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Abstract
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Keywords
industrial relations, Industrial Relations Act 1988, Australian Industrial Relations Commission, Federal, States

RESTRAINING STATE INDUSTRIAL AUTHORITIES - AN EMERGING GAP?

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Introduction

It is no exaggeration to say that there is currently a marked tension between the Federal Government and the States concerning the regulation of industrial relations. In fact, this tension has been around for sometime now but it has deteriorated in the last 12 months or so, especially since the reform of the Federal industrial relations system which, in the main, came into force on 30 March, 1994.

If one needed evidence to support these assertions, it would be sufficient to point to the number of High Court challenges which have been mounted by the States against aspects of the *Industrial Relations Act* 1988 (Cth). Even before the recent spate of challenges, the Kennett Government in Victoria had been having its own wrangles with the Federal authorities both in and out of the courts. Until the High Court determines the issues involved, the States have no choice but to comply with the law as it currently stands. Similarly, if their challenges fail, the States will have no alternative but to toe the line.

There is only one source of power available to the Australian Industrial Relations Commission to intervene where a State industrial authority is stepping out of line. The purpose of this article is to discuss the use of the power to restrain State industrial authorities. In particular, the article looks at how the scope of the restraining power available to the Australian Industrial Relations Commission is being narrowed by developments in State industrial law.

The Power to Restrain a State Industrial Authority

In its original form, s 20 of the *Conciliation and Arbitration Act* 1904 (Cth) merely authorised the then Commonwealth Court of Conciliation and Arbitration to give directions to a State industrial authority or direct it not to deal with certain disputes. The section was repealed in 1928 and substantially re-enacted in its present form.

The power of the Australian Industrial Relations Commission to restrain is contained in s128 of the *Industrial Relations Act* 1988 (Cth). It is a relatively short section and is reproduced here:

128(1) If it appears to a Full Bench that a State industrial

> authority is dealing or about to deal with:
> (a) an industrial dispute;
> (b) a matter provided for in an award or an order of the Commission; or
> (c) a matter that is the subject of a proceeding before the Commission;
> the Commission may make an order restraining the State industrial authority from dealing with the industrial dispute or matter.
>
> 128(2) The State industrial authority shall, in accordance with the order, cease dealing or not deal, as the case may be, with the industrial dispute or matter.
>
> 128(3) An order, award, decision or determination of the State industrial authority made in contravention of the order of the Full Bench is, to the extent of the contravention, void.

Constitutional Validity

Before discussing the scope of the restraining power, some comment should be made on the constitutional validity of the section.

As early as 1910, the High Court of Australia seemed to have accepted that the incidental power in the Commonwealth Constitution provided the source of constitutional validity to the Federal Commission's restraining power. Thus, in *R v The Commonwealth Court of Conciliation and Arbitration and the President Thereof and the Boot Trade Employees Federation; ex parte Whybrow & Co & Ors*[1] the validity of s 20 (now s128) of the *Conciliation and Arbitration Act* 1904 (Cth) was challenged. The High Court held it to be valid. In particular, Issacs J said that the restraining power was 'incidental, and even necessary in the strict sense to the complete and effectual determination of the dispute as a whole by the federal tribunal.'[2]

Similarly, in *The Amalgamated Engineering Union & Ors v Alderdice & Ors*[3] the then Commonwealth Court of Conciliation and Arbitration upheld the validity of s 20. Detheridge CJ said:

> To my mind, legislation to prevent the possibility of these results is clearly within the powers given to the Commonwealth legislature by pl. 35 and 39 of s 51 of the Constitution. The Commonwealth legislature might legislate directly prohibiting State tribunals from so acting, or it might, as in s 20, give power to this Court to decide when the occasion for prohibition has arisen and to make a direction accordingly, whereupon the statutory prohibition in the section operates.[4]

However, in the comparatively more recent case, Dawson J suggested that s66

1 (1910) 11 CLR 1.
2 Ibid, 52.
3 (1927) 24 CAR 375.
4 Ibid, 379.

of the *Conciliation and Arbitration Act* 1904 (Cth) [now s128] might be invalid though the High Court did not decide the issue. His Honour said in *Re Moore & Ors; ex parte New South Wales Public Service Professional Officers' Association & Anor*:[5]

