and prohibition may issue from this Court pursuant to s 75(v) of the Constitution.

By s 30(1) of the Commonwealth Act and by s 36(1) of the State Act, the Governor-General and the Governor of New South Wales respectively were authorized to enter into an arrangement for the constitution of " ... a Coal Industry Tribunal and for the appointment of a person to constitute that Tribunal". By s 37(1) of the Commonwealth Act and by s 43(1) of the State Act, the Tribunal is empowered to appoint persons to be Local Coal Authorities in the State.

Section 32(1) of the Commonwealth Act and s 38(1) of the State

Act each provides that any authority constituted under the relevant part of each Act is to have all the powers and functions specified in those parts in relation to that authority. The powers are then vested by s 32(2) of the Commonwealth Act and by s 38(2) of the State Act to the full extent of the legislative powers of the Commonwealth and the State of New South Wales. The Tribunal and the Local Coal Authorities are constituted under the relevant part of each Act and, although the powers of the Tribunal and Local Coal Authorities are not co-extensive, the powers are in each case conferred by the Commonwealth and State Acts.

The Tribunal and the Local Coal Authorities derive their existence from the Commonwealth Act and from the State Act. They are, in short, joint Commonwealth and State authorities. Although they exercise powers conferred by Commonwealth and State laws, they stand outside the category of State officers exercising particular Commonwealth functions, as, e.g, judges of State courts exercising invested federal jurisdiction, who have been held not to be officers of the Commonwealth in relation to the exercise of Commonwealth powers: see *R v Murray and Cormie; Ex parte The Commonwealth* 53 ; *In re Anderson; Ex parte Bateman* 54 ; *R v Governor of South Australia* 55 ; and *R v Bevan; Ex parte Elias and Gordon* 56 .

State officers perform State functions pursuant to State law, and may additionally, if so authorized and empowered, perform Commonwealth functions. The Tribunal and the Local Coal Authorities only exercise State powers because they are so authorized by the Commonwealth Act, albeit that such authority is a matter of necessary inference rather than express legislative provision. That authority is necessarily implicit in the declaration in s 32(1) of the Commonwealth Act that the authorities constituted under Pt V of that Act are to have all the powers specified in that Part in relation to that Authority, and in the words of s 34(1A) of the Commonwealth Act which expressly recognize that the Tribunal is to have power conferred upon it by the State Act. The provisions of s 34(1A) are applied to Local Coal Authorities by s 39 of the Commonwealth Act.

The necessity for authorization under the Commonwealth Act for the Tribunal's exercise of powers conferred by the State Act was explained by Brennan J in *Reg. v Duncan; Ex parte Australian Iron & Steel Pty. Ltd.* 57 :

(1987) 163 CLR 117 at 128

"If the [Commonwealth] Act had merely constituted or authorized the constitution of a tribunal and had vested federal powers of conciliation and arbitration in it without reference to State powers, an attempt by a State Act to vest similar State powers in the same tribunal would fail — not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it."

While it is unnecessary to investigate the matter here, it may well be, of course, that precisely the same comments could be made, mutatis mutandis, in relation to an attempt by a Commonwealth Act to confer federal duties upon a State-constituted non-judicial tribunal, which was not expressly or impliedly authorized to exercise them by State law.

Given then that the authorities derive their existence from the Commonwealth Act, although not exclusively so, and that the Commonwealth Act either confers or authorizes the conferral on the authorities of all or any of their powers and functions, the persons constituting the authorities are necessarily officers of the Commonwealth and remain so in respect of the exercise of all their powers unless, perhaps, the Commonwealth Act evinces an intention that in the exercise of powers derived from the State Act the authorities function in some different capacity. The Commonwealth Act has no provision similar to s 5 of the *National Companies and Securities Commission Act* 1979 (Cth) which provides that in the performance of a function or the exercise of a power under an Act the Commission represents the Crown in right of the Commonwealth, but that nothing is to prevent a State Act providing that, in the performance of a function or the exercise of a power under a State Act, the Commission is to represent the Crown in right of the State. This provision was considered, but its effect was not determined, by Dawson J in *Broken Hill Proprietary Co Ltd v National Companies & Securities Commission* 58 . It is unnecessary to consider the effect of such a provision or like implication from a Commonwealth Act in this case for we are satisfied that no like implication can be drawn from the *Coal Industry Act* (Cth). Such an implication, it seems to us, could only be drawn if, either, the Commonwealth Act evinces an intention that the powers conferred by the State Act are to be exercised in isolation from the powers

conferred by the Commonwealth Act, or there are separate Commonwealth and State Tribunals and Local Coal Authorities, rather than a joint Tribunal and unified joint authorities.

