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JUDGMENT No. 817 / 90

CATCHWORDS

INDUSTRIAL LAW - Registered organisation - Inquiry into election - Whether candidate eligible for election - whether candidate at relevant time qualified for and desirous of employment or engagement in appropriate industry or industrial pursuit - whether continuous actual or deemed employment or engagement in appropriate industry or industrial pursuit a condition of continuing membership - whether union organiser engaged in connection with industries or callings specified in the eligibility rule of the union - whether appointed organisers "persons elected or appointed as officers of the Union".

Conciliation and Arbitration Act 1904 ss.4 and 144
Conciliation and Arbitration Regulations, reg. 115

The Queen v Aird; Ex parte Australian Workers' Union (1973) 129 C.L.R. 654
Burgess v John Connell-Mott, Hay and Anderson Pty Ltd (1979) 37 F.L.R. 386
Owens v Australian Building Construction Employees' and Builders' Labourers' Federation (1978) 46 F.L.R. 16
Turner v Australasian Coal and Shale Employees Federation (1984) 55 A.L.R. 635
Re Collins; Re Clothing & Allied Trades Union of Australia (1987) 19 I.R. 182
Kennedy v The Australasian Coal and Shale Employees Federation [No. 2] (1983) 74 F.L.R. 241
Troja v Australasian Meat Industry Employees' Union (Victorian Branch) (1978) 46 F.L.R. 340
Re Election for Office in Professional Radio Employees Institute of Australasia (1961) 3 F.L.R. 151
Rounsevell v Mitchell (1968) 11 F.L.R. 414
Egan v Harradine (1975) 25 F.L.R. 336
Bielski v Oliver (1958) 1 F.L.R. 258
Ransley v Australian Public Service Association (Fourth Division Officers) Tasmanian Branch (1985) 12 I.R. 55
Y.Z. Finance Company Pty Limited v Cummings (1964) 109 C.L.R. 395
Landeryou v Taylor (1967) 15 F.L.R. 147

IN THE MATTER OF SECTION 218 OF THE INDUSTRIAL RELATIONS ACT 1988 and IN THE MATTER OF AN APPLICATION BY CHARLES EDWARD BUTCHER FOR AN INQUIRY IN TO AN ELECTION FOR OFFICE IN THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH

WAI 1 of 1990

Ryan J
Perth
11 December 1990

IN THE FEDERAL COURT OF AUSTRALIA)
)
WESTERN AUSTRALIA DISTRICT REGISTRY) WAI 1 of 1990
)
INDUSTRIAL DIVISION)

IN THE MATTER OF SECTION 218 OF THE INDUSTRIAL RELATIONS ACT 1988

and

IN THE MATTER OF AN APPLICATION BY CHARLES EDWARD BUTCHER FOR AN INQUIRY IN TO AN ELECTION FOR OFFICE IN THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH

Judge Making Order: Ryan J.

Date of Order: 11 December 1990

Where Made: Perth

MINUTES OF ORDER

THE COURT ORDERS:

That the inquiry into an alleged irregularity in relation to the election of Ralph Edwin Blewitt to the office of Organiser within the Western Australian Branch of the Australian Workers' Union be terminated.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
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WESTERN AUSTRALIA DISTRICT REGISTRY) WAI 1 of 1990
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IN THE MATTER OF SECTION 218 OF THE INDUSTRIAL RELATIONS ACT 1988

and

IN THE MATTER OF AN APPLICATION BY CHARLES EDWARD BUTCHER FOR AN INQUIRY IN TO AN ELECTION FOR OFFICE IN THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH

Coram: Ryan J.

Date: 11 December 1990

Place: Perth

EX TEMPORE REASONS FOR JUDGMENT

Judgment in this matter was reserved on 7 November 1990. Since then counsel for the successful candidate in the election, Mr Blewitt, has brought to my attention and to the notice of counsel for the applicant, a subsequent unreported decision of Pincus J. Having listed the matter for further argument this morning in the light of that decision, I am now able to formulate my own complete reasons for judgment in this matter, to which, of course, I have given considerable thought since 7 November 1990.

An inquiry has been instituted pursuant to s.218 of the Industrial Relations Act 1988 on the application of Charles Edward Butcher into an alleged irregularity in relation to the election of Ralph Edwin Blewitt to the office of Organiser within the Western Australian Branch of the Australian Workers' Union

("the AWU"). The election was conducted by the Australian Electoral Commission and the ballot closed on 18 December 1989.

There were eight candidates for election to seven vacancies in the office of Organiser. The applicant, Mr Butcher, was the unsuccessful candidate.

The alleged irregularity is that Mr Blewitt was ineligible under the rules of the AWU to nominate for election to an office within the Western Australian Branch of that organisation. The facts on which Mr Blewitt's eligibility falls to be determined are in relatively small compass, and, on the whole, are not seriously in dispute.

Mr Blewitt came to Western Australia in 1962 as a young man with his father seeking work on iron ore projects in the north-west. He worked at different times as a labourer, chainman-driver, steel erector-rigger, dogman, trades assistant and plant operator, and claimed to have acquired membership of the A.W.U. for which contributions were made by way of payroll deductions by his various employers including Morrison-Knudsen-Mannix-McDonald, and Western Mining Corporation. He also claimed to have attended, during that time, stop-work meetings convened by the AWU.

In 1966, Mr Blewitt was conscripted for national service. On his discharge in 1968 after a tour of duty in Vietnam, he travelled around Australia and South-east Asia with a group of ex-Army friends engaging sporadically in casual work, including

work on construction sites, but apparently without renewing or acquiring any Union affiliation. In 1970, he married and settled in Melbourne where he obtained work as a salesman with the Australian Mutual Provident Society. Between 1972 and 1979 he worked in various capacities, including as Group Stores' Manager for Hannam's Discount Stores, a retailer of electrical goods and furniture. When that business failed in 1979, he became a forklift driver, first for Fibremakers Ltd, and then for Woolworths at its Bayswater warehouse.

