

12, 1981

IN THE PRIVY COUNCIL

No. 52 of 1980

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS NO. C.A. 309 of 1979

BETWEEN: CALTEX OIL (AUSTRALIA) PTY. LIMITED

Appellant (Plaintiff)

AND: PAUL LESLIE FEENAN, MARIE THERESE
FEENAN, THE INDUSTRIAL COMMISSION OF
NEW SOUTH WALES

Respondents (Defendants)

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

Moore and Bevins
60 Martin Place
SYDNEY

By their Agents:

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Barrington House,
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SOLICITORS FOR THE RESPONDENT

Borthwick Wilson Smith &
Mitchell
13-15 Watt Street,
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D.H. Dwyer Forbes & Yeo,
20 O'Connell Street,
SYDNEY

By their Agents;

Charles Russell & Co.,
Hale Court,
Lincolns Inn,
LONDON WC2A 3UL U.K.

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL IN TERM NO. C.A. 309 of 1979

B E T W E E N

CALTEX OIL (AUSTRALIA) PTY. LIMITED

Appellant (Plaintiff)

PAUL LESLIE FEENAN, MARIE THERESE FEENAN,
THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Respondents (Defendants)

CASE FOR THE APPELLANT

RECORD

Introduction

1. This is an appeal by leave of the Supreme Court of New South Wales, Court of Appeal, finally granted under the Order in Council of 1909 on the 20th day of October, 1980, from an order dated P. 217 L.10
11th July, 1980 of that Court (Moffitt P., Hope and Hutley JJ.A.) dismissing an application in which the appellant sought a declaration that a P. 199 L.10
decision and orders of the Industrial Commission of New South Wales were void and of no effect and an injunction restraining the enforcement of such orders.

2. The questions raised in this appeal concern the proper construction of s. 88 F of the Industrial Arbitration Act, 1940, (N.S.W.) as amended. That section is in the following terms:

"88F. (1) The commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto -

- (a) is unfair, or
- (b) is harsh or unconscionable, or
- (c) is against the public interest.
Without limiting the generality of the words 'public interest' regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or
- (d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award, industrial agreement, agreement registered under Part VIIA or contract determination.

(2) The commission, in making an order or award pursuant to subsection one of this section, may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case.

(3) The commission may make such order as to payment of costs in any proceedings under this section, as may appear to it to be just and may assess the amount of such costs."

THE FACTS

3. The appellant refines and distributes petroleum products of various kinds in New South Wales and elsewhere. Its products are sold to the public at outlets located throughout the State. These outlets, which are commonly known as service stations, are owned and fully equipped by the appellant. Such service stations commonly provide ancillary services to the motoring public, such as repair shops, lubrication bays and fast food facilities.

P. 169 1.13

4. With rare exceptions the appellant does not operate service stations with its own staff.

In 1975 it entered into arrangements with persons desiring to operate service stations on their own account. Such arrangements took the form of a licence pursuant to which the appellant granted the licensee the right to conduct the service station and the licensee agreed to buy from the appellant petroleum products required for sale at the service station.

5. The appellant was the owner of a service station situated on the Pacific Highway at Hexham, a suburb of Newcastle, New South Wales. For some time prior to February 1975 this service station was occupied under licence by licensees who operated the service station and its associated snack bar. Their licence terminated in February 1975 and thereafter and until November 1975 the appellant operated the service station by using its own employees.

6. In July 1975 the appellant placed advertisements seeking a new licensee for the service station. The first two respondents (who are hereinafter referred to as "the respondents") answered the advertisement. A representative of the appellant subsequently gave them a written statement containing estimates of the petrol and other products that could be expected to be sold from the service station, and of the

estimated net profit from the future operation of the service station.

7. It was claimed by the respondents that the representations made to them, both oral and in writing, as to the future takings and profitability of the service station were false. The trial judge (Macken J.) found that the facts did not justify the appellant representing that the profits of the service station would be as they were represented.