The dual sources of existence and power of the Tribunal and a Local Coal Authority were most recently considered by this Court in *Reg. v Duncan*. In that case, although Gibbs CJ and Mason J expressly refrained from deciding the question, no member of the Court considered that the powers conferred by the State Act were required to be exercised in isolation from the powers conferred by the Commonwealth Act. Gibbs CJ 59 , with whom Murphy J stated his general agreement, expressed the view that:

" ... the Tribunal, once constituted, can exercise any of the powers validly conferred on it either by the Commonwealth or by the State Act. In other words, it can exercise both Commonwealth and State powers in the one case."

Mason J 60 stated:

"Section 34(1A) lends weight to the submission that the Tribunal was intended to have the capacity to exercise all or any of its powers, irrespective of the source from which they are derived, in the determination of a dispute which comes before it. On the other hand, s 36(1) provides that an award or order made by the Tribunal by virtue of the powers and functions vested by s 36(2) has effect as if it were an award of the Commission and is binding on the parties and other persons on whom it is expressed to be binding so that the provisions of the *Conciliation and Arbitration Act* 1904 (Cth), as amended, in relation to enforcement apply to it. This may suggest that powers conferred on the Tribunal by State legislation were not intended to be exercised so as to vary an award made in the exercise of powers conferred by s 36(2), although I am not inclined to think that there is much force in this argument."

Wilson and Dawson JJ. 61 held:

" ... in the Coal Industry Tribunal Acts, both Commonwealth and State, there is a clear expression of intention that the Tribunal should be able to exercise the powers which it derives from the Commonwealth legislation and the powers which it derives from the State legislation, not so that the exercise of the one set of powers excludes the exercise of the other, but so that its powers from both sources should remain available to it to be exercised from time to time and notwithstanding that the exercise of the powers given under the Commonwealth Act might supersede an earlier exercise of the powers under the State Act or vice versa."

Later 62 :

"What at least is apparent from the Commonwealth Act is an intention that the powers derived from both the Commonwealth and State legislation should be exercisable by the Tribunal in a single hearing or successively so as to produce different results."

Brennan J 63 held that subject to s 34(7) of the Commonwealth Act which restricts the exercise of powers conferred by the Commonwealth Act to conciliation and arbitration, the Tribunal may "exercise the two sets of powers concurrently", and Deane J 64 held that:

"It would be contrary to the intended operation of the concurrent legislation to import any requirement that the powers conferred upon the Tribunal by the [Commonwealth] Act and by the State Act must be exercised in isolation, one from the other."

The case is clear authority for the proposition that the Tribunal is not required to exercise powers conferred by the State Act in isolation from the powers conferred by the Commonwealth Act. Are the Local Coal Authorities in any different position? The only relevant distinction between the Local Coal Authorities and the Tribunal is that the Tribunal may specify "limits as to locality or otherwise" within which a Local Coal Authority is to exercise its power in the State: s 37(3) of the Commonwealth Act; s 43(3) of the State Act. However, a limitation as to locality or otherwise within the State, does not have the consequence that all matters within the limitation necessarily lack an interstate element sufficient to attract powers referable to s 51(xxxv) of the Constitution, or, even if they do, that Commonwealth powers may not be exercised in relation thereto, for as was pointed out by Murphy J in *Reg. v Duncan* 65 , the Commonwealth Act does not depend for its validity solely upon s 51(xxxv) of the Constitution. Accordingly, in our view, Local Coal Authorities, like the Tribunal, are not required to exercise powers derived from the State Act in isolation from powers derived from the Commonwealth Act.