It was during that time that Mr Blewitt first became actively involved in union affairs becoming a shop steward for the organisation then known as the Federated Storemen and Packers' Union. He also undertook research on a part-time basis at different times for the Pastrycooks' Union, and the Australian Timber Workers' Union. In 1983, he was taken on by the latter Union as a full-time field officer within its Victorian Branch, and, in 1986, was elected to the office of Organiser within its Victorian Branch.

He resigned that office in March 1987 in order, for personal reasons, to come to live in Western Australia. Before leaving Victoria, Mr Blewitt had been advised by well-known figures in the industrial and political wings of the Labor movement, of persons who might be of assistance to him in obtaining work as a union organiser or in some similar position in Western Australia. Accordingly, in about April 1987, Mr Blewitt renewed an acquaintance which he had earlier made with Mr Loader, the

Secretary of the Western Australian-registered South West Timber Workers' Union, and established contacts with a Mr Cunningham, then an officer of the AWU, Mr Bishop, the General Secretary of the Western Australian-registered Shop Assistants' Union, and Mr Booth, an industrial officer with the Western Australian Branch of the AWU. Mr Blewitt made it clear to each of those men that he strongly desired employment as a union organiser or in some similar capacity in the Labor movement. However, as time passed with no offer of employment of that kind having been made, he became prepared, in the face of financial pressures, to accept, at least in the interim, any remunerative work which he could obtain in the Perth metropolitan area. He replied to newspaper advertisements and approached various firms which he thought might offer him work as a plant operator or labourer in civil construction. He obtained one day's casual labouring work on 27 May 1987 in the yard and commercial nursery of Marshall's Landscaping, a large industrial and commercial landscape gardening firm. As well, he undertook work selling advertising space by telephone, and attempted to earn commission on sales for an entity known as "Hedging Services".

Ultimately, through the good offices of Mr Bishop of the Shop Assistants' Union, Mr Blewitt obtained work on a more or less regular daily basis as a labourer for P & O Cold Storage Ltd, in its cold store. Although that company maintained a closed shop in favour of the Western Australian-registered Shop Assistants' Union, Mr Blewitt saw no need to obtain membership of that Union because Mr Bishop understood his employment in the

cold store to be temporary until he could obtain an appropriate permanent position in the union movement.

In the meantime, Mr Blewitt had spoken with Mr Booth, the industrial officer of the AWU, at a seminar conducted by the Labor Unity faction of the Australian Labor Party. Mr Booth held out some prospect of Mr Blewitt's being employed as an Organiser by the AWU and at his, Booth's, suggestion, Mr Blewitt on 19 May 1987 attended at the office of the AWU and paid the pro rata fee prescribed by the rules of that organisation to obtain membership for the year ending 31 July 1987. He was then and there issued with a membership ticket. At that time, he did not mention his earlier claimed membership of the AWU in the 1960s, and regarded himself, in May 1987, as joining, or rejoining, the AWU. He renewed his membership for the full year ending 31 July 1988 by paying a full year's contribution on 31 July 1987.

On 5 June 1987, Mr Blewitt was introduced by Mr Booth to Mr Keenan, the Secretary of the Western Australian Branch of the AWU, to whom he gave a copy of his curriculum vitae and said he was a current member of the AWU. Towards the end of August 1987, the prospect of employment held out by Mr Booth materialised when Mr Keenan offered Mr Blewitt a position as an employed Organiser. The letter of appointment dated 24 August 1987, signed by Mr Keenan, was in these terms:

> "Mr. Blewitt is to commence employment as an Additional Employed Organiser, with The Australian Workers' Union, West Australian Branch, as at Monday 24th August, 1987.

He shall at all times conform to the direction of the Branch Secretary, in accordance with the Rules.

Employment shall be on a trial basis, up to a maximum of six (6) months, and shall be reviewed prior to the end of that period.

The employment may be terminated by either party, with one (1) week's notice, in the event of the arrangement proving to be unsatisfactory.

Rates of pay and conditions, shall be on the same basis as other employed Organisers.

Organiser Blewitt's duties will entail travel to various parts of the State of Western Australia, and may require periods living away from the metropolitan area.

Daily Reports of activities shall be maintained, and forwarded to the Branch Secretary, on a weekly basis."

In reliance on that offer of employment, Mr Blewitt resigned his employment with P & O Cold Storage Ltd and commenced as an employed Organiser for the AWU. In the course of that employment, he was required to visit large projects throughout the north-west shelf of Western Australia, and later attended sites where AWU members were employed in the Kalgoorlie and Bunbury areas, before returning to Perth where his organising duties were focussed on civil construction work in the metropolitan area which included road making, bridge building, cement and concrete product making, kerb and culvert construction, asphalting, landscaping and pest control.

After the six months' probationary period contemplated by the letter of appointment, Mr Blewitt was confirmed in the position of employed Organiser and, I infer, has continued to discharge the duties of an Organiser to this day. On 25 July 1988 he renewed his membership by paying the full adult contribution of $130 and was issued with a current ticket. Similar renewals of membership occurred on 10 July 1989 and 9 May 1990.

Nominations for election to various offices within the Western Australian Branch of the AWU opened on 22 September 1989 and closed on 20 October 1989. Mr Blewitt was nominated for election to one of seven vacancies in the position of Branch Organiser.

Rule 75 of the registered rules of the AWU is in these terms:

"75 - ELECTION AND CONTROL OF ORGANISERS

(a) Prior to the date for calling nominations for the regular elections of Officers in accordance with rule 74 of these Rules, each Branch Executive shall determine the number of Organisers to be elected at such election.

(b) All organisers, elected or employed, shall in all cases conform to the direction of the Branch Secretary, District Secretary or Divisional Secretary by which they are employed.

