12 of 1981

IN THE PRIVY COUNCIL No. 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 RESPONDENTS

SOLICITORS FOR THE APPELLANT

Moore and Bevins,
60 Martin Place,
SYDNEY.

By their Agents:

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
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SOLICITORS FOR THE RESPONDENTS

Borthwick Wilson Smith & Mitchell,
13-15 Watt Street,
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By their Agents:

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By their Agents:

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Record

CIRCUMSTANCES GIVING RISE TO THE APPEAL:

1. This is an appeal pursuant to final leave granted by the Supreme Court of New South Wales, Court of Appeal on 20th October, 1980.

2. The appeal is brought from a decision of the Supreme Court of New South Wales, Court of Appeal constituted by the President, Mr. Justice Moffitt, Mr. Justice Hope and Mr. Justice Hutley, Justices of Appeal dismissing a Summons for:

   1. A declaration that the purported decision and orders of the Industrial Commission of New South Wales made on 3rd September, 1979 in

proceedings in the Commission No. 200 of 1979 are void and of no effect.

2. An order that Paul Leslie Feenan and Marie Therese Feenan and the Industrial Commission of New South Wales be restrained from enforcing or attempting to enforce the orders referred to in paragraph 1 hereof.

3. Such further or other order or decision as to the Court seems fit.

GROUNDS

1. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because Section 88F of the Industrial Arbitration Act, 1940 did not apply to the contract or arrangement or any condition or collateral arrangement relating thereto between the Plaintiff and the First and Second Defendants.

2. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because there was not any contract or arrangement made between the Plaintiff and the First and Second Defendants whereby the First and Second Defendants performed work in any industry.

3. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because the contracts and arrangements referred to in Section 88F are contracts or arrangements whereby one person performs work for another, and the agreement made between the Plaintiff and the First and Second Defendants was not such a contract or arrangement.

and upholding a finding by the Industrial Commission (constituted by Mr. Justice Macken) that it had jurisdiction.

3. The present Appellant appealed also to the Industrial Commission in Court Session, an appeal to a Full Bench of that Commission. Such an appeal lay pursuant to s. 14 ss. 8(b)(i) and (ii) and s. 14 ss. 8(c) of the Industrial Arbitration Act, 1940, which provides as follows:

"(b) From any order, award, ruling or decision made by a member of the Commission sitting alone, an appeal shall only lie to the Commission in Court Session -

(i) Where any question of jurisdiction is involved; or

(ii) by leave of the Commission in Court session, where the Commission in Court session is of the opinion that the matter raised on appeal is of such important that an appeal should lie.

(c) On such appeal the Commission in Court session may vary any such order, award, ruling or decision in such manner as it thinks fit. On any such appeal further evidence shall be admitted on special grounds only and not without special leave of the Commission in Court session."

The Appellant abandoned that appeal which was accordingly dismissed.

4. The relevant facts found by his Honour Mr. Justice Macken, appear on pages 169-177, (to line 15) of the Record. His Honour dealt with particular aspects in more extensive detail, under headings "The Representations", "The Licence Agreement", "The Caltex Trading System", between pages 181 (line 18) and 192 (line 16). Record: 169-177; 181-192

5. A brief summary of the facts is as follows:

(a) A licence agreement was entered into on 26th September, 1975, between the Feenans and Caltex, which commenced on 1st November, 1975. Record: 169 lines 11-13; 173 line 21

(b) The licence agreement is reproduced at pages 162-7 Record: 162-167

(c) Caltex refines and distributes petroleum products of various kinds in New South Wales and elsewhere, which are sold at outlets located throughout the State. The outlets are owned and fully equipped as service stations by Caltex. They not Record: 169 lines 13-24

only comprise petrol and distillate storage tanks and pumps but some outlets also provide ancillary services which include repair shops and lubrication bays and, in the case of the subject service station, a take-away food facility.