P. 182 1.5

8. On 26th September 1975 the respondents entered into a licence agreement with the appellant. The most relevant provisions of the licence agreement were as follows:

P. 162-167

THIS AGREEMENT made the twenty sixth day of September 1975 BETWEEN CALTEX OIL (AUSTRALIA) PTY. LIMITED of 167-187 Kent Street Sydney (hereinafter called 'the Licensor') of the one part AND PAUL LESLIE and MARIE THERESE FEENAN of 7/42 McBurnie Road Cabramatta N.S.W. (hereinafter called 'the Licensee' of the other part

WHEREAS the Licensor is the

1. Owner/Lessee of the lands more particularly described in Part 'A' of the schedule hereto.
2. Owner/Lessee of the buildings and improvements erected thereon more particularly

described in Part 'B' of the schedule hereto (hereinafter called "the licensed buildings").

3. Owner of the plant, equipment and facilities more particularly described in Part 'C' of the schedule hereto (hereinafter called "the licensed facilities").
4. Owner of the goodwill of the business of a Service Station conducted on and from the lands hereinbefore referred to.

AND WHEREAS the Licensor has agreed with the Licensee to allow the Licensee free liberty and licence to use in common with the Licensor its workmen servants and agents the licensed buildings and the licensed facilities in the said Schedule and for that purpose to have access thereto over the said lands described in Part A of the said Schedule AND WHEREAS the Licensor has agreed to grant and the Licensee has agreed to accept a lease of the said goodwill of the said business upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED as follows:

- Licence
1. The Licensor hereby grants and the Licensee hereby accepts a licence
 - (a) to use in common with the Licensor its workmen servants and agents:
 - (i) the licensed buildings described in Part B of the Schedule hereto; and
 - (ii) the licensed facilities more particularly described in Part C of the Schedule hereto
 - (b) to have access over the said lands described in Part A of the Schedule hereto for the purposes aforesaid.

No
lease
to be
implied

2. It is expressly agreed and declared that the rights hereby granted shall be by way of licence only and that the Licensee shall not be entitled to exclusive possession of the said land or the licensed buildings or any part thereof and in particular that this document shall not, except in regard to the lease of the goodwill hereinafter contained, be construed as a lease nor confer any tenancy whatsoever upon the Licensee who hereby acknowledges that this Agreement shall constitute the only agreement between the parties in respect thereto and that there is no contract or arrangement in regard thereto between the parties hereto either in writing or verbal or to be implied except such as is contained or referred to in this Agreement.

Term
of
Licence

3. The licence shall commence on the 1st day of November 1975 and shall, subject to earlier determination as hereinafter provided, continue for twelve (12) months thereafter.

PROVIDED HOWEVER THAT -

- (a) the Licensor may determine the licence at any time within that period without assigning any reason by 30 days notice in writing given to the Licensee;
- (b) if the Licensee shall continue to use the said buildings and facilities with consent of the Licensor after the said period of twelve (12) months he shall remain upon the same terms and conditions as are herein contained PROVIDED HOWEVER THAT the Licensor may at any time determine this Licence by giving 30 days notice in writing to the Licensee and that the Licensee may determine this Licence by giving to the Licensor not less than 3 months' notice in writing expiring at the end of any successive period of twelve months first referred to in this Clause;
- (c) the Licensor may determine the licence without notice in the event of non-payment of any debt owing by the Licensee to the Licensor and remaining unpaid for a period

of seven (7) days after becoming due;
and

(d) the Licence shall be personal to the Licensee and shall determine in the event of the Licensee dying or ceasing to carry on business from the licensed premises.

Licence fee 4. The Licensee shall pay to the Licensor for the Licence hereby granted the Licence fee at the times and in the manner in Clause 28 provided.

Trade name 5. The Licensor hereby grants to the Licensee the right to conduct and the Licensee shall conduct the said business of a garage and service station in the licensed buildings under the trade name of _____ during the period of this Licence and upon the termination thereof shall transfer the said business name to the Licensor or to such other person or persons as the Licensor in writing may direct.