> It is, I think, apparent that the order which the Conciliation and Arbitration Commission made in this case cannot, upon these principles, have a valid operation. That is enough to dispose of the matter without dealing with the validity of s 66. Although its validity is not beyond question, having regard to the changes made to the structure of the Act since the decisions which I have cited above, it is undesirable to deal with that question where it is unnecessary to do so and where, as a consequence, there is no factual situation against which the relevant limits of the constitutional power can be brought into focus.[6]

If Dawson J is correct, it means that there is a cloud hanging over the constitutional validity of s128. The predecessor to s128 had a limited reach as it related only to Part III of the *Conciliation and Arbitration Act* 1904 (Cth). As his Honour did not spell out his objections, it is unclear what the difficulty is. Whatever it might be, as s128 of *Industrial Relations Act* 1988 (Cth) is much broader than its predecessor, in all likelihood it may be as tainted as its predecessor (if not more so). One thing that is clear is that s128 can be supported by the incidental power of the *Commonwealth Constitution* by virtue of either s 51(xxxv) or s 51(xxxix) of the Constitution.

Rationale for the Power

The question then may be asked: what is the rationale behind giving the Australian Industrial Relations Commission a power to restrain state industrial authorities in certain situations? As the power to regulate industrial relations is concurrently shared by the Federal and State Parliaments, it is inevitable that there will be conflicts. This is especially so in times like this when the majority of the State Governments seem to have different ideas about regulating industrial relations from that of the Federal Government.

A purpose of s128 must be the preventative element. By that is meant that, an order issued under s128 will have the effect of preventing the conflict that will result between the Federal and State systems if the state industrial authority were allowed to proceed to deal with a matter that had been dealt with (or is about to be dealt with) by the Federal Commission.

The rationale for the existence of s128 was discussed by Dethridge CJ when analysing s 20 of the *Conciliation and Arbitration Act* 1904 which was the first enactment of the restraining power. In *The Amalgamated Engineering Union & Ors v Alderdice & Co*,[7] his Honour explained that the type of disputes which the Federal Commission can deal with extend beyond the limits of one

5 (1984) 54 ALR 11.
6 Ibid, 25.
7 (1927) 24 CAR 375.

State. Thus, if an industrial authority were permitted to deal with the part in its State, this will affect or interfere with the Federal Commission's handling of the wider interstate dispute. Detheridge CJ stated:

> Obviously, in many cases, such a dealing with a party by the State tribunal would, or might, interfere with the satisfactory settlement of the whole interstate dispute by the Federal tribunal, and it is to prevent mischief arising in this way that s 20 was enacted.[8]

The relevant 'mischief' is one which 'might result in conditions of the one industry differing widely in different States, to the detriment of industrial peace.'[9]

Even if the state industrial authority were allowed merely to express an opinion on the 'local' part of an interstate dispute, this would be dangerous. Detheridge CJ went on:

> Moreover, even if the action of a State tribunal is designed and expressed to have no effect unless and until the matter dealt with ceases to form part of an interstate dispute and to be covered by a Federal award made to determine such dispute, such action may nevertheless cause friction and unrest as between the parties to a dispute. The mere expression of an opinion upon the subject-matter by a State tribunal would have so great weight that it might tend to hamper this Court [now the Commission] in its conciliative functions, and also tend to militate against the practical success of its award if one is made in settlement of the dispute.[10]

Scope of the Power

It is obvious from the wording of s128 that the power given to a Full Bench of the Australian Industrial Relations Commission is not a power at large. The Federal Commission cannot intervene in just any matter that a State industrial authority is dealing with or about to deal with. This is so, notwithstanding that, s128 as currently worded 'protects' the whole of the Federal system, whereas its predecessor, s 66, was confined to Part III of the *Conciliation and Arbitration Act* 1904 (Cth), as already stated. If the Australian Industrial Relations Commission had a power at large to restrain state industrial authorities, this would render meaningless the States' concurrent power to regulate industrial relations.[11]

In *Australian Timber Workers' Union & Anor v The Sydney and Suburban Timber Merchants' Association & Ors*,[12] the then Commonwealth Court of Conciliation and Arbitration made an order restraining the Sawmillers & Co (Cumberland and Newcastle) Conciliation Committee set up under New South Wales legislation from dealing with any matter for which provision had