In *Reg. v Duncan* 66 Gibbs CJ, with whose reasons Murphy J stated his general agreement and Wilson and Dawson JJ stated their substantial agreement, Mason J 67 , Brennan J 68 and

Deane J 69 expressed the view that the joint operation of the Commonwealth and State Acts created a single tribunal rather than separate Commonwealth and State tribunals, although Gibbs CJ expressly refrained from so deciding. In our view that conclusion is inescapable. Section 30(1) of the Commonwealth Act and s 36(1) of the State Act, each speak of the constitution of "*a* Coal Industry Tribunal" and of "appointment of a person to constitute *that* Tribunal" (emphasis added). Subsequent references within the Acts are to the Tribunal.

More importantly, once it is accepted that the powers derived from the Commonwealth and State Acts are not required to be exercised in isolation from each other, but may be exercised concurrently or in combination in the one matter, then the concept of separate Commonwealth and State tribunals exercising separate powers becomes untenable. As there is no relevant distinction between the Tribunal and the Local Coal Authorities, there is no basis on which it can be held that they lack the same single nature possessed by the Tribunal.

In our view the persons who constitute the Tribunal and the Local Coal Authorities are officers of the Commonwealth and remain so notwithstanding that they exercise or purport to exercise power conferred by the State Act, even if the power being or purportedly being exercised is identifiable as power conferred by the State Act. As such they are subject to the jurisdiction conferred by s 75(v) of the Constitution on this Court in all matters in which a writ of prohibition or mandamus is sought against an officer of the Commonwealth. This position is not and cannot be altered in relation to the exercise of powers conferred by the State Act by the privative provision contained in s 44 of the Commonwealth Act and s 50 of the State Act. It is beyond argument that such a provision cannot operate to preclude this Court from exercising the powers directly conferred upon it by s 75(v) of the Constitution (*R v Hickman; Ex parte Fox and Clinton* 70), although as explained in *Reg. v Coldham; Ex parte Australian Workers' Union* 71 by Mason ACJ and Brennan and Murphy JJ. 72 , such a clause may in certain cases validate an award, order or determination which travels beyond the powers conferred.

We turn now to the proceedings before the Authority and the Tribunal, and the orders made therein. The prosecutor's case for prohibition primarily depends on the submission that the order made

by the Authority in settlement of the dispute was not authorized by the Commonwealth or the State Act. Section 38(1)(a) of the Commonwealth Act and s 44(1)(a) of the State Act provide, inter alia:

"Subject to this Act and to the State Act, a Local Coal Authority is to have, in pursuance of the powers conferred by those Acts, power to—

(a) settle any dispute as to any local industrial matter likely to affect the amicable relations of employers in the coal-mining industry of the State and their employees where such dispute is not pending before the Tribunal ... ".

The expression "industrial matters" is defined by s 4 of both Acts, unless any contrary intention appears, as meaning:

" ... all matters pertaining to the relations of employers and employees in the coal mining industry, and, without limiting the generality of the foregoing, includes, in respect of that industry ... ".

There follows in pars (a) to (p) inclusive a list of particular matters of which pars (g), (h), (i), (j), (k) and (l) should be mentioned. They are in these terms:

"(g) the hours of employment, sex, age, qualifications and status of employees;

(h) the mode, terms and conditions of employment;

(i) the employment of young persons or of any persons or class of persons;

(j) the preferential employment or the non-employment of a particular person or class of persons being or not being members of an organization;

(k) the right to dismiss or to refuse to employ ... a particular person or class of persons;

(l) a custom or usage, whether general or in a particular locality."

The prosecutor argues that the dispute notified by the Union "concerning the manning and method of employment of labour at the Hunter Valley No 1. Open Cut Mine" was not a dispute as to an industrial matter. This, so the argument runs, is because a dispute about manning and mode of recruitment of labour does not directly affect the relations of employers and employees. According to the prosecutor, the opening words of the definition of "industrial matters" refer to matters which pertain directly to such relations. This submission reflects the comments of O'Connor J in *Clancy v Butchers' Shop Employes Union* 73 . His Honour was considering a similar, but not identical, definition of "industrial matters" in s 2 of

the *Industrial Arbitration Act* 1901 (NSW). He made the point that if the definition included matters:

" ... indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part."