(d) The subject service station is situated on the Pacific Highway at Hexham, a suburb of Newcastle, about 100 miles north of Sydney, New South Wales. 169 lines 25-26; 170 line 1

(e) From a date in, or shortly after, February 1975 Caltex operated the station by using its own employees under a manager, Mr. Bennett. 170 lines 21-24

(f) Caltex preferred to operate its retail outlets by securing the services of licensees. 171 lines 21-23

(g) During the period of Mr. Bennett's management of the Hexham service station, Caltex was continuously advertising to secure the services of a licensee for that site. 171 lines 19-22

(h) In July 1975, one such advertisement came to the attention of Mr. Paul Leslie Feenan. 171 lines 23-24

(i) The terms of the advertisement are at page 172. 172 lines 1-23

(j) The Feenans attended the service station site with Mr. Parker, an employee of 171 lines 6-8

		Record
	Caltex who was the Merchandising Representative of Caltex in the Newcastle area.	172 lines 34-35 173 lines 1-3
(k)	Mr. Parker produced an income and expenses statement he had prepared.	173 lines 6, etc.
(l)	This income and expenses statement is at page 161.	161
(m)	The Feenans attended a Caltex dealers school to receive instruction in how to manage the service station.	174 lines 18-21
(n)	Prior to commencing operating the service station under the licence agreement Mr. Feenan was told of the long trading hours he would be expected to work.	174 lines 23-29 175 lines 1-3
(o)	In or about February, 1976 Mr. Feenan discovered that the station was not selling 26,000 gallons of fuel per month, and that he was not going to receive $24,000 per year, as had been told to him. Further, despite the fact that his wife was working very hard, the snack bar was not taking $1,000 per month.	175 lines 16-25
(p)	Mr. Feenan gave evidence that he averaged, conservatively, between 85 and 90 hours per week; and Mrs. Feenan worked an average of 75 hours per week.	175 lines 25-27 176 lines 3-6

		Record
(q)	In early 1976 Mr. Feenan gave notice to Caltex of his intention to terminate the licence on 31 March, 1976.	176 lines 26-29 177 line 1
(r)	During the period of five months in which the licence agreement was operated by the Feenans their taxation records show that they made approximately $1,500 each.	177 lines 9-11
(s)	The representation in the advertisement which attracted the Feenans that a good operator was capable of earning in excess of $20,000 per year went beyond legitimate "puffing" of the business.	182 lines 1-4
(t)	The estimated gallonage of 26,000 per month was not justified by the gallonage sold while the station was under Caltex direct management: It was not nearly achieved in that period.	182 lines 18-22 182 lines 18-22
(u)	It must have been obvious to Caltex that the suggested return of $20,000 per year was not likely to be realized.	182 lines 26-28
(v)	Had the Feenans been aware of the true position as to the likely monetary return for their hours of work, they would never have entered into the transaction at all.	183 lines 3-6
(w)	Even making liberal allowances for the suggested hidden advantages which	194 lines 6-13

attached to the licensees under the agreement, there remains thereafter a considerable short-fall on the sum the Feenans would have received as employees working under the terms of the relevant awards. The contract provided a total remuneration less than a person performing the work would have received as an employee performing such work.

6. No attempt was made in the Court below to show that Mr. Justice Macken's findings of fact were incorrect. Vide Mr. Justice Hutley's judgment in the Court of Appeal. 213 line 27

7. There was in any event ample evidence to support the findings. Vide Mr. Justice Moffitt P's judgment. 204 line 22

8. The Respondents adopt the reasoning of Mr. Justice Macken.

9. The Respondents adopt the reasoning of Mr. Justice Hutley.

10. The Respondents adopt the reasoning of Mr. Justice Moffitt P.

11. Section 88(F) of the Industrial Arbitration Act, 1920 (as amended) provides:-

"88F. Power of Commission to declare certain contract void.

(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 or agreement.

(2) The commission, in making an order or award pursuant to subsection one of this section, may make such order as to the payment 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 the 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."

