

IN THE FEDERAL COURT OF AUSTRALIA)
WESTERN AUSTRALIA DISTRICT REGISTRY) No WAI 3 of 1990
INDUSTRIAL DIVISION)

IN THE MATTER of Section 218 of
the Industrial Relations Act
1988

IN THE MATTER of an application
by Glen Dallas Ivory for an
inquiry into an election for
Office in the Australian
Workers' Union, Western
Australian Branch

Coram: Ryan J
Place: Melbourne
Date: 19 March 1993

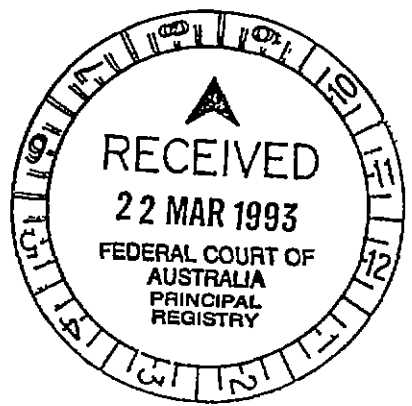
MINUTES OF ORDER

THE COURT ORDERS:

1. That the inquiry into an alleged irregularity in relation to the election of Joseph Harold Isherwood to the office of Branch President within the Western Australian Branch of the Australian Workers' Union be terminated.

2. That each exhibit be returned to the custody of the party or other person from whose custody the same was produced.

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



CATCHWORDS

References

Re Blewitt ex parte Butcher (WAI 1 of 1990) (11 December 1990).

R v Gray ex parte Marsh (1985) 157 CLR 351 Gibbs CJ at 367.

Re Collins ex parte Hockings (1984) 167 CLR 523 Toohey and McHugh JJ at 526.

Re Brailey (1985) 10 FCR 168.

Taylor v Taylor (1890) 11 NSW 323.

Re Pastrycooks, Bakers, Biscuitmakers and Allied Union (Victorian Branch) ex parte Johnson (1990) 34 IR 18 Gray J.

Abigail v Lapin [1934] AC 491 at 508.

G D IVORY - WAI 3 of 1990

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IN THE MATTER of an application
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Coram: Ryan J
Place: Perth
Date: 19 March 1993

REASONS FOR JUDGMENT

Ryan J: An inquiry has been instituted pursuant to s.218 of the *Industrial Relations Act* 1988 on the application of Glen Dallas Ivory into an alleged irregularity in relation to the election of Joseph Harold Isherwood to the office of President within the Western Australian Branch of the Australian Workers' Union ("the AWU").

Nominations for election to that and other offices within the Western Australian Branch of the AWU opened on 22 September 1989 and closed on 20 October 1989. Two nominations were lodged for election to the office of President, one by Mr Isherwood and the other by the applicant, Mr Ivory. Mr Ivory had been elected as an organizer within the Western Australian Branch of the AWU in 1986 but resigned from that position in 1989. At the time of the election which is the subject of

this inquiry, he was employed as a production operator by Woodside Offshore Petroleum ("Woodside") at Karratha.

After dissatisfaction over the conduct of an industrial dispute involving the proposed introduction by Woodside of twelve-hour shifts, Mr Ivory, in conjunction with Mr Wilson, who was then an elected organizer within the Western Australian Branch of the AWU, and certain other officials of that Branch, agreed to form a "ticket" to oppose, at the next election to be held in late 1989, a group of other elected officials led by the incumbent President of the Branch, Mr Isherwood. Mr Wilson had himself resolved to become a candidate in the conjoint election for the office of General Secretary within the federal structure of the AWU and to stand, as well, for election as Branch Vice-President and Executive Councillor.