(c) All elected Organisers shall be subject to removal from office pursuant to Rule 43."

Requirements governing the nomination of candidates for election to offices within a Branch of the AWU are stipulated in Rule 74 as follows:

"74 - BRANCH NOMINATIONS

Nominations of candidates for office of Delegates to Annual Convention and Delegate Meetings shall be called for annually, and in the case of the Branch Executive Councillors, Branch President, Branch Vice-Presidents, Branch Secretary, District Secretaries, the President and the Secretary of the Mining Division of the West Australian Branch, Organisers, District Representatives, Branch Executive Committeemen, every four years by the Branch Returning Officer by advertisement in The Australian Worker and shall remain open for at least twenty-eight (28) days, and such advertisements shall state whether the office is an honorary one or not.

Persons elected to office for the positions of Branch President, Branch Vice-Presidents, Branch Secretary, Branch Executive Councillor, District Secretaries, President and Secretary of the Mining Division of the West Australian branch, Organisers, District Representatives and Branch Executive Committeemen at the General Elections in 1985 shall hold that position for the period of time as elected in accordance with the Rules of the Union at the time the elections were held in 1985.

At the next General Elections to be held in 1989 for all of the above positions those persons elected to office shall hold such office until the 1st February 1994 and thereafter persons elected at General Elections shall hold such office for a four year period commencing at the 1st February in the year in which the elected person takes office.

The nomination paper must be signed by at least two members and must contain the name, address and Branch of such members.

Each candidate must consent to the nomination in writing and must also state their occupation, name, date of birth, address and the Branch in which they are members. The nomination paper must contain either the candidate's ticket or a certificate from the Branch or District Secretary in order to show the candidate has been a continuous member for the 12 months immediately preceding the closing date of nomination.

Nominations must be forwarded in a closed envelope with the word "Nomination" written thereon, addressed to the Branch Returning Officer.

No member shall be eligible to nominate for or hold at any one time:

(a) more than one salaried office;

(b) more than one office on a Branch Executive;

(c) the office of Organiser and any office on a Branch Executive except

(i) Branch President, or

(ii) Branch Vice-President, or

(iii) President of the Mining Division of the West Australian Branch;

(d) an office in separate Branches of the Union.

In this rule salaried office shall mean any Branch Secretary, District Secretary, Divisional Secretary, Organiser, General Secretary and Assistant General Secretary.

Nothing in this rule shall prevent the holder of an office from being appointed or elected to fill a casual vacancy pursuant to Rule 79 except that, where this rule prevents a member holding two offices at the same time, such appointment or election pursuant to Rule 79 shall effect the resignation by the member appointed or elected from the office that the member held immediately prior to the appointment or election to the subsequent office.

Nominations for all positions within the Branch shall close on the same date."

Putting to one side the contention that Mr Blewitt was not eligible to be and therefore was not a member of the AWU during the twelve months immediately preceding the closing date of

nomination, it is not contended that his nomination failed to comply with any of the other requirements specified in Rule 68.

The stipulation in Rule 74 as to the provision of evidence that the candidate has been a continuous member for the twelve months immediately preceding the closing date of nomination is a reflection of the substantive requirement in Rule 68 that:

> "No member shall be eligible for nomination for election as an Officer:
>
> (i) unless he or she has signed the pledge described in Rule 69;
>
> (ii) unless he or she has been a continuous member for the 12 months immediately preceding the closing date for nomination;"

In my view the inquiry into Mr Blewitt's eligibility to nominate for election to the office of Organiser must commence at the time when he was issued with a membership ticket on 19 May 1987. I am satisfied that any earlier membership of the AWU which Mr Blewitt may have acquired had long since been abandoned. That Mr Blewitt himself regarded his claimed previous membership of the AWU in that light, if he thought about it at all, is demonstrated by the fact that be described himself on the curriculum vitae, provided to Mr Keenan on 5 June 1987 but apparently prepared some time before May 1987, as a "past member of the AWU" and paid only half of the annual contribution for the year ended 31 July 1987, in accordance with a facility afforded by what was then Rule 9A to "a person becoming eligible to join the Union after the 31st day of March in any year".

The registered rules of the AWU as in force on 19 May 1987 included, under the heading "FULL MEMBERSHIP", Rule 6 which provided that:

> "(1) Subject to these Rules, every bona fide worker, male or female, engaged in manual or mental labour in or in connection with any of the following industries or callings, namely ... shall be entitled to become and remain members of the Union and all persons elected or appointed as Officers of the Union shall be entitled to remain members of the Union."

The list of industries and callings interpolated between the prefatory words of Rule 6(1) and the concluding words was extremely lengthy and complex. It included the following expressions:

> "Pastoral (otherwise than as a shearing contractor), agricultural, horticultural ... meat preserving and meat trade generally, road making, water and sewerage, railway construction work, ... all persons engaged in or in connection with the manufacture or preparation, applying laying or fixing of bitumen emulsion, asphalt emulsion bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt, (other than tar paving or asphalt work in connection with building operations), ... and all persons engaged in the production or manufacture of aluminium for use as a raw material in the manufacture of articles, the construction, maintenance and conduct of the Commonwealth Railways, and all kinds of general labour ... the manufacture of cement and cement articles and/or the operation of concrete batching plants ... the formation and maintenance of race course tracks, golf links, bowling greens and tennis courts and of all gardens, lawns and greens in connection therewith ..."