Lease of goodwill 6. The Licensor hereby grants to the Licensee a lease of the goodwill of the said business PROVIDED ALWAYS that the rights and lease of goodwill granted by this clause shall come to an end immediately upon the termination of the licence hereinbefore granted.

Goodwill rental 7. The Licensee shall pay to the Licensor monthly in advance on the first day of each and every month a rental at the rate of \$100.00 per month for the lease of the said goodwill the first payment to be a proportionate one if necessary.

Abatement 8. If at any time during the continuance of the said licence the licensed buildings or the licensed facilities shall be destroyed or damaged by fire except fire due to act of negligence of the Licensee flood lightning storm or tempest so as substantially to interfere with the exercise by the Licensee of the rights hereby granted then and so often as the same shall happen the licence fee and the rental for goodwill hereby secured or a proportionate part thereof shall abate either wholly or to such extent as the Licensor may in its discretion bona fide deem to be fair and reasonable.

Removal of equipment 9. The Licensee shall not remove from the premises any of the licensed facilities the subject of this licence.

Use of facilities and buildings 10. The Licensee shall not use the licensed facilities or the licensed buildings for any purpose other than for the operation of a Petrol Service Station Garage and shall be entitled to and shall conduct the said business during all lawful hours and for this purpose the Licensee shall and will apply for and use his best endeavours to obtain from any relevant authority any permission that may be necessary to ensure that the said business may be conducted for the maximum permissible number of trading hours PROVIDED that the Licensee shall take delivery of petrol from time to time required to be delivered by the Licensor in full tank loads at a time convenient to the Licensor or its agents or servants in that behalf.

Sale of goods 11. The Licensee shall buy exclusively from the Licensor all petroleum products which may be required for sale at the service station as long as the Licensor shall be ready to supply the same and he shall not directly or indirectly buy receive sell or dispose of or permit to be bought received sold or disposed of on or about the service station petroleum products not actually purchased by the Licensee from the Licensor.

12. ...

13. ...

14. ...

15. ...

Restriction on similar trading 16. The Licensee shall not during the period of this licence be engaged concerned or assist in the sale of petrol or petroleum products at any place other than the licensed buildings within a radius of 5 miles from the licensed buildings.

17. ...

18. ...

19. ...

20. In the event of the Licensee failing to carry on the said business for any period during lawful trading hours on any day, or in case of default by the Licensee in payment of any moneys due hereunder or breach of any of the terms and conditions of this licence, or if bankruptcy or insolvency proceedings are instituted against the Licensee, or if the Licensee makes any assignment to a trustee for creditors or commits any act of bankruptcy or if any judgment or any Court is given, or any attachment or garnishee proceeding or execution is levied or instituted against the Licensee, or if he shall be found guilty of any indictable offence, the Licensor may without notice immediately terminate this licence.

Default
by
Licensee

21. ...

22. ...

23. ...

24. ...

25. ...

26. The Licensor will provide such advertising facilities as it may from time to time deem fit to assist the Licensee to sell the Petroleum products supplied by it and the Licensee is hereby licensed to use all copyrighted advertising matter which the Licensor may from time to time deem necessary to be displayed painted or otherwise affix to the premises.

Provision
of advert-
ising
facilities
and use of
copyright
advertis-
ing, etc.

27. The Licensor will from time to time as it may deem fit provide trained personnel to work in and about the licensed buildings at its own expense to advise on such merchandising problems as may arise in connection with the said business of the Licensee and shall give as soon as convenient on request such technical assistance and carry out such tests regarding complaints or otherwise in respect of the quality of the goods supplied as it may deem proper and generally will assist in maintaining the standards laid down by it in connection with its general Service Station policy. In connection with the "Marfak" service it shall from time to time upon request

Provision
of
trained
personnel
etc.

and at its earliest convenience train such employees of the Licensee as may be required to assist in developing the greasing facilities of the said business.

Licence fee. 28. The Licensee shall pay to the Licensor for the Licence hereby granted a licence fee as follows : -

(a) the sum of \$600.00 per month on the first day of each and every month, the first payment if necessary to be a proportionate one,

29. ...

