No. 29 OF 1981

40/81

IN THE PRIVY COUNCIL No. of 19

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

IN PROCEEDINGS NO. 360 OF 1980

BETWEEN: WILSON PARKING (N.S.W.) PTY. LIMITED

Appellant (Applicant)

AND: THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

First Respondent (Respondent)

TORE JOHN LENNART SUNESON
HAROLD SIMPSON
JOHN McCORMACK
WILLIAM SMITH
LIONEL DOUGLAS WHITTINGHAM
NORMAN RICHARDSON
ALLAN O'NEIL
GEORGE WILLIAM WILKS
INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Other Respondents

TRANSCRIPT RECORD OF PROCEEDINGS

SOLICITORS FOR THE APPELLANT

Moray & Agnew,
14 Martin Place,
SYDNEY. N.S.W. 2000

By their Agents:

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

SOLICITORS FOR THE FIRST RESPONDENT

Steve Masselos & Co.,
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SYDNEY. N.S.W. 2000

By their Agents:

Coward Chance,
Royex House,
Aldermanbury Square,
LONDON. EC2V 7LD

Prepared by Young & Cooke, 78-78a Castlereagh St., Sydney

IN THE PRIVY COUNCIL No. of 19

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BETWEEN:

WILSON PARKING (N.S.W.) PTY. LIMITED

Appellant (Applicant)

AND:

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA NEW SOUTH WALES BRANCH

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Other Respondents

TRANSCRIPT RECORD OF PROCEEDINGS

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IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 350 of 1980
COURT OF APPEAL)

IN THE MATTER OF THE INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (NSW) PTY. LIMITED

Plaintiff

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

TORE JOHN LENNART SUNESON

HAROLD SIMPSON 10

JOHN McCORMACK

WILLIAM SMITH

LIONEL DOUGLAS WHITTINGHAM

NORMAN RICHARDSON

ALLAN O'NEILL

GEORGE WILLIAM WILKS

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Defendants

SUMMONS

The Plaintiff claims:- 20

1. An order that the Defendants be prohibited and restrained from proceeding further in proceedings 475 of 1975 between the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch (the applicants therein) and Wilson Parking (NSW) Pty. Limited and others (the respondents therein).

2. An order removing proceedings No. 475 of 1977 from the Industrial Commission of New South Wales into this Court and quashing the decision of the Industrial Commission of New South Wales.

3. A declaration that the Industrial Commission of New South Wales has no jurisdiction to hear or determine any application 30

pursuant to s. 88F of the Industrial Arbitration Act, 1940 upon the application of the Federated Miscellaneous Workers Union of Australia, New South Wales Branch, as an industrial union of employees, for an order or award declaring void in whole or part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the Plaintiff and one L. Suneson and others to which the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch is not a party. 10

4. Such further or other relief as the nature of the case may permit or require.

To the Defendant: The Federated Miscellaneous Workers, Union of Australia, New South Wales, Branch,
337 Sussex Street, Sydney. 2000

To the Defendant: The Industrial Commission of New South Wales,
50 Phillip Street, Sydney. 2000

To the Defendant: Tore John Lennart Suneson,
47 Dina Beth Avenue, Blacktown. 2148

To the Defendant: Harold Simpson, 20
31A Kitchener Street, Maroubra.

To the Defendant: John McCormack,
55 Terrington Road, Maroubra.

To the Defendant: William Smith,
28 Gannon Street, Tempe.

To the Defendant: Lionel Douglas Whittingham,
72 Nicholson Street, Crows Nest.

To the Defendant: Norman Richardson,
2/37 Nelson Street, Woollahra.

To the Defendant: Allan O'Neil, 30
58 Pellister Street, Putney.

To the Defendant: George William Wilks,
Unit 20, J. Northcott Place, Surry Hills.

If there is no attendance before the Court by you or your Counsel or solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence. Before any attendance at that time you must enter an appearance in the Registry.

Time: 8th December, 1980 at 10.15 a.m.

Place: Court No:

Supreme Court of New South Wales, 10

Queens Square, Sydney.

Plaintiff: Wilson Parking (NSW) Pty. Limited

Solicitor: Brian Thomas Agnew,
C/- Moray & Agnew,
14 Martin Place,
Sydney. 2000

Plaintiff's address
for service:

Moray & Agnew,
14 Martin Place, 20
Sydney. 2000

Address of Registry:

Supreme Court of New South Wales,
Queen's Square,
Sydney. 2000

Filed 25 November 1980

Brian Agnew

Plaintiff's Solicitor

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 350 of 1980
COURT OF APPEAL)

IN THE MATTER OF THE INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (NSW) PTY. LIMITED

Plaintiff

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

TORE JOHN LENNART SUNESON

HAROLD SIMPSON 10

JOHN McCORMACK

WILLIAM SMITH

LIONEL DOUGLAS WITTINGHAM

NORMAN RICHARDSON

ALLAN O'NEIL

GEORGE WILLIAM WILKS

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Defendants

AFFIDAVIT

Deponent: B.T. Agnew 20
Sworn: 24/11/80

On 24th November 1980 I, BRIAN THOMAS AGNEW, Solicitor of 14 Martin Place, Sydney in the State of New South Wales, say on oath:-

1. I am a member of the firm of Messrs. Moray & Agnew, Solicitors and the Solicitor for the Plaintiff.

2. The Plaintiff is a company duly incorporated under the Companies Act, 1961 having its registered office at 100 Williams Street, Sydney.

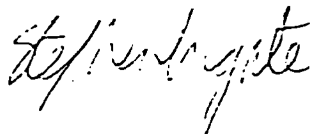
3. The Company carries on business as a car park operator. 30

4. The Firstnamed Defendant is an industrial union of employees registered under the Industrial Arbitration Act, 1940.

5. The Second to Ninth Defendants were added as Respondents in proceedings before the Industrial Commission referred to below on 27 September 1979 upon the application of the First Respondent. They were parties to the Deed of Partnership the subject of the said proceedings before the Industrial Commission.

6. The Tenth Defendant is constituted under the Industrial Arbitration Act. 10

7. The First Defendant commenced proceedings before the Industrial Commission of New South Wales (numbered 475 of 1977 in the records of the Commission) by Notice of Motion seeking orders declaring void (inter alia) the contracts, arrangements, conditions and/or collateral arrangements relating thereto between the Plaintiff on the one hand and the Second



Brian Agnew

-2-

Defendant on the other hand whereby the said Defendant performed work under such contract or arrangement in industry. The 20 notice of motion also sought consequential orders.

8. The Plaintiff commenced proceedings in the Court of Appeal (no. 391 of 1978) against the First Defendant and the Ninth named Defendant claiming that the Industrial Commission of New South Wales lacked jurisdiction to grant the relief sought at the suit of the First Defendant. During the course of those proceedings the Second Defendant was added as a

Plaintiff. I seek leave to refer to my Affidavit sworn 25th September, 1978 and filed in the Court of Appeal in the said proceedings as though the same were set forth herein.

9. On 16 May 1979 this Court dismissed the summons in proceedings No. 391 of 1978 with costs.

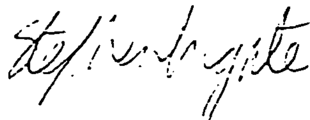
10. The proceedings before the Industrial Commission of New South Wales continued before Mr. Justice Dey on 19th November, 1979 and on 3rd April, 1980 when His Honour reserved his decision. A true record of the proceedings before His Honour is contained in the official transcript a copy of which is now produced and shown to me and marked "DTA1". A copy of the exhibits tendered in evidence before His Honour is now produced to me and marked "DTA2". 10

11. Mr. Justice Dey delivered his reasons for judgment on 24th June, 1980 and made orders pursuant to those reasons for judgment on 7th July 1980. A copy of those reasons for judgment and the orders made are annexed and marked respectively "A" and "B". The award made by the Commission pursuant to His Honour's judgment was finally settled and published in the Government Gazette on 24 October 1980. 20

12. It is respectfully requested that the orders sought in the summons herein be made.

SWORN at Sydney

Before me:



Solicitor, Sydney.

Brian Agnew

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: DEY, J.
Tuesday, 24th June, 1980.

No 475 of 1977

FEDERATED MISCELLANEOUS WORKERS' UNION re WILSON PARKING (N.S.W.) PTY LIMITED AND C. WHALAN AND ANOTHER.

Application for order declaring contract void.

JUDGMENT.

The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch (the Union) has made application to the Commission for an order or award declaring void in whole or in part or varying in whole or in part, either ab initio or from some other time, contracts, arrangements, conditions and/or collateral arrangements relating thereto between Wilson Parking (N.S.W.) Pty Limited (the Company) on the one hand and in one case the respondent, C. Whalan and others and in the other case the respondent Tore John Lennart Suneson and others. 10

Subsequent to the institution of the proceedings, the respondent C. Whalan died and the matter therefore was not pursued in respect of him. 20

S.88F of the Industrial Arbitration Act, 1940 (the Act) under which the proceedings are brought is in the following terms:

(1) The commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto -- 30

(a) is unfair, or

Annexure "A" to the Affidavit of Brian Thomas Agnew

(b) is harsh or unconscionable, or

(c) is against the public interest. Without limiting the generality of the words "public interest" regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or 10

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award or agreement.

(2) The commission, in making an order or award pursuant to subsection (1), may make such order as to the payment of

2.

money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or 20 in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case.

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

Mr McAlary, then senior counsel for the Company, challenged the jurisdiction of the Commission to make an order or award as claimed, when the application was made by an industrial union of employees and not by one of the parties to the contract or 30 arrangement. Thereupon the following question of jurisdiction was referred by me to the Commission in Court Session pursuant to s.30C of the Act, namely:

> Has the Industrial Commission jurisdiction, power and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in

part and either ab initio or from some other time a contract or arrangement between the respondent, Wilson Parking (N.S.W.) Pty Limited and the respondent, L. Suneson, to which the union is not a party?

This question was answered in the affirmative by a unanimous judgment of the Commission given on 25th August, 1978[(1)]. The Company and Mr Suneson (who was joined during the hearing before the Court of Appeal) then applied to the Court of Appeal for a declaration that the Commission had no jurisdiction to entertain the application by the Union or to make the orders or awards sought and for ancillary relief. The Court of Appeal (Street C.J., Hope and Hutley JJ.A.)[(2)] for various reasons which were given, dismissed the summons. In the course of his judgment, with which Street C.J. agreed, Hope J.A. expressed the view that there were cases where it would be more appropriate if the challenge to jurisdiction awaited the making of an order or award by the Commission and commented in passing on the fact that the other parties to the arrangement were not joined as parties in the proceedings before the Commission. It was for this reason no doubt that the Union made application for leave to join the other parties as respondents to these proceedings and an order was made on 27th September, 1979 adding seven named respondents who had been served with notice of that application.

3.

The Company, which is the member of a group which is based in Perth, became established in Sydney in about 1971 and introduced an arrangement whereby retired men (mostly

pensioners) worked for it under contract for services as car park attendants.

The respondent, Suneson, was called as a witness in the applicant's case, but did not appear until 5th September. He said in his evidence that he did not request the applicant to bring the proceedings and that they had been brought in the absence of any suggestion, request or desire on his part. He said he was happy to go on as he was working if the Unions agree with it, but if the Unions objected, he would resign. He was aged 72 years and 8 months when he gave evidence on 27th October, 1977. He first contacted the Company in response to an advertisement for retired gentlemen seeking limited work and commenced working at a new parking station being opened by the Company at the corner of Kent and Market Streets. After about eight months he was sent to work at the parking station at the Union Carbide Building, Elizabeth Street. He worked six hours a day five days a week. He continued to work for the Company at parking stations at various other locations. He was paid weekly, his money being handed to him in an envelope. About the time he started working for the Company he was asked to sign an agreement which he did on 15th April, 1974. That roneoed agreement (Exhibit 2) was between the Company and Mr Suneson as contractor for the "supervision of car parks on the terms and conditions" therein contained.

In about mid-October, 1975, Mr Wilfred Alfred Simpson, an Industrial Inspector with the then Department of Labour and

Annexure "A" to the Affidavit
of Brian Thomas Agnew

Industry and who was called by the applicant, had cause to make investigations in relation to the employment by the company of parking attendants. He was informed by the representative of the company that it did not have any parking attendants as such, the persons concerned being contractors.

On 30th August, 1976, Mr Donald Elkin Power, another Industrial Inspector, who was also called by the applicant,

4. 10

visited a number of parking stations operated by the company and on the following day, accompanied by Mr Lance Peter Crawford, a fellow Industrial Inspector who also gave evidence, went to the office of the company and interviewed Mr Peter Burrows, the New South Wales manager of the company. He was informed by Mr Burrows that the company employed approximately forty elderly people, mostly pensioners and that the company had submitted to the Industrial Registrar applications for Slow Worker Permits for a number of employees. Such permits may be issued by the Industrial Registrar under s. 89 of the 20 Industrial Arbitration Act on the application of certain aged, infirm or slow workers. Mr Crawford was told that the company had received some permits in the past, but that others "had not come through". It appears that no further Slow Workers Permits were in fact granted by the Department after the date of that visit. Mr Crawford returned with another inspector in February, 1977 to inspect the wages records.

In December, 1976, an advertisement appeared in the Sydney

Morning Herald, calling tenders for service for the company.

Mr Norman Cooper Richardson, who was called by Mr McAlary, and who had been the managing partner of Partnership No. I., submitted a tender to the company on 22nd December, 1976. The Partnership Deed (Exhibit A) states that it was made on "the day of One thousand Nine Hundred and Seventy-six" and that the date of commencement was January, 1977. However, Mr Richardson said that it was not signed until January, 1977 and that the tender had been submitted before the partnership was formed. The Deed, which names thirteen persons (who then worked as car parking attendants for the company) recites that the partners wish to become partners in "a business of supplying services and management to industries the nature of which shall suit the age and physical condition of the partners." The initial capital was to be a sum equal to one dollar for each partner signing the schedule and was to be provided by the purchase of one dollar units, one to each partner. The partnership was to continue until dissolved by mutual consent or with respect to

5.

particular partners, until an individual partner disposed of his unit. There is also provision for the partnership being determined by a resolution passed by a majority of the votes of the partners at a general meeting. On the death of any partner he automatically ceased to be a partner and the partnership was

obliged to pay to his personal representatives the sum of $1.00 by way of satisfaction of his interests in the capital of the partnership, together with such sum as might be due for his pro rata portion of the profits up to the date of his death. A schedule contained the Rules of the partnership which provided for the election of a Managing Partner with a number of powers, including the duty to ensure that the profits of the partnership are divided amongst the members in proportion to the 10 quality and quantity of services rendered by each member which proportion shall also bear some relationship to the amount of time each member shall devote to the objects of the partnership. There is also provision for the holding of general meetings, the keeping of minutes and accounts and the appointment of proxies. The Managing Partner also was given power to make regulations as to any matter of management or carrying on of the affairs of the partnership, to call upon any member to resign immediately in the case of misconduct, and to negotiate contracts on behalf of the partners and to delegate his powers to any 20 person. The Rules provided that the capital of the partnership was to be limited to twenty dollars to be divided into units of one dollar each to be issued only by the Managing Partner. No partner could hold more than one unit in the partnership.