It is clear that Mr Blewitt was not, on 19 May 1987, actually employed or working in any category of work comprehended within any of those expressions. However, Mr Pope who appeared as Counsel for Mr Blewitt invoked s.144 of the Conciliation and Arbitration Act 1904 as in force in May 1987 which so far as relevant provided:

> "144(1) A person employed in connection with an industry, or engaged in an industrial pursuit, is, unless he is of general bad character, entitled, subject to payment of any amount properly payable in respect of membership, to be admitted as a member of an

> organization (being an organization of employees in or in connection with that industry or of employees engaged in that industrial pursuit) and to remain a member so long as he complies with the rules of the organization.
>
> ...
>
> (3) For the purposes of this section -
>
> (a) a person whose usual occupation is that of employee in an industry or engagement in an industrial pursuit; or
>
> (b) a person who is qualified to be an employee in an industry or to engage in an industrial pursuit and desires to become such an employee or so to engage,
>
> shall be deemed to be employed in that industry or to be engaged in that industrial pursuit."

It should be noted that many of the activities listed in Rule 6(1) of the rules of the AWU are businesses or undertakings of employers referred to in paragraph (a) of the definition of industry in s.4 of the Conciliation and Arbitration Act. Unlike some callings, industrial occupations or vocations of employees which are comprehended within paragraph (b) of that definition, engagement in manual or mental labour in or in connection with one or other of the employer's businesses or undertakings listed in the Rule does not necessarily require the possession of some special trade or professional qualification or skill. Nor is any such requirement apparent in respect of the few callings or vocations described in the Rule of which "all kinds of general labour" is an example. As to those words, Gibbs J. (as he then was) said in The Queen v Aird; Ex parte Australian Workers' Union (1973) 129 C.L.R. 654 at 668:

> "The prosecutor also suggested that the words 'all kinds of general labour' might include work in or in connexion with the manufacture of ready-mixed concrete. I do not doubt that persons engaged in making ready-mixed concrete may properly be described as labourers. However, the phrase 'all kinds of general labour' does not mean all kinds of labour; if it bore that meaning it would have been unnecessary to list at length the other industries and callings that are mentioned in the conditions of eligibility.

> The word 'general' does not expand, but restricts, the meaning of 'labour'. It would not be desirable to attempt any exhaustive definition of the words 'general labour'; in the present case it is enough to say, speaking broadly, that the word 'general' in that phrase is used in the sense of 'not specialized'. An employee whose work is separately classified on the basis of some special skill or experience necessary to perform it is not engaged in general labour. Even if it be the fact (as to which it is unnecessary to express an opinion) that the three classes of employees engaged in the making of ready-mixed concrete do not all require special skills of a very high order, it is apparent that they are engaged in occupations which are to some extent specialized and therefore would not properly be described as engaged in general labour."

See also Burgess v John Connell-Mott, Hay and Anderson Pty Ltd (1979) 37 F.L.R. 386 at 395. I am satisfied in the light of the evidence of Mr Blewitt's diverse occupational history that he was, in May 1987, qualified to be employed in a wide range of capacities in or in connection with many of the industries or callings listed in Rule 6(1) of the rules of the AWU. As I have already indicated, engagement in many of those industries or callings, or sections of them requires no special skills or qualifications other than experience of a kind which Mr Blewitt clearly possessed.

There can be paraphrased to apply to those industries, or callings or sections of them the following passage from a judgment of a Full Court of this Court in Owens v Australian Building Construction Employees' and Builders' Labourers' Federation (1978) 46 F.L.R. 16 at 33:

> "We are of opinion that a person is 'qualified' to be an employee in a particular industry or to engage in an industrial pursuit within the meaning of s.144(3) if he has the necessary skills or qualifications required to work in that industry or section of an industry. In the building industry builders' labourers carry out various duties ranging from unskilled labour requiring physical capacity only to semi-skilled labour generally acquired by experience. Physical capacity in many cases would be the only consideration in determining whether a person is qualified to

> engage in this industry as a builders' labourer. None of the applicants suffer from any physical handicap."

See also Turner v Australasian Coal and Shale Employees Federation (1984) 55 A.L.R. 635 at 640.

The question then arises of whether it could have been said of Mr Blewitt in May 1987 that he "desires" to become an employee in an industry or to engage in an industrial pursuit described in Rule 61. The existence of such a desire was treated by the Full Court in Owens Case, to which I have just referred, as a question of fact which the Court resolved shortly by saying, at 33:

> "The organization further argued that the court should not be satisfied that the applicant Mundey desired to become an employee as a builders' labourer. He was cross-examined at length in this regard.
>
> We are satisfied that on the evidence all applicants are qualified to be employed as builders' labourers and desire to become such employees. In the case of Mr. Duggan he in fact is, and has been for some time, working as a builders' labourer."

How that question of fact is resolved in a given case obviously must depend on how specifically defined is the industry or industrial pursuit on which the desire to become an employee or to engage is predicated, and on the circumstances of the individual to whom the desire is imputed. In my view, the desire need not be focussed exclusively on some industry or industrial pursuit within the eligibility rule of a single organisation. Thus a desire by a truck driver or plant operator to work as such within any available employer's industry may sustain an entitlement pursuant to s.144 to membership of several registered organisations. Of course, to be made effective by s.144(1) in relation to a specific organisation that desire must be

accompanied by an application for membership of that organisation and payment of, or an assumption of liability to pay, the membership contributions stipulated by its rules. The desire contemplated by s.144 is not confined to the industry or industrial pursuit for which the person has a first or high preference. For example, a worker with technical qualifications which are a prerequisite to engagement in a highly paid industrial pursuit may prefer to obtain employment in that pursuit but be prepared reluctantly to take less remunerative work, at least temporarily, in some completely unrelated industry. Such a worker can, while he or she remains prepared to take the latter work be deemed, pursuant to s.144(3) to be employed in the unrelated industry.

Nor does the reason for which the person desires to become an employee in a particular industry or engage in a particular industrial pursuit affect the application to that person of s.144(3); c.p. Re Collins; Re Clothing & Allied Trades Union of Australia (1987) 19 I.R. 182 especially at 185.