30. ...

31. ...

32. ...

SCHEDULE

PART A. DESCRIPTION OF THE LAND: Being all that piece or parcel of land contained in conveyance registered No. 920, book No. 2550 being in the Parish of Hexham, County of Northumberland, City of Newcastle.

PART B. SCHEDULE

DESCRIPTION OF THE LICENCED FACILITIES: A brick one bay Service Station complete with fixtures, shelving and furniture. Cafe and residence constructed of brick comprising of restaurant, kitchen, storeroom, ladies and gents rest rooms, two bedrooms, lounge room, lobby, bathroom and laundry. Fencing.

PART C. SCHEDULE

See annexure listing licenced facilities attached hereto.

9. The respondents went into possession of the service station on 1st November, 1975. Thereafter they conducted the service station business on their own account, working long hours in so doing. They did not sell as much petrol as they had anticipated selling as a result of the representations made to them nor did the business make the profits which it was represented as being capable of making. In consequence they gave the appellant notice of their intention to terminate the licence on 31st March 1976. They vacated the service station pursuant to that notice.

Hearing in The Industrial Commission

10. Thereafter the respondents commenced proceedings against the appellant in the Industrial Commission of New South Wales pursuant to s. 88 F of the Industrial Arbitration Act.

11. It was submitted on behalf of the appellant that s. 88 F did not apply to the contractual arrangements made between it and the respondents and that therefore the Industrial Commission had no jurisdiction to make an order under the section. This submission was overruled by Macken J. who made an order, inter alia, declaring void the licence agreement made on

P. 197 1.8

26th September, 1975. Further orders were made requiring Caltex to pay various sums of money to the respondents.

Hearing in The Court of Appeal

12. The appellant applied to the Supreme Court of New South Wales (Court of Appeal) seeking a declaration that the orders made by Macken J. were void and of no effect and an injunction restraining enforcement of the orders. This application was determined by the Court of Appeal on 11th July 1980 (Moffitt P., Hope and Hutley JJ.A.) when it was dismissed with costs. P. 199-200
13. In the Court of Appeal it was argued on behalf of the appellant that jurisdiction under s. 88 F (1) only arose if there were a contract or arrangement "whereby a person performs work in any industry". It was submitted that, in the absence of such a contract or arrangement, there was no jurisdiction to make orders under that section. Hutley J.A. held that the contract between Caltex and the respondents lead directly to the respondents working in the industry of the distribution of petroleum products and was a contract of the type referred to in the section. P. 217 1.10
- Hutley J.A. held that the contract between Caltex and the respondents lead directly to the respondents working in the industry of the distribution of petroleum products and was a contract of the type referred to in the section. P. 211 1.20

14. Hutley J.A. further held that even if on the proper construction of the contract made between Caltex and the respondents it did not cause the respondents to do work in the industry, Macken J. still had jurisdiction because, apart from contract, Macken J. "reached the conclusion that there was an arrangement which led the first and second defendants to working in an industry". It was then said by his Honour that this was a finding of fact which was not shown to be incorrect. He held that the Industrial Commission was entitled to determine the facts which led to the exercise of its own jurisdiction. P. 212 L.25
15. Moffitt P. and Hope J.A. agreed with these findings of Hutley J.A. P. 203 L.10
and
P. 206 L.10
16. Hutley J.A. further held that even if the Court of Appeal had decided that it was proper for it to intervene in the matter, it would have had no jurisdiction to make the declaration which was sought. He said, however, that it would have been appropriate to make an order restraining the respondents and the Industrial Commission from enforcing the orders made by the Commission. P. 215 L.17
P. 215 L.25
- Moffitt P. and Hope J.A. did not make any finding on the appropriateness of declaratory relief, as P. 204 L.15
P. 206 L.10

the question did not arise for decision.