On 26 September 1989 Mr Wilson initiated a meeting between himself and Mr Isherwood at the Lemon Tree Hotel in Perth, at which the two men discussed the possibility that certain positions for which nominations had just been called might be distributed between the faction led by Mr Wilson and that led by Mr Isherwood without a contested election. According to a typewritten note of the conversation made by Mr Isherwood, Mr Wilson indicated that it was likely that Mr Isherwood would be opposed in the election for Branch President by Mr Ivory, a Mr Swale and one other candidate, but that if Mr Isherwood were to agree to ensure the election of Mr Blewitt as an organizer,

he, Wilson, "would attempt to fix that". Mr Isherwood's note, apparently made for the information of the Branch Secretary, Mr Keenan, continued:

"I then said before finally committing myself to Blewitt, I would talk to the Secretary.

As you know I did discuss this and agreement was reached.

I advised B. Wilson of this and he said he was happy and would support 1 card.

He also asked me if I could arrange with Woodside to get Ivory down so as we could talk to him about not having others nominate for the President's position, this is arranged for Wednesday next week."

Mr Ivory caused a form to be lodged with the Returning Officer on 19 October 1989 nominating himself for election to the office of Branch President. The form was signed by Mr Blewitt as first nominator or proposer, and by Mr Beahan as second nominator or seconder, and contained, amongst other things, the following notation:

"CANDIDATES WHO WISH TO WITHDRAW THEIR NOMINATION SHOULD ENSURE THAT THE WITHDRAWAL NOTICE REACHES ME NO LATER THAN WEDNESDAY, 1 NOVEMBER 1989. THIS NOTICE MUST CONTAIN THE CONSENT OF THE CANDIDATES' NOMINATORS."

At the same time as he signed the nomination form, Mr Ivory signed a form of withdrawal of nomination in these terms:

"I wish to withdraw my nomination as Branch President of the Western Australian Branch of the Australian Workers Union in the forthcoming election.

Attached is a document signed by the people who nominated me, agreeing to my withdrawl (sic).

I apologise for any inconvenience."

The consent to withdrawal was undated and signed by each of Mr Blewitt and Mr Beahan. It read:

"As the Nominators of Mr Glen Ivory for the position of Branch President of the West Australian Branch of the A.W.U. we hereby agree that he withdraw his nomination."

Mr Ivory intended the notice of withdrawal to be held, as it were, in escrow against the possibility that Mr Wilson might reach an accommodation between his group and that led by Mr Isherwood which would result in an uncontested election for certain positions. Accordingly, Mr Ivory caused the completed withdrawal form to be sent to Mr Blewitt in Perth to be kept in a safe place.

In October 1989, Mr Wilson and Mr Keenan were required to attend a meeting of the Federal Executive of the AWU in Sydney. Because of an airline pilots' strike, they travelled by car, leaving Perth on 9 October. Before leaving, Mr Wilson had requested Mr Ivory to fill out a form of withdrawal of nomination and deliver it, in escrow, to Mr Blewitt in the way described above.

On 20 October, the day on which nominations for the election closed, Mr Keenan and Mr Wilson commenced to drive back from Sydney. After nominations had closed, Mr Wilson spoke by telephone from Broken Hill to Mr Isherwood who expressed concern about Mr Ivory's nomination for election as Branch President and asked whether Mr Wilson could do anything to secure its withdrawal. Mr Wilson replied, in effect, that Mr Isherwood would have to discuss directly with Mr Ivory the

possible withdrawal of his nomination. As they drove together, Mr Keenan and Mr Wilson discussed the forthcoming election and Mr Keenan expressed his preference for agreement between the factions which would avoid a contested ballot.

Mr Keenan and Mr Wilson reached Perth on Sunday, 22 October. Before reporting to the Branch Office on 24 October, Mr Wilson obtained from Mr Blewitt the form of withdrawal of Mr Ivory's nomination. On the same day, a meeting occurred between Mr Keenan, Mr Isherwood and Mr Wilson. In the course of that meeting, Mr Isherwood produced a manilla folder containing, amongst other things, forms of withdrawals of nominations by members of his faction, including a Mr Butcher who had nominated against Mr Wilson for election as Executive Councillor and Branch Vice-President. There was further discussion between Mr Isherwood and Mr Wilson about reaching, with the aid of withdrawals of nominations, an agreed "ticket" which each of their factions could support. According to Mr Wilson, when the question of the withdrawal of Mr Ivory's nomination for election as Branch President was raised, he, Wilson, indicated that Mr Isherwood would have to negotiate that directly with Mr Ivory. However, Mr Wilson did tell Mr Isherwood and Mr Keenan at their meeting on 23 October that he, Wilson, held a completed form of withdrawal signed by Mr Ivory and his nominators.