Applying these principles to Mr Blewitt's circumstances on 19 May 1987 I am satisfied that he then desired to engage or be employed, at least in the short term, in any one of many unskilled or semi-skilled occupations some of which were in industries or industrial pursuits specified in Rule 6(1) of the AWU rules. I am confirmed in that finding by the fact that within eight days of 19 May, Mr Blewitt sought employment as a labourer with Marshall's Landscaping and was engaged for one day in casual

work for that firm which was concededly in or in connection with "horticulture" within Rule 6(1).

A desire to be employed in a particular industry evinced by a person at one time can cease to be attributable to that person with the passage of time or as a result of some change in his or her circumstances such as the obtaining of permanent employment in some unrelated industry. However, I am not persuaded that merely because Mr Blewitt was, by 24 August 1987, working more or less regularly as a day labourer for P & O Cold Storage Ltd that he no longer had a real desire, however faint or receding to become an employee in some industry, or to engage in some industrial pursuit specified in Rule 6(1).

Mr Van Hattem who appeared with Miss Miller for the applicant, Butcher, contended that s.144(3) of the Conciliation and Arbitration Act had no application to an organisation like the AWU with an eligibility rule in terms such as its Rule 6(1) which imposed as a requirement for membership actually working or being engaged or employed in one of the specified industries or callings.

In support of that contention reliance was placed on the following passage from the judgment of Beaumont J. in Kennedy v The Australasian Coal and Shale Employees Federation [No 2] (1983) 74 F.L.R. 241 at 248 where his Honour said:

> "Whilst s.144(3) may deem the applicant to be employed in the industry for the purposes of that provision, it is clear from the structure of s.144, especially the opening words of s.144(2), that such a deeming clause is not intended to override any eligibility requirement made by the rules of the organisation concerned. Thus, when r.7 of the rules of the first respondent speaks of persons 'working' in the industry it is not, in my view, intending to pick up 'deemed' employees under s.144(3) as well as those persons not actually so working or even merely so employed and not actually working (see also Automation Fire Sprinklers Pty Ltd v. Watson (1946) 72 C.L.R. 435 - 'they also serve who only stand and wait' - per Dixon J. at 466).
>
> An eligibility clause such as r.7 should be liberally construed (see, for example Electrical Trades Union of Australia v. Waterside Workers Federation of Australia (1982) 42 A.L.R. 587 at 595). But however liberally that rule is interpreted, its language is intractable on one point at least and that is its requirement that membership be confined to those in fact working or at the least employed in the industry as distinct from those who merely have aspirations in that direction. In this context, a comparison with other eligibility provisions which cater for aspirants as well as participants is instructive (see Owens' case (supra) at 586; Giffin v. Association of Pastures Protection Boards Secretaries [1967] A.R.(N.S.W.)31; Ward v. The Federated Municipal and Shire Council Employee Union of Australia N.S.W. Branch [1933] A.R.(N.S.W.) 213)."

With respect to his Honour, I consider that s.144(2) was concerned to preserve the operation of an eligibility rule which was narrower than the rule specifying the industry in or in connection with which the organisation was registered. (For the requirement that an organisation's rules had to specify both the industry in or in connection with which it was registered and the conditions of eligibility for membership thereof see Reg. 115(1)(d) and (2) of the Conciliation and Arbitration Regulations.)

The eligibility rule of the Australian Building Construction Employees and Builders' Labours' Federation was not set out in the judgment in Owens' Case (supra) cited by Beaumont J., and the two cases cited lastly by his Honour concerned unions registered under the Industrial Arbitration Act of New South Wales to which,

of course, s.144 of the Conciliation and Arbitration Act had no application.

In any event, I am bound by the decision of the Full Court in Turner v The Australasian Coal and Shale Employees Federation to which I have already referred in which the appellant had made an application which was heard by Beaumont J., at the same time as Kennedy's Case and as to which his Honour, immediately after giving judgment in Kennedy, said: "In the matter of Turner, the proceedings are proceedings for the same relief on essentially the same facts, and for the same reasons I make in that matter the same orders."

Turner appealed from those orders dismissing his application; see 55 A.L.R. 635 at 637. Accordingly, his Honour's ruling that s.144(3) had no application in the context of the eligibility rule of the organisation with which he was concerned must be taken to have been overruled by the following passage from the joint judgment of the Full Court at 642:

> "Even if the construction of r 2 set out, supra, is incorrect, Turner was entitled to be admitted as a member of the Federation by virtue of s 144(3). Counsel for the Federation argued that, under s 132(1)(b) of the Act, it is open to an organization to elect whether to be an association, the rules of which include or exclude persons qualified to be employed in a particular industry, as well as those actually so employed. He argued that the Federation has adopted a rule excluding persons who are merely qualified and desiring to be employed. It followed, so he said, that the 'category of persons who are eligible for membership' of this organization consist only of persons actually employed. The argument involved reference to the second reading speech of the Bill which became Act No 138 of 1973, by which sub-s (2) of s 144 was inserted. It also involved reading sub-s (3) as subordinate to sub-s (2).

> This argument seems to run counter to the scheme of s 144, which is legislation designed to enable a person qualified and desiring to be employed in a particular industry to become a member of the relevant organization in that industry. If all that was intended by sub-s (2) was to pick up the organization's eligibility rules, even if they excluded persons who would otherwise be the subject of sub-s (3), there would have been no need for the insertion of the words 'included in a category of persons who are' in sub-s (2). These words are intended to refer to occupational categories. The relevant test is whether, if the person concerned was employed, he or she would fall within a category in the eligibility rules of the organization. Sub-section (2) was intended to do no more than to exclude the possibility that a person might be entitled to admission to membership of an organization which was registered in or in connection with the industry in which that person was employed or deemed to be employed, even though the rules of the organization contained no category into which that person's occupation or deemed occupation would fall. The fact that r 2 of the Federation's rules contains no occupational categories, or contains only one all-embracing occupational category, cannot be relied upon to frustrate the operation of sub-s (3)."