(A) HAD DIRECTLY TO WORK IN AN INDUSTRY

12. The contract or arrangement between the Appellant (hereinafter "Caltex") and the first and second Respondents (hereinafter "the Feenans"), whether it be the Licence Agreement (on one approach) or the total arrangement (as alternatively found by Mr. Justice Macken) led directly to the Feenans working in the petroleum industry. In accordance with Stevenson v. Barham (136 C.L.R. 190) this satisfies the threshold jurisdictional question. In that case Barwick, C.J. said (at 192):-

> "Notwithstanding the wide language of s.88F, I have found difficulty in becoming convinced that it was within the contemplation of the legislature that agreements for business ventures, of which the present may be a specimen, freely entered into by parties in equal bargaining positions, should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void. However, I have come to the conclusion that the language of s.88F of the Act is intractable and must be given effect according to its width and generality. The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited.
>
> Since forming this conclusion I have had the advantage of reading the reasons for judgment prepared by my brothers Mason and Jacobs. I agree with their conclusion and with their expressed reasons for it. I also agree with their comments upon the reasons for judgment of the Chief Justice of New South Wales.

Mason and Jacobs, JJ. at pages 199-202 said:-

'The first obstacle in the Appellant's way is t at the power conferred upon the Commission by s. 88F is in the widest terms. It enables the Commission to make an order or award varying a contract or arrangement or a condition or collateral arrangement relating thereto, on the grounds stated. The grounds so stated are wide ranging and embrace many considerations. They are not all limited to considerations which are themselves industrial in character - they include the grounds that a contract or arrangement is (a) unfair, (b) harsh or unconscionable, (c) contrary to the public interest.

The fact that grounds (a), (b) and (c) are included in sub-s. (1) in addition to grounds (d) and (e), indicates that the Commission's powers are not confined in point of jurisdiction to contracts or arrangements designed to avoid the industrial awards or agreements or the rates of remuneration fixed for the performance of work by employees, the matters stated in grounds (d) and (e). According to the language in which the first three grounds are expressed the Court can grant relief if a contract or arrangement is unfair or harsh or unconscionable or is against the public interest, whether it tends to subvert industrial awards and industrial agreements or not.

There is little force in the argument that because the power has been entrusted to the Industrial Commission and not to the Supreme Court, it should be circumscribed and confined to agreements which tend to subvert orderly industrial regulation. There were strong reasons for giving the power, whether it be extensive or circumscribed, to the Industrial Commission rather than to the Supreme Court. The Supreme Court does not exercise jurisdiction in industrial matters. The Industrial Commission does exercise such a jurisdiction; it was therefore an appropriate repository of a jurisdiction which includes matters having an industrial character.

In the present case Kelleher, J. said:-

"In substance it (i.e. the agreement) was a business venture of a type traditionally carried on in the rural sector, conducted on a partnership basis and involving the risks attendant upon its operation. It was not, in my view, a transaction necessarily in intention or effect subversive of the scheme and purposes of industrial legislation, nor a case in which work was performed under some form of contractual arrangement with a person who could be an employer nor one where the Respondent was in the position of an employer or a contractor getting or purporting to get work done for himself in some way."

In concluding that these considerations operated to deprive him of jurisdiction his Honour relied on the decision of the Industrial Commission in In Re Becker and Harry M. Miller Attractions Pty. Limited (No. 2) where the Commission said: "We are satisfied that the limitation of the scope of s. 88F to transactions which have, in the words of Jacobs J.A., speaking for the Court of Appeal in the V.G. Haulage case an industrial colour or flavour arises as a matter of interpretation and therefore imposes a jurisdictional restriction."