SUBMISSIONS

17. The appellant submits that the Court of Appeal was in error in finding that the contract was one "whereby a person performs work in an industry". The contract was a licence permitting the respondents to use the premises for the purpose of conducting thereon their own service station business involving the sale of Caltex petroleum products. The independent nature of the respondents' business is illustrated by the fact that the premises included a restaurant from which the respondents conducted a cafe and take-away food business. The appellant submits that such a contract is not within s. 88 F (1).

18. The meaning of s. 88 F has been considered in many cases, most recently and authoritatively in Stevenson v. Barham 136 C.L.R. 190. In that case there was a division of opinion amongst the members of the High Court as to the meaning of the section and as to whether it extended to include within its ambit an agreement by a farm worker to share-farm a farmer's land. The majority (Barwick C.J., Mason and Jacobs JJ.) were of the opinion that

a contract was within s. 88 F (1) if it led "directly" to a person working in an industry. See 136 C.L.R. at 201. The minority (Stephen and Aickin JJ.) were of the view that a contract was only within the section if as a consequence of it one party performed work for another in an industry. See per Stephen J. at 193-194 and per Aickin J. at 211.

19. The appellant submits that the minority view is to be preferred. The reference in s. 88 F (1) to a person performing work "in any industry" conveys the notion of one person performing work for another. See the definition of "industry" in s. 5 where the word is defined as meaning "craft, occupation, or calling in which persons ... are employed for hire or reward ...". Section 88 F (1) thus refers to contracts in consequence of which one person performs work for another in any craft occupation or calling. This construction derives support from the language of s. 88 F (1)(d) which assumes that the work referred to in the opening words of s. 88 F (1) is work being performed for another, although not as an employee. Section 88 F (1)(c) and (e) also supports this construction.

20. As Stephen J. said in Stevenson v. Barham at 195 :

"That s. 88 F should be concerned with contracts under which work is performed by one person for another, although not as an employee, is precisely what, on first reading the section in its statutory context, one would conclude to be its purpose. The Industrial Arbitration Act consolidates "the Acts relating to Industrial Arbitration" and confers upon the Tribunals it creates wide powers in relation to the employer-employee relationship; s. 88 F then meets the case of those industrial relationships in which the parties are not in any master and servant relationship yet the one is performing work for the other in consequence of a contract."

21. The appellant submits that this reasoning is persuasive, as is the reasoning of Aickin J., who said of s. 88 F that "the basic concept is of a contract whereby one person performs work in an industry for another person." 136 C.L.R. at 211.

22. The reasons of Mason and Jacobs JJ. are almost exclusively confined to rejecting the argument advanced on behalf of the appellant in that case that the jurisdiction of the Industrial Commission was restricted to cases in which the agreement is subversive of industrial regulation. That argument was not accepted by any member of the Court in Stevenson v. Barham, and

is not advanced by the appellant in the present case.

23. If the test of jurisdiction be that the contract made by the parties must be one in consequence of which one person performs work for another, then the contract made by Caltex with the respondents does not meet that test. On no construction of the contract or of the facts of the case could it be held that the respondents worked for Caltex. They purchased petroleum products from Caltex, and sold those products in their own business. The degree of control which Caltex exercised under the licence agreement was related to the manner in which the respondents conducted their own business, not to the manner in which they performed any work for Caltex.

24. But even if the test of jurisdiction be that propounded by the majority in Stevenson v. Barham, i.e. the existence of a contract which leads "directly" to a person working in an industry, that test was not met by the contract made by Caltex with the respondents. The contract did not lead directly to the respondents working in industry. Mason and Jacobs JJ. do not elaborate

in their reasons on the requisites of a contract "whereby a person performs work in any industry" beyond finding that on the facts of the case before them, the share-farming agreement provided directly for the employment of the farm worker in the dairy farming or dairying industry - see 136 C.L.R. 202, 2nd para. But certainly they did not decide that if a person conducts his own business on premises which he leases or licenses from another, then the lease or licence is a contract within s. 88 F.

