

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE PRESIDENT AND CERTAIN OTHER MEMBERS OF
THE COMMONWEALTH CONCILIATION AND
ARBITRATION COMMISSION;

EX PARTE THE ASSOCIATION OF PROFESSIONAL
ENGINEERS, AUSTRALIA.

THE QUEEN

AGAINST

THE PRESIDENT AND CERTAIN OTHER MEMBERS OF
THE COMMONWEALTH CONCILIATION AND
ARBITRATION COMMISSION;

EX PARTE THE STATE OF NEW SOUTH WALES
AND OTHERS.

THE QUEEN

AGAINST

THE PRESIDENT AND CERTAIN OTHER MEMBERS OF
THE COMMONWEALTH CONCILIATION AND
ARBITRATION COMMISSION;

EX PARTE THE COUNCIL OF THE CITY OF SYDNEY.

- H. C. OF A. 1959. *Constitutional Law (Cth)—Conciliation and arbitration—Jurisdiction of Commission*
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 SYDNEY, *—Log of claims by professional engineers—Employment described by reference*
to professional qualifications—Engineers employed by State governments, agencies
of State governments or municipal bodies—Governmental character of employers
 April 2, 3, *—Whether inconsistent with work being industrial in character—Jurisdiction*
 6-10, 13-15; *where some employees described in log not industrially employed—The Constitu-*
tion (63 & 64 Vict. c. 12), s. 51 (xxxv.)—Conciliation and Arbitration Act 1904-
 Sept. 9, *1958 (Cth), s. 4 (1), definitions of “industry” and “industrial dispute”.*
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 Dixon C.J.,
 McTiernan,
 Fullagar,
 Kitto,
 Taylor and
 Windeyer JJ.
- The Association of Professional Engineers, an organization of employees registered under Pt VIII of the *Conciliation and Arbitration Act 1904-1958* (Cth), served a log of claims upon certain bodies including State governments,

agencies of State governments and some municipal bodies. The work in respect of which demands were made was described as professional engineering duties, an expression defined to mean "duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires qualifications of the employee as (or at least equal to those of) a graduate of the Institution of Engineers, Australia." Failure by the bodies served to comply with the demands was treated as evidence of industrial disputes existing or threatened. Two of the alleged disputes were heard by the Commission. At this hearing an objection was raised that the Commission had no jurisdiction to bind by award in purported settlement of the alleged disputes the State of New South Wales or any of the departments or agencies of the State enumerated. It was said that the employment of professional engineers by the State or these departments or agencies could not in that character become the subject of an industrial dispute raised by the service of the log of claims and non-compliance therewith. The Commission ruled that, with certain exceptions, the employment of professional engineers might or did form the subject of an industrial dispute. In the result the Commission refused to exercise authority with respect to five of the departments and bodies but accepted authority over the remaining bodies. The Association of Professional Engineers obtained an order nisi for a writ of mandamus commanding the members of the Commission to exercise the authority or jurisdiction that had been refused. The State of New South Wales and five bodies or agencies of the State, which the Commission held to be subject to its authority, obtained one order nisi for a writ of prohibition and the Council of the City of Sydney another restraining the Commission from exercising the authority it had asserted.

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Held, by Dixon C.J., Fullagar, Kitto, Taylor and Windeyer JJ., McTiernan J. dissenting, that the order nisi for mandamus should be made absolute and the orders nisi for prohibition discharged.

A dispute that has an industrial character does not lose that character because it concerns a service of a governmental character and the legislative power conferred by par. (xxxv.) of s. 51 of the Constitution clearly applies to the States and the organs and agencies of the States.

The supposed distinction between the so-called "regal" functions and other functions of government considered by *Windeyer J.*

Per Dixon C.J., Windeyer J. to the same effect: Constant resort in the argument to the notion of "governmental function" as a category almost inevitably effected a tacit re-introduction (*scil.* into the reasoning forming the basis of the argument) of the same tests of the application of s. 51 (xxxv.) to employment by the States or their agencies as were in use before the *Engineers' Case* (1920), 28 C.L.R. 129. An attempt under cover of the word "industrial" in this fashion to go back and to re-employ former tests of immunity is inadmissible.

The effect of the *Engineers' Case* (1920), 28 C.L.R. 129, discussed by *Taylor J.*

Per Dixon C.J., Fullagar, Kitto, Taylor and Windeyer JJ., McTiernan J. dissenting: There is nothing in the nature of the duties usually performed by a professional engineer which creates any *prima facie* presumption that a dispute, in which he or an association representing him or the interests of

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his profession is engaged, concerning the terms and conditions of his employment should not fall within the description "industrial" as that word is used in par. (xxxv.).