This sentence, read in isolation, gives a misleading impression of what was actually decided in the Becker case and all that was said by Jacobs J.A. (with whom Mason J.A. and Hardie J.A. agreed) in Ex Parte V.G. Haulage Services Pty. Limited; Re Industrial Commission (N.S.W.). The critical passage in the V.G. Haulage case is:

"If the grounds upon which the powers under s.88F might be exercised were limited to (d) and (e) in s. 88F(1), there might be much to be said for the restrictive view; but as Barwick, C.J. pointed out in Brown v. Rezitis: 'The five grounds on which the commission may vary or avoid contractual arrangements are not homogeneous' and as Sheldon, J.

pointed out in Davies v. General Transport Development Pty. Limited: 'For it (that means s. 88F) not only proscribes transactions which directly undermine awards, see (d) and (e), or threaten general industrial standards which, I think, is the most relevant 'public interest' referred to in (c), but it also, in (a) and (b) strikes separately at those which are 'unfair' or 'harsh' or 'unconscionable'. Presumably this is because any transaction leading to work in an industry which can be so described is regarded as inimical to the purposes of the Act.' I think this last sentence properly expresses the principle, in that the transaction must directly lead to work in the industry - that is what gives the industrial colour or flavour - but there is no suggestion in the passage that there must be throughout an identity between the person working and the contracting party."

When the last sentence in this passage is read in the light of the comments which precede it, it becomes obvious that what was being rejected was the argument that the powers of the Commission are confined to transactions which directly undermine awards or threaten industrial standards and what was being asserted was that so long as the transaction leads directly to work in any industry it has the necessary 'industrial colour or flavour'.

That this was the effect of the V.G. Haulage case seems to have been recognised in a later passage in the judgment of the Commission in the Becker case when it said:

"Returning to the primary question whether this contract is one 'whereby' the Applicant 'performs work in any industry', we find that it is a contract of this character. We think that the word 'whereby' has its permitted dictionary meanings of 'by means of or by the agency of which'; in consequence of, as a result of, or of owing to which' (Shorter Oxford) and that this accords

with the statement of Jacobs, J.A. in the V.G. Haulage Case that the transaction must 'directly' lead to work in the industry'. Normally such a contract will be the actual work contract".

Consequently neither case properly understood provides support for the jurisdictional limitation which the Appellant seeks to introduce and which Kelleher J. enunciated.

There is nothing in Brown v. Rezitis which supports the suggested limitation on jurisdiction. Barwick C.J. pointed out that of the five grounds, only two refer to the avoidance of an award or the underpayment of a worker in industry. Menzies, J. said specifically, "Section 88F confers upon the Commission the power to make orders which cannot be comprehended within the description of orders relating to or appearing to relate to industrial matters".

It follows, then, that if the contract is one which leads directly to a person working in any industry it has the requisite industrial character - it is a contract "whereby a person performs work in any industry". This is the relevant jurisdictional fact which needs to be established. An error of law whereby the commission assumes or declines jurisdiction may be corrected by the Supreme Court; but once the jurisdiction is established the Industrial Commission is the final arbiter both on matters of law and on matters of fact. Its decision cannot, except by way of appeal to the commission in court sessions pursuant to s. 14, be challenged, appealed against, reviewed, quashed or called in question by any court on any account whatsoever (s.84). The plaintiff must, as a condition of making out a case for relief, show the existence of one of the five grounds set out in the subsection. When such a ground has been established it is for the commission in the exercise of its discretion to determine whether relief will be granted. Thus in exercising its discretion the commission may decide, as it appears to have done in

a number of cases, that relief will only be granted if the agreement appears to be one which is subversive of industrial regulation. By so deciding the commission might or might not be acting upon a correct legal principle governing the exercise of the discretion given to it. Since s.88F(1) includes pars. (a), (b) and (c) as well as (d) and (e) it may well be that the commission would not be acting on a correct principle if it were so to decide. But it must be recognized that the principle so adopted is one which relates, not to jurisdiction, but to the exercise of the discretion conferred by the sub-section. The various facts and circumstances relied upon by Kelleher J. as reasons for holding that he had no jurisdiction may lead him to conclude that no order ought to be made but that is a matter for the Industrial Commission.