On Wednesday, 25 October 1989, Mr Wilson and Mr Isherwood had a further discussion by telephone in which the preparation of

a common, cross-factional, how-to-vote card was explored. Mr Isherwood indicated that his faction could not join in promulgating such a card because he was committed to support Mr Hodder, the candidate for election as General Secretary who was being opposed by Mr Wilson. Mr Wilson then asked Mr Isherwood to make a financial contribution to the preparation and postage of the Wilson faction's how-to-vote card. After further discussion, Mr Isherwood agreed to contribute \$3,000. According to his own evidence, Mr Wilson, for his part, agreed to speak to Mr Ivory about the withdrawal of Ivory's nomination, although, at the same time, urging Mr Isherwood to have Mr Ivory brought to Perth for direct discussions between the two candidates for election as Branch President.

On Monday, 30 October, a pre-arranged meeting occurred between Mr Isherwood and Mr Wilson at the "Bar Italia" coffee shop. Mr Isherwood handed to Mr Wilson 3,000 postage stamps and, on Mr Isherwood's evidence, \$1,000 or, according to Mr Wilson, \$500, in cash. In turn, Mr Wilson gave Mr Isherwood the executed form of withdrawal of Mr Ivory's nomination, although, as Mr Wilson acknowledged in evidence, nothing had been said in his latest telephone conversation with Mr Ivory during the preceding weekend, to authorize the taking of that course.

There is a conflict between the evidence of Mr Wilson and Mr Isherwood as to whether it was a term of the agreement between them that the form of withdrawal of Mr Ivory's nomination

which Mr Wilson handed to Mr Ivory at the "Bar Italia" could only be lodged with the Returning Officer if Mr Ivory consented, and if there were also lodged a similar form of withdrawal of the nomination of Mr Barndon, a member of Mr Isherwood's faction, for election as Branch Executive Member. For the reasons indicated below, the resolution of this conflict is not essential to the conclusion which I have reached. However, although I am satisfied that Mr Wilson suggested that Mr Isherwood should speak to Mr Ivory in an endeavour to persuade him of the mutual benefits which would flow from the agreement which had been reached between the leaders of the two factions, I am not persuaded that Mr Wilson stipulated that Mr Ivory's withdrawal could only be lodged with his, Ivory's, consent.

Similarly, I am satisfied that Mr Isherwood showed Mr Wilson a form of withdrawal of nomination dated 23 October 1989 which had been signed by Mr Barndon as candidate and countersigned by way of consent by Mr Isherwood and Mr Keenan as nominators, and led Mr Wilson to believe that Barndon's withdrawal of nomination would be lodged with the Returning Officer at the same time as that by Mr Ivory. However, I am not able to find on the balance of probabilities that Mr Isherwood expressly or impliedly undertook not to lodge Mr Ivory's withdrawal unless he also lodged the corresponding document on behalf of Mr Barndon.

In the light of Mr Wilson's avowed distrust of Mr Isherwood,

it would have been a simple and natural course, had the latter bound himself in the way suggested, for Mr Wilson to have retained control of Mr Ivory's withdrawal and attended on the Returning Officer together with Mr Isherwood to lodge it simultaneously with that of Mr Barndon after first obtaining Mr Ivory's consent. Conversely, it is inherently unlikely that Mr Isherwood would have parted with cash and stamps to a value of \$1,500 or \$2,000 for no more than the hope of securing Mr Ivory's consent to the withdrawal of his nomination.