In *Federated Clerks' Union (Aust.) v Victorian Employers' Federation* 74 , Mason J pointed out that, in order to constitute an "industrial matter" and become the subject of an "industrial dispute" what is demanded must have a relevant connexion with the relationship of employer and employee or, as it has been put more narrowly, "the relationship of employer and employee must be directly involved in the demand": see *Reg. v Commonwealth Conciliation & Arbitration Commission; Ex parte Melbourne & Metropolitan Tramways Board* 75 . More recently in *Re Manufacturing Grocers' Employees Federation* 76 , the Court said:

"For present purposes, it is sufficient to say that a matter must be connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential for it to be an industrial matter capable of being the subject of an industrial dispute."

Accepting the major premise of the prosecutor's argument, we are nevertheless unable to accept the minor premise, namely that a dispute about manning and recruitment, in particular a dispute about mode of recruitment, as that is the correct characterization of the dispute here, is not directly connected with the relationship between employer and employee and is merely consequential. The essence of the prosecutor's argument on this point is that a dispute about manning and recruitment does not directly affect the relationship of existing employer and employee as such; it is a dispute about the policy and procedure to be adopted by the employer in the management of his business enterprise and thus falls within the scope of managerial prerogatives. The subject-matter of the dispute is non-industrial, just as a dispute about the opening and closing hours of shops was held to be non-industrial in *Clancy* and *R v Kelly; Ex parte Victoria* 77 .

Before dealing with the various strands of thought embedded in this argument, we should mention some aspects of the general words

of the definition of "industrial matters" as established in the context of s 4 of the *Conciliation and Arbitration Act* 1904 (Cth). The words "pertaining to" mean "belonging to" or "within the sphere of" and the expression "the relations of employers and employees" refers to the relation of an employer as employer with an employee as employee: *Kelly* 78 . And, as Dixon CJ noted in *Reg. v Findlay; Ex parte Commonwealth Steamship Owners' Association* 79 , although the possibility of an indirect and consequential effect is not enough, the conception of what arises out of or is connected with the relations of employers and employees includes much that is outside the contract of service, its incidents and the work done under it. The Chief Justice went on to say 80 :

"Conditions affecting the employee as a man who is called upon to work in the industry and who depends on the industry for his livelihood are ordinarily taken into account."

His Honour referred to the remarks of Isaacs and Rich JJ in *Australian Tramways Employes Association v Prahran and Malvern Tramway Trust* 81 . Their Honours, with reference to the equivalent of par (h) of the definition of "industrial matters" in the Commonwealth and State Acts, said:

"The `conditions' of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment.

And the words `employers' and `employes' are used in the Act not with reference to any given contract between specific individuals, but as indicating two distinct classes of persons co-operating in industry, proceeding harmoniously in time of peace, and contending with each other in time of dispute."

Then they referred to the extended definition of "employe" in s 4 of the *Conciliation and Arbitration Act* which includes "any person whose usual occupation is that of employe in any industry", asserting that it makes manifest the last point made in the passage already quoted. Although neither the Commonwealth nor the State Act contains any corresponding definition of "employee" or "employer", the point sufficiently emerges from the opening words of the definition of "industrial matters", reinforced by the particular paragraphs which follow. And the comments of Isaacs and Rich JJ also apply to the opening words of the definition, notwithstanding that they were directed at par (h). Dixon CJ obviously read them as relating to the general conception of relations between employers and employees.