We would therefore reject the Appellant's submission that the contract is not one of the kind contemplated in the opening words of s. 88F(1). The share-farming agreement provided directly for the employment of the first Respondent in the dairy farming or dairying industry and, in accordance with the provisions of the agreement, he performed work in that industry. This, so it seems to us, is the end of the Appellant's case in this Court. It was not suggested, nor could it be suggested, that if the agreement be held to fall within the opening words of the sub-section, there was an excess of jurisdiction on the part of the commission in proceeding to hear and determine the Respondent's claim for relief."

(B) THRESHOLD QUESTION ONE OF FACT

13. In proceedings in the nature of prohibition, the Court of Appeal, was not engaged in reviewing the Industrial Commission's findings of fact. The commission was entitled to

determine the facts which went to the exercise of jurisdiction.

The commission found that a relevant arrangement existed and the Appellant has never submitted that the evidence did not support the commission's findings of fact.

The Court of Appeal was correct on this basis in rejecting the Appellant's application. Moffitt P. 204 Hutley J. 215

14. Section 84 of the Industrial Arbitration Act, provides:-

"84. Decision of commission or member final.
(1)(a) Except as provided in section fourteen of this Act any decision of the Commission in court session or of any member of the commission sitting alone, whether pursuant to a delegation or otherwise, shall be final; and no award and no order or proceeding of the commission in court session or of any such member shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed or called in question by any court of jurisdiction on any account whatsoever.

(b) No writ of prohibition or certiorari shall lie in respect of any award, order, proceeding or direction of -

(i) the commission in court session, or

(ii) any member of the commission sitting alone, whether pursuant to a delegation or otherwise, relating to any industrial matter or any other matter which, on the face

of the proceedings, appears to be or to relate to an industrial matter.

(2) Sub-section one of this section shall be deemed to have commenced on the ninth day of December, One thousand nine hundred and twenty-seven.

15. In Ex Parte Mullen: Re Hood 35 S.R. (N.S.W.) 289 at 300 Sir Frederick Jordan said:-

"The case of Colonial Bank of Australasia v. Willan (supra) and the well known remarks of Lord Esher in R. v. Commissioner for Special Purposes of Income Tax (21 Q.B.D. 313 at 319) as paraphrased by the Privy Council in R. v. Nat Bell Liquors Limited (1922) 2 A.C. 128 at p. 158) suggest that if a fact on which the presence or absence of jurisdiction turns is itself one which can only be determined as part of the general inquiry into the matter which is being heard, and especially where it is one of the matters which would arise to be disposed of in any ordinary case, this is a material factor pointing to the conclusion that it is intended that it is the determination by the inferior tribunal that the fact exists which is to be the criterion of the existence of jurisdiction; and that that determination must therefore be treated as final and not provisional. The question is, however, in every case one to be determined on the language of the particular statute."

16. In Parisienne Basket Shoes Pty. Limited v. Whyte (59 C.L.R. 369 at 391) Dixon J. (as he then was) said:-

"It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as

> distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

17. Short of a submission that there was no evidence to support the finding that an arrangement of the relevant sort existed, the Appellant must fail. Vide Connor v. Sankey (1976) 2 N.S.W.R.L.R. 570, at 609-611.

(C) ARRANGEMENT AS A WHOLE, NOT MERELY THE LICENCE MAY BE LOOKED AT.

18. The word "arrangement" as used in the expression "any contract or arrangement" in s. 88F was considered by the Industrial Commission in court session in Custom Credit Corporation Limited v. Goldsmith (Industrial Arbitration Service Current Review 1976 X20). Their Honours, while recognising "the limited extent to which the interpretation of words used is one statute can be applied to like words in another statute, reviewed cases wherein the word "arrangement" has been considered.