It is convenient to deal, at this point, with two alternative bases on which counsel for Mr Blewitt sought to establish his continuing valid membership of the AWU from 24 August 1987. Neither of those bases was essential, as the argument went, to Mr Blewitt's eligibility to nominate for election to the office of Organiser in October 1989. In the first place it was contended that having properly acquired membership in May 1987 with the aid of s.144(3), Mr Blewitt could not have been deprived of that membership without resigning in accordance with what was then Rule 14 (now Rule 18), or being expelled pursuant to the former Rule 15 (now Rule 21).

Support for that argument was derived from Troja v Australasian Meat Industry Employees' Union (Victorian Branch) (1978) 46 F.L.R. 340, where Keely J. with whom J.B. Sweeney and Deane JJ agreed, canvassed the rules of the Australasian Meat Industry Employees' Union, Victorian Branch and said at 346:

> "Accepting Mr Laurie's argument that such persons no longer fall within r.4, I am unable to accept the next step in the argument, namely, that such persons automatically cease to be members upon leaving their employment in the industry. In my view r.4 deals only with the eligibility of persons seeking to be members of the union and not with the question of whether members automatically cease to be members upon ceasing to fall within the terms of r. 4.

His Honour then proceeded to analyse other provisions of the rules of the Meat Employees' Union and continued at 347:

> "In my view r.4 does not bring about a termination of membership upon the member ceasing to fall within the class there set out. The intention of the rules is that membership may be terminated in the manner dealt with by rr.38 and 39. Further, r.10(e) provides that membership shall automatically cease in the case of a member 'who is not employed in the trade, who is thirty-six months in arrears with contributions'. I accept Mr. Lawrence's argument that, apart from r.10(e) (and r.39(3)), membership does not cease until the member takes some positive action in compliance with the requirements of rr.38 or 39 - or under s.145 of the Act if its terms operate to permit resignation in circumstances not giving rise to such a right under rr. 38 or 39. Accordingly, it is not correct to say that membership ceased automatically whenever a member left the trade or returned to some other regular occupation."

However, as appears from the passages to which I have just referred, there was nothing in the eligibility rule of the Australasian Meat Industry Employees' Union which made continuous employment or engagement in the butchering and meat industry specified in that Rule, a condition of continuing membership. By contrast, Rule 6(1) of the rules of the AWU stipulates that:

> "Every bona fide worker male or female engaged in manual or mental labour in or in connection with any of the following industries or callings ... shall be entitled to become and remain members of the Union ..." (emphasis added).

By a curious inconsistency of drafting a similar formula is reproduced in sub-rule 6(2) but not in sub-rule 6(3) or 6(4). However, I consider that the presence of the words to which I have added emphasis requires a person whose membership is predicated on Rule 6(1) and who plans to remain a member to

continue to be engaged in or in connection with one of the industries or callings specified in that sub-rule, or if resort to s.144(3) be necessary, as it might during a period of unemployment, to have a continuing desire to be so engaged.

The second alternative basis advanced by Mr Pope was that by virtue of his employment as an organiser from 24 August 1987, Mr Blewitt was engaged in connection with many of the industries or callings specified in Rule 6(1) because of the requirement to provide industrial advice and other services and assistance to persons themselves engaged in those industries or callings.

In support of that contention reliance was placed on this proposition enunciated by Joske J. in Re Election for Office in Professional Radio Employees Institute of Australasia (1961) 3 F.L.R. 151 at 153 where his Honour said:

> "The holder of an office, such as the secretary of an organization, in my opinion is a person who is employed in connexion with an industry. He has to carry out a very great deal of industrial work in relation to that particular industry and it seems to me that you cannot give a meaning to the words 'in connection with an industry' of such a nature as would exclude the secretary from being regarded as a person employed in connexion with the industry to which his organization relates.
>
> In any event I consider that par.(c) of s.132 does indicate that officers of the association, as it is called there, are included as members if they have been admitted as members of the association and that that does link up with the expression 'a person employed in connection with an industry'. I do not see how you can construe s.144 to cut out these officers from membership in view of the language in par.(c) of s.132."

However, that reasoning was disapproved by a Full Court of the Australian Industrial Court in Rounsevell v Mitchell (1968) 11 F.L.R. 414 where the following passage occurs in the joint judgment at page 429:

"It was argued for the respondent that although Barry was not employed or engaged in the above-mentioned industries or callings at the time he applied for membership he was engaged 'in connexion with' those industries or callings and r.6 permits a person in this position to become a member. The argument was that Barry was employed to handle, as an industrial officer, industrial matters arising in relation to the members of the union in the industries or callings set out in r.6 and because his employment was of this nature he could be said to be employed in connexion with those industries and callings. In the case Re Election for Office in Professional Radio Employees Institute of Australasia (supra) Joske J. held that a secretary employed by that institute who did not have an occupation as set out in the constitution rule of the institute could validly be admitted to membership of the institute and hence be elected to office. The rules of the institute are different in some respects from the rules of the organization under consideration in this case. One part of the reasoning of Joske J. is, however, relied upon by the respondents. He was considering the meaning of the phrase 'a person employed in connexion with an industry or engaged in an industrial pursuit' in s.144 of the Act, and he came to the conclusion that a person such as the secretary under consideration in the case before him was a person employed in connexion with an industry. He said: 'He has to carry out a very great deal of industrial work in relation to that particular industry and it seems to me that you cannot give a meaning to the words "in connexion with an industry" of such a nature as would exclude the secretary from being regarded as a person employed in connexion with the industry to which his organization relates.'