The circumstances surrounding the formation of the partnership were explained by Mr Richardson as being that the parking attendants had been informed by the secretary of the company that there was a prospect that the attendants were going to

lose their jobs because of industrial pressure that the company should pay award wages to the attendants. He said that as a result of discussions with some of the attendants, the partnership scheme was conceived. The three initiators then approached a number of the others and obtained their agreement to become partners, telling them that

the company was at the point of putting off the attendants and that to overcome this and to save the jobs a number of partnerships were to be formed. They were in close touch with officers of the company about the formation of the partnerships, but the Partnership Deed was prepared by a solicitor for one of the partners. The company's representatives indicated that the formation of the partnerships would enable the car parking attendants to continue working at the parking stations for the rates of pay which had previously been paid. 10

The contract or arrangement which is the subject of the proceedings superseded the lastmentioned arrangement. It purports to be tender submitted by Mr Richardson as Managing Partner on behalf of a partnership consisting of himself, Mr Suneson and eight other named persons all of whom with three other people had constituted the original partnership. The tender commences: 20

This tender document is dated the 11th day of March, 1977 and is in response to your advertisement for tenders to supply management services for the city car parks for a period of twelve months from 17th March, 1977 until 16th March, 1978.

It is said to be submitted on the following conditions: 30

(1) The Company shall pay to the partnership the sum of $2,726.00 (hereinafter referred to as "the Contract Sum") by equal monthly instalments payable on the first day of each month with the first payment to be made on the 1st day of April, 1977.

(2) That the partnership shall -

(a) well and faithfully execute the management of the nominated car parks; 10

(b) supply and provide all, if any, plant, equipment materials and other things requisite for or incidental to carrying out the contract;

(c) provide such men as shall reasonably be necessary to manage the nominated car parks for the period.

(3) If, in the event that the Company requires any expansion or reduction of the duties and services under this agreement then the partnership shall comply with the requirements to so expand or reduce the duties and services under this agreement and the Company shall pay an amount 20 varying the Contract Sum which shall either be agreed upon by the parties or failing agreement shall be determined by a member of the Institute of Chartered Accountants who shall be agreed upon by the parties or failing agreement appointed by the President for the time being of the New South Wales Institute of Chartered Accountants whose decision shall be final and binding upon the parties with neither party having the right of appeal therefrom.

(4) The partnership acknowledges that the Contract Sum has 30 made provision for all necessary insurance premiums.

7.

(5) The partnership shall not without the written consent of the Company first had and obtained assign the Contract or assign mortgage charge or encumber in any way the monies due or becoming due under the Contract or any other benefit whatsoever arising or which may arise under the Contract.

There was also a provision for the Company having the option to suspend payments or cancel the contract in the event 40 of breach of the contract or refusal or failure of the

partnership to perform its duties in a proper fashion or if any member of the partnership were guilty of misconduct and such member is not removed from the partnership after a request in writing which has been received by the partnership's managing partner.

Mrs D.P. Kemeny, who was employed as the bookkeeper for several of the partnerships, gave evidence on behalf of the respondent with regard to the operation of the partnership. She rendered accounts to the Company and attended to payments of the outgoings, including her wages, rent, phone and electricity. She made provision for an accountancy fee and for payment (if any) if a partner were absent sick or on holidays for four weeks per year. The sole income of the partnership was derived from the company although in her capacity as secretary for the partnership, she had attempted to find other avenues of work for the different partners, but without success. A name had been lodged for registration under the Business Names Act, 1962, but it had not been accepted.

The other witness called by the respondent was Dr Ehrlich, a medical practitioner specialising in general surgery, with a particular interest in the problems of chronic disability and of the aged. He had been for five years director of the psycho-geriatric unit of the Health Commission and ultimately had been the Commission's principal adviser for geriatrics and rehabilitation services. He emphasised that the finding of a meaningful occupation in old age was often an important factor in the

Annexure "A" to the Affidavit
of Brian Thomas Agnew

well-being of the aged. For many people the right to work in retirement was important not only for physical health, but as a means of avoiding poverty, but because of the difficulties of age, many people were not able to work normal working hours or to perform the type of work they could carry out when fully active.

8.

The Union protects the interests under the Industrial Arbitration Act (inter alios) of persons employed as parking station attendants and has obtained for them a Parking Attendants, Motor Car Washers &c (State) Award, published 4th July, 1979[3] which rescinds and replaces the Parking Attendants, Motor Car Washers &c (State) Award published 13th August, 1975[4] (Exhibit 6). It contains provisions with regard to the wages of weekly and casual employees, hours of work and other matters which are normally regulated by award. 10

The applicant also called Mr L.A. Canty Branch Manager of Kings Parking Company. That company employed about forty parking attendants in Sydney. Over the past two years the company had successfully competed against his company in tendering for the lease of parking stations to be operated by the lessee, the clear inference being that they were able to under-quote in tendering because of lower costs. Mr Canty said that his company was considering adopting the same form as the "Wilson Scheme", which he described as "low cost contract labour". 20

In his final submissions, Mr Shaw, counsel for the Union, contended that the working arrangements in respect of Mr Suneson's services for the company flowing from the tender of 11th March, 1977 were unfair, harsh, unconscionable, against the public interest, provided a total remuneration less than a person performing work would have received as an employee performing such work and were designed to and/or did avoid the provisions of the Parking Attendants, Motor-car Washers &c (State) Award. He submitted that elaborate legal smoke-screens had been erected by the company to mask the real relationship between itself and Mr Suneson and that there was much to be said for the view that the real relationship between the company and Mr Suneson was at all material times, an employment relationship. He contended that he performed the basic functions of a parking attendant by collecting money and handing out parking slips and that this was done under the direction or instruction of the company; that he was paid (subject to attendance) a regular sum fortnightly based on claims submitted weekly. Although his entitlements with reference thereto were inadequate, there was

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provision for his being absent with pay during periods of sickness or holidays and he submitted such entitlements were indicia of an employment relationship. Where he worked extra hours he received extra payment.

Mr Trew, counsel for the Company and who also appeared for Mr Suneson to oppose the application, contended that there

was no employment relationship between the company and Mr Suneson at any stage and referred to Australian Mutual Provident Society v Allan(5) as illustrating the well-recognised proposition that parties are free to formulate their arrangements in such manner as they desire so long as they are genuine legal arrangements and not shams. However, he conceded, particularly in the light of the judgment of the Commission (Sheehy J.) in Manni v Scully(6) that it was not necessary to establish an employment relation- 10 ship before s. 88F operated.

Mr Shaw also attacked the partnership as not being a genuine arrangement resulting from the individual members freely deciding to engage in some enterprise, but as being merely a subterfuge to avoid the award. He pointed to the evidence of Mr Suneson who, when asked about the partnership said that he was not sure how it actually worked and while he knew some of the partners, said he did not know two of those about whom he was asked in cross-examination. He further said that he did not know when it commenced operation. Mr Shaw claimed that the 20 creation of the partnership was precipitated by the information emanating from the company that it was going to have to pay the award wage which would mean that the partners would be replaced, leaving them with the option of signing the agreement or losing their job and there was a liaison with officers of the company with regard to the formation of the partnerships. Mrs Kemeny who administered the partnership operations from their commencement in January, 1977, had previously been an

employee of the company for eighteen months. Although the partnership was not signed until January, 1977 and was not due to commence until that month, the tender was submitted on behalf of the partnership on 22nd December, 1976.

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The minutes of the partnership which were tendered showed that the first meeting on 21st January, 1977, was only attended by four out of approximately sixty persons constituting the four partnerships in question and the business transacted was, over the relevant period, minimal. It was not suggested the members of the partnership ever participated in the fixation of the rates for their work. No registration of business name was effected, nor did the partnership normally furnish a return of income as required by the Commonwealth Income Tax Act. Entry into the partnership was determined by Mrs Kemeny, not in accordance with the provisions of the Partnership Act, nor was there any real profit sharing apart from the payment of an hourly rate. All these factors, Mr Shaw submitted, raised a question mark over the bona fides of the formation of the partnership and its operation and the contract which it purported to enter into with the company.

These criticisms were all strong resisted by Mr Trew who claimed that there was nothing in the evidence to justify a conclusion that the transaction was anything other than what it purported to be, namely, a partnership. The obligation under the Business Names Act he contended was merely to register a

name under which a business was conducted and had nothing to do with the registration of partnerships as such and the breach of any such requirement or of the requirements with regard to the lodging of Income Tax returns did not go to the validity of the parties' arrangements. He contended further, that Mrs Kemeny was working solely for the partnership, that the company had a firm commitment to pay the partners a fixed weekly fee for the provision of a service which the partnership contracted to pro- 10 vide. It was perfectly permissible for the partners to organise their business by appointing one of the partners to manage it. No adverse inference should be drawn from the fact that the formalisation of the tender was completed ahead of the finalisation of the partnership agreement. The partnership was operating a separate business and was entitled to tender for the work and to organise the fulfilment of that contract by the individual partners.

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In my view, although there are a number of pecularities 20 surrounding the setting up and operation of the partnership and its entry into the arrangement which is the subject of these proceedings, there is no basis for holding there is no partnership, nor for holding that it did not legally contract with the company in terms of the tender document dated 11th March, 1977. This does not, however, prevent the arrangement being dealt with under s.88F if the circumstances warrant the intervention of the Commission.

It was not disputed that Mr Suneson was performing work to which the Parking Attendants, Motor car Washers &c (State) Award applied. He earned normally $54.00 per week based on an hourly rate of $1.80 there being no suggestion that it was adjusted following increases consequent upon the State Wage Case judgments. As at February, 1976 the award entitlement for a weekly employee was $86.93 or if he were a casual employee because he was not employed for a full week, his entitlement would have been $95.62. A number of other calculations (Exhibit 7) were presented contrasting his earnings and entitlement at other periods, including periods when he worked at weekends and on shift. 10

Mr Trew submitted that there was no jurisdiction to make an Order in this case because the contract or arrangement to which the company is a party and which is under attack, is not a contract which led directly to the performance of work in an industry. He relied upon passages in the joint judgments of Mason and Jacobs JJ., with whom Barwick C.J. agreed, in Stevenson v Barham[7] particularly at p.201 where their Honours said: 20

> It follows then, that if the contract is one which leads directly to a person working in any industry, it has the requisite industrial character - it is a contract 'whereby a person performs work in an industry'. This is the relevant jurisdictional fact which needs to be established.

He contended that the tender constituted a contract between two businesses and was merely a contract to manage parking stations for a fee. It was under the partnership 30

Annexure "A" to the Affidavit
of Brian Thomas Agnew

agreement, which was one step removed from the company's agreement, that the work was performed. The partnership had contracted to perform a service for a total sum and was free, either to perform the work through the individual

partners personally or to engage outsiders to perform it. The partners could work when they liked or not at all. That was of no concern to the company under its contract and it had no control over it. The company's contract envisaged and led to the carrying out of the work - it gave work - but the necessary direct nexus between the contract and the performance of the work was not established. The work which was performed by Mr Suneson was for the partnership, not for the company. Mr Trew also formally made a submission, based on the minority view in Stevenson v Barham, that it could not be said that the partners were working for the company, because they were part of a separate business. In this regard he quoted passages from the judgments of Stephen J. and Aickin J. He recognised that the Commission was bound to follow the majority view as to the meaning and application of the section.

Mr Shaw accepted that it was necessary under the section to establish that the contract or arrangement was one whereby a person performed work in the industry and he did not dispute the proposition that the contract must lead directly to the performance of that work. However, he submitted that although the term "management services" was used in the tender, the

document itself and the way in which it had been applied, demonstrated that those services envisaged the performance of work in the industry in which car part attendants are engaged, such as the supply of labour for the semi-skilled tasks of collecting money, issuing tickets and the security of the car park. The supply of those services involve clearly and directly the performance of work in the industry. That was the dominant purpose of the arrangement. 10

I am satisfied that Mr Shaw is correct and that Mr Trew's jurisdictional objection has no validity. There is one further aspect which confirms that view. The partnership is not a separate legal entity and has no existence apart from the individual partners who compose it. Mr Suneson was under a direct obligation along with the other partners to provide the service for which he and they had contracted under the tender. When he carried out those functions he was performing work directly pursuant to a contractual arrangement to which he, with others, was a party. 20

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On the question of the exercise of discretion Mr Shaw relied upon a number of facets of the arrangement, namely,

1. the nature of the arrangement when seen against its historical background;

2. the absence of any real change in the functions performed as a result of the partnership compared with Mr Suneson's original contract for services;

3. the nature of the service rendered and the manner of its performance, which he contended resulted in Mr Suneson being for all practical purposes, a wage earner; 30

4. the exploitation of Mr Suneson by the utilization of his labour at a weekly rate of remuneration which was below the minimum award wage for persons performing such work as employees;

5. the subversion by the arrangement, in the words of Sheldon J. in Davies v General Transport Development Pty Limited (8) of the orderly control of industry;

6. the unfair advantage which the arrangement gave to the company over its business competitors. 10

Mr Trew approached the question of discretion on the premise that despite the width and generality of the language of s.88F, it had been left to the good sense of the Commission, in the words of Barwick C.J. in Stevenson v Barham (9) "not to use its extensive discretion to interfere with bargains freely made by a person who is under no restraint or inequality, or whose labour was not being oppressively exploited". His submissions can be summarised as follows:

1. The arrangement was not a sham or subterfuge, but a genuine and legitimate arrangement of their affairs by the parties for their mutual advantage. 20

2. Both parties opposed any interference with the arrangement, thereby demonstrating their satisfaction with it and indicating that it was a reasonable and acceptable arrangement.

3. There was no deceit or unfair dealing by the company with Mr Suneson or the other members of the partnership who had not been induced to enter into the arrangement by any misrepresentation or pressure. 30

4. In fact the arrangement was advantageous to Mr Suneson and his partners because being retired and pensioners it was in their best interests that they should have the opportunity of gainful employment from the point of view of their physical and mental health and self esteem and from the point of view of their economic well-being by having the opportunity to supplement their age pension to the permissible limit.

5. The sedentary nature of the occupation and the ability to

limit their hours of employment were important considerations from the point of view of the partners for whom it had been shown no other employment opportunities were available.

6. The Commission is not an economic regulator and it was not the function of the Commission to ensure that one business

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did not achieve a competitive advantage over another or to prevent an enterprise from organising its affairs in the most economical way possible within the law.

7. The arrangement rather than adversely affecting the public interest, in fact promoted it by reducing the cost to the public of a necessary service and by enabling persons who did not wish to seek a full weeks work at normal pressure as normal employees to find an avocation which was within their physical and mental capabilities and provided them with the kind of paid activity which attracted them. 20

8. The provisions for a slow worker permit under s. 89 of the Act clearly contemplated the possibility of particular persons being paid at less than the award entitlement and represented a legislative endorsement of the purpose behind the company's scheme.

There was also debate as to the inferences which I ought to draw adversely to the company on the state of the evidence, Mr Shaw relying upon the principles established in Jones v Dunkel[10] and Steele v Mirror Newspapers[11]. Mr Trew contended that the fact that particular evidence was not called from 30 persons employed by the company was not relevant to the question whether the arrangements were designed to avoid the award in question.

In the view which I have formed of the matter and of the nature of the arrangements between the parties, it does not

become necessary to resolve the debate as to the applicability of the principle in Jones v Dunkel.

Despite the important considerations emerging from Mr Trew's submissions, I consider that the arrangement should be declared void. I have already expressed the view that the arrangement is one whereby a person performs work in an industry. Having regard to the fact that Mr Suneson entered willingly into the arrangement, I doubt whether it would be proper to conclude that it was unfair - even although he surrendered thereby "what was described by Sheldon J. in Davies v General Transport Development Pty Limited(12) as "many of the substantial rights applicable to employees". Although the formation of the partnership and the submission of the tender which constituted the arrangement, was prompted by the knowledge that the company otherwise could well dispense with their services, this does not in the circumstances demonstrate that it was unfair when Mr Suneson, and presumably the others, had been functioning previously under a contract for services and they entered into the arrangement without any misrepresentation or other inducement from

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the company. His position as a pensioner made it eminently suitable and acceptable to him and it is therefore difficult to say that it was unfair to him because he was willing to sell his labour cheaply.