In the circumstances, I find on the balance of probabilities that, although Mr Wilson expected, or hoped, that Mr Ivory would consent to the withdrawal of his nomination, and that Mr Barndon's nomination would also be withdrawn, the only condition precedent to the lodging of Mr Ivory's withdrawal was the making by Mr Isherwood of a contribution to the printing and postage of a how-to-vote ticket for the Wilson faction. That condition was satisfied.

After the meeting at the "Bar Italia", Mr Wilson again spoke by telephone to Mr Ivory and urged him to consent to withdrawal of his nomination, arguing that there was a wider interest to be served by his, Wilson's, contesting the election for General Secretary without strong opposition from Isherwood's faction. However, according to Mr Wilson, Mr Ivory maintained that he would have to be persuaded directly by Mr Isherwood to consent to the withdrawal of his

nomination. Mr Wilson did not tell Mr Ivory that he had that day delivered the executed form of withdrawal of nomination to Mr Isherwood, although he had then, or earlier, created the impression in Mr Ivory's mind that the withdrawal form had been placed on a file in Mr Keenan's office.

On Tuesday, 31 October, a meeting of the Branch Executive of the AWU was in progress and Mr Wilson asked Mr Isherwood whether he had spoken to Mr Ivory. Mr Isherwood replied that he had not done so and, in response to Mr Wilson's indication that little time was left, said that he would contact Ivory. On the same afternoon, Mr Isherwood gave to Mr Wilson an amount which the latter believes was \$1,000. At all events, it seems to be common ground that the second payment by Mr Isherwood represented the balance of the contribution which he had promised to make to the campaign expenses of the Wilson faction.

On Wednesday, 1 November 1989, the last day for withdrawal of nominations, the Branch Executive meeting was still proceeding, and in the course of it, Mr Wilson passed to Mr Isherwood a note enquiring, "Did you get Barndon's and Ivory's withdrawals in this morning?". Mr Isherwood mouthed an affirmative reply, causing Mr Wilson to assume that Mr Ivory had consented to Isherwood's lodging the withdrawal of his nomination.

In fact, although Mr Panegyres, the Returning Officer, had

earlier been advised by Mr Isherwood to expect a number of withdrawals of nominations, he received only one withdrawal, that by Mr Ivory. Mr Ivory's form of withdrawal was lodged with Mr Panegyres at 9.00am on 1 November by Mr Isherwood. On receipt of that document, Mr Panegyres declared Mr Isherwood elected unopposed as Branch President. After learning from the Returning Officer what had happened, Mr Wilson, who had unsuccessfully tried to contact Mr Ivory on the evening of 31 October, spoke to him by telephone on 2 November. Thereafter Mr Ivory instructed his present solicitors to take whatever action they thought appropriate. On those instructions the following letter dated 2 November 1989 was sent by facsimile transmission to the Returning Officer:

"Re: A.W.U. Elections

We confirm we act for Glen Ivory in the abovementioned elections

We confirm that our client did not authorise the lodging of the apparent withdrawal of his nomination for position of President of the W.A. Branch of the Australian Workers Union.

The lodging of the apparent withdrawal in these circumstances would in our view constitute an irregularity in the conduct of the election.

We note your power pursuant to S215(1) of the Industrial Relations Act 1988 and request that our client immediately be reinstated as a candidate for the position for which he had nominated.

We seek confirmation that this has occurred by 5pm Monday 6th November 1989."

When he was subsequently taxed by Mr Wilson about his failure to lodge the withdrawal of Mr Barndon's nomination, Mr Isherwood explained that he had received a facsimile transmission from Mr Barndon instructing him not to lodge it. That explanation is supported by documentary evidence

consisting of the following letter dated 31 October 1989 from the company which employed Mr Barndon on an offshore drilling vessel addressed to the AWU, Western Australian Branch:

"RE: MR W. BARNDON

We have received a message at 3:30 PM this day from Mr Warren Barndon of "Maersk Voyager" who wishes for this company to advise you both that he does not wish for his nomination to be withdrawn.