Expressed in its simplest form, the argument relied upon is that a person employed on the staff of an organization as an employee handling industrial matters arising in respect of the employment of union members in their various industries or callings is employed by the union in connexion with those industries or callings. We are unable to agree with this argument. He is employed in another industry or calling, completely different from the industries or callings in r.6. There is no connexion between his employment and those other industries or callings. He does no work connected with the actual work of those engaged in those industries or callings. His work is to endeavour to obtain for them wages and conditions of employment which they seek or the organization seeks on their behalf. Work of this kind is not work connected with the industries or callings themselves. It is not work connected with what such employees do in their industries or callings, but is work connected with the reward they get for what they do or with the relations between their employer and themselves. Persons engaged in helping settle various aspects of the contract of employment between employer and employee in various industries would not be engaged in connexion with those industries. If this were so a clerk employed by the legal firm to handle industrial work for such an organization (i.e. doing work very similar to that done by Barry) would be equally able to claim that he was engaged in connexion with the industries or callings covered by its constitution. A similar claim could be made by a clerk employed by a legal firm to handle the workers' compensation claims or common-law actions for damages arising out of the employment of the members of an organization. It could be similarly argued that he was engaged in connexion with the industries concerned. Such an argument would, in our view, be erroneous."

In the light of that passage Joske J. engaged in Egan v Harradine (1975) 25 F.L.R. 336 at 353 in what Mr Pope called a "spirited defence", somewhat curiously expressed in the third person, of the position which he had earlier taken in the Professional Radio Employees' Case.

However, the other two members of the Court in Egan v Harradine (supra) appeared content to adopt, without qualification, the reasoning in Rounsevell v Mitchell (supra) saying, at 378:

> "The amalgamated union covered a great variety of industries and occupations in addition to those set out in the eligibility rule of the association and in our view Egan while employed in the capacity of secretary of that amalgamated union could not be said 'to be engaged in any capacity in or in connection with the various industries set out in the constitution of this association'. He thus ceased to be within the eligibility rule of the organization. There can be no argument that he was not employed in any of those industries (Rounsevell v Mitchell) (supra)."

A similar view had earlier been taken in the context of the eligibility rule of the AWU itself in Bielski v Oliver (1958) 1 F.L.R. 258 where it was observed in the joint judgment of Spicer CJ and Morgan J. at 262:

> "It is common ground that Bielski's employment as a compositor in the New South Wales Government Printing Office in 1950-1951, which he relinquished to enter the employment of the union, was not an industry or calling falling within rule 6. Nor would his employment by the union itself be such although it is contended that by reason of such employment Bielski fell within the concluding part of rule 6 as 'a person appointed an officer of the union'."

See also Ransley v Australian Public Service Association (Fourth Division Officers) Tasmanian Branch (1985) 12 I.R. 55 where Gray

J. at 67 referred to the divergence of views between Joske J. at the Full Court in Rounsevell v Mitchell (supra) and continued:

> "None of these cases is binding on me. The position has since become more complicated, because of two decisions of the High Court of Australia, with reference to the rules of the Australian Workers' Union. The first of these cases was R v Moore; Ex parte Australian Workers' Union (1976) 11 ALR 449, in which it was held that employees of contractors, providing catering and accommodation services to employees of iron ore mining companies, were not employed in or in connection with metalliferous mining. In the second case, the High Court held that employees of construction companies, engaged in building structures for mining companies at and near mine sites, were employed in connection with metalliferous mining: R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia (1978) 140 CLR 470. The determination whether a person, not engaged in an industry, is employed in connection with that industry is obviously difficult. It is all the more difficult, in the case of an employee of an organization, the rules of which define eligibility for membership by reference to callings of employers, as distinct from callings of employees. In the present case, the bulk of the members of the association are deemed to be employed in an industry, by the provision which is now s4(7) of the Act. (A similar provision was formerly found in s4 of the Public Service Arbitration Act 1920.) The concept of a person employed in connection with a deemed industry is a difficult one as well. I am not prepared to hold in this case that Ms Fitton and Mr Smith, as organisers, were employed in connection with any relevant industry for the purposes of s132(1)(b). I prefer the view taken in Rounsevell v Mitchell (above) to that asserted by Joske J."

Support for the view that neither an organiser nor any other officer of the AWU was seen by the draftsman of Rule 6(1) as being engaged in manual or mental labour in connection with any of the industries or callings specified in that Rule is provided by the express reservation at the end of that Rule that such persons shall, notwithstanding their election or appointment to office, be entitled to remain members of the AWU.

Guided, therefore, by the preponderance of authority and my own preference, I am led to conclude than an Organiser employed by the AWU is not engaged in manual or mental labour in

connection with any of the industries or callings specified in Rule 6(1) of its rules.

Accordingly, it remains, to consider whether Mr Blewitt, as a result of his engagement as an Organiser on 24 August 1987, and his continued employment in that capacity came within the category of "persons elected or appointed as officers of the Union" specified in the concluding words of Rule 6(1) as "entitled to remain members of the Union". Mr Van Hattem contended that under the rules in 1987 when Mr Blewitt was purportedly appointed an Organiser, a person could only validly become an Organiser by election or by appointment to fill a casual vacancy pending an election. That argument relied on the presence in the rules as they then were of a definition of "officer" in Rule 4 which was in these terms:

> "(e) 'Officer' shall include the President, Vice-Presidents, General Secretary, Branch President, Branch Vice-Presidents, Branch Secretary, District Secretaries, President and Secretary of the Mining Division of the West Australian Branch, Branch Executive Councillors, Branch Executive Committeemen and elected Organisers, Delegates to Convention and Delegates to Delegate Meeting Queensland Branch."

The express reference there to "elected Organisers", it was said, excluded from the definition of officer the second category of appointed Organiser recognised by the definition of "Organiser" which also appeared in Rule 4 and was as follows:

> "(h) 'Organiser' means a member elected in manner hereinafter appearing or appointed by a Branch Executive or Convention or the Executive Council to advocate the principles of Unionism and promote the organisation and enrolment of members."