However, it was not disputed that the arrangement provided

a total remuneration less than a person performing work would have received as an employee performing such work. Furthermore, although it may not have been a subterfuge, it was clearly designed to avoid the provisions of the award, which would have been applicable if the partners had been employees and it certainly had that consequence.

Moreover, in my view it was against the public interest within the meaning of s. 88F(1)(c) as that paragraph has been interpreted. Disregarding the legal dress in which the arrangement was clothed, its substance is for the performance by Mr Suneson of the work of a car park attendant at one of the company's parking stations in the same way as the actual work would have been performed if he had been a worker in the industry protected by the award. S.88F was described by Menzies J. in Brown v Rezitis[13] as "clearly intended to confer a comprehensive power upon the Commission .... to put such a worker in no worse position than if he had been working under a contract of employment protected by award conditions." The union has an obvious interest in protecting the rights of its members from an erosion of their employment prospects by the employment of persons at less than award rates. The power of the Commission under the section was described by Jacobs J.A. in ex parte V.G. Haulage Services Pty Limited[14] as being derived from the concern of the legislature that the impinged agreement had a recognisable impact upon the conditions of employment and disclosed a purpose that by the adoption of the arrangement the

industrial objectives of the legislation would be more or less defeated.

The argument that it is not against the industrial system to conduct one's business in a way that reduces costs even if it gives a competitive advantage, is met by the observation of Sheldon J. in Davies v General Transport Development Pty Limited[15] with which I respectfully agree, that the protection of the arbitration system which the section is designed to achieve includes protection against those who seek to avoid the regulation of wages and conditions of

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employment by award, by getting their work done for them in a way which gives them "a business advantage over competitors so bound".

It has long been accepted that the prescription of minimum rates of pay not only protects employees from exploitation by unscrupulous employers, but also protects fair employers from inequitable competition from employers who pay less than just wages. Intervention upon this basis in my view, in no way involves the Commission becoming an economic regulator.

The presence of s.89 in the Act containing special provisions with regard to persons who consider themselves unable by reason of age or infirmity, to earn award wages, to obtain a "slow workers" permit, cuts against, rather than aids Mr Trew's position. The section lays down a procedure for dealing with and evaluating such cases and the arrangement under

attack seems to have emerged in part, at least, from the inability of the company to obtain such permits for Mr Suneson and the attendants. That hardly justifies the Commission in concluding that it should refrain from scrutinising an arrangement which is designed by another means to achieve an objective which it has failed to accomplish by the prescribed procedures.

Even accepting that these employees are in a special class and have a particular problem, the fact remains that the 10 arrangement enables the company to obtain the kind of labour it requires more cheaply and enables it to circumvent obligations which would otherwise arise under the award. The transaction therefore is inimical to the purposes of the Act and defeats the industrial objectives of the Act. The intervention of the Commission is therefore justified as part of the "industrial policing" of the Act.

Accordingly, the Commission makes an order that the contract or arrangement constituted by the submission on behalf of a partnership consisting of the respondent Tore John Lennart 20 Suneson and others and the acceptance by the company of the tender document dated 11th March, 1977 signed by Norman Cooper Richardson as Managing Partner on behalf of the partnership and all conditions and collateral arrangements relating thereto be declared void in whole ab initio except in so far as such

contract or arrangement or such conditions or collateral arrangements provided for the payment of money to the said Tore John

Lennart Suneson in accordance with the terms of such contract or arrangement or of such conditions or collateral arrangements for work actually performed for the respondent. I propose to make a further order for the payment by the company to the union in trust for Mr Suneson of an amount of money broadly representing the difference between what he would have received as an employee and the amount of his actual earnings. It seems desirable that the parties should endeavour to agree upon an appropriate amount of money with recourse to the Commission if they are unable to agree. 10

It was agreed by the parties on completion of the case that the question of costs should be reserved and the parties at liberty to make submissions both as to the appropriate order with regard to costs and if necessary the quantum thereof. Mr Trew suggested that short minutes of the order should be filed and this would seem to be an appropriate course. The applicant is directed to file and serve such minutes and arrangements can be made for speaking to the minutes and making submissions on the question of costs. 20

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1. 1978 A.R. (25th August, 1978)
2. 1979 1 N.S.W. L.R. 396
3. 214 I.G. 6
4. 198 I.G. 1648
5. (1978) 52 A.L.J.R. 407
6. 1967 A.R. 606

Annexure "A" to the Affidavit
of Brian Thomas Agnew

7. (1976-1977) 136 C.L.R. 190

8. 1967 A.R. 371 at 373

9. (1976-1977) 136 C.L.R. 190 at 192

10. (1959-1960) 101 C.L.R. 298

11. 1974 2 N.S.W.L.R. 348 at 360

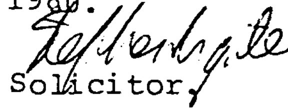
12. 1967 A.R. 371 at 384

13. (1970-1971) 127 C.L.R. 157 at 169

14. 1972 2 N.S.W.L.R. 81 at 88 10

15. 1967 A.R. at 373

This and the preceding 16 pages are the annexure "A" referred to in the Affidavit of BRIAN THOMAS AGNEW sworn before me this day 24th November, 1980.



Solicitor.

"B"

BEFORE THE INDUSTRIAL COMMISSION)
) No. 475 of 1977
OF NEW SOUTH WALES)

IN THE MATTER of the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, industrial union of employees, v. Wilson Parking (N.S.W.) Pty Limited and C. Whalan and another,

IN THE MATTER of an application for an order or award under section 88F of the Industrial Arbitration Act, 1940, 10

AND IN THE MATTER of the Industrial Arbitration Act, 1940.

BEFORE THE HONOURABLE MR JUSTICE DEY

24TH JUNE, 1980

THE COMMISSION ORDERS THAT -

1. The contract or arrangement constituted by the submission of the tender document dated 11th March, 1977, signed by Norman Cooper Richardson as Managing Partner on behalf of the partnership consisting of the respondent, Tore John Lennart Suneson and others, and the acceptance 20 thereof by the respondent, Wilson Parking (N.S.W.) Pty Limited and all conditions and collateral arrangements relating thereto, be declared void in whole ab initio, except in so far as such contract or arrangement or such conditions or collateral arrangements provided for the payment of money to the said Tore John Lennart Suneson or any other member of the said partnership in accordance with the terms of such contract or arrangement or of such conditions and collateral arrangements for work actually performed for the said Wilson Parking (N.S.W.) 30 Pty Limited.

Annexure "B" to the Affidavit of Brian Thomas Agnew

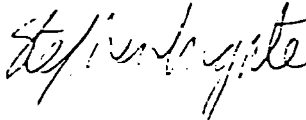
2. The said, Wilson Parking (N.S.W.) Pty Limited shall pay to the applicant, the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch the sum of $6,161.87, to hold in trust for the said Tore John Lennart Suneson.

3. The said Wilson Parking (N.S.W.) Pty Limited shall pay to the said applicant, the applicant's costs of these proceedings, being 10

-2- BS:LB

a sum to be agreed between the parties or to be determined by the Industrial Commission of New South Wales on application by either party in the event of non-agreement as to the said sum.

This and the preceding page are the annexure "B" referred to in the Affidavit of BRIAN THOMAS AGNEW sworn before me this day 24th of November, 1980.



Solicitor. Sydney

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

CORAM: MOFFITT, P.
HOPE, J.A.
SAMUELS, J.A.

MONDAY, 8th DECEMBER, 1980

WILSON PARKING NEW SOUTH WALES PTY. LIMITED v. FEDERATED MISCELLANEOUS WORKERS' UNION & ORS.

MR. TREW appeared for the plaintiff. 10
MR. KENZIE appeared for the first-named defendant.

MR. TREW: This is a summons seeking relief in the form of prerogative relief against the tenth defendant, the Industrial Commission, in relation to certain orders that it made against the plaintiff that the plaintiff pay moneys to the first defendant to be held in trust for the second defendant.

One of the defendants, namely the eighth defendant, has not yet been served. The issue is a very short one because this is the final decision of the Industrial Commission.

MOFFITT, P: I was going to ask you about that. Was this decided on the delegated power or did it go to the Full Bench? 20

MR. TREW: On the delegated power. It went back to the primary judge from the Commission in Court Session after this Court had ruled that the first defendant was a proper plaintiff in the proceedings.

MOFFITT, P: This has been before this Court before?

MR. TREW: Yes, and it is reported in (1979) 1 N.S.W.L.R. 396, and the Court was comprised of the Chief Justice, your Honour Mr. Justice Hope and Mr. Justice Hutley.

In that case the plaintiff in these proceedings was also one of the plaintiffs in those proceedings and it sought to prohibit the proceedings before the Industrial Commission on the ground that the first defendant, the union, was not a proper plaintiff, and this Court decided that contrary to the submissions of the plaintiff and the case then went back for final hearing before a single judge of the Commission and he has made an order now that the plaintiff pay certain moneys to the first defendant to be held in trust for the second defendant and it now comes back on a further summons. 30

Your Honours, with respect will be bound by the earlier decision. There was some doubt expressed in the judgment of your Honour Mr. Justice Hope and also the judgment of Mr. Justice Hutley that it was an appropriate proceeding to bring the matter before the Court at an interlocutory stage, as it were, before final relief was granted, and that final relief has now been granted and it is brought back here.

HOPE, J.A: We decided the issue.

MR. TREW: You did decide the issue so there is nothing now, although we would submit, with respect, that the first defendant is not a proper plaintiff, your Honours will decide against that issue. 10

HOPE, J.A.: What is it here for at all, in order to appeal further?

MR. TREW: That is so, yes. I do not know to what extent your Honours wish to go into it today or whether it should be fixed -

MOFFITT, P: I had not been in this matter earlier, but there was a later proceeding, quite recently before this Court, under the same section dealing with Caltex and the question was raised and the Commission in fact had counsel here, although 20 the argument was eventually presented by the opponent on the construction of the privative provision against prohibition, etcetera, and if I am not mistaken in my recollection I think we upheld this jurisdictional question and therefore did not embark, on the merits of the matter and I think, has not leave to the Privy Council been obtained in respect of that one?

MR. TREW: I have heard that is so.

MOFFITT, P: This is one question which may intrude, whether it is a matter to just simply dismiss it on the merits or whether or not with the same question involved here that we dismiss 30 it for want of jurisdiction.

MR. TREW: Certainly his Honour Mr. Justice Hutley reserved that question specifically in his judgment in this case.

MOFFITT, P: I am taking it a step beyond that. There is a positive decision, a carefully considered decision of this Court. You may have to look at the particular circumstances of the case and see whether or not the jurisdictional question arises in the same way. I do not know that it can be automatically said that there is no jurisdiction.

HOPE, J.A.: I think that is so. The mere fact that it is a 40 mistake of law does not give us jurisdiction, and the mere fact that it is a mistake of law in the construction of the relevant statute does not necessarily create the necessary jurisdiction in this Court and in that particular case they said there was no jurisdiction here.

MR. TREW: That is what I understood from Mr. Justice Hutley's judgment that he at least was indicating that he might require argument on that question at a later stage - presumably in this case - and that certainly is one of the matters, if your Honours wish to be satisfied about that, time would have to be set aside for that argument.

MOFFITT, P: What is your submission as to what is to happen? I know you cannot submit that you should immediately lose, but you say we should hear the matter now and you would concede that you cannot succeed, you submit you ought to be able to succeed but on the present state of the authority you cannot? 10

MR. TREW: That is so, and I would concede that, for the reasons of the Court in the earlier part of this case, the summons must be dismissed.

MOFFITT, P: There is one difficulty in respect of the matter that I have raised. I know that you joined the Industrial Commission and despite the contention of not coming and opposing any matter arising out of any jurisdictional questions - they have done that before - they did in the Caltex case - what is the position about their appearance today? 20

MR. TREW: I do not know. They were served and I do not know why they are not here.

MOFFITT, P: This is an application for what?

MR. TREW: For certiorari, prohibition and declarations as to jurisdiction. Paragraph 1 seeks prohibition. Paragraph 2 seeks certiorari. Paragraph 3 seeks declarations.

There are no affidavits of service filed. I would seek leave to file those. Service has been effected on all the defendants except the eighth defendant, Allan O'Neil. I seek leave to file in court the affidavit of Stephen Ingate and also 30 the affidavit of Vivian Shead sworn on 8th December, 1980. I am told Mr. Ingate's affidavit was filed.

MOFFITT, P: The appearance we have at the moment is merely for the union.

MR. TREW: Yes.

MOFFITT, P: All the other persons would need to be called.

MR. TREW: Except for No. 8, Allan O'Neil, who has not been served.

(Defendants 2 to 10 called. No appearance).

The error of fact is in Mr. Agnew's affidavit sworn 24th 40 November, 1978. In para. 11 he says in the last two lines

that the order had been published in the Government Gazette on 24th October, 1980. That is wrong. I cannot rely on publication. My instructions are it has not been published yet. That is an error.

MOFFITT, P: There are ten defendants?

MR. TREW: Yes.

MOFFITT, P: And the one who is not served is O'Neil.

MR. TREW: Yes.

MOFFITT, P: It is noted that all the defendants except O'Neil, the eighth defendant has been served. All defendants 2 to 10 were called outside the court and did not appear. 10

MR. McKENZIE: A question of the prematurity of the application arose before the Court of Appeal in the previous matter, but that did not prevent the Court from dealing with the matter, although the Court said in some other case under 88F an application at that stage might be premature. I adopt what my learned friend has said about that.

MOFFITT, P: In these proceedings in this Court No. 350 of 1980 counsel for the applicant formally submits that orders sought should be made but concedes that, having regard to the binding authority of Wilson Parking N.S.W. Pty. Limited and another v. The Industrial Commission and anor, reported in (1971) N.S.W.L.R. 396, this Court is bound by that decision and it cannot succeed in this Court but wishes to put the applicant in a position of appealing to another court. If the Court had jurisdiction, it would be bound to dismiss the present proceedings by reason of the decision in the case to which I have just made reference. It may be in conformity with the more recent decision in the Caltex case that we do not have jurisdiction. But in the circumstances it is not necessary to consider this jurisdictional question. Accordingly it is sufficient to make the order which the Court now makes, namely that the application is dismissed with costs. 20 30

IN THE SUPREME COURT

OF NEW SOUTH WALES   No. 350 of 1980

COURT OF APPEAL

IN THE MATTER OF THE INDUSTRIAL ARBITRATION ACT 1940

WILSON PARKING (NSW) PTY. LIMITED

Plaintiff

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

TORE JOHN LENNART SUNESON

HAROLD SIMPSON   10

JOHN McCORMACK

WILLIAM SMITH

LIONEL DOUGLAS WHITTINGHAM

NORMAN RICHARDSON

ALLAN O'NEIL

GEORGE WILLIAM WILKS

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Defendants

MINUTES OF ORDER

The Court Orders   20

1. That the application is dismissed with costs.

Ordered 8th December 1980

Entered   July 1981

By the Court

Registrar

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) 391 of 1978
)
COURT OF APPEAL)

IN THE MATTER of the INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (N.S.W.) PTY. LIMITED
LEONARD SUNESON

Plaintiff

INDUSTRIAL COMMISSION OF NEW SOUTH WALES,
THE FEDERATED MISCELLANEOUS WORKERS' UNION OF
AUSTRALIA, NEW SOUTH WALES BRANCH 10

Defendants

AMENDED SUMMONS

The Plaintiff claims:-

1. An order that the Industrial Commission of New South Wales has no jurisdiction, power and/or authority under Section 88F of the Industrial Arbitration Act, 1940 to make, upon the application of The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in part and either ab initio or 20 from some other time a contract or arrangement between the Plaintiff Wilson Parking (N.S.W.) Pty. Limited and one L. Suneson, to which The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch is not a party.