8 Ibid, 378.
9 Ibid.
10 Ibid, 379.
11 See s 51(xxxv) and s 107 of the *Commonwealth of Australia Constitution Act* 1900.
12 (1935) 53 CLR 665.

been made in a Federal award. The High Court of Australian unanimously held that the restraining order was invalid because it was worded in such a way as to have general application and irrespective of persons. The order did not identify the dispute to which it related and failed to specify the matters on which the State Committee was being restrained.[13]

In order to invoke s128, it is not sufficient merely to point to matters being before the Australian Industrial Relations Commission and the State industrial authority. As subsection (1) of s128 clearly shows, there are only three distinct situations in which the restraining power can be used against a State industrial authority. There has to be an identity between the matters between the Federal Commission and the State industrial authority in the three specified areas. These points are illustrated by *Application by Alcoa of Australia for order restraining WA Industrial Relations Commission.*[14] The wages and conditions of employees were regulated by a Federal award, the *Alcoa of Australia (WA) Award* 1980. Thirteen electrical workers claimed payment in the Western Australian Industrial Relations Commission for wages for a period for which they had been stood down by their employer, Alcoa, during a demarcation dispute. The demarcation dispute was referred to the Federal Commission. A Full Bench of the Federal Commission refused to grant the application to restrain the Western Australian Industrial Relations Commission. It based its decision on three separate grounds. Firstly, the matter before the State Commission was not an industrial dispute (as defined in the Federal legislation). It was a matter localised within Western Australia. Secondly, the matter before the State Commission, being a claim for wages was different from the one that was referred to the Federal Commission which was a demarcation dispute. Thirdly, although wages payable to the employees in question were prescribed by a Federal award, action before the State Commission would not in any way affect the provisions in the Federal award. The Federal award provisions would not be put in 'peril' by such a decision.

The Federal Commission said that it was not the function of the Commission to enforce awards, that being a matter for the Federal Court (now the Industrial Relations Court of Australia) and so any decision made by the Western Australian Industrial Relations Commission would not affect the functions of the Federal Commission. At any rate, it was questionable whether the State Commission had authority to enforce a Federal award but this was not a matter for the Federal Commission to decide on.

The High Court of Australia had the opportunity to discuss the scope of the Federal restraining power under the predecessor to the current s128 of the *Industrial Relations Act* 1988 (Cth) in *Re Moore & Ors; ex parte New South*

13 In *The Western Australian Timber Workers' Industrial Union of Workers' Industrial Union of Workers (South West Land Division) v The Western Australian Sawmillers' Association & Ors* (1929) 43 CLR 185, the High Court held invalid a restraining order made by the Commonwealth Court of Conciliation and Arbitration against the Court of Arbitration of Western Australia because the Commonwealth Court had acted without jurisdiction in re-opening a Federal award and made it binding on a State registered union which had obtained a State award. Therefore the parties to the Federal dispute and its award were not the same to the State award.

14 1981 AILR #2.

Wales Public Service Professional Officers' Association & Anor.[15] Two state-registered unions lodged identical applications for an award from the then Industrial Commission of New South Wales. They sought an increase of 4 per cent in the salaries of professional engineers employed in the New South Wales Public Service and among other things, preference in employment. On 10 March 1983, the Association of Professional Engineers Australia (APEA) notified the Federal Commission of the existence of an industrial dispute, following the non-acceptance of a log of claims on the Public Service Board of New South Wales, demanding a salary increase of 50 per cent and among other things preference in employment. A Full Bench of the Australian Industrial Relations Commission granted an order restraining the then Industrial Commission of New South Wales from dealing with the two applications. The High Court of Australia unanimously held that the order was invalid and without jurisdiction and quashed the order. Wilson J's judgment succinctly said:

> This matter may be disposed of without consideration of the validity of s66 of the *Conciliation and Arbitration Act* 1904 (Cth) as amended [now s128]. The order which the Conciliation and Arbitration Commission purported to make by virtue of that section is ineffective in any event because it fails to specify with sufficient precision the industrial dispute or matter with which the State Industrial Authority is to be restrained from dealing and to state whether the restraint extends to the whole or part of that dispute or matter. It is essential that the dispute or matter to which the restraining order relates be 'an industrial dispute or... a matter which is provided for in an award or is the subject of proceedings under' Part III of the Act.[16]

When can the Power be used?