Yours truly,
for Maersk Drilling (Australia) Ltd. Aps.
Western Australia Branch

A.A. Worlow"

I am unable to find whether or not Mr Isherwood procured Mr Barndon to give that instruction after he had obtained from Mr Wilson a form which would be effective, upon lodgment, to eliminate Mr Ivory as a candidate in the election. However, in view of the findings already made and the reasons given below, it is unnecessary to reach a conclusion on that question.

Much time was spent during the taking of evidence on this inquiry in exploring whether Mr Isherwood had admitted on 6 December 1989 to having deceived Mr Wilson by lodging only the withdrawal of Mr Ivory's nomination, and whether Mr Wilson had conceded at a meeting of the Branch Executive on 4 September 1990 that no agreement had been reached between himself, Isherwood and Keenan at their meeting on 24 October 1989. However, again having regard to the findings already made and the conclusions of law reached below, there is no need to

canvass those questions in these reasons.

In the light of the facts which I have just summarized, Mr Ivory has alleged that an irregularity occurred in relation to the election for Branch President of which the following particulars are given in his application:

"The Application alleges that a document which appeared to be a letter of withdrawal of the Applicant's nomination for the position of Branch President of the Branch was transmitted to the Australian Electoral Commission on 1 November 1989 without the authority or permission of the Applicant."

Counsel for Mr Isherwood contended on three separate grounds that this inquiry should be terminated.

In the first place, it was argued that Mr Ivory's nomination as originally lodged was invalid because one of his nominators, Mr Blewitt, was not, at the time of lodging of nomination, a member as required by the relevant rules. It follows from the conclusion which I reached in *Re Blewitt ex parte Butcher* WAI 1 of 1990 (11 December 1990) that I cannot uphold that submission.

The second contention advanced on behalf of Mr Isherwood was that the withdrawal of Mr Ivory's nomination was not lodged with the Returning Officer without Mr Ivory's actual or ostensible authority. Thirdly, it was argued that the events which happened, assuming that of the available findings of fact, those most favourable to Mr Ivory were made, did not constitute an "irregularity" within the meaning of s.4(1) of

the *Industrial Relations Act* 1988. It is convenient to deal with these two submissions together.

"Irregularity" is defined by s.4(1) of the *Industrial Relations Act* as follows:

"irregularity", in relation to an election or ballot, includes:

- (a) a breach of the rules of an organisation or branch of an organisation; and
 - (b) an act or omission by means of which:
 - (i) the full and free recording of votes by all persons entitled to record votes and by no other persons; or
 - (ii) a correct ascertainment or declaration of the results of the voting;
- is, or is attempted to be, prevented or hindered."

The corresponding definition in the *Conciliation and Arbitration Act* was considered by the High Court in *The Queen v Gray; Ex parte Marsh* (1985) 157 CLR 351 where it was held that the definition was inclusive, comprehending things which were "irregularities" within the ordinary meaning of the word as well as those which were specifically included in the definition. On the ordinary meaning of "irregularity", Gibbs CJ observed at 367:

"According to the *Oxford English Dictionary* "irregularity", in its relevant sense, means "want of conformity to rule; deviation from or violation of a rule, law, or principle ... deviation from what is usual or normal". The notion of an irregularity, in relation to an election, involves the idea of some departure from some rule, established practice or generally accepted principle governing the conduct of the election. The question is whether it can be said that the alleged conduct of Mr. Bali and his supporters did depart from some rule, practice or principle of that kind."

In the present case, the question is whether the conduct of Mr

Isherwood, in lodging the withdrawal of Mr Ivory's nomination, departed from some rule, practice or principle of the kind identified by Gibbs CJ in the passage just quoted. The statutory definition, in conjunction with the terms of s.218 itself, makes it clear that the conduct said to constitute an irregularity must be in relation to an election or ballot. It is not sufficient for the conduct to touch or affect some part of the electoral process. In *Re Collins; Ex parte Hockings* (1989) 167 CLR 522, an alleged use of union resources to promote one group of candidates in an election, and a denial of similar assistance to rival candidates, was held incapable of constituting an irregularity having the requisite relation to the election. Toohey and McHugh JJ observed, at 526:

"Conduct which constitutes a breach of the rules of an organization but which goes no further than supporting the candidature of members of a particular "team" amounts to an irregularity but it does not give rise to an irregularity in or in connexion with an election because it does not involve a departure from some rule, practice or principle governing the conduct of the election."