2. An order that The Industrial Commission of New South Wales be prohibited and restrained from proceeding any further in proceedings No. 475 of 1977 between The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch (the Applicants therein) and Wilson Parking (N.S.W.) Pty. Limited and others (the Respondents therein). 30

3. An order removing application No. 475 of 1977 from the Industrial Commission of New South Wales into the Supreme Court of New South Wales and quashing the decision of the Industrial Commission of New South Wales.

4. Such further or other order as the nature of the case may require.

To the Defendant:

Industrial Commission of New South Wales,

And to the Defendant: 10

The Federated Miscellaneous Workers' Union of Australia,

New South Wales Branch.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 1978 at

Place: Court No. 20
Supreme Court of New South Wales,
Queen's Square, Sydney.

Plaintiff: Wilson Parking (N.S.W.) Pty. Limited

Solicitor: Brian Thomas Agnew,
c/- Messrs. Moray & Agnew,
14 Martin Place, Sydney.

Plaintiff's Address for Service:	c/- Messrs. Moray & Agnew, 14 Martin Place, Sydney. D.X. 106.
Address of Registry:	Supreme Court of New South Wales, Queen's Square, Sydney.

FILED: 30th March, 1979.

Brian Agnew

Plaintiff's Solicitor

IN THE SUPREME COURT

OF NEW SOUTH WALES 391 of 1978

COURT OF APPEAL

IN THE MATTER of the INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (N.S.W.) PTY. LIMITED

Plaintiff

INDUSTRIAL COMMISSION OF NEW SOUTH WALES,
THE FEDERATED MISCELLANEOUS WORKERS' UNION OF
AUSTRALIA, NEW SOUTH WALES BRANCH

Defendants 10

AFFIDAVIT

Deponent: B.T. Agnew
Sworn: 25/9/1978.

On 25th Sept, 1978 I, BRIAN THOMAS AGNEW, Solicitor, of 14 Martin Place, Sydney in the State of New South Wales being duly sworn make oath and say as follows:-

1. I am a member of the firm of Messrs. Moray & Agnew, Solicitors. I have the carriage of these proceedings on behalf of the Plaintiff and am authorised to make this Affidavit on its behalf. 20

2. The Plaintiff is a company duly incorporated in the State of New South Wales having its registered office at 100 William Street, Sydney, New South Wales and carrying on business in New South Wales as a car park operator.

3. The Defendant the Industrial Commission of New South Wales is constituted under the Industrial Arbitration Act, 1940. The Honourable Sir Alexander Craig Beatty is the President of the said Commission and the Honourable John Fletcher Dey and the Honourable James Joseph Macken are members of the said Commission. 30

4. The Defendant The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch is a registered organisation of employees.

5. The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch (hereinafter referred to as "the M.W.U." in matter No. 475 of 1977 in the New South Wales Industrial Commission by Notice of Motion sought orders that:-

1. The contracts, arrangements, conditions, and/or collateral arrangements relating thereto 10

   (a) between the Respondent Wilson Parking (N.S.W.) Pty. Limited

Michael A. Pitt

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on the one hand and the Respondent C. Whalan on the other hand, and

   (b) between the Respondent Wilson Parking (N.S.W.) Pty. Limited on the one hand and the Respondent L. Suneson on the other hand, whereby the Respondents Whalan and Suneson performed work in industry are void in whole ab initio on the grounds specified in the Notice of Motion herein. 20

2. That the Respondent Wilson Parking (N.S.W.) Pty. Limited paid to the Respondents Whalan and Suneson such sum of money as may appear to the Commission to be just in the circumstances of the case.

3. That the Respondents pay the Applicant its costs of and

incidental to these proceedings as assessed by the Commission.

4. That this order and award shall be binding upon the parties referred to above and shall take effect on and from the day of , 1977. It shall remain in force within the State of New South Wales for a period of 3 years and after such period until varied or rescinded in accordance with the Industrial Arbitration Act, 1940 as amended. A true copy of the said Notice of Motion is annexed hereto and marked "A". 10

5. The said Notice of Motion was heard before the Honourable John Fletcher Dey on the 27th October, 1977, the 16th March, 1978 and the 17th March, 1978. I was present during the proceedings.

6. Mr. Foord, Q.C., Counsel for the M.W.U. informed the Commission that the matter would be restricted to an application in respect of the Respondent Suneson as he had been informed that the Respondent Whalan had died before the institution of the proceedings. The matter proceeded on the basis of the application being restricted to the contract alleged between Wilson Parking (N.S.W.) Pty. Limited and the Respondent Suneson. 20

7. The Respondent Suneson gave evidence and stated that:-

   (a) he did not request the M.W.U. to bring the proceedings and they had been brought in the absence of any suggestion, request or desire on his part.

(b) he signed an agreement with Wilson Parking (N.S.W.) Pty. Limited dated the 15th April 1974. Annexed hereto and

Michael A. Pitt

marked with the letter "B" is a copy of the said agreement as tendered in evidence.

(c) he did work for Wilson Parking (N.S.W.) Pty. Limited as a car park attendant handing tickets to car owners as they drove into the car parks and collecting their money as they came out. 10

(d) he was paid for his work.

(e) that about the end of 1976 he signed a partnership agreement and since he has been claiming his payment from the partnership. Annexed hereto and marked with the letter "C" is a copy of the said partnership agreement as tendered in evidence.

8. At the close of the evidence before His Honour it was agreed by the parties that a question of jurisdiction was involved it being whether or not the proceedings could be brought by the M.W.U. as it was not a party to the contract or arrangement the subject of the proceedings. The matter was then by consent referred by His Honour to the Industrial Commission of New South Wales in Court session. The reference was in the following terms:- 20

"Has the Industrial Commission jurisdiction, power

and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the Respondent, Wilson Parking (N.S.W.) Pty. Limited and the Respondent, L. Suneson, to which the union is not a party, and providing in the terms of pars (2) and (3) of the schedule to the Notice of Motion". 10

9. On the 25th August 1978 the Judgment of the Commission was handed down and the question of jurisdiction referred by His Honour was answered in the affirmative. Annexed hereto and marked with the letter "D" is a copy of that decision.

10. A true record of the proceedings before His Honour is contained in the official transcript a copy of which has 20
Michael A. Pitt

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been exhibited to me at the time of swearing this Affidavit and marked with the letter "E" and I crave leave to refer to the said transcript as may be required as if the same were set out herein.

6. The ground upon which the orders herein are sought is that

the Industrial Commission of New South Wales has no jurisdiction, power and/or authority under Section 88F of the Industrial Arbitration Act, 1940 to make the orders sought in the Notice of Motion referred to in paragraph 5 herein.

SWORN by the Deponent at)
)
Sydney before me:) Brian Agnew
....

Michael A. Pitt
....
SOLICITOR
SYDNEY

10

"A"

BEFORE THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES) No. 475 of 1977.

IN THE MATTER of contracts, arrangements, conditions and/or collateral arrangements relating thereto between WILSON PARKING (N.S.W.) PTY. LIMITED and C. WHALAN and L. SUNESON

AND IN THE MATTER of an application by the FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH, for an order or award under section 88F of the Industrial Arbitration Act, 1940, as amended.

AND IN THE MATTER of the Industrial Arbitration Act, 1940, as amended.

TAKE NOTICE that application will be made to the Industrial Commission of New South Wales at 50 Phillip Street, Sydney, on the 23rd day of September 1977 at 10 of the clock in the fore- noon, or so soon thereafter as the Commission may hear the application, by the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, pursuant to the provisions of section 88F of the Industrial Arbitration Act, 1940, as amended, for an order or award declaring void in whole or in part of varying in whole or in part either ab initio or from some other time contracts, arrangements, conditions and/or collateral arrangements relating thereto.

(a) between Wilson Parking (N.S.W.) Pty. Limited on the one hand and C. Whalan on the other hand;

and

(b) between Wilson Parking (N.S.W.) Pty. Limited on the one hand and L. Suneson on the other hand;

whereby two persons, namely the said C. Whalan and the said L. Suneson perform work in an industry, namely, the industry

Thomas Agnew sworn on the day of 1978 Before me:

Annexure "A" to the Affidavit of Brian Thomas Agnew, 25 September, 1978

covered by the Motor Car Washers &c. (State) Conciliation Committee, and in particular for an order or award in terms set out in the schedule hereto or such other orders or awards as may appear to the Commission to be just UPON THE FOLLOWING GROUNDS AND REASONS:

1. That the said Contracts arrangements conditions and/or collateral arrangements relating thereto (hereinafter described as "the contracts") are unfair and/or harsh and/or unconscionable. 10

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2. That the said contracts are against the public interest.

3. That the said contracts provide or have provided a total remuneration less than a person performing the work would have received, according to law, as an employee performing such work.

4. That the said contracts were designed to or do avoid the provisions of an award, namely, the Parking Attendants, Motor Car Washers, &c (State) Award (hereinafter referred to as "the award"). 20

5. That the said contracts result in remuneration for the respondents C. Whalan and L. Suneson being substantially less than that prescribed by the award.

6. That the said contracts make no provision for the following benefits prescribed by the award:

hours of work, Saturday penalty, meals and crib breaks, allowance for being "in charge" of an establishment, casual employee loading, minimum payment for each start,

overtime, Saturday, Sunday and Holiday loadings, annual leave, annual leave loading, long service leave, sick-leave, shift work allowances, contract of employment, payment of wages, protective clothing, dining room, accommodation, rest pause, preference of employment, clothing, compassionate leave, miscellaneous conditions and accident pay. 10

7. That the said contracts are unfair to the respondents C. Whalan and L. Suneson.

8. That the said contracts are unfair to persons employed under the award.

9. That the said contracts are subversive of the orderly control of industry, the award, general industrial standards, and the system of industrial arbitration.

10. For such other grounds and reasons as to the Commission may seem proper.

DATED at Sydney this 9th day of Sept, 1977. 20

CHRISTOPHER JOHN RAPER

for an on behalf of the
Federated Miscellaneous Workers'
Union of Australia, New South
Wales Branch.

SCHEDULE

THE COMMISSION HEREBY ORDERS AND AWARDS:

(1) That the contracts, arrangements, conditions and/or collateral arrangements relating thereto:

(a) between the respondent Wilson Parking (N.S.W.) Pty. Limited on the one hand and the respondent C. Whalan on the other hand; and 10

(b) between the respondent Wilson Parking (N.S.W.) Pty. Limited on the one hand and the respondent L. Suneson on the other hand,

whereby the respondents Whalan and Suneson performed work in an industry are void in whole ab initio on the grounds specified in the Notice of Motion herein.

(2) That the respondent Wilson Parking (N.S.W.) Pty. Limited pay to the respondents Whalan and Suneson such sum of money as may appear to the Commission to be just in the circumstances of the case. 20

(3) That the respondents pay the applicant its costs of and incidental to these proceedings as assessed by the Commission.

(4) That this order and award shall be binding upon the parties referred to above and shall take effect on and from the day of 1977. It shall remain in force within the State of New South Wales for a period of three years and after such period until varied or

rescinded in accordance with the Industrial Arbitration Act, 1940, as amended.

THIS AGREEMENT made the 15th day of April One thousand nine hundred and seventy ~~five~~. four.

BETWEEN : WILSON PARKING (N.S.W.) PTY. LTD. of 95 Crown Street, East Sydney in the State of New South Wales (herein-after called "the Company") of the one part and LEONARD SUNERSON of 47 DINA-BETH AVE BLACKTOWN.

(herein-after called "the Contractor") of the other part.

WHEREAS : The Company and the Contractor have agreed that the Contractor will carry out for the Company the supervision of car parks on the terms and conditions herein-after contained. 10

NOW THIS AGREEMENT WITNESSETH as follows:

1. The Contractor agrees with the Company that he will carry out for the Company the supervision of car parks including the collection of parking fees payable by the customers thereof at such places and for such periods as the Company shall request from time to time.

2. The contractor agrees with the Company that he will while carrying out his obligations under the agreement wear the uniform adopted by the Company from time to time provided that such uniform shall be supplied by the Company. 20

3. The Contractor shall submit to the Company weekly accounts for the amount payable by the Company to him under this agreement.

4. The amounts payable by the Company to the Contractor under this agreement shall be determined by mutual agreement between the parties from time to time.

5. The Contractor agrees with the Company that he will supervise the car parks nominated by the Company in a manner conductive to the maintenance and furtherance of the Company's business at such car parks and that he will account to the Company for all moneys collected by him as agent for the Company from customers of such car parks. 30

6. The parties hereto agree that this agreement may be terminated by either party giving to the other one week's notice in writing.

7. The Company and the Contractor acknowledge and agree that this agreement is made between them as principal and independent contractor.

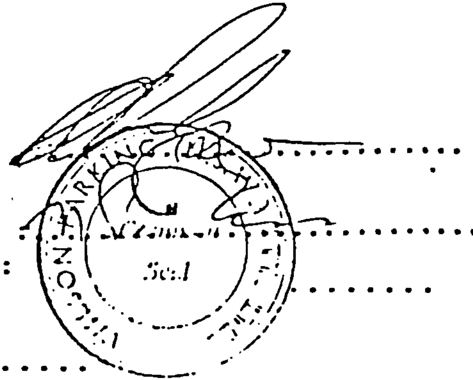
8. The Company will provide the necessary workers compensation insurance for the Contractor. 40

Annexure "B" to the
Affidavit of Brian Thomas
Agnew, 25 September, 1978

IN WITNESS whereof the parties hereto have executed these presents the day and year first aforesaid.

The Common Seal of WILSON PARKING)
PTY. LTD. was hereunto affixed by)
authority of the Directors in the)
presence of :-)

Director: 10



Secretary: ....

BY the said contractor: L. Suneson ....

presence of: ....

This is the annexure marked "B" referred to in the Affidavit of Brian Thomas Agnew sworn on the day of 1978 Before me:

"C"

This is the annexure marked "C" referred to in
the Affidavit of Brian Thomas Agnew sworn on the
day of 1978 before me:

THIS DEED OF PARTNERSHIP is made the day of

One thousand nine hundred and seventy six

BETWEEN The partners set out in the First Schedule hereto who have agreed that upon their signing their names in the spaces provided in the said Schedule they shall be and become partners in the partnership the terms of which appear hereunder. 10

WHEREAS the Partners wish to become partners in a business supplying services and management to industries the nature of which shall suit the age and physical condition of the Partners and so the terms of the partnership shall be:

THE TERMS OF THE PARTNERSHIP:

1. The initial capital shall be a sum equal to One Dollar ($1.00) for each partner signing the Schedule and shall be provided by the purchase of One Dollar ($1.00) units one to each partner the partners purchasing being the persons described in the First Schedule hereto. 20

2. The partnership shall commence with respect to which partner on the date set out beside the names of the partners in the First Schedule hereto and shall continue until dissolved by mutual consent or with respect to particular partners until any individual partner shall dispose of his units as hereinafter provided for.