25. There was no requirement imposed upon the respondents by the licence to personally perform any work. Their obligation was to "conduct the business of a garage and service station in the licensed building". Vide clause 5 of the licence agreement. They could have complied with that obligation by 163 employing other persons to do all the necessary work. They were at liberty to work as much or as little as they pleased - or not at all - in the business. Their position was no different from that of a publican employing staff and conducting a hotel business on premises leased to him by a brewer. In such cases it is not the licence "which leads directly" to the licensee performing work. The circumstance which leads directly to the licensee performing work is his election to work and his

decision not to employ others to work for him.

26. The test adopted by Stephen and Aickin JJ. i.e. whether the contract is one whereby a person performs work for another in an industry, is more apt for determining, in the present case, whether the contract made by Caltex with the respondents was within the section. This test is not necessarily inconsistent with the meaning of the section adopted by the majority in Stevenson v. Barham, although it led to the minority coming to a different view on the facts of that case.

27. Although it has been held in past cases that s. 88 F applies to a broad class of contracts, it has not previously been held that the section applies to a contract of the kind made by Caltex with the respondents. In most of the cases decided on the section, an essential element of the contractual relationship between the parties has been the performance, in one way or another, of work by one party for another. See, for example, Brown v. Rezitis 127 C.L.R. 15, In re Becker and Harry M. Miller Attractions Pty. Limited (No. 2) (1972) A.R. 298; In re Player & Anor. and Kacy & Anor. (1971) A.R. 124; Federated Miscellaneous Workers' union v. Wilson Parking (N.S.W.) Pty. Ltd.

(1978) 1 N.S.W.L.R. 563; (1979) 1 N.S.W.L.R. 398.

This element was absent from the relationship between Caltex and the respondents. The Caltex trading system described by Macken J. was not a system which involved the respondents in working for Caltex. P. 184 1.20

28. In some of the cases it has been said that for a contract to be within s. 88 F (1) it must have "an industrial colour or flavour". See for example Ex parte V.G. Haulage; re Industrial Commission (1972) N.S.W.L.R. 81 at 87 A. If this be a requirement, it is not met by the contract made by the parties in this case. The licence agreement was of a conventional commercial kind which did not give rise to any employment or quasi employment relationship such as would give it an "industrial colour or flavour".

29. Hutley J.A. seems to have been influenced into finding that the contract was within the section because "it was the inducement which led (Mr. Feenan) to give up his previous career and embark upon ... a new occupation." It is submitted that considerations of this kind do not determine the nature of contracts caught by the section. All the remedies of the common law are available to a party to a P. 211 L.24

contract who claims to have suffered damage by reason of false or inaccurate or negligent statements which lead him to enter into a contract. But the making of such statements do not lead to the result that the contract is brought within the section if it is not otherwise within it.

30. _____ Much evidence was given before Macken J. as to the hours worked by the respondents in the business and as to the poor financial rewards which they received. Evidence was also given of alleged misrepresentations made by an employee of Caltex prior to the signing of the agreement. None of this evidence is of any relevance on the question of jurisdiction of the Industrial Commission under s. 88 F (1). It is not the doing of work or the making of misrepresentations which is relevant to jurisdiction under the section. It is the existence of a contract or arrangement of the requisite kind that is the relevant jurisdictional fact. See Stevenson v. Barham 136 C.L.R. at 201 last para.

31. It is further submitted that the Court of Appeal was in error in finding that, even if the contract did not found the Industrial Commission's jurisdiction, then such jurisdiction was nevertheless established because Macken J. found as an

alternative basis of jurisdiction that there was an 'arrangement' within the meaning of the section. Macken J. made no such finding. P. 213 L.7

33. The basis upon which Macken J. found he had jurisdiction is set out quite specifically by him in his judgment. He found that "the licence agreement is a contract which led directly to the applicants working in an industry. As such it is a contract "whereby a person performs work in any industry (s. 88 F (1))". Nowhere in his judgment does Macken J. find that there was any arrangement different from that which flowed from the contract itself. It is true that he said that to analyse clause by clause the terms of the licence agreement would be to "take a fragmentary view of the transaction" and that "It is with the essence of the transaction that s. 88 F should be concerned." But he did not find that there was any arrangement separate from or independent of the contract. Nor was there any evidence to support a finding that such an arrangement existed. The exposition by Macken J. of the Caltex trading system explains the making of the contract. But Macken J. did not find that there was any arrangement under s. 88 F (1) apart from the contract itself. It was P. 179 L.25 P. 183 L.29 P. 184 L.19

thus unnecessary for Caltex to show before the Court of Appeal that Macken J's findings of fact were incorrect. Hutley J.A. inferred that it was necessary for Caltex to do this but he was incorrect.