The section is silent as to who can invoke the power. In the absence of any limitation, it would seem that applications can be made by interested parties to a Full Bench of the Australian Industrial Relations Commission to exercise the power. There is nothing to suggest that the Commission cannot exercise this power on its motion. It would be expected that in most, if not all cases, interested parties, such as trade unions or employers likely to be affected by a decision of a state industrial authority will bring matters to the attention of a Full Bench of the Australian Industrial Relations Commission (the 'Full Bench').

It is also clear from the wording of the section that the power to restrain is entirely at the discretion of the Full Bench. First, it has to 'appear' to a Full Bench that the State industrial authority is dealing with a matter provided for in a Federal award or before the Australian Industrial Relations Commission and then the Full Bench 'may make an order'. This raises the question: under what circumstances will a Full Bench consider it appropriate to exercise its discretion? There is not much case law on the subject to answer the question definitively.

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15 (1984) 54 ALR 11.

16 Ibid 17. The principles to be applied in s 128 orders were set out by Deane J in the same case at 20-21 in more detail.

The Australian Industrial Relations Commission has, however, made it clear that the restraining power is not to be used 'lightly or without good cause'. The Commission has pointed out that there is a difference between a court or tribunal ordering the stay of proceedings before itself, on the one hand, and a court or tribunal ordering the stay of proceedings before another court or tribunal.

In *Government Insurance Office of New South Wales & Anor v State Public Services Federation & Anor*,[17] the Government Insurance Office of New South Wales sought a restraining order against the Industrial Relations Commission of New South Wales. Although the application was supported by a federal union, it was opposed by two State unions. Whilst the State Commission was hearing an application for a State award, findings of two interstate disputes were made by a member of the Federal Commission. A Full Bench of the Australian Industrial Relations Commission refused the application for a restraining order.

The report of the case is short but the following principles on restraining orders can be gleaned from it:

* a decision is not to be taken lightly and so a clear case must be made by the applicant warranting the granting of the order;

* an order is likely to be granted if the continued hearing by the State Commission will embarrass the Federal Commission in the sense of impeding the performance of the statutory functions of the Federal Commission; and

* other considerations may include the duplication of proceedings and unnecessary expense.

Similarly, in *Application by the AWU to restrain State authority*[18] a Full Bench of the Australian Industrial Relations Commission described the exercise of its discretion under s128 as 'a serious matter'. This statement was made in the light of the general trend in the legislation of both the Federal and State authorities 'encouraging comity and co-operation'. In that case there was a demarcation dispute between the Federated Miscellaneous Workers Union and the Australian Workers Union over coverage of employees of the Department of Conservation and Land Management who were neither park rangers nor forest employees. The Federated Miscellaneous Workers' Union of Australia, WA Branch, applied to the Western Australian Industrial Relations Commission for an extension of the scope of the State award by expanding the definition of the areas to which that award applied and by including a new classification of 'Park and Reserve Ranger', defined to cover 'Reserves Management Assistants'. The Australian Workers Union sought a restraining order from the Federal

17 [1991] 44 IR 133.
18 1992 AILR #85.

Commission against the Western Australian Industrial Relations Commission.

A Full Bench of the Australian Industrial Relations Commission characterised s128 as a provision of 'relatively narrow effect'. Its terms require an identity between the competing considerations in, or, of the two tribunals. Although the Full Bench expressed strong doubt about the existence of an identity between the subject-matters of the two applications, it granted the restraining order against the Western Australian Industrial Relations Commission. The Full Bench came to the conclusion that the Australian Workers Union Award provided for the matter that was to be dealt with by the State Commission and if it were allowed to proceed its decision would put the Federal award 'at peril' or 'might cause a conflict between state and federal awards'.

A recent example of a State industrial authority being restrained can be found in *Re Media, Entertainment and Arts Alliance*.[19] An industrial dispute had been found to exist between the federally registered union and the company which predominantly operated cinemas in Queensland but also one cinema in New South Wales and two in the Northern Territory. Whilst that dispute was pending, the parties negotiated an enterprise agreement which they lodged for certification by the Federal Commission. Subsequently, a rival State-registered union obtained an interim award from the Queensland Industrial Relations Commission binding on the company and covering the same employment conditions as before the Federal Commission. A Full Bench of the Australian Industrial Relations Commission granted the application to restrain the Queensland Industrial Relations Commission. The former said that if the latter were allowed to proceed, any change in the State award coverage could 'seriously embarrass' the Federal Commission in its deliberations on certifying the enterprise agreement.