In the context of the issue which arises in the present case it makes no difference whether the comments apply to the general words of the definition, to par (h) or even to pars (g), (i), (j) or (k). The comments apply with varying force to each of these paragraphs. And they apply with even greater force now than at the time when they were made. To make this point, we return to the sta tement already quoted by O'Connor J in *Clancy* 82 . That statement probably echoes in some respects what was received doctrine at an earlier time — that it was the prerogative of management to decide how a business enterprise should operate and whom it should employ, without the workforce having any stake in the making of such decisions. In that climate of opinion, disputes about the making of such decisions, despite their impact on working conditions and work to be done, might not necessarily be regarded as industrial matters susceptible of resolution by industrial arbitration. Over the years that climate of opinion has changed quite radically, perhaps partly as a result of the extended definition of "industrial matters" in s 4 of the *Conciliation and Arbitration Act* and partly a result of a change in community attitudes to the relationship between employer and employee. The judgment of Isaacs and Rich JJ in *Tramways Employes* reflects the first of these factors. No doubt our traditional system of industrial conciliation and arbitration has itself contributed to a growing recognition that management and labour have a mutual interest in many aspects of the operation of a business enterprise. Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an "industrial matter".

A dispute about the level of manning is a good example. It has a direct impact on the work to be done by employees; it affects the volume of work to be performed by each employee and the conditions in which he performs his work. So also with the mode of recruitment of the workforce. The competence and reliability of the workforce has a direct impact on the conditions of work, notably as they relate to occupational health and observance of safety standards. Employees, as well as management, have a legitimate interest in both these matters.

Why then is not the proposed employment of non-union labour or the refusal to abide by a system of recruitment which gives preference to union labour a matter directly affecting the relations of employer and employee? The decision in *Reg. v Gaudron; Ex parte Uniroyal Pty. Ltd.* 83 shows that it is. There the Court held

that a dispute about preference in employment for a particular class of members of a union was a dispute as to an "industrial matter" as defined by s 4 of the *Conciliation and Arbitration Act*: see also *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd.* 84 ; *Reg. v Holmes; Ex parte Altona Petrochemical Co Ltd.* 85 . It is simply not to the point that the industrial matter related to prospective employment: see *Uniroyal* 86 . There was an actual dispute between existing employees and employers about that industrial matter.

The order made by the Authority in settlement of the dispute did not exceed the ambit of the dispute that arose from the employer's refusal to abide by the pre-existing arrangement for recruitment of labour from a register maintained by the Union, so long as there were sufficient or suitable persons on the register. The dispute was, accordingly, a dispute about a mode of recruitment of labour which involved a claim for preference for members of the Union enshrined in the pre-existing arrangement for recruitment. And the order made by the Authority required compliance with a detailed procedure embodied in the order which gave effect to that claim for preference. The order was valid on the ground that it was made

in settlement of a dispute as to "industrial matters" as defined, the relevant matter falling within the opening words of the definition as well as pars (h), (i) and (j). We have no need to decide whether the matter also fell within pars (g), (k) and (l).

In reaching this conclusion we reject the suggestion, based on the remarks of Barwick CJ in *Melbourne & Metropolitan Tramways Board* 87 , that managerial decisions stand wholly outside the area of industrial disputes and industrial matters. There is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction: see *Federated Clerks Union* 88 . Indeed, the difficulty of making such an implication is accentuated by the fact that the extended definition of "industrial matters" proceeds on the footing that many management decisions are capable of generating an industrial dispute.

These considerations indicate that the objection voiced by O'Connor J in *Clancy* to the regulation and control of business enterprises by industrial tribunals is not a matter that goes to the jurisdiction of the tribunals. Rather it is an argument why an industrial tribunal should exercise caution before it makes an award in settlement of a dispute where that award amounts to a substantial interference with the autonomy of management to decide how the business enterprise shall be efficiently conducted. The evident importance of arming such tribunals with power to settle industrial disputes capable of disrupting industry is a powerful reason for refusing to read down the wide and general definition of "industrial matters" in the Commonwealth and State Acts by reference to any notion of managerial prerogatives as such.

This brings us back to the suggestion that the decisions in the trading hours cases are fatal to the proposition that manning and mode of recruitment are matters directly affecting the relationship between employer and employee. The suggestion is unsound. The problem there was quite different from the problem here. As the Court observed in *Kelly* 89 :

"Trading hours of an employer are not the same subject as working hours of an employee, and a prescription of trading hours as distinct from working hours does not `affect or relate to work done or to be done'."