19. Their Honours considered three cases, each of which concerned the consideration of the word "arrangement" as it appeared in taxation legislation (Jaques v. Federal Commissioner of Taxation (1923-1924) 34 C.L.R. 328; Bell v. Federal Commissioner of Taxation (1952-53) 87 C.L.R. 548; and Newton v. Federal Commissioner of Taxation (1958) A.C. 450) and expressed the view that each of these cases afforded a valuable guide to the proper construction of the word "arrangement" in s. 88F. Their Honours concluded:-

(a) "arrangement is not a term of arm and is not a word which has a very precise meaning;

(b) in one of its meanings in s. 88F "arrangement" embraces transactions which do not give rise to contracts or obligations, that is to say, obligations enforceable at law;

(c) in another meaning "arrangement" embraces a situation where there exists two or more separate contracts which, notwithstanding their separateness, are, given the facts, so sufficiently associated with each other in a practical sense as together to constitute an arrangement of which each contract is a part.

20. The Respondents adopt the judgment of the Industrial Commission in court session in Custom Credit Corporation Limited v. Goldsmith insofar as it deals with the word "arrangement" in the expression "any contract or arrangement" in s. 88F.

21. Their Honours in the Custom Credit case also quoted with approval several passages from the judgment of Mr. Justice Sheppard in In Re Hall & Alison Clint Floral Delivery Pty. Limited (1971) A.R. (N.S.W.) 56. The Respondents adopt also what Mr. Justice Sheppard said about the word "arrangement", and particularly his observation that "an arrangement will be found to exist where there is a plan or concerted action by a number of people to bring about a particular result".

22. Mr. Justice Macken examined not only the licence agreement but all the details of the arrangement, of which he stated the licence agreement was the core, entered into between Caltex and the Feenans. He held the licence agreement and the collateral arrangements which attached to it were unfair, harsh and unconscionable. 184 lines 14-17

23. In determining matters before it under the Industrial Arbitration Act, the Industrial

Commission is not restricted by rules governing the admissibility of evidence.

This is provided in s. 83 which provides:-

"83. Rules to govern the commission and committees. The commission, conciliation commissioner or a committee exercising the jurisdiction conferred by this Act shall be governed in its procedure and in its decision by equity and good conscience, and shall not be bound to observe the rules of law governing the admissibility of evidence."

24. Section 83 is an element in the statement of Chief Justice Street in Barham v. Stevenson (1975) 1 N.S.W.L.R. 31 at 35, which the Respondents adopt.

> "It is necessary to bear in mind that the essential matter to be evaluated in determining whether the jurisdictional prerequisite of the section is fulfilled is the true contract or arrangement existing between the parties. In some cases this may be sufficiently disclosed from a document comprising or setting forth the terms of the contract or arrangement itself. In some cases there may be no document specifying the contract or arrangement, in which event resort will be had to oral evidence of discussions and conduct. Frequently the real contract or arrangement existing between the parties will best be discovered by examining the actual relationship between them, and then regarding this as the manifestation of their contract or arrangement. The inquiry is not fettered by rules of evidence which might ordinarily exclude oral discussions or details of the course of performance. The commission's duty is to ascertain the true contract or arrangement; it is this upon which the jurisdiction of the commission is to be exercised. Having ascertained this, whether by direct evidence or by a process of implication

> and construction from the details of their relationship, the commission must examine, as a matter going to jurisdiction, whether the true contract or arrangement under attack has an industrial colour or flavour."

25. The Respondents adopt, also, the passage from the judgment of Mr. Justice Menzies in Brown v. Rezitis (1970-1971) 127 C.L.R. 157 at 169:-

> "The section is clearly intended to confer a comprehensive power upon the commission to go to the substance of an arrangement made for a person to perform work in an industry - and to do so in disregard of the legal dress in which the arrangement has been clothed - in order to put such a worker in no worse a position than if he had been working under a contract of employment protected by award conditions."