The Effect of Contravention

What if in the face of a restraining order, the State industrial authority proceeds to deal with the matter in the State jurisdiction? The answer to that is straightforward. As we have already seen under sub-section (3) of s 128, the order, award, decision or determination of the State industrial authority becomes void. In order to appreciate the full meaning of this subsection, it is better to contrast it with s152 of the *Industrial Relations Act* 1988 (Cth) on which there is a wealth of authority. Section 152 states that where a State law, order, award, decision or determination is inconsistent with a Federal award, the latter shall prevail and the former, 'to the extent of the inconsistency' shall be 'invalid'. This is clearly taken from s 109 of the Commonwealth Constitution where a similar phraseology is used. 'Invalid' in this context has been held to mean 'inoperative' and not null and void. In *Butler v Attorney-General*[20] it was explained that being invalid to the extent of the inconsistency' must be taken to have a temporal as well as a substantive connotation. Thus, the Federal law can

19 [1994] 54 IR 314.
20 (1961) 106 CLR 268.

only prevail whilst it remains in force.[21]

The following principles can be put forward as applicable to the effect of s 152:

(i) where there is inconsistency, it does not mean that the whole of the State law or instrument becomes invalid. It simply means that only the relevant provisions in the State law become 'infected', leaving the rest of the legislation or instrument intact.

(ii) the 'infected' provisions in the State law do not become void and of no effect whatsoever. They remain in the statute or instrument but inoperative. It may be said that the 'infected' provisions become comatose.

(iii) as and when the Federal law with which the State law is inconsistent is amended or withdrawn altogether, the 'infected' provisions in the State law become operative again without the need for the State Parliament to repromulgate them or take any other action. Put another way, the 'infected' provisions come out of their coma and back to full life. The best illustration of this can be seen in a case involving the New South Wales Anti-Discrimination Board. In *Viskauskas & Anor v Niland*[22] the High Court of Australia held that provisions of the *Anti-Discrimination Act* 1977 (NSW) were inconsistent with the *Racial Discrimination Act* 1975 (Cth) as originally enacted because the Federal legislation was intended to cover the field.

In response to the High Court's decision, the Federal Parliament inserted s6A(1) into the *Racial Discrimination Act* 1975 (Cth). It states that the Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of State or Territory law capable of operating concurrently with the Act. An almost identical provision is contained in s10(3) of the *Sex Discrimination Act* 1984 (Cth). The effect of the amendment was that the 'infected' sections in the *Anti-Discrimination Act* 1977 (NSW) became 'cleansed' and operative.

(iv) when the 'infected' provisions in the State law become operative once again, they do so prospectively. They do not have a retrospective effect. Therefore, the period during which they were in 'coma', amounts to a legislative blank and any rights they provided are lost. A good illustration of this is provided by *University of Wollongong v Metwally & Ors.*[23] A person of Egyptian descent was found by the Equal Opportunity Tribunal of New South Wales to have been discriminated against on the basis of his race whilst undertaking a

21 Particularly by Taylor J at 283.
22 (1983) 47 ALR 32.
23 (1984) 56 ALR 1.

PhD in Metallurgy at the University of Wollongong. He was awarded damages of more than $46,000 and other ancillary orders were made against the University. The High Court held that the proven discrimination occurred at a time when the relevant provisions in the State legislation were invalid as held in *Viskauskas & Anor v Niland*.[24]

As we have seen, when the Federal legislation was amended, the relevant provisions of the State law became operative again. However, this did not extend to the period when the discrimination against Metwally occurred because of the invalidity at the time. The majority of the High Court pointed out that the amended Federal legislation could not prevail over the *Commonwealth Constitution* and thereby alter the objective, historical, fact that s109 of the Constitution had at a particular point in time rendered provisions of the State law invalid. In short, Metwally's victory became pyrrhic!

Coming back to the *Industrial Relations Act* 1988 (Cth), it can be seen that there is a sharp contrast in the wording between s 128 and s 152. The use of 'void' rather than 'invalid' indicates that it is the intention of the Federal Parliament that s 128 have a more lasting effect than s 152.