On the other hand, for reasons already stated, the impact on the employer-employee relationship of the level of manning and the mode of recruitment, is direct and not merely consequential.

We should also express a caveat at the suggestion made in argument that a dispute between an employer and employee about a matter which lies outside the concept of "industrial matters" as defined can never develop into an industrial dispute. If such a dispute escalates to the point that there is a threatened, impending or probable dispute involving the withdrawal of labour, it is possible that a dispute about an industrial matter may come into existence, notwithstanding its origins: but cf. *Reg. v Foster; Ex parte Commonwealth Steamship Owners' Association* 90 .

The final question relates to the validity of the interim order made by the Tribunal when application was made to it to review the decision of the Authority. The Tribunal ordered that the current vacancies at Mt Thorley be filled in accordance with the provisions laid down in the order of the Authority. The interim order was made on the footing that there was a dispute between the Union and the management of Mt Thorley mine "over the filling of certain vacancies". The decision recorded that it was not disputed that eight additional employees in the Union classifications were currently required at the mine.

However, this is a misstatement of the position. The mine

management, claiming that the order of the Authority was invalid, decided that the vacancies would not be filled, at least pending a determination of the validity of the order. Mr Handley QC, for the Union, submits that this decision by the management acknowledged that there were vacancies when the matter came before the Tribunal. This submission does not capture the true import of the decision. The effect of the decision was that the management was going to make do with its existing workforce, at least until the controversy was resolved, on the footing that the eight vacancies previously declared would not be filled. A vacancy which is not to be filled is not for relevant purposes a vacancy at all.

The issue then is whether the management's refusal to employ eight persons in compliance with the Union's demand created a dispute about a matter within the meaning of par (k) of the definition of "industrial matters". The management certainly refused to employ the eight persons. But the question is whether par (k) contemplates a refusal to employ in circumstances where the employer has no job vacancy to fill. Mr Handley relies on the decision of the Industrial Commission of New South Wales in *Orange City Bowling Club Ltd v Federated Liquor & Allied Industries Employees' Union of Australia, New South Wales Branch* 91 . There the Commission (Beattie P and Cahill J) said with reference to par (c) of the definition of "industrial matters" in s 5 of the *Industrial Arbitration Act* 1940 (NSW), the equivalent of par (k) in the Commonwealth and State Acts 92 :

" ... we do not consider it necessary that the words in question should be interpreted so as to exclude jurisdiction where no job vacancy is immediately available in the employer's establishment ... We make the comment ... that it is difficult to visualize such a case, in practice, being brought. Be that as it may, to restrict the meaning of the words so as to exclude jurisdiction where no immediate job vacancy exists would remove from what we regard as a legitimate province of the Commission's interest and concern a class of case which might well be quite substantial in nature."

We agree with this interpretation of the provision and conclude therefore that the interim order was valid. And, even if we did not agree with that interpretation, the dispute would fall within the opening words of the definition of "industrial matters" because it raised a question about the level of manning.

The order nisi should be discharged.

2pOrder nisi for a writ of prohibition discharged with costs.

Solicitors for the prosecutors, *Pigott Stinson*.

Solicitors for the third respondent, *Steve Masselos & Co*.

Solicitors for the interveners, *Australian Government Solicitor* and *H K Roberts*, Crown Solicitor for the State of New South Wales.

RAS

1 (1984) 154 CLR 472, at 489.

2 (1986) 160 CLR 341, at 353.

3 (1904) 1 CLR 181, at 207.

4 (1950) 81 CLR 64, at pp 84-85.

5 (1966) 115 CLR 443, at pp 451-452.

6 (1972) 126 CLR 529, at pp 556-557.

7 (1952) 86 CLR 283, at 305.

8 (1968) 121 CLR 313, at pp 317-318.

9 (1982) 153 CLR 376, at 390.

10 (1969) 119 CLR 529, at 553.

11 (1953) 90 CLR 621, at pp 630-631.

12 (1955) 93 CLR 528, at pp 544-545.

13 (1978) 141 CLR 204, at 211.

14 (1955) 93 CLR, at pp 544-545.