Annexure "C" to the
Affidavit of Brian Thomas
Agnew, 25 September, 1978

3. The partners agree to abide by the terms and conditions of this Deed and the terms and conditions set out in the Second Schedule hereto called the Rules of the Partnership and they will carry on the business as partners in partnership between themselves and any other persons that may be admitted to the partnership in the manner provided by this Deed.

4. The partnership shall continue until determined by a resolution passed by a majority of the votes of the partners at a general meeting held pursuant to the terms of the rules of the partnership. 10

5. The retirement death or bankruptcy or other disability of any partner shall not determine the partnership as between the remaining partners.

6. Upon the death of any Partner he shall automatically cease to be a Partner and the partnership shall pay to his personal representatives the sum of One Dollar ($1.00) as and by way of satisfaction of his interest in the capital of the partnership 20 and shall also pay to the partner such sum as may be due to the partner for his pro rata proportion of the profits up to the date of his death determined as hereinafter provided.

7. Any of the following persons that is to say:

(a) a party hereto;
(b) a transferee of units;
(c) a later joining partner

in whose name units are entered in accordance with the rules of

the partnership and who sign their names in the First Schedule as persons bound by the Rules shall be deemed to have become partners subject to the rules (as they may be from time to time in force) of the partnership with the other partners who are from time to time partners.

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THE FIRST SCHEDULE

NAME AND ADDRESS	DATE OF COMMENCEMENT	NO. OF UNITS	SIGNATURE	WITNESS	DISPOSAL OR DATE OF TERMINATION OF PARTNERSHIP
RICHARDSON, Norman 2/37 NELSON STREET WOOLLAHRA.	JANUARY 1977	ONE			11/10/77
O'NEIL, Allan 58 PELLISIER STREET, PUTNEY. (8)	JANUARY 1977	ONE.			
GOLDSTEIN, George. 3/118 WILLIAM STREET KING'S CROSS. (7)	JANUARY 1977	ONE			
SIMPSON, Harold 31A KITCHENER STREET MAROUBRA. (10)	JANUARY 1977	ONE			
PRICE. Walter. 5 LUPIN AVENUE RIVERWOOD. (19)	JANUARY 1977	ONE.			
PRICE. Clifford 2/267 DARLINGHURST ROAD. DARLINGHURST. (8)	JANUARY 1977	ONE.			
MC CORMACK John, 55 TOPPINGTON ROAD MAROUBRA BEACH. (20)	JANUARY 1977	ONE.			
SMITH. William 28 GANNON STREET. TEMPE. N.S.W. (20)	JANUARY 1977	ONE.			
SUNESON, Leonard. 47 Dina Beth AVENUE, BLACKTOWN. (12)	JANUARY 1977	ONE.			
WEST. Earnest. 1/2 STATION STREET KOGARAH. N.S.W. (12)	JANUARY, 1977	ONE.			

Annexure "C" to the
Affidavit of Brian Thomas
Agnew, 25 September, 1978

THE FIRST SCHEDULE

NAME AND ADDRESS	DATE OF COMMENCE-MENT	NO. OF UNITS	SIGNATURE	WITNESS	DISPOSAL OR DATE OF TER-MINATION OF PARTNERSHIP
1. O'HARRORAN, Henry. 7A GRENFELL STREET BLAKEHURST. N.S.W.(2)	JANUARY 1977.	ONE.	[signature]	[signature]	Left. [signature]
2. LIONEL DOUGLAS WHITTINGHAM 22 NICHOLSON STREET, CROWS NEST. 2065	18/8/77	1	[signature]	[signature]	
GEORGE WILLIAM WILKS B9/20 NORTHCOTT PI. SURRY HILLS	12/10/77	1	[signature]	[signature]	

Annexure "C" to the Affidavit of Brian Thomas Agnew, 25 September, 1978

THE SECOND SCHEDULE

THE RULES OF THE PARTNERSHIP

INTERPRETATION

In the rules so far as the context admits or requires:

"Books" means books of the partnership.

"Managing Partner" means the partner appointed and acting pursuant to those rules from time to time. 10

"Partner" includes any of the parties to this deed and also any person who upon transmission after the death of any partner or transfer of units in any way permitted by the rules is entered in the books as the holder of one or more units and who signs his name in the First Schedule as a person intending to become bound by the rules and "Partners" means the partners for the time being.

"Rules" means this Schedule as it may from time to time be varied and be in force between the partners.

"Trustee" means that said or such other person as he may by deed declare to be the Trustee in addition to or in substitution for himself. 20

The singular includes the plural and the plural includes the singular.

The masculine gender includes the feminine.

Workds improting persons include bodies corporate.

UNITS IN PARTNERSHIP

1. Each partner shall be deemed to hold a unit in the partnership.

2. Any entry made in the books with the approval of the Managing Partner of a transfer of units (if the transfer is not contrary to the rules) shall be effective without any instrument in writing as evidence of the right to the units so entered by the Managing Partner if it sees fit may require an authority in writing from the persons concerned before an entry is made of a transfer. 30

3. The capital of the partnership shall be limited to the sum of TWENTY DOLLARS ($20) and shall be divided into units of ONE DOLLAR ($1.00)

ACQUISITION AND DISPOSAL OF UNITS

4. No partner shall hold more than one unit in the partnership.

5. Each partner agrees that he will surrender his unit in the partnership in the event of being requested so to do pursuant to the powers to make such request granted to the Managing Partner and hereinafter contained. 10

6. Any partner retiring either voluntarily or when requested so to do by the Managing Partner shall receive the sum of One Dollar ($1) in respect of his unit and there shall be no goodwill in the partnership.

7. No partner may sell his unit in the partnership to any other person adn units can only be issued by the Managing Partner from time to time.

8. Before any units are entered in the books as belonging to a person not already a partner he shall sign his name in the First Schedule in token of his agreeing to be bound 20 by this deed and the rules.

GENERAL MEETINGS

9. (a) General Meetings of the partners (to be called ordinary general meetings) shall be held once at least in every calendar year and at such time and place as the committee determines.

(b) all other general meetings shall be called extraordinary general meetings.

10. The Managing Partner or any four of the partners may convene extraordinary general meetings. 30

11. Such notice as the Managing Partner from time to time decides shall be given of every general meeting.

12. No business shall be transacted at any general meeting unless a quorum of partners is present at the time when the meeting proceeds to business. Save as in the rules otherwise provided three partners present in person or by proxy or by attorney shall form a quorum.

13. If within a quarter of an hour from the time appointed for the meeting a quorum is not present the meeting is convened by any of the partners other than the Managing 40 Partner shall be dissolved but in any other cast it shall

stand adjourned to the same day in the next week at the same time and place and if at the adjourned meeting a quorum is not present within a quarter of an hour from the time appointed for the meeting the partner or partners present in person or by proxy or attorney shall be a quorum.

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14. At any general meeting each partner shall be entitled to one vote.

(a) Votes and any consent or signature required by the rules may be given or signed either in person or by proxy or attorney.

(b) All questions at a metting shall be decided by majority of the votes of the partners unless in any particular case the rules otherwise provide.

15. A declaration by the chairman that a resolution has been carried or carried unanimously or by a particular majority or lost or not carried by a particular majority of the votes recorded in favour of or against that resolution. 20

16. A resolution or consent in writing signed by all the partners shall be as valid and effectual as if it had been passed or given at a meeting of the partners duly called and constituted.

MANAGEMENT

17. There shall be a Managing Partner (in the rules called "the Managing Partner") who shall be elected by the partners in general meeting. The first Managing Partner shall be Mr. N. RICHARDSON of 37 Nelson Street, Woollaraha. 30

18. The Managing Partner shall have power to make regulations (not inconsistent with the rules) as to any matter of management or carrying on of the affairs of the partnership and all such regulations made by the Managing Partner shall be binding on all the partners.

19. The Managing Partner shall have the power to call upon any Member to resign in the case of misconduct by a member by giving the member immediate notice thereof. 40

20. The Managing Partner shall have the power on behalf of the Partners to negotiate any contracts relating to the

supply of services and/or management, the amount and method of renumeration and terms and conditions of contracts relating to the well being and further advancement of the Partners and to delegate his powers to any other person, persons or corporations from time to time.

21. The Managing Partner shall ensure that the profits of the Partnership are divided amongst the members in proportion to the quality and quantity of services rendered by each member which proportion shall also bear some relationship to the amount of time each member shall devote to the objects of the Partnership. 10

22. The Managing Partner shall have power to assign tasks and shifts to the members of the partnership and to alter the tasks shifts and areas of work between the members from time to time.

ATTORNEYS AND PROXIES OF PARTNERS

23. (a) Any partner may with the approval of the Managing Partner appoint any person to be his attorney and the appointment shall have effect and the appointee whilst he remains the attorney of the partner shall be entitled to notice of meetings of partners and to attend in the place of the appointor and take part in any meeting and to vote at any meeting. 20

(b) The appointee shall vacate office if and when the appointor ceases to be a partner or removes the appointee from office or if the committee decides that he shall be removed from office. 30

(c) Any appointment and removal by the appointor under this clause shall be effected by notice in writing under the hand of the appointor given to the Manager.

24. Any partner may with the approval of the Managing Partner appoint any person to be his proxy:

(a) to vote for him at any meeting or meetings or at any meetings held during any period if the meeting or meetings or period are specified in the instrument of appointment; and 40

(b) to give consent to any resolution that may be signed by partners without holding a meeting during any period specified in the instrument or relating to any subject specified in the instrument.

MINUTES

25. Minutes of the proceedings of every meeting of the Committee and of the partners shall be recorded in proper books kept for that purpose and shall be confirmed either at the meeting to which they relate or at a subsequent meeting and shall be signed by the chairman of the meeting at which the minutes are confirmed. The minute book so signed shall upon production and without further proof be prima facie evidence of the proceedings recorded in it and of their regularity. 10

ACCOUNTS

26. The Managing Partner shall cause true accounts to be kept of all items of income and expenditure of the partnership and of the assets and liabilities of the partnership. Such accounts shall be balanced once at least in every year.

20

27. The books of account shall be kept at the office of the partnership or at any other place or places decided by the Managing Partner and shall always be open to the inspection of each partner.

28. Once at least in every year the Managing Partner shall lay before the partners in general meeting a profit and loss account for the period since the preceding account made up to a date not more than three months before the meeting together with a balance sheet made up to the same date.

INDEMNITY 30

29. The Managing Partner shall be indemnified out of the funds of the partnership against all costs losses and expenses which he may incur or become liable to by reason of any contract entered into or act or thing done by him as manager or in any way in the discharge of his duties unless the same is attributable to his own wilful default or dishonesty.

NOTICES

30. A notice may be given to any partner either personally or by sending it by prepaid post to him at his last known address. 40

31. Any notice sent by post shall be deemed to have been received in the ordinary course of post.

This is the annexure marked "D" referred to in the Affidavit of Brian Thomas Agnew sworn on the day of 1978 Before me:

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

IN COURT SESSION

CORAM: BEATTIE J., PRESIDENT
DEY J.
MACKEN J.

Friday, 25th August, 1978

No. 475 of 1977 10

The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch v. Wilson Parking (N.S.W.) Pty Ltd and others.

JUDGMENT OF THE COMMISSION

This is a reference made by Dey J. pursuant to s. 30C of the Industrial Arbitration Act, 1940, (the Act) of a question of jurisdiction which arose during the hearing of a matter commenced under s.88F of the Act. The reference is in these terms:

> Has the Industrial Commission jurisdiction, power and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the respondent, Wilson Parking (N.S.W.) Pty Limited and the respondent, L. Suneson, to which the union is not a party. 20

The order and award which the applicant sought in a schedule to its notice of motion was this:

(1) That the contracts, arrangements, conditions and/or collateral arrangements relating thereto: 30

   (a) between the respondent Wilson Parking (N.S.W.) Pty Limited on the one hand and the respondent C. Whalan on the other hand; and

   (b) between the respondent Wilson Parking (N.S.W.) Pty Limited on the one hand and the respondent L. Suneson on the other hand,

Annexure "D" to the Affidavit of Brian Thomas Agnew, 25 September, 1978

whereby the respondents Whalan and Suneson performed work in an industry are void in whole ab initio on the grounds specified in the Notice of Motion herein.

(2) That the respondent Wilson Parking (N.S.W.) Pty Limited pay to the respondents Whalan and Suneson such sum of money as may appear to the Commission to be just in the circumstances of the case. 10

(3) That the respondents pay the applicant its costs of and incidental to these proceedings as assessed by the Commission.

(4) That this order and award shall be binding upon the parties referred to above and shall take effect on and from the day of 1977. It shall remain in force within the State of New South Wales for a period of three years and after such period until varied or rescinded in accordance with the Industrial Arbitration Act, 1940, as amended. 20

Dey J. was told that the respondent Whalan had died and that the matter would not be pursued in respect of him. At the hearing before us of the question of jurisdiction it was pointed out from the bench that the question referred by Dey J. did not extend to the Commission's jurisdiction to make an order for the payment of money and costs referred to in (2) and (3) of the claim and, by consent, Dey J. added the following to his reference: 30

> and providing in the terms of pars (2) and (3) of the schedule to the notice of motion.

The contract or arrangement which is the subject of the proceedings arose from an advertisement calling for the supply of services to manage car parks. A tender was submitted by a Mr Richardson, stated to be the managing partner, on behalf of

a partnership consisting of ten persons, on the following conditions:

(1) The Company shall pay to the partnership the sum of $2,726.00 (hereinafter referred to as "the Contract Sum") by equal monthly instalments payable on the first day of each month with the first payment to be made on the 1ST day of APRIL 1977. 10

(2) That the partnership shall -

(a) well and faithfully execute the management of the nominated car parks;

3.

(b) supply and provide all, if any, plant, equipment materials and other things requisite for or incidental to carrying out the contract;

(c) provide such men as shall reasonably be necessary to manage the nominated car parks 20 for the period.

(3) If, in the event that the Company requires any expansion or reduction of the duties and services under this agreement then the partnership shall comply with the requirements to so expand or reduce the duties and services under this agreement and the Company shall pay an amount varying the Contract Sum which shall either be agreed upon by the parties or failing agreement shall be determined by a member of the Institute of Chartered Accountants who 30 shall be agreed upon by the parties or failing agreement appointed by the President for the time being of the New South Wales Institute of Chartered Accountants whose decision shall be final and binding upon the parties with neither party having the right of appeal therefrom.

(4) The partnership acknowledges that the Contract Sum has made provision for all necessary insurance premiums.

(5) The partnership shall not without the written con- 40 sent of the Company first had and obtained assign the Contract or assign mortgage charge or encumber in any way the monies due or becoming due under the

Contract or any other benefit whatsoever arising or which may arise under the Contract.

(6) If the partnership:

(a) commits any breach of or fails to comply with or observe the provisions of the Contract or any of them;

(b) refuses or fails to prosecute its duties hereunder or any separable part of it in a proper fashion; 10

(c) any member of the partnership is guilty of misconduct and such member of the partnership is not removed from the partnership after a request in writing has been received by the partnership's Managing Partner then in any of such events the Company may at its option:

(a) suspend payments under the Contract until the position is remedied; or 20

(b) cancel the Contract.

4.

The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, (the union) protects the interests under the Act of persons employed as parking station attendants and has obtained an award for them, the Parking Attendants, Motor Car Washers, &c (State) Award. Its interest in the Wilson Parking contract may be deduced from the grounds and reasons on which it sought relief in its application under s. 88F, namely:

1. That the said contracts arrangements conditions and/or collateral arrangements relating thereto (hereinafter described as "the contracts") are unfair and/or harsh and/or unconscionable. 30

2. That the said contracts are against the public interest.

3. That the said contracts provide or have provided a

total remuneration less than a person performing the work would have received, according to law, as an employee performing such work.