See also *Re Brailey* (1985) 10 FCR 168.

It is by no means clear that the arrangements between Mr Ivory and Mr Wilson, and between Mr Isherwood and Mr Wilson in his own right, or as agent for Mr Ivory, were intended to create contractual liabilities rather than obligations binding only in honour. Moreover, if the principle enunciated in *Taylor v Taylor* (1890) 11 NSW 323, to which I was referred by Counsel for Mr Ivory, has any application to elections within registered organizations, it may also be that the contract, if

there was one, between Mr Isherwood and Mr Ivory or Mr Wilson was unenforceable as being contrary to public policy.

However, even assuming in favour of Mr Ivory that what happened amounted to a breach of contract by either Mr Isherwood or Mr Wilson or by both of them, any such breach was collateral to the election and did not involve a departure from some rule, practice or principle governing the conduct of the election. In that way, the presumptive breach was analogous to a breach of contract by a postal authority or courier entrusted with delivering a nomination to a returning officer before the time fixed for the close of nominations. Thus in *Re Pastrycooks, Bakers, Biscuitmakers and Allied Union (Victorian Branch) ex parte Johnson* (1990) 34 IR 18 Gray J observed at 22:

"In his submissions on behalf of the applicant, Mr Borenstein did not contend that Mr Richards acted as agent for the returning officer in accepting a nomination form from Ms Josevska. In my view, the evidence of Ms Josevska discloses that Mr Richards acted as her agent, for the purpose of conveying her nomination to the returning officer. Unless it can be shown that Mr Richards was subject to some particular duty in that respect, he was in no different position from that of any other person requested to convey a nomination form to a returning officer. Indeed, his position was no different from that of the Australian Postal Commission in a case in which a candidate posts a nomination. It is the responsibility of a candidate to ensure that his or her nomination is lodged with the returning officer in the correct form, at the correct place and by the correct time. There can be no irregularity for the purposes of the Act merely by the failure of some means chosen by a candidate to convey the nomination form."

Likewise, in my view there can be no irregularity merely because arrangements chosen by a candidate to lodge, or withhold, a withdrawal of nomination, valid on its face, have miscarried. Mr Ivory had delivered the withdrawal of his

nomination into the control of Mr Wilson who, in turn, passed that control to Mr Isherwood. If, as the applicant contends, either Mr Wilson exceeded the limits of his authority, or Mr Isherwood exceeded the limits of the authority which he derived from Mr Wilson, the case remains, as far as the Returning Officer and the general body of the members of the AWU were concerned, one of an agent "exceeding the limits of his authority but acting within its apparent indicia": *Abigail v Lapin* [1934] AC 491 at 508.

It is true that in *Johnson's Case (supra)*, Gray J held that the failure by a branch secretary/treasurer to lodge with a returning officer a nomination form entrusted to him for that purpose by a candidate, could amount to an irregularity if it constituted an offence by virtue of s.315(1)(b) of the *Industrial Relations Act* which provides:

"315(1) A person shall not, without lawful authority or excuse, in relation to an election for an office in, or in a branch of, an organisation:

.....

(b) destroy, deface, alter, take or otherwise interfere with a nomination paper, ballot paper or envelope."

However, I can find nothing in the facts which I have found even drawing from them all available inferences which are most favourable to Mr Ivory, that could constitute any statutory offence in relation to the subject election.

For these reasons, the application must be refused and the inquiry terminated.

Counsel for the applicant: Mr N Pope
Solicitor for the applicant: Dwyer Durack

Counsel for the respondent: Mr Van Haltan
Solicitor for the respondent: Freehill Hollingdale & Page

I certify that this and the preceding sixteen (16) pages are a true copy of the reasons for judgment of his Honour Mr Justice Ryan

Associate: *Daniel Neill*

Date: *19 March 1993*