There are a number of principles which can be advanced as being applicable to the effect of a restraining order made by a Full Bench of the Australian Industrial Relations Commission against a State industrial authority. First, an award, decision or order made by a State industrial authority in contravention of the restraining order has no effect whatsoever. The question here is not one of becoming inoperative as it is the case with State law or orders coming in conflict pursuant to s 152; the effect of s 128(3) is that the award, order or decision made by the State industrial authority is null and void *ab initio*. Secondly, like the effect of s 152, it is not the entire award, order or decision made by the State industrial authority that becomes null and void. Rather, only those parts which are 'infected' with the contravention. Thirdly, unlike the effect of s 152, an award, order or decision of a State industrial authority once it contravenes a s 128 restraining order is doomed for all time and cannot be revived at any time in the future. This is even so, in the case of industrial disputes, after the matter before the Australian Industrial Relations Commission has been resolved.

The only possible situation in which the award, order or decision of the State industrial authority may survive is where it can be demonstrated that in exercising its restraining power, a Full Bench of the Australian Industrial Relations Commission had acted without jurisdiction or exceeded its jurisdiction. Such a case can be established where, for instance, the Full Bench acted when the matter in question was neither provided for in a Federal award or order nor the subject of a proceeding before the Australian Industrial Relations Commission. The other way to show that the Full Bench has acted outside its jurisdiction is to demonstrate that the matter in respect of which the restraining

24 (1983) 47 ALR 32.

order had been made was not an interstate industrial dispute.

Recent Developments in State law - An Emerging Gap?

In an appropriate case, a Full Bench can exercise its discretion to grant a restraining order only against a 'State industrial authority'. The term is defined in s4(1) of the *Industrial Relations Act* 1988 (Cth) as follows:

> (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State;
> (b) a special board constituted under a State Act relating to factories; or
> (c) any other State board, court, tribunal, body or official prescribed for the purposes of this definition.

It follows that a State authority or official who does not fall within this definition cannot be restrained by the Australian Industrial Relations Commission even if the same subject matter is being dealt with by both authorities.

Until a few years ago, there was no doubt that this restraining power could be exercised against all State industrial authorities. This was because all of them exercised conciliation and arbitration functions. Since 1992, the Australian industrial relations landscape, both Federal and State, has changed markedly. More relevantly, the situation in the States is not the same as what it used to be a few years ago. A consequence of the changes at the State level is that a number of State industrial authorities or officials do not perform a conciliation or arbitration function: *prima facie*, they are not amenable to a restraining order of the Australian Industrial Relations Commission. Consider, for instance, the following recent cases. In *Health Services Union of Australia v Goulburn Valley Radiology & Ors*[25] the Union had an industrial dispute before the Australian Industrial Relations Commission between itself and a number of employers in New South Wales and Victoria providing health services. An enterprise agreement was lodged with the New South Wales Commissioner for Enterprise Agreements for registration. The Union sought a restraining order against the Commissioner. A Full Bench of the Australian Industrial Relations Commission declined to issue the restraining order. It held that the New South Wales Commissioner for Enterprise Agreements does not fall within the definition of 'State industrial authority' as the Commissioner does not exercise a conciliation or arbitral power to bring about an agreement. Rather, the Commissioner exercises limited statutory functions of inquiry and registration.

A similar result occurred in *PKIU v Glass Decorators Australia Pty*

25 1994 AILR #247.

Ltd.[26] The company and its employees had registered an enterprise agreement in accordance with the New South Wales legislation. The Union argued that there was an interstate industrial dispute and that the industry was federally regulated and so a federal award should be made. The company argued that the Australian Industrial Relations Commission should refrain from hearing the matter. The Commission held that it could not refrain from exercising its jurisdiction on the ground that it was proper to be dealt with by the State industrial authority, because the enterprise agreement had been registered by the New South Wales Commissioner for Enterprise Agreements who does not have conciliation or arbitration powers. In this case, the Australian Industrial Relations Commission granted the application but on the ground of public interest. In so doing, the Commission avoided the problem of a 'State industrial authority' as the public interest requirement is not tied to the actions of a State industrial authority.