4. That the said contracts were designed to or do avoid the provisions of an award, namely, the Parking Attendants, Motor Car Washers, &c (State) Award (hereinafter referred to as "the award"). 10

5. That the said contracts result in remuneration for the respondents C. Whalan and L. Suneson being substantially less than that prescribed by the award.

6. That the said contracts make no provision for the following benefits prescribed by the award:

> hours of work, Saturday penalty, meals and crib breaks, allowance for being "in charge" of an establishment, casual employee loading, minimum payment for each start, overtime, Saturday, Sunday and Holiday loadings, annual leave, annual leave loading, long service leave, sick leave, shift work allowances, contract of employment, payment of wages, protective clothing, dining room accommodation, rest pause, preference of employment, clothing, compassionate leave, miscellaneous conditions and accident pay. 20

7. That the said contracts are unfair to the respondents C. Whalan and L. Suneson.

8. That the said contracts are unfair to persons employed under the award. 30

9. That the said contracts are subversive of the orderly control of industry, the award, general industrial standards, and the system of industrial arbitration.

10. For such other grounds and reasons as to the Commission may seem proper.

5.

The respondent Suneson was called as a witness in the applicant's case but took no other part in the proceedings. He said in his evidence that he did not request the applicant 40

to bring the proceedings and that the applicant had brought the proceedings in the absence of any suggestion, request or desire on his part.

Section 88F of the Act provides:

(1) The commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto --- 10

(a) is unfair, or

(b) is harsh or unconscionable, or

(c) is against the public interest. Without limiting the generality of the words "public interest" regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or 20

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or 30

(e) was designed to or does avoid the provisions of an award or agreement.

(2) The commission, in making an order or award pursuant to subsection (1), may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case.

(3) The commission may make such order as to the payment of costs in any proceedings under this section, as may appear to it to be just and may assess the amount of such costs. 40

It was submitted to us on behalf of the respondent Wilson Parking (N.S.W.) Pty Ltd that s.88F is a statutory provision dealing with private rights and that, in accordance with a fundamental principle of the law, the relief provided for by the section was available only at the instance of a party to a contract or arrangement falling within the scope of the section. 10 The fundamental principle was said to have been applied by the House of Lords in Stockport District Waterworks Co. v. Manchester Corporation[1] and to have been mentioned as trite law in a number of the speeches of their Lordships in Gouriet's Case[2] of which we quote a sample from that of Lord Diplock, who, speaking of private rights conferred by a certain class of statute, said[3]:

> For the protection of the private right created by such a statute a court of civil jurisdiction has jurisdiction to grant to the person entitled to the private right, but to none other, an injunction to restrain a threatened breach of it by the defendant 20
>
> The words italicised in the last paragraph are important words for they draw attention to the fact that the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement.

Reference was also made to various local authorities including Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd[4], 30 Helicopters Utilities Ltd v. Australian National Airlines Commission[5] and Forbes v. New South Wales Trotting Club[6].

It was argued that, in contrast to the private right situation

said to be the subject of s.88F, other sections of the Act, such as those dealing with the making and enforcement of awards, were concerned with the creation and enforcement of rights of general application to contracts of employment and that the role of an industrial union of employees as a litigant was confined to them. Attention was drawn to s.92, under which any unpaid balance of wages due to an employee under an award or industrial agreement 10

may be sued for by the employee or by the secretary or other officer of an industrial union concerned in the industry with the consent in writing of the employee and in the employee's name and on his behalf, and which provides for any amount recovered by such secretary or other officer to be held in trust for the employee. The absence of any like provisions in s.88F was said to tell against an industrial union having any right to invoke that section. A like conclusion was said to flow 20 from s.119, under which an order under s. 88F(2) for the payment of any money is to have the effect of a judgment for the amount of such money in stated courts "at the suit of the Crown or person or union respectively, against the person or union against whom such order has been made". It was pointed out that, if an order under s.88F for the payment of money to a third party were made at the suit of an industrial union, the Act made no provisions for the industrial union to hold any

money recovered in trust for the third party. These enforcement provisions, it was argued, clearly implied that proceedings under s.88F can be brought only by a party to the contract or arrangement impugned. Finally it was submitted that the Act conferred no express power on an industrial union to initiate proceedings under the section and that no such power could be implied. 10

It was submitted on behalf of the union, however, that the answer to the question of jurisdiction depended upon the true construction of s. 88F read in the context of the Act as a whole and that on that true construction an industrial union of employees with a sufficient interest in the relevant area of industry was a competent applicant for relief under the section. The union's interest was demonstrated by the fact that, on its application, an award had been made for parking attendants and would have been applicable to the partner parties to the contract if they had been employees. The section was silent 20 on the question of who might set in motion

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the jurisdiction conferred by it but other sections, such as s.111A, did specify competent applicants. The section had been a novel enactment and there was no <u>a priori</u> reason for applying to its construction the rules of the common law, such as those referred to in <u>Gouriet's Case</u>. It found its place in a statute establishing a system of industrial arbitration the purpose of which was to enable common law contractual rights to be

over-ridden in the public interest by awards or orders and which accorded to industrial unions of employees and of employers a special role. It was significant that s.88F(1) referred to "an order or award", and that pars (c), (d) and (e) of s.88F(2) were concerned not only with the effect of a challenged transaction on an individual but with its effect on strangers to the transaction and, in particular, on the public and on other employers 10 and industrial unions interested in the relevant industry. As originally enacted in 1959, the section conferred jurisdiction not only on the Commission but on conciliation committees but it was not until 1966 that provision had been made for a personal remedy sounding in terms of money and at the same time the jurisdiction had been restricted to the Commission. Under the section as originally enacted, proceedings before a committee could have been commenced only in the manner specified in s.74 and an industrial union of employees whose members were employees in the industries or callings for which a committee 20 had been established would have been a competent applicant. It would be wrong to construe s.88F(1) as having been reduced in scope by the amendments made in 1966. If in the period 1959 to 1966 an industrial union of employees was a competent applicant to a committee, it must also have been a competent applicant to the Commission and the 1966 amendment should not be construed as having altered that state of affairs. It has long been recognized

in the Commission and the superior courts that an individual party to the transaction always has been a competent applicant to the Commission and that has never been challenged but industrial unions with a proper interest were also intended to be competent applicants both before and after the 1966 amendments.

We will now state our views on the question which has been argued. We agree with the submission made on behalf of the union that the proper answer depends upon the construction to be given to s.88F read in its setting in the Act and we think that the task of construing it is facilitated by a consideration of the history of the section. Counsel for the respondent submitted that we were not entitled to refer to the history of the legislation unless some ambiguity or defect in it was apparent but we do not agree with that submission. The Commission has frequently found it helpful in construing the oft-amended Industrial Arbitration Act to look at the history of a particular provision. See, for example, the judgment of the Commission in Court Session in the Carters and Motor Waggon Drivers Case[7] where the Commission said:

> Now it is true that what we are required to do is to interpret s.31(b), but we are obliged to interpret it in the legislative setting in which it is found, that is to say, when interpreting the section we must look at its context in the Act as a whole. Furthermore, for a proper consideration of the matter it is clearly lawful and, we think, necessary to examine the history of the prior relevant legislation.

Section 8(b) of Act No. 29 of 1959, the Industrial

Arbitration (Amendment) Act, 1959, inserted in the principal Industrial Arbitration Act, 1940, two new sections, s.88E and s.88F. The simultaneous birth and contiguity of the sections is not without significance. Section 88E provided that certain persons if not otherwise employees employed to do the work referred to in the section were to be deemed to be employees for the purposes of the Act and were to be deemed to be workers for the purposes of the Annual Holidays Act, 1944, and the Long Service Leave Act, 1955. 10

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Disregarding refinements, the persons referred to included drivers of taxi cabs, private hire cars and public motor vehicles, milk vendors, drivers of motor lorries used for the delivery of goods to the customers of a retail trader, cleaners of premises, persons performing carpentry or joinery or bricklaying or house or general painting, persons delivering bread from a vehicle and others who might be prescribed. In enacting s.88E, Parliament's intention plainly was to bring within the scope of the industrial legislation persons performing work which, if done under a contract of employment, would attract award rates and conditions but which, if done under some other form of contract, would not attract such rates and conditions. Section 88F was in these terms: 20

> The commission or a committee may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral 30

arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto --

(a) is unfair, or

(b) is harsh or unconscionable, or

(c) is against the public interest. Without limiting the generality of the words "public interest" regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or 10

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award or agreement. 20

It will be observed that, like s.88F, this section dealt with persons performing work. It was a section ancillary to s.88E and its terms evinced Parliament's intention to strike at contracts and arrangements for the performance of work designed

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to avoid the incidence of the industrial law or which were unfair, harsh or unconscionable or against the public interest. It was not concerned with the payment of money to individuals. It would not be a matter for any surprise if the legislature 30 had contemplated that industrial unions of employees or of employers should have the right to invoke the remedies provided by the new section in order to secure the maintenance of common standards of wages and conditions in an industry and it seems

beyond doubt that such industrial unions derived a right from the original s.88F to apply to a conciliation committee for an order or award under the section and further that such industrial unions were alone entitled to invoke the section by way of application to a committee. This resulted from the provisions of s.74, which provided in 1959, as it still does, as follows: 10

> (1) Proceedings before a committee shall be commenced by --
>
> (a) reference to the committee by the commission or the Minister; or
>
> (b) application to the committee by employers or employees in the industries or callings for which the committee has been established.
>
> (2) Any such application shall be in the form, and shall contain the particulars prescribed, and shall be signed by -- 20
>
> (a) an employer or employers of not less than twenty employees in any such industry or calling; or
>
> (b) an industrial union whose members are employers or whose members are employees in any such industry or calling.

It is to be noted, however, that the 1959 s.88F began by saying "The commission or a committee may make an order or award ..." and, by so doing, it invested both the Commission and conciliation committees with the jurisdiction referred to 30 in the section. If the Commission had exercised the jurisdiction conferred by the section, it would have exercised the jurisdiction

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conferred directly upon it and would not have exercised the jurisdiction conferred upon a committee. In this regard it is relevant to refer to s.30 of the Act, which provides:

> The commission, in addition to the jurisdiction and powers conferred on it by this Act, shall have the powers and may exercise the jurisdiction hereby conferred on a conciliation commissioner and conciliation committees and the chairman of a conciliation committee and on the registrar and an industrial magistrate and may exercise the powers, jurisdiction and functions of a conciliation committee in respect of any industry or calling, notwithstanding that a committee may not have been established for such industry or calling. 10

That section recognizes the two distinct sources of the Commission's jurisdiction (i) that conferred on it directly by the Act, as in the case of s. 88F and (ii) that conferred on it by 20 s.30, that is, the jurisdiction conferred by other sections on conciliation committees and the other subordinate tribunals. Where the Commission exercises the jurisdiction of one of the subordinate tribunals, it is subject to the same limitations as the subordinate tribunal in relation to the competence of an applicant. Thus, if the Commission is exercising the jurisdiction conferred on a conciliation committee by s.20 of the Act, it can act only on a reference or application made in accordance with s.74. But where the Commission is exercising jurisdiction other than that of a conciliation committee, although the sub- 30 ject matter may also be within the competence of a committee, the Commission is not subject to the limitations imposed on a committee by s.74 - see <u>Steel Works Employees Case</u>[8].

It follows from these considerations that the 1959 s.88F:

(i) directly invested the Commission with jurisdiction to make an order or award giving relief under the section and said nothing expressly as to who could invoke the section; and

(ii) invested committees with jurisdiction to make an order or award giving relief under the section but left untouched those provisions of s.74 which specified how proceedings before a committee were to be commenced and limited the power to initiate them to industrial unions, employers of not less than twenty employees and the Minister. 10

From the outset it was accepted that an individual party to a contract or arrangement was a competent applicant to the Commission. As far as we are aware, no submission has ever been made in any of the multitude of cases involving s.88F which have come before the Commission or the superior courts that such an individual was not a competent applicant. We have no doubt that the view which has been acted on is sound. 20

But what of the competence of an industrial union as an applicant to the Commission? In the only case instituted by an industrial union, In re Women's College and Miscellaneous Workers' Union[9], no point was taken as to the competence of the applicant and Sheehy J. dealt with the matter on the basis

that it was properly before the Commission. We think that the conclusion is irresistible, however, that under the 1959 s.88F an industrial union with a proper interest in the performance of work in the industry to which a contract or arrangement related, would have been a competent applicant to the Commission. The general scheme of the Act, as evidenced by s.30, is to ensure that the Commission has no less jurisdiction than the committees and other subordinate tribunals and it is impossible to believe that Parliament provided that industrial unions were to be the only competent applicants to committees but incompetent applicants before the Commission. 10

14.

Was this then changed by the amendments made to s.88F in 1966? They were prompted, no doubt, by findings made by the Commission in Agius v. Arrow Freightways (10) that an order or award made under the original s.88F avoiding a contract was not enforceable by any procedure available under the Act and that a successful applicant would have to institute further proceedings in the ordinary courts if he wished to seek the recovery of monies he had paid. Section 5 of Act No. 51 of 1966, the Industrial Arbitration (Further Amendment) Act, 1966, included the following: 20

The Principal Act is further amended --

(a) (i) by omitting from section 88F the words "or a committee";

(ii) by inserting at the end of the same section the following new subsections:-

(2) The Commission, in making an order or award pursuant to subsection one of this section, may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case. 10

(3) The commission may make such order as to the payment of costs in any proceedings under this section, as may appear to it to be just and may assess the amount of such costs. 20

By s.8(b) of the same Act, s.119 of the principal Act was amended so as to read:

(1) Where an order is made under subsection (2) of section 88F, section 92, 93, 95, 98 or 118, that any person or union shall pay the amount of any money due, or where an order is made under subsection (4A) of section 28 for the refund of any premium, fee, gift, reward, bonus or consideration or the value thereof, such order shall have the effect of a judgment for the amount of such money or for the amount of the value of such premium, 30 fee, gift, reward, bonus or consideration in the district court or court of petty sessions named in such order, or if no such court is so named, in the metropolitan district court at the suit of the Crown or person or union respectively, against the person or union against whom such order has been made; and such amount may be recovered and such recovery may be enforced by process of such court as in pursuance of such judgment.

(2) Any property of a union, whether in the hands of 40 trustees or not, shall be available to answer any order made as aforesaid.

We see no indication in the 1966 amendments that Parliament intended to change the law as it stood on the subject

of the competence of applicants to the Commission for relief under s.88F. The purpose of the legislation was to vest the s.88F jurisdiction solely in the Commission, to make the jurisdiction more efficacious by extending it to order the payment of money and to provide for the enforcement of orders for the payment of money. The amendments were silent on the question of the competency of applicants and, if any change in the existing law on that matter was effected, it would have had to be by implication. We think it highly unlikely that Parliament would have intended to effect a change when the result would be to take away from an industrial union rights which, as was pointed out in a passage from the oft-cited judgment of Sheldon J. in Davies Case[11], were designed to protect the arbitration system and provide for the avoidance of transactions regarded as inimical to the purposes of the Act. 10

As we have mentioned, counsel for Wilson Parking (N.S.W.) Pty Ltd placed some reliance on the provisions of s.119. Under that section an order made under s.88F(2) that any person or union shall pay the amount of any money due is to have the effect of a judgment for the amount of such money in the district court or court of petty sessions named in such order, or if no such court is named, in the metropolitan district court at the suit of the Crown or person or union respectively against the person or union against whom such order has been made and such amount may be recovered and such recovery may be 20

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enforced by process of such court as in pursuance of such judgment. In the present case the applicant union has sought two orders involving the payment of money:

(i) an order for payment to Mr Suneson, who, as we have explained, did not request the union to bring the proceedings. 10

(ii) an order for the payment of the union's costs.