Even if "Officers" in Rule 6(1) extended beyond the inclusive definition of officer in Rule 4(e), it was contended that Mr Blewitt had not validly become an appointed Organiser within the second limb of the definition in the former Rule 4(h) because, on the evidence, he had not been appointed by the Branch Executive or Convention or Executive Council but had merely been appointed by Mr Keenan as Branch Secretary on his own initiative.

I am unable to uphold that contention. The Branch Secretary was required by the former Rule 67 to "act generally according to the instructions of his Executive". None of the other powers specifically enumerated in that Rule authorised him to engage additional Organisers on his own initiative. Moreover, there was evidence from Mr Booth, an industrial officer employed by the AWU, that "when a decision was made that an additional organiser would be put on I arranged, on Mr Keenan's behalf, a meeting with the Secretary between the Secretary and Mr Blewitt".

The Branch Secretary gave evidence that in company with the Branch President, Mr Isherwood, he interviewed Mr Blewitt "some four or six weeks before I employed him" and "I employed him as from 24 August on a temporary basis for six months, and after that period he was confirmed as an additional employed Organiser on the same basis as other employed Organisers". Both the Branch President and the Branch Secretary were, by virtue of Rule 78, members of the Branch Executive.

The inference which I draw from the whole of the evidence, aided by presumption of regularity, is that Mr Keenan's action in engaging Mr Blewitt as an additional Organiser was authorised or subsequently ratified by the Branch Executive. It is thus still necessary to decide whether, as a result of his employment as an additional Organiser, Mr Blewitt was appointed as an officer within the meaning of Rule 6(1).

I do not consider that the concept of "Officer" in that Rule is confined to the list of office holders set out in the definition of "Officer" in the former Rule 4(e). In the first place, that definition is prefaced by the words "includes". Kitto J. observed in Y.Z. Finance Company Pty Limited v Cummings (1964) 109 C.L.R. 395 at 401:

> "Unlike the verb 'means', 'includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. The well-known statement of Lord Watson in Dilworth v Commissioner of Stamps [1899] A.C. 99, at pp. 105, 106 should not be taken so literally as to reduce the inquiry in a case like the present to an inquiry into the meaning of the word 'includes'. Strictly speaking, that word cannot be equivalent to 'means and includes'. But a provision in which it appears may or may not be enacted as a complete and therefore exclusive statement of what the subject expression includes. A provision which is of that character has the same effect as if 'means' has been the verb instead of 'includes'. The question whether a particular provision is exclusive although 'includes' is the only verb employed is therefore a question of the intention to be gathered from the provision as a whole."

In my view in its context in a general definition intended to embrace a variety of positions in a federal union structure, some of which may be created subsequently, the list of specific officers in Rule 4(h) should not be regarded as exhaustive of the concept of office, which is the subject of the word "includes".

Secondly, even if the definition in Rule 4 were exhaustive it would be contrary to principle to construe an eligibility rule, which Rule 6(1) is, by reference to a Rule like Rule 4(e) which could be amended without the consent of the Industrial Registrar. Thus in Turner v Australasian Coal and Shale Employees Federation (supra) the Full Court said at 641:

> "At the trial, there was no contest as to what was the eligibility rule of the Federation. On appeal, the Court raised the question what was the eligibility rule, and whether a rule requiring the consent of the Industrial Registrar under what are now sub-sections 139(1) and (2) of the Act can be construed by reference to a rule to which such consent is not required; see Co-operative Bulk Handling Ltd v Waterside Workers' Federation of Australia (1980) 49 FLR 355 at 361; 32 ALR 541, and Sims v Australian Institute of Marine and Power Engineers (Sydney Branch) (1980) Law Book Co Industrial Arbitration Service (Current Review) 575 at 579. Pursuant to s27 of the Federal Court of Australia Act 1976, the court gave leave for further evidence to be tendered for the purpose of assisting in the determining of what was the eligibility rule of the Federation. Documents tendered from the file of the Industrial Registrar pursuant to that leave indicate that r2 is to be regarded as the eligibility rule. In accordance with the authorities referred to above, that rule should be construed without reference to r7."

In my view a person appointed as an additional Organiser comes within the expression "persons appointed as Officers of the Union" within Rule 6(1) construed in accordance with the principles to which I have just referred. I derive support for this conclusion from the reasoning of the majority in Landeryou v Taylor (1967) 15 F.L.R. 147; Bielski v Oliver (supra) at 403 to 431 and from Gray J.'s analysis of some of the relevant authorities in Ransley v Australian Public Service Association (Fourth Division Officers) Tasmanian Branch (supra) at 65 to 66.

In Bielski v Oliver, which also concerned the rules of the AWU, a different result was reached because under the rules in force at that time appointment as an additional Organiser was

confined to any financial member of not less than two years' standing. Contrast the absence of any such qualification in Rule 4(h), Rule 64 or elsewhere in the rules in force in August 1987. As indicated at the outset of these reasons I was referred, after reserving judgment, to a recent judgment of Pincus J. in Rennie v Australian Workers' Union (unreported, 8 November 1990). However, on reviewing that judgment with the assistance of further argument from Counsel, I consider that it was confined to the factual question of whether Mr Ballin was eligible to and did become a member of the AWU before taking up employment as a full time Organiser. There is nothing in his Honour's decision which contradicts the conclusions which I have already expressed.

Accordingly, for the reasons indicated I find that Mr Blewitt was at all relevant times entitled to, and did remain a member of the AWU by virtue of his acquisition of membership in May 1987 and his appointment as an additional Organiser on 24 August of the same year.

Mr Butcher's contention that an irregularity has occurred in or in connection with the subject election therefore fails, and the inquiry should be terminated.

I certify that this and the preceding twenty-seven (27) pages are a true copy of the Reasons for Judgment of His Honour Mr Justice Ryan.

Associate: B Conway

Date: 11 December 1990

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Date of Hearing	:	5, 6 and 7 November 1990 11 December 1990
Date of Judgment	:	11 December 1990