Further illustrations can be obtained from two other decisions of the Australian Industrial Relations Commission in *State Public Services Federation v AC Mackie Nursing Home & Ors* and *NUW v Alexander & Ors.*[27] In the former case, the State Public Services Federation had served a log of claims on the operators or proprietors of a number of hospitals, health centres and nursing homes in New South Wales, Victoria and Western Australia. None of the claims were acceded to and the Union sought a finding of an industrial dispute principally against the operators and proprietors in Victoria. On behalf of the State of Victoria and certain public hospitals, community health centres and other agencies in Victoria, an application was made to the Australian Industrial Relations Commission to refrain from exercising its jurisdiction even before a finding of dispute was made. The Commission rejected it, holding that s111(1A) of the *Industrial Relations Act* 1988 (Cth) is clearly intended to exclude any refusal to exercise jurisdiction where there is no available system of compulsory arbitration.

In the latter case, the Commission adopted a similar reasoning. Although the last three cases were decided under the Commission's refrain jurisdiction, they are clearly relevant and strong authority for the proposition that a Full Bench of the Australian Industrial Relations Commission cannot exercise the restraining power against State bodies which do not exercise conciliation or arbitration powers.

It should be pointed out that 'State arbitrator', the term relevant to the refrain jurisdiction, is defined in s 111(4) to mean 'a State industrial authority that has, or at the relevant time had, the power, or powers that include the power, to regulate terms and conditions of employment by compulsory arbitration'. Whilst there is a difference in the definition of this term and state industrial authority, it is clear that for the purposes of invoking the power under s 128, it is a minimum that the state industrial authority must be performing conciliation or arbitration functions. Where, however, a state industrial authority is exercising

26 1993 AILR #201.
27 1993 AILR #167.

conciliation or arbitration functions, as well as some other functions, it should be amenable to a restraining order from the Australian Industrial Relations Commission.

As long ago as 1927, it was held that it was sufficient that a State tribunal was exercising powers of conciliation or arbitration and it did not matter that it also exercised other powers or functions. In *The Amalgamated Engineering Union & Ors v Alderdice & Co & Ors*[28] it was held that the Engineers, etc, (State) Conciliation Committee set up under the *Industrial Arbitration Act* 1912 (NSW) came within the definition of 'State industrial authority' in the *Conciliation and Arbitration Act* 1904 (Cth). Although the Committee had wide enough power to cover practically any matter and person engaged in the industry for which it was created, that included conciliation and arbitration. Therefore, a restraining order was granted by the then Commonwealth Court of Conciliation and Arbitration against the State Committee.

Before concluding the discussion, reference should be made to two other developments at the State level. Western Australia's workplace agreement system does not involve the exercise of conciliation or arbitration function. Along side the system of compulsory conciliation and arbitration operating under the *Industrial Relations Act* 1979 (WA), the workplace agreements system has been in operation since 1 December 1993. Basically, the *Workplace Agreements Act* 1993 (WA) establishes a voluntary system for employees and employers to make workplace agreements. Section 82(1) provides for the appointment of a Commissioner for Workplace Agreements. The main function of the Commissioner is the registration of workplace agreements under Division 4 of Part 2. It is also the function of the Commissioner to publish statistical and other information about agreements or other matters arising under the Act.[29] Section 86(3) makes it clear that it is not a function of the Commissioner for Workplace Agreements to engage in conciliation or arbitration.

The Western Australian Industrial Relations Commission has no role in the functioning of the workplace agreement systems. It is the clear intention of the Western Australian Parliament that the two systems operate separately from each other. Thus, under s 6 of the *Workplace Agreements Act* 1993 (WA) once a workplace agreement comes into effect, no award, whether existing or future, applies to that employment relationship.[30]

There are only two situations where the two systems come in contact with each other, otherwise they remain parallel. Under s 7F of the *Industrial Relations Act* 1979 (WA), the parties to a workplace agreement may by agreement in writing refer to the Western Australian Industrial Relations Commission for determination, any question or dispute arising about the meaning or effect of their workplace agreement. This includes any provisions

28 (1927) 24 CAR 375.

29 Section 86(1)-(2).

30 See also ss 7A-7E of the *Industrial Relations Act* 1979 (WA).

implied into the workplace agreement by the *Minimum Conditions of Employment Act* 1993 (WA). Under s 7F(3), the parties are given the right to request a particular Commissioner to deal with their application. It is made explicitly clear in s 7F(5) of the *Industrial Relations Act* 1993 (WA) that the Western Australian Industrial Relations Commission's sole function in such a situation is to determine the meaning and effect of the workplace agreement. The Commission cannot exercise any of its functions with respect to industrial matters.