The provisions of s. 119 appear to be appropriate in relation to an order for the payment of the applicant's costs but the application of s. 119 to an order that the company respondent pay money to a person other than the applicant presents some problems. It would have the effect of an order at the suit of the union against the company and the money ordered to be paid would be recoverable presumably by the union if not paid to the third party; who has not sought the money and could refuse to take it. However, notwithstanding such problems, we are 20 not disposed to regard the 1966 amendment made to s.119 as raising an implication that the only competent applicant for an order or award under s.88F(1) or (2) is a person who is a party to a contract or arrangement which is the subject of an action. Those provisions give the Commission a wide discretion. The order for the payment of money which is authorized by s.88F(2) is such "as may appear to the commission to be just in the circumstances of the case". Those circumstances in the present

case include the attitude of the respondent Suneson and we believe that a proper exercise of the Commission's discretion could avoid any problems of enforcement.

Our attention was drawn to an observation by Barwick C.J. in Brown and Others v. Rezitis and Others[12], where the learned Chief Justice, speaking of s.88F, said:

> In my opinion, even if the proceedings for the variation or avoidance of the contract or arrangement must be initiated by one of the parties to the contract or arrangement, the parties to the proceedings are not necessarily limited to those parties. 10

That was said in a case which was concerned not with the competence of applicants under s. 88F but with the question whether persons who were not parties to the contract or arrangement sought to be avoided could be made parties to proceedings under the section and, if they could, whether an order for the payment of money by such persons could be made. The Court unanimously answered both parts of the question in the affirmative. In our opinion the quoted statement is not to be taken as even a tentative expression of a concluded opinion formed by the Chief Justice that only a party to the relevant contract or arrangement can commence proceedings under the section. The decision of the Court depended entirely upon the construction of s.88F. Our decision in this case will likewise so depend. The decision of the High Court provides some support for the view we have formed in so far as it rejected the submission that

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the only persons who can be made parties to a proceeding under s.88F are the persons who are the parties to the contract or arrangement which is the subject of the action.

Because in our view s.88F, on its proper construction, makes an industrial union of employees with a proper interest a competent applicant for relief under the section, there is no room for the application of the principle referred to in the Stockport District Waterworks Case and Gouriet's Case. 10

For these reasons the question of jurisdiction referred by Dey J., as amended, is answered in the affirmative.

****

18.

REFERENCES

(1) 7 L.T. 545

(2) (1977) 3 W.L.R. 300

(3) (1977) 3 W.L.R. 300 at p.331

(4) (1955) 95 C.L.R. 43

(5) 80 W.N. 48 20

(6) (1977) 2 N.S.W.L.R. 515

(7) 1962 A.R. 153 at p. 156

(8) 1956 A.R. 562 at p. 569

(9) 1970 A.R. 336

(10) 1965 A.R. 77

(11) 1967 A.R. 371 at p.373

(12) 127 C.L.R. 157 at p. 163

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 391 of 1978
COURT OF APPEAL)

CORAM: STREET, C.J.
HOPE, J.A.
HUTLEY, J.A.

Wednesday, 16th May, 1979

WILSON PARKING (N.S.W.) PTY. LIMITED v. INDUSTRIAL COMMISSION OF NEW SOUTH WALES & ANOR.

JUDGMENT 10

HOPE, J.A.: The Federated Miscellaneous Workers' Union of Australia, New South Wales Branch (the union) is an industrial union registered under the provisions of the Arbitration Act, 1940, as amended, whose members include persons employed as parking station attendants. The union applied for and obtained an award in respect of persons so employed, the award being entitled the Parking Attendants, Motor Car Washers, &c (State) Award.

On 15th April, 1974, a written agreement was entered into between Wilson Parking (N.S.W.) Pty. Limited (the company) and 20 Leonard Suneson under which Mr. Suneson agreed to supervise car parks for the company. A similar agreement was apparently made by the company with Mr. C. Whalan, but he has since died. Mr. Suneson proceeded to carry out work pursuant to his agreement. At the end of 1976 he became a party to a deed of partnership expressed to take effect (as regards Mr. Suneson) in January, 1977. A fresh contract to provide services in relation to the supervision of car parks was then made by the

partnership with the company, and Mr. Suneson thereafter derived his remuneration from the partnership.

On 9th September, 1977 the union instituted proceedings before the Industrial Commission of New South Wales by a notice of motion in which it sought an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time, contracts, arrangements, conditions and/or collateral arrangements relating thereto 10 between Wilson Parking (N.S.W.) Pty. Limited and Mr. Suneson and Mr. Whalan whereby Mr. Suneson and Mr. Whalan performed work in an industry, namely, the industry covered in the award previously referred to, and in particular for an order or award in terms set out in the schedule to the notice of motion or such other orders or awards as might appear to the Commission to be just. The orders or awards set out in the schedule were:-

"(1) That the contracts, arrangements, conditions and/or collateral arrangements relating thereto:

(a) between the respondent Wilson Parking (N.S.W.) Pty. 20 Limited on the one hand and the respondent C. Whalan on the other hand; and

(b) between the respondent Wilson Parking (N.S.W.) Pty. Limited on the one hand and the respondent L. Suneson on the other hand,

whereby the respondents Whalan and Suneson performed work in an industry are void in whole ab initio on the grounds specified in the Notice of Motion herein.

(2) That the respondent Wilson Parking (N.S.W.) Pty. Limited pay to the respondents Whalan and Suneson such sum of 30 money as may appear to the Commission to be just in the circumstances of the case.

(3) That the respondents pay the applicant its costs of and incidental to these proceedings as assessed by the Commission.

(4) That this order and award shall be binding upon the parties referred to above and shall take effect on and from the day of 1977. It shall remain in force within the State of New South Wales for a period of three years and after such period until varied or rescinded in accordance with the Industrial Arbitration Act, 1940, as amended."

As appears from the recital of the body of the notice of motion the application was not limited to these orders or awards but sought others that the Commission might think proper to be made. The grounds upon which the application was made were:- 10

"1. That the said contracts arrangements conditions and/cr collateral arrangements relating thereto (hereinafter described as 'the contracts') are unfair and/or harsh and/or unconscionable.

2. That the said contracts are against the public interest.

3. That the said contracts provide or have provided a total remuneration less than a person performing the work would have received, according to law, as an employee performing such work. 20

4. That the said contracts were designed to or do avoid the provisions of an award, namely, the Parking Attendants, Motor Car Washers, &c (State) Award (hereinafter referred to as 'the award').

5. That the said contracts result in remuneration for the respondents C. Whalan and L. Suneson being substantially less than that prescribed by the award. 30

6. That the said contracts make no provision for the following benefits prescribed by the award:

hours of work, Saturday penalty, meals and crib breaks, allowance for being 'in charge' of an establishment, casual employee loading, minimum payment for each start, overtime, Saturday, Sunday and Holiday loadings, annual leave, annual leave loading, long service leave, sick leave, shirt work allowances, contract of employment, payment of wages, protective clothing, dining room accommodation, rest pause, preference of employment, clothing, compassionate leave, miscellaneous conditions and accident pay. 40

7. That the said contracts are unfair to the respondents C. Whalan and L. Suneson.

8. That the said contracts are unfair to persons employed under the award.

9. That the said contracts are subversive of the orderly control of industry, the award, general industrial standards, and the system of industrial arbitration.

10. For such other grounds and reasons as to the Commission may seem proper." 10

The application came on for hearing before Dey, J. Because of Mr. Whalan's death, the proceedings in respect of him were not pursued, but evidence was taken in the proceedings in respect of Mr. Suneson. The other parties to the partnership agreement were not joined as parties when the notice of motion was issued and they do not appear to have been joined subsequently. Before otherwise deciding the application, Dey, J., referred to the Commission in Court Session this question of jurisdiction:- 20

> "Has the Industrial Commission jurisdiction, power and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the respondent, Wilson Parking (N.S.W.) Pty. Limited and the respondent, L. Suneson, to which the union is not a party." 30

At the hearing before the Arbitration Commission in Court Session it was pointed out that the question so referred did not extend to the orders sought in paragraphs (2) and (3) to the schedule to the notice of motion, and by consent Dey, J., added the following to his reference:-

"and providing in the terms of pars (2) and (3) of the schedule to the notice of motion".

The Commission in Court Session answered the question referred to it in the affirmative. The company thereupon instituted proceedings in this court for orders:-

(1) declaring that the Industrial Commission has no jurisdiction, power and/or authority to make, upon the application of the union, orders or awards sought by the union in respect of the contract or arrangement between the company and Mr. Suneson to which it was not a party; 10

(2) prohibiting and restraining the Industrial Commission from proceeding any further in the union's application;

(3) removing the application from the Industrial Commission into the Supreme Court and quashing the decision of the Industrial Commission.

Mr. Suneson was not a party to these proceedings when they were first instituted, but by leave he was joined as a plaintiff in the course of the hearing before this court. 20

The issue between the parties concerns s.88F of the Industrial Arbitration Act, 1940, as amended, which in its present form provides:-

"88F. (1) The commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto - 30

(a) is unfair, or

(b) is harsh or unconscionable, or

(c) is against the public interest. Without limiting the generality of the words 'public interest' regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or 10

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award or agreement.

(2) The commission, in making an order or award pursuant to subsection (1), may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case. 20

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

This section had its origin in an amendment effected by the Industrial Arbitration (Amendment) Act, 1959, which inserted in the principal Act a s.88F in terms similar to the present s.88F (1), save that the words "or a committee" appeared after the words "the Commission" at the commencement of the section. In Agius v. Arrow Freightways Pty. Limited (1965) 65 A.R. (N.S.W.) 77 the problems of enforcing any order or award made under the section were discussed by Beattie, J., (as he then was) and reference was also made to the fact that Conciliation Committees had jurisdiction to hear these applications. In the result the 30

Industrial Arbitration (Further Amendment) Act, 1966, amended the section by deleting the words "or a committee", and by inserting sub-sections (2) and (3).

In many provisions of the Industrial Arbitration Act express authority is given (although not always exclusively) to specified persons to take particular proceedings, or to take proceedings before particular bodies. The present question arises because s.88F does not specify who may initiate proceed- 10 ings seeking the relief which it provides. There is one reported decision in which an industrial union initiated an application under the section: In re Women's College and Miscellaneous Workers' Union (1970) A.R. (N.S.W.) 336. This application was heard by Sheehy, J., who dealt with the matter without addressing himself to the question of the union's competence, since the matter had not been argued by the parties. Sheehy, J., stated, as is undoubtedly the fact, that it had always been understood that the aggrieved party to a contract or arrangement would always have the right to make an application. It has 20 been affirmed in the High Court that persons who are not parties to the contract or arrangement may be respondents to the proceedings. In Brown v. Rezitis (1970) 127 C.L.R. 157 at pp. 163-164, Barwick, C.J., in a passage quoted in the Commission's judgment, said:-

> "In my opinion, even if the proceedings for the variation or avoidance of the contract or arrangement must be initiated by one of the parties to the contract or arrangement, the parties to the proceedings are not necessarily limited to those parties." 30

The Commission said that this statement was not to be taken as even a tentative expression of a concluded opinion by the Chief Justice that only a party to the relevant contract or arrangement could commence proceedings under the section, and I would respectfully agree with this view. It being conceded by all parties to the present proceedings, and supported by ample authority, that a party to the contract or arrangement can be an applicant, and that such a party, or a person who is not a party to the contract or arrangement can be a respondent, the question for decision is whether an industrial union registered under the Industrial Arbitration Act, 1940, which is not a party to the contract or arrangement but whose members include employees in the industry in which a person performs work as a result of the contract or arrangement, can be an applicant. 10

The Arbitration Commission considered that the section should be construed in the light of the context of the Act and of its history. Section 88F was initially inserted in the Industrial Arbitration Act at the same time as s.88E, which provided that certain persons if not otherwise employees employed to do the work referred to in that section were to be deemed to be employees for the purposes of the Industrial Arbitration Act and to be workers for the purpose of the Annual Holidays Act, 1944, and the Long Service Leave Act, 1955. The persons to which this section applied included the drivers of taxi cabs, private hire cars and public motor vehicles, milk vendors, 20

drivers of motor lorries used for the delivery of goods to the customers of a retail trader, cleaners of premises, persons performing carpentry or joinery or bricklaying or house or general painting, persons delivering bread from a vehicle, and other prescribed classes of persons. As the Commission pointed out, s.88E was intended to bring within the scope of the industrial legislation persons performing work, which, if done under a contract of employment, would attract award rates and conditions but which, if done under some other form of contract, would not attract those rates and conditions. The Commission suggested that s.88F was ancillary to s.88E, for it dealt with persons performing work in an industry, and it evinced a legislative intention to strike at contracts and arrangements for the performance of that work designed to avoid the incidence of the industrial law or which were unfair, harsh or unconscionable or against the public interest. In its original form it was not concerned with the payment of money to individuals. 10

Having expressed the view that it would not be a matter for any surprise if the Legislature contemplated that industrial unions of employees or employers should have the right to invoke the remedies provided by the new section in order to secure the maintenance of common standards of wages and conditions in an industry, the Commission went on to point out that the jurisdiction conferred by the original s. 88F on Conciliation Committees undoubtedly resulted in unions having a right to initiate an application. This right flowed from s.74 of the Act, which 20

provided that proceedings before a Conciliation Committee should be commenced, for relevant purposes, by an application to the Committee by employers or employees in the industries or callings for which the Committee has been established, and that the application should be signed by an employer or employers of not less than twenty employees in any such industry or calling or by an industrial union whose members are employers or whose members are employees in any such industry or calling. It went on to point out that the Commission had two different sources for its jurisdiction, one flowing from jurisdiction conferred on a Conciliation Commissioner or a Conciliation Committee, the Chairman of such a committee, the Registrar or an industrial magistrate, and the other flowing from the direct conferral of jurisdiction upon the Commission. In the former case the Commission is constrained by the same jurisdictional limitations as the tribunal or person to whom jurisdiction is initially given by the Act. It cannot be and is not so limited where jurisdiction is directly conferred upon it. Since the result of the 1959 legislation was that unions had a right to make an application under s.88F to Conciliation Committees, the Commission concluded that its own jurisdiction could not have been more limited. An industrial union accordingly now has the right to initiate proceedings under s.88F before the Commission unless that right had been revoked by the 1966 amendments. The Commission concluded that this was not the effect of those amendments, which were designed to vest

jurisdiction under the section solely in the Commission, and to make that jurisdiction more efficacious. Accordingly the union's application was properly made.

I respectfully agree with the conclusions of the Commission that under the 1959 legislation an industrial union might be an applicant for an order or award under s.88F, and that the 1966 amendments to the section did not deprive unions of this right. I agree with the reasons given by the Commission 10 for these conclusions, but there are some further reasons which I would like to add. I propose also to deal with what may be a separate question, namely, whether, assuming a union can be an applicant, it can seek and obtain an order for the payment of money under s.88F(2), and also with the question whether the present proceedings have been brought prematurely.