Per Dixon C.J., Fullagar, Kitto, Taylor and Windeyer JJ., McTiernan J. not deciding : Even if there were persons in the employ of a particular department or agency qualified as required by the log, but doing work which would not fall within the constitutional power conferred by par. (xxxv.), this does not mean that the dispute, so far as it affects all other professional engineers in that employ and the employ of other employers, is outside the power. If a professional engineer is found outside the industrial field because of the character of his individual work, that would be a matter for the Commission to consider in making its award.

Per Kitto J. : The reason why the Commission has authority to proceed is that the employees as to whom the parties are in dispute include some the character of whose work would make a dispute as to them alone an industrial dispute. There is for that reason an industrial dispute as to those employees, and none the less so because the dispute as to them forms part of a wider dispute. To the former dispute, but not to the latter, the constitutional power extends and the authority of the Commission exists.

Per Dixon C.J., McTiernan, Fullagar, Kitto and Windeyer JJ. : A restrictive interpretation cannot be given to the *Conciliation and Arbitration Act* either by treating par. (c) of the definition of "industrial dispute" in s. 4 (1) as an exhaustive statement of the authority of the Commission in a dispute concerning a State or by rejecting pars. (a) or (b) of the definition of "industry" in the section as inapplicable to par. (c) of the definition of "industrial dispute."

Dictum of Latham C.J. in The King v. Commonwealth Court of Conciliation and Arbitration ; Ex parte the State of Victoria (1942), 66 C.L.R. 488, at pp. 499-501, doubted.

Per Taylor J. : It is doubtful whether, for any practical purposes, the contention for the restrictive interpretation has any significance in cases where the dispute is concerned with the conditions of employment of employees whose occupations are unequivocally industrial.

ORDERS NISI FOR MANDAMUS AND PROHIBITION.

(1) On 27th January 1959 *Fullagar J.* on the application of The Association of Professional Engineers, Australia, granted an order nisi directed to the Honourable Richard Clarence Kirby, the Honourable Sydney Charles Grenville Wright, the Honourable Francis Heath Gallagher, Edward Alfred Charles Chambers and John Hereford Portus members of the Commonwealth Conciliation and Arbitration Commission constituted under the *Conciliation and Arbitration Act* 1904-1958 and the State of New South Wales (in relation to the Department of Public Works and the Department of Main Roads), Water Conservation and Irrigation Commission, The Metropolitan Water Sewerage and Drainage Board and Hunter District Water Board calling upon the respondents to show cause why a writ of mandamus should not be issued commanding the

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words. But the Commonwealth Parliament cannot take liberties with the language in which its powers are expressed.

Counsel for the States started with the proposition that disputes are either industrial or not industrial. That is logically incontestable; and, as was said by counsel in *Repton v. Hodgson* (1) in a sentence which *Jordan C.J.* brought to light in an essay, "Like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without a nightcap, it would seem to exhaust the subject". But the presence or absence of the quality "industrial" in a dispute is not as indisputably apparent as the presence or absence of a nightcap on a sleeper. And to collect a miscellany of diverse elements referred to in different judgments as characteristics of industrialism, and treat them all as either collectively or individually significant, so that the presence or absence of one may be decisive is, in my view, fallacious. It can lead to a sophistic sorites. It was, however, contended that these difficulties were surmounted by treating the occupation of the employer as the cardinal factor. Then it was said that, as government is not industry, a complete antithesis exists between activities which are governmental and those which are industrial. Our task it was then suggested was, in counsel's words, to see in each case "whether the particular activity can truly be said to be governmental or industrial". Thus, instead of being asked to say whether a particular project, enterprise or undertaking in which engineers were employed was by reason of its nature one in which an industrial dispute could occur, we were asked to consider whether it was or was not a governmental project, enterprise or undertaking. What for the purposes of this argument was meant by "governmental" was stated only in broad generalities such as "government organization for solving a communal problem", and whether as a way of dealing with "a communal need" it was "akin to the ordinary departments of state". It was also said that whether any activity was industrial or governmental was to be determined by seeing whether it was "more akin to the type-specimen government or the type-specimen industry". This last phraseology was apparently derived from remarks of *Latham C.J.* in his judgment in the *Victorian Public Servants' Case* (2). It may, no doubt, sometimes be helpful, to adopt for the social sciences this method of classification, familiar in natural history; but it can only be satisfactory if the type-specimens with which comparisons are to be made are postulated, and their relevant attributes so ascertained that in making

(1) (1850) 3 H.L.C. 72, at pp. 79, 80 (2) (1942) 66 C.L.R., at p. 501.
[10 E.R. 28, at p. 31].