The other situation in which the two systems come into contact is provided by s 7G of the *Industrial Relations Act* 1979 (WA). A claim of unfair dismissal arising under a workplace agreement may be referred to the Commission for determination. This can only be done where the workplace agreement itself has provided for such referral.

Based on the case law which we have just discussed, it can be said that Western Australia's Commissioner for Workplace Agreements is not amenable to a restraining order issued by the Australian Industrial Relations Commission.

Finally, reference should be made to the system in Victoria. As it is well known, there has not been a system of compulsory arbitration in Victoria since March 1993. Under Part 2 of the *Employee Relations Act* 1992 (Vic) employees and employers may enter into employment agreements either individually or collectively. There is no involvement by the Employee Relations Commission in the making of the agreement and there is no need for certification by the Commission.[31] Under s 83 the general functions of the Employee Relations Commission include conciliation and arbitration. Under the new s 99 which was inserted into the legislation by the *Employee Relations (Amendment) Act* 1994 (Vic) which received the assent on 29 November 1994, the Commission may arbitrate an industrial matter or dispute only with the consent of all the parties or if expressly authorised by the Minister to do so on a reference. However, paragraphs (c) and (d) of the same section empower the Commission, on application, to set or adjust a minimum wage in declared industry sectors and work classifications within them. Where the Employee Relations Commission is exercising a power of conciliation or arbitration, it would seem that it becomes amenable to a restraining order of the Australian Industrial Relations Commission. The corollary is that the Commission would not be amenable to a restraining order from the Federal Commission where the Employee Relations Commission is not exercising powers of conciliation and arbitration.

Conclusion

The restraining power available to a Full Bench of the Australian Industrial Relations Commission is a rare power in that it authorises a Federal body not having judicial power to directly intervene and put to an end, proceedings

31 Though under s 13, there is a requirement to lodge a copy of a collective agreement with the Chief Commission Administration Officer. The number of individual employment agreements must also be notified in July of each year.

before a state industrial authority. The full potential of the restraining power is yet be explored. It is, however, undoubtedly a powerful tool in ensuring stability in Federal/State industrial relations.

The restraining power also discourages forum shopping in that if unions or employers are unhappy with the progress of proceedings before the Australian Industrial Relations Commission and decide to have the 'matters sorted out' at the State level, the restraining power is there to stop that happening.

In view of its potentially divisive effect on Federal/State industrial relations, the Australian Industrial Relations Commission recognises and has publicly stated that the restraining power is not to be used lightly. However, it is a power which is available and when necessary may be used.

Whilst all the states had a system that was substantially similar to the Federal one there was no difficulty. Recent changes which have occurred at the State level resulting in a number of State industrial officials not exercising conciliation or arbitration functions, have created a gap between the Federal and State systems as far as the Federal restraining power is concerned. In other words, the Federal restraining jurisdiction is becoming narrower. As these developments continue at the State level, the gap will be widening, raising the questions whether it should be closed and how?

There is at present no cause for alarm but if the gap continues to widen, then a serious question would arise as to whether the Federal authorities should take steps to close the gap. In pondering whether any action should be taken at all, the rationale behind enacting s 128 of the *Industrial Relations Act* 1988 (Cth) should be borne in mind. As it was put by Dethridge CJ in *The Amalgamated Engineering Union & Ors v Alderdice & Co:*[32] 'it is to prevent mischief arising'.[33]

Some may say that s 128 of the *Industrial Relations Act* 1988 (Cth) as it currently stands need not be changed. The argument will be that under the definition of state industrial authority in s 4(1) the Federal Government is able to prescribe state officials who may be covered by the definition from time to time. Therefore, if a problem arose, it could simply be cured by the Federal Government making the prescription. This way, those state officials will become amenable to a restraining order of the Federal Commission. This argument is not unsound. But as to whether it is a satisfactory way to deal with the situation will depend on the extent of the widening gap created as more and more state officials fall through the net. A watching brief is all that is called for at this stage.

32 (1927) 24 CAR 375.
33 Ibid, 378.