P. 213 L.29

34. In any event, even if an arrangement had been found by Macken J. to have existed, there was no evidence that any such arrangement was one "whereby a person performs work in any industry". Any such arrangement would have been for the occupation by the respondents of the service station pursuant to the licence agreement and would not have been different in character from the licence agreement itself.

35. Upon the proper construction of s. 88 F (1) the jurisdiction of the Industrial Commission to make an order under the section depends upon the actual existence of a contract or arrangement of the specified kind, not merely upon the decision of the Commission that there was such a contract or arrangement. When originally enacted in 1959, the opening words of s. 88 F (1) were: "The commission or a committee may ...". The reference to a "committee" was to a lay conciliation committee - see s. 18. By Act No. 51 of 1966, s. 5(a)(i) the words " or a

committee" were deleted. It could not have been intended by the Legislature that the power to make an order avoiding a contract would depend upon the decision of laymen that the contract was of the specified kind, as distinct from the actual existence of such a contract. It is the intention of the Legislature which must be ascertained. See Manning v. Thompson (1979) 1 N.S.W.L.R. 384 at 389 B; Ex parte Redgrave; re Bennett 46 S.R. (N.S.W.) 122 at 125 and Anisminic v. Foreign Compensation Commission (1969) 2 A.C. 147. It was assumed, correctly, by the High Court in Stevenson v. Barham that it was open to the Court of Appeal and it to examine the correctness of the decision of the Commission as to the existence of a contract of the requisite kind. At p. 201 Mason and Jacobs JJ. said that a contract with the requisite industrial character was "the relevant jurisdictional fact which needs to be established". It is submitted that their Honours meant to convey by that observation that the existence of a contract of the requisite kind was necessary to found the Commission's jurisdiction. P.203 L.24

36. However, Moffitt P. (with whom Hope J.A. agreed) held that the decision of the Commission as to the existence of a contract must be made "upon evidence which left such decision open". P.204 L.2

The appellant submits that there was no evidence before Macken J. which could support a finding that a contract or arrangement of the requisite kind in fact existed.

37. The statement by Hutley J.A. that Caltex was not entitled to the declaratory relief sought is of no consequence in the present appeal. The appellant does not concede that its claim for declaratory relief is inappropriate. But the matter is of academic importance. The appellant accepts that, if otherwise entitled to succeed in the appeal, it will be sufficient for an order to be made in terms of paragraph 2 of the amended summons, i.e. for injunctive relief only.

P. 215 L.17

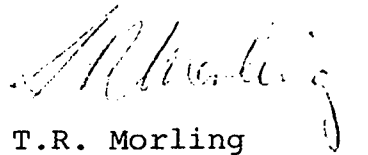
P. 207 L.21

38. The appellant respectfully submits that the judgment of the Court of Appeal is wrong and ought to be reversed, and this appeal ought to be allowed with costs for the following (amongst other)

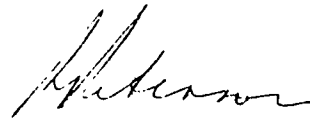
R E A S O N S

- (1) Because the contract made between the parties was not a contract of the kind referred to in s. 88 F (1) of the Industrial Arbitration Act.

- (2) Because there was no arrangement between the parties of the kind referred to in s. 88 F (1) of the said Act.
- (3) Because the Industrial Commission did not have any jurisdiction to make orders under s. 88 F (1) of the said Act.



T.R. Morling



R.J. Peterson