And the passage from the judgment of Chief Justice Barwick in the same case at p.164:-

> "It must be borne in mind that one of the purposes of the section is to deal with subterfuges, subterfuges which will take the worker out of the relationship of master and servant and therefore out of the operation of an industrial award designed, amongst other things, for the protection of workers in industry. There may be persons involved in the subterfuge who are not parties to the contract or arrangement but who are in reality the actors deriving benefit from the making or the execution of the contract or arrangement ...
>
> Again the avoidance of the contract or arrangement may be a step in uncovering the real transaction benefiting at the expense of the worker parties other than those in whose name the contract or arrangement was apparently made."

26. The Respondents adopt the passage from the

judgment of the Industrial Commission in court session in In Re Becker and Harry M. Miller Attractions Pty. Limited (No. 2) (1972) A.R. (N.S.W.) 298 at 309:-

> "The realities as distinct from mere form are the target of the section and this is a material consideration in giving it (s. 88F) a sensible interpretation."

27. His Honour Mr. Justice Macken stated the realities of the arrangement between Caltex and the Feenans, and held that that arrangement offended the provisions of s. 88F. His findings were manifestly correct.

(D) ALTERNATIVE APPROACHES

28. Mr. Justice Macken observed that if he were to apply the minority view in Stevenson v. Barham, the contract would nevertheless fall squarely within the terms of s. 88F. The Defendant submits that this is correct. 180 lines 15-18

29. Mr. Justice Stephen in his dissenting judgment in Stevenson v. Barham expressed his view that "performs work" must be read as "performs work for another" and he pointed to paragraph (d) of s. 88F(1) as support.

30. The Respondents submitted that there is no warrant for such a restrictive reading, 190 lines 9-16

but if it be right, here the examination of the whole arrangement shows that the Respondents were in effect "working" for Caltex. Their so called "profit" was nothing more than the return for their labour, and his Honour correctly equated it to wages.

31. Mr. Justice Aitken, in his dissenting judgment in Stevenson v. Barham also adopted the "performs work for another" construction (p.211) and adopted, by implication, Mr. Justice Sheppard's "essential figure" - the main who stands in the place of an employer and who seeks to get around the award system established by the Act.

(In Re Player & Kacy (1971) A.R. (N.S.W.) 125 at 129).

32. In this case the essential figure is not missing. It is Caltex.

33. The Caltex representative Parker conceded in cross-examination that the reason Caltex avoided as far as possible conducting its own service stations through staff was to avoid having to meet award obligations. 115

34. Before Stevenson v. Barham it was suggested that s. 88F was only attracted by contracts subservice of the scheme of industrial

regulation achieved by the Industrial Arbitration Act. This contract and/or arrangement leading as it did to remuneration grossly under award wages for the same work was clearly such a contract. Vide Becker's case (1973) A.R. (N.S.W.) 298 at 304. 144 lines 6-13

35. Industrial flavour and colour has also been suggested as an appropriate test. This arrangement, it is submitted, has more industrial flavour than the sharefarming agreement in Stevenson v. Barham.

36. In Mitchell v. Vending Machine Co. of Australia Pty. Limited (Law Book Company Arbitration Service, Current Review, 1977, X27) the Full Bench of the Industrial Commission of New South Wales followed Stevenson v. Barham and revised the earlier jurisdictional tests to conform with the majority view.

37. This case is in an area of law in which the High Court and the Privy Council have concurrent final appellate jurisdiction. The Board would, therefore, although not bound by Stevenson v. Barham follow that decision unless convinced beyond a doubt that it was

wrong (Max Cooper & Sons Pty. Limited v. Sydney City Council) (1980) 54 A.L.J.R. 234.

38. The Respondents submit that the decision was correct and in accord with standard principles of construction.

39. The Appellant seeks to severely restrict the operation of s. 88F. This section was called by a most experienced Justice of the Industrial Commission, Mr. Justice Sheldon "a radical law" (cf. Davies v. Credit Terms Acceptance (1967) A.R. (N.S.W.) 371). It has been called in aid in a wide range of cases to deal with a serious social evil. Vending Machine "runs", involving high prices, long hours and low returns have fallen to its strength. "Trucks with work" sold at grossly inflated prices with non-enforceable hopes of continuous contracts likewise. Even a money lender acting in good faith whose actions facilitated a harsh and unconscionable scheme whereby persons did work in an industry, was caught by the section.