15 (1972) 126 CLR, at pp 556-557.

16 (1978) 141 CLR, at pp 213-214.

17 (1958) 98 CLR 586.

18 (1960) 103 CLR 15, at pp 21, 23.

19 (1916) 22 CLR 437, at pp 452-453, 464, 471.

20 (1943) 68 CLR 51, at pp 54-55, 58-59, 61, 64.

21 [1954] Ch. 334, at 345.

22 [1962] AC 171.

23 (1948) 76 CLR 1, at 363.

24 (1910) 11 CLR 1, at 22.

25 (1982) 148 CLR 88, at pp 94-95.

26 (1945) 70 CLR 598.

27 (1958) 58 SR (NSW) 306, at 308.

28 (1916) 22 CLR, at pp 452-453.

29 (1978) 53 ALJR 165; 21 ALR 56.

30 (1907) 4 CLR 1497.

31 (1942) 66 CLR 452, at 462.

32 (1943) 68 CLR, at pp 58-59.

33 (1948) 76 CLR, at 363.

34 (1985) 159 CLR 192, at 258.

35 (1983) 158 CLR 535.

36 (1960) 103 CLR, at 21.

37 (1958) 98 CLR, at 596.

38 (1980) 144 CLR 335, at pp 341-342, 347, 348-349, 350, 352, 359.

39 (1965) 113 CLR 228, at 252.

40 (1914) 18 CLR 54, at 79.

41 (1916) 22 CLR, at pp 452-453, 464, 471.

42 (1943) 68 CLR, at pp 54-55, 58-59.

43 (1958) 98 CLR, at 596.

44 (1986) 61 ALJR 124, at 126; 67 ALR 545, at 548.

45 (1916) 22 CLR, at pp 452-453, 464, 471.

46 (1958) 98 CLR, at 596.

47 (1960) 103 CLR, at 21.

48 (1982) 148 CLR 88.

49 (1983) 153 CLR 415, at pp 418-419.

50 (1981) 148 CLR 457, at 475.

51 (1983) 152 CLR 570.

52 (1983) 154 CLR 261.

53 (1916) 22 CLR 437.

54 (1978) 53 ALJR 165; 21 ALR 56.

55 (1907) 4 CLR 1497.

56 (1942) 66 CLR 452.

57 (1983) 158 CLR 535, at p 579.

58 (1986) 61 ALJR 124, at p 126; 67 ALR 545, at p 548.

59 (1983) 158 CLR, at 553.

60 (1983) 158 CLR, at 562.

61 (1983) 158 CLR, at pp 571-572.

62 (1983) 158 CLR, at 572.

63 (1983)158 CLR, at pp 582-583.

64 (1983) 158 CLR, at pp 588-589.

65 (1983) 158 CLR, at p 566.

66 (1983) 158 CLR, at 553.

67 (1983) 158 CLR, at p 561.

68 (1983) 158 CLR, at p 577.

69 (1983) 158 CLR, at pp 586-587.

70 (1945) 70 CLR 598.

71 (1983) 153 CLR 415, at 418.

72 (1983) 153 CLR, at p 422.

73 (1904) 1 CLR 181, at p 207.

74 (1984) 154 CLR 472, at 488.

75 (1966) 115 CLR 443, at p 450.

76 (1986) 160 CLR 341, at 353.

77 (1950) 81 CLR 64, at p 84.

78 (1950)81 CLR, at p 84.

79 (1953) 90 CLR 621, at pp 629-630.

80 (1950) 81 CLR, at p 630.

81 (1913) 17 CLR 680, at pp 693-694.

82 (1904) 1 CLR, at p 207.

83 (1978) 141 CLR 204.

84 (1924) 34 CLR 482.

85 (1972) 126 CLR 529.

86 (1978) 141 CLR, at p 211.

87 (1966) 115 CLR, at pp 451-452.

88 (1984) 154 CLR, at pp 490-491.

89 (1950) 81 CLR, at p 84.

90 (1956) 94 CLR 614, at pp 619-620.

91 [1979] AR 90.

92 [1979] AR, at pp 96-97.