40. Analogies with money lending laws permitting re-opening of contracts where they are harsh and unconscionable, and with hire purchase contract supervised by the courts are valid (cf. Parnam "The Law of Money Lenders" (1965)

Law Book Co. and The Hire Purchase Act, s.32 (N.S.W.)).

The social realities and legislative context would point towards a broad rather than a restrictive interpretation of this useful piece of legislation.

41. Sheldon, J. said in Davies case at p.373-4:-

> "It is true, however, that, once it has been confined within its proper industrial context, s.88F acts with drastic and pervasive effect. It certainly plays havoc with the classic principles relating to contracts. 'In general, unless a contract is vitiated by duress, fraud or mistake, its terms will be enforced through unreasonable or even harsh and unconscionable ... Moreover, in the ordinary case the court will not remake a contract; unless in the special case where a contract is severable, it will not strike out one provision as unenforceable and enforce the rest" (Esso Petroleum v. Harper's Garage (per Lord Reid) (l)). But s.88F has no such inhibitions; for it not only proscribes transactions which directly undermine awards (see (d) and (e) or threaten general industrial standards (which, I think, is the most relevant "public interest" referred to in (c)), but it also, in (a) and (b) strikes separately at those which are "unfair" or "harsh" or "unconscionable". Presumably this is because any transaction leading to work in an industry, which can be so described is regarded as inimical to the purposes of the Act. In this setting, these words are probably, for practical purposes, a tautological trinity. To find in relation to a shoddy dealing concerning, say, a motor truck and a promise of carrying work, that it is "unfair" but not "harsh" or "unconscionable" suggests an approach too refined for the

subject. But, insofar as there are nuances between these words (as Lord Reid's statement suggests) s.88F makes it clear that, for its purposes, any one will serve. As to remaking contracts, this can be done either by omitting parts and retaining the rest, or by adding new terms. Thus, destruction, dilution, renovation and patching are weapons in the section's arsenal. Nor does it tolerate argument on such nice questions as whether the contractual relationship has been perfected. It is sufficient that there be an "arrangement" and, for good measure, "conditions and collateral arrangements" are also included. Moreover, there is no loophole available in transactions, so dear to those allergic to awards, under which the working party is not an employee but an independent contractor. Unlike some other sections in the Act, s.88F does not transmute contractors into employees; it takes the contract as it finds it but imperils both its continuance and its prior operation. In the result, when deciding actual cases under this section, to seek assistance from authorities on the general law of contract is an arid exercise, for if ever a law was intended to stand on its own feet it is this one.

... under s. 88F the way of the transgressor is hard. He is under fire from a diversity of angles and the armour that clever drafting sometimes supplies is in this case far from impenetrable. The fact that this Commission has been selected to enforce the section adds to his difficulties. In this regard, the Commission's general statutory duty to be "governed in its ... decisions by equity and good conscience" (s.83) may not be significant because that conception is also embodied in the section itself. But the fact that this is not a court of pleading and is not "bound to observe the rules of law governing the admissibility of evidence" (s.83) is a real advantage in this class of case, where it is better to have all the cards on the table (even if some don't matter) than to lack vital ones because of difficulties of proof. At times, too, a

> judicious relaxation of the rules relating to hearsay can help to unravel the truth. All in all smart operators would do well to consider whether it may be cheaper in the long run to assume, with what equanimity they can summon, the burdens that fall on more orthodox employers.
>
> On the other hand, the fact that the Commission has been given such massive power makes it imperative that it should be exercised with proper restraint." 10

The Respondents respectfully adopt his Honour's views.

42. For these reasons it is submitted the appeal should be dismissed with costs.

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Counsel for the Respondent.