Section 88F appears in Part VIII of the Industrial Arbitration Act which is headed "Awards". In its judgment the Commission discussed the context of the section and the role which industrial unions play in the policing of the Act. This 20 context, and the history of s.88F, seem to me to provide cogent reasons for the conclusion that an industrial union whose members include employees in the industry in which a party to a contract or arrangement performs work may initiate an application under s.88F. The fact that neither party to the contract or arrangement may wish to have any award or order made under the section does not seem to me to justify a contrary conclusion. Contracts or arrangements to which the section

applies directly affect the parties to it, but may also affect other persons in the same industry, whether employers or employees. A person seeking work may well be willing to enter into an agreement not complying with the terms of an award which would be applicable were he an employee, and may be quite unwilling to have the contract challenged, because the result may be loss of work. The policy of the legislation is such that trade unions, for the sake of their members and the maintenance of conditions of employment which they have obtained, could well have a very direct industrial interest in seeking to set aside or otherwise have varied such a contract, which by itself, or with other contracts of a similar kind, could be subversive of the system of industrial regulation established by the Act. Although it may be a less likely position, an employer or organisation of employers, who complies with or whose members comply with, the provisions of an award might also be concerned to challenge contracts or arrangements resulting in cheaper labour for competitors. If industrial unions had a right to be applicants under the 1959 legislation, it is difficult to imagine that the Legislature intended to deprive them of that right by the 1966 amendments, either because this difficult jurisdiction was left solely with the Commission, or because the Commission was given power to order the payment of money. This power did not change the nature of the Commission's jurisdiction, but gave it more teeth.

Apart from these general considerations, the provisions of the section itself justify this conclusion. As well as

being empowered to make an order, the Commission is empowered to make an award. It was submitted that the use of the expression "order or award" in s.88F, and indeed in the other sections of the Act where it appears, was a hendiadys, and that there was no distinction between an "order" and an "award" which the Commission might make under the section. That this view is not accepted generally in respect of the use of the words in the Act appears in a number of reported decisions of 10 the Commission, and that it is not accepted in respect of their use in s.88F appears in the decision of the Commission in Court Session in Imisons Metal Sand Filling Suppliers Pty. Ltd. v. Rezitis (1969) A.R. (N.S.W.) 373. It appears also from the provisions of ss. 87 and 88 of the Act, which prescribe a number of matters concerning the operation of awards which do not apply to orders. In s.88F itself, an award may be made under the provisions of s.s. (1); it is only an order, and not an award, that may be made under s.ss. (2) and (3). In s.s. (2), the Legislature recognises this circumstance by providing that 20 the Commission may make an "order" as to the payment of money in making an "order or award" pursuant to s.s. (1).

It may be that the Commission normally makes orders under s.88F (1) rather than awards, but it is empowered to make an award, and situations could exist in which an award might be appropriate. Under s. 87, one feature of an award is that it has effect for a period, not exceeding three years, specified in the award, and after that period until varied or rescinded.

If the Commission wished to take action pursuant to an application under s.88F(1) without reserving any right to review the effect of what it does, then it would have to make an order. If it wished to be able to review from time to time the remuneration or other conditions under which work is performed in the way in which it does when it makes what might be called an ordinary industrial award, it might be appropriate to make an award. It may be that an award can only be made in respect of employer-employee relationships. If this is the case, there would still be room for making awards under s.88F(1). The challenged contract or arrangement may create an employer-employee relationship, or a contract for services might be varied so as to become a contract for service. This may appear to be a large step for the Commission to take, but the power to vary "in whole or in part" any contract or arrangement is an extraordinarily wide power, and seems to me to be wide enough to empower the Commission to make such a variation in appropriate cases. In respect of such a contract as Mr. Suneson made with the company on 15th April, 1974, such a variation may not be a very significant one. Without attempting to investigate all the possibilities, there is room for the making by the Commission of awards when applications are made under s.88F, and their making is expressly authorised by the section. It is difficult to imagine that the 1966 amendments were intended to have the effect, or had the effect, of depriving unions of a previously existing right to apply to have an award made.

If the Commission has jurisdiction to make an award under s.88F upon the application of a union, I do not think that it would be deprived of jurisdiction because, after hearing the case, it decided that it would be appropriate to make an order rather than an award. Once properly seised of the matter, it is for the Commission to decide what award or orders it should make. For this reason I do not think that the question whether the Commission has power to make an order for the payment of money in an application initiated by a union, against the will of both parties to the contract or arrangement under challenge, has decisive importance. However it has been much debated before us, and the union sought such an order in the notice of motion. Accordingly I shall deal with it.

If the view be right that s.88F is part of the "industrial policing" provisions of the Act so that a contract or arrangement can be challenged even though the parties to it wish to maintain it, there is no reason why the Commission should not have power to make an order for the payment of money, even though it is not made upon the application of the party to the contract or arrangement who performs the work. Apart from this general consideration, in challenging the power of the Commission to make such an order, much reliance was placed upon the absence in s.88F of provisions such as those to be found in s.92 of the Act. Section 92(4A) provides that amounts ordered to be paid in proceedings under the section may be paid to the union secretary or other union officer who has taken the proceedings, and that the secretary or other officer shall hold

those amounts (less costs) in trust for the person on whose behalf the proceedings were taken. Since there is no such machinery in s.88F, only a party to the contract or arrangement, so it was submitted, could apply for an order for the payment of money.

There are at least two considerations which deprive this submission of much of its force. In the first place, there would seem to be no reason why the Commission should not order one respondent to pay money to another respondent, the respondent payee being a party to the contract or arrangement challenged by an applicant union. The respondent to whom the money is ordered to be paid could then take the appropriate proceedings under s. 119 of the Act to enforce the order, although he could not be required to do so. In the second place, s. 95 of the Act authorises the taking of proceedings by the secretary of an industrial union, and for the making of orders in the proceedings for the reimbursement of wages lost by an employee, who may not be a party to the proceedings. The section contains no provisions such as those to be found in s.92(4A), but if an order were made, s. 119 would seem to require that the union secretary, and not the employee, should enforce it. If the union secretary did enforce it, he would undoubtedly hold the money in trust for the employee. The former course, that is, the ordering of a respondent to pay the money to the respondent who has done the work, seems to me to be the more appropriate, but the absence of special machinery provisions in s.88F does

not, in my opinion, preclude the Commission from making an order under s.88F(2) at the request of a union applicant.

The remaining question is whether the present proceedings are premature. The reference by Dey, J., to the Commission in Court Session was made pursuant to s. 30C. This section authorises the reference to the Commission in Court Session of questions of jurisdiction. When such a question is referred, the Commission in Court Session, pursuant to s.30B(1)(b), hears and determines the question. Section 30C authorises a single member of the Commission, if he does not refer it to the Commission in Court Session, to "decide the question of jurisdiction", and presumably this is what the Commission in Court Session does if the question is referred to it. Accordingly there has been a decision of the Commission made in the course of a proceeding which is still before it.

By virtue of s. 84(1)(a) of the Act, the decision which the Commission has made is final, and the proceeding before it is not liable to be challenged, appealed against, reviewed, quashed or called in question by any court of judicature on any account whatsoever. By virtue of s. 84(1)(b) no writ of prohibition or certiorari shall lie in respect of the proceeding providing it relates to an industrial matter or any other matter which, on the face of the proceedings, appears to be or to relate to an industrial matter. The effect of privative provisions such as these has been limited by a long series of judicial decisions, but it is not necessary to consider them for present purposes. The decision of the High Court in

Stevenson v. Barham (1976-1977) 136 C.L.R. 190 is authority for the proposition that notwithstanding s. 84, an order in the nature of a writ of mandamus will lie against the Commission where it has, by a final order, wrongly declined to exercise jurisdiction in an application under s.88F. The decision of the same court in Brown v. Rezitis (1970) 127 C.L.R. 157 is authority for the proposition that a writ of certiorari may issue against the Commission to quash final orders made by it without jurisdiction in respect of an application under s.88F. In that case the jurisdiction to issue the writ was challenged. Menzies, J., expressed the view that s. 84 did not preclude the issue of the writ because "section 88F confers upon the Commission the power to make orders which cannot be comprehended within the description of orders relating to or appearing to relate to industrial matters". Barwick, C.J., with whom the other members of the court (save Menzies, J.,) agreed, did not express any view on this matter, but based his conclusion that certiorari should issue upon the lack of any conveivable connection of the order which the Commission had made with the contract which, in the proceedings, it had declared void. His conclusion assumes, of course, that s.84 did not preclude the issue of a writ of certiorari.

If the correct view be that the Commission has no power to make any award or order upon an application under s.88F initiated by an industrial union, the proceedings before it can be challenged in this Court although no final award or order has been made. On the other hand there are no doubt some cases

where it would be more appropriate if the challenge to jurisdiction awaited the making of an award or order by the Commission. In cases such as Brown v. Rezitis (supra) where the only challenge to jurisdiction is in respect of the particular order made by the Commission, the challenge must, of course, await the making of that order. Problems can arise for this Court if the challenge before it to the jurisdiction of the Commission is one which may be dealt with more appropriately after the making of a final award or order, but the parties do not wish to argue the matter. I have had the benefit of reading the judgment of Hutley, J.A. and I agree with him that it would be of assistance to the Court if it had the benefit of argument where questions as to its own jurisdiction do or may arise. The appropriate course in such cases would seem to be that which has been adopted in other classes of case, namely, for the Court to invite the Attorney General to assist it with submissions on the matter. Having regard to my conclusion as to the jurisdiction of the Commission, a matter which was fully argued by the parties, this is not an appropriate case in which to adopt that course.

In my opinion the Commission in Court Session was correct in giving an affirmative answer to the question referred to it by Dey, J. and the summons should be dismissed with costs.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 391 of 1978
COURT OF APPEAL)

CORAM: STREET, C.J.
HOPE, J.A.
HUTLEY, J.A.

Wednesday, 16th May 1979

WILSON PARKING (N.S.W.) PTY. LIMITED & ANOR. v.
INDUSTRIAL COMMISSION OF NEW SOUTH WALES & ANOR.

JUDGMENT 10

HUTLEY, J.A.: In this amended summons the plaintiffs seek an order that the Industrial Commission of New South Wales has no justification to make, at the application of the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, an order or award concerning a contract or arrangement between the plaintiffs, and consequential orders. The summons, which was originally taken out by the first named plaintiff alone, was amended as a result of questions from the bench.

Wilson Parking (N.S.W.) Pty. Limited and Suneson were parties to an arrangement under which Suneson undertook to carry 20 out the supervision of car parks as requested by the company. There appear to have been two arrangements, one simply between Wilson Parking and Suneson and the other between it and a number of persons including Suneson.

The propriety of the Commission entertaining any application touching the partnership without all the partners at the time of the application being parties was mentioned, but Wilson Parking stated that it did not propose at this stage to take

any point as to any deficiencies of the parties. Later, when Suneson was joined as a plaintiff, he also took no objection.

When the application first came before the Commission Dey, J., pursuant to s. 30C of the Industrial Arbitration Act, referred the question of jurisdiction to the Commission in court session.

The terms of reference are as follow:

> "Has the Industrial Commission jurisdiction, power and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in any part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the respondent, Wilson Parking (N.S.W.) Pty. Limited and the respondent, L. Suneson, to which the union is not a party." 10

The Commission held that it had jurisdiction under s.88F. The plaintiffs in these proceedings then sought the orders referred to above. It was not suggested by either party that this court was not competent to entertain the proceedings; the only question argued was whether on the true construction of s.88F proceedings of the kind could be brought by the union despite the fact that neither party to the contract or arrangement wished the Commission to entertain them. 20

S.88F as originally enacted by the Industrial Arbitration (Amendment) Act 1959 had significant differences from the section at present in force. Orders could be sought not only from the Commission but from a Conciliation Committee, and subsections (2) and (3) were not in the original provision, but were added by Act No. 51 of 1966. The original Act was found to be 30

ineffective because though contracts or arrangements caught within its terms could be declared void or varied, it was held that it was necessary to resort to other proceedings in order to obtain refunds of money (In re Agius and Arrow Freightways Pty. Ltd., 64 A.R. 599). In the original form of s.88F proceedings could be commenced before a Conciliation Committee. Section 74 of the Industrial Arbitration Act provided that such applications "shall be commenced by an employer or employers 10 of not less than 20 employees (s.74(2)(a)) or an industrial union whose members are employees in any such industry or calling" for which the committee has been established. It would seem to have been very arguable whether it was possible for an individual to have brought a claim under s.88F as originally enacted before a committee. However, in the Agius case, which was brought before the Commission, it was not suggested that there was any similar restriction in cases before it. The Commission, in the judgment under appeal, said:

> "We think that the conclusion is irresistible however 20 that under the 1959 section 88F an industrial union with a proper interest in the performance of work in the industry to which a contract or arrangement related, would have been a competent applicant to the Commission."

This follows from s.30 of the Act under which the Commission has the powers, jurisdiction and function of a Conciliation Committee in respect of any industry or calling.

Both parties in these proceedings accepted that this was the case. Indeed, a real difficulty is to see how any individual could be the plaintiff either before a Conciliation 30

Committee or the Commission unless he was an employer of not less than 20 employees. However, not only was an individual applicant accepted as a plaintiff before the Commission prior to the 1966 amendments but except for one case referred to in the judgment of the Commission where no point as to competence was taken (In re Women's College and Miscellaneous Workers' Union, 1970 A.R. 336) there does not appear to have been any case where the application was by an industrial union of em- 10 ployees, nor does there appear to have been an application by an employer or an industrial union of employers.

It was conceded by counsel for the union that individual parties to the contract or arrangement which was challenged were competent applicants under this section. There are at least two decisions in which the High Court has dealt with individual applications in which it was assumed that such could be brought, namely Brown v. Rezitis, 127 C.L.R. 157 and Stevenson v. Barham, 136 C.L.R. 190.

The right of an individual party to the contract or 20 arrangement to bring proceedings being unchallenged, it is against this background that the right of a union to bring such proceedings must be considered. The question is, have the amendments by implication taken away this right?

It was contended by counsel for the plaintiffs that the object of removing the jurisdiction of the Committee was to achieve this result. As a matter of construction, I am unable to agree with this stage of his argument. The legislature

having by the amendment made in 1966 increased the power of the Commission so that it could deal with all aspects of the invalidation or variation may well have taken the view that these powers should only be exercised by trained lawyers, hence their removal from a Conciliation Committee. The powers are most extensive and have been imaginatively exercised by the Commission. In Brown v. Rezitis, at p. 164 Barwick, C.J., speaking of subsection 2, said: 10

> "But underlying sub-s (2) is I think a broad concept of a restitution of the parties to a situation which existed before the making of the contractual arrangement as well as in an appropriate case to make remedial provision for what has taken place or been done under the contract in the meantime. This, it seems to me, cannot of necessity and in all cases and with relation to an arrangement varied or avoided on each of the grounds in sub-s(1) be confined to an order for payment of money by one of the parties. In some cases, as I have said, there will be 20 persons who are not the parties to the contract but who have in fact participated in its making and there may be persons who have received money indirectly from one of the parties to the contract or who may be holding money derived therefrom for one of the parties. Consequently, I am of opinion that the power to order the payment of money is not limited to the making of an order for the payment of money by one of the parties to the contract or arrangement varied or avoided."

Powers of this nature can really only be exercised by persons 30 with a mastery of the law of property and contract.

The inference, if it be drawn, that the union had by implication had its previous right of action taken away is to be derived from the terms of sub-s(2). I have great difficulty in seeing how the Commission at the suit of a union can make any of the orders of the kind envisaged in sub-s(2). The union which brings the proceedings may not have the information

necessary to enable any such order to be made; for example, if it based its application on sub-cl(c) and relies upon the ill effects the contract may have upon the system of apprenticeship it may well make out a case without any knowledge of the financial effects upon the parties to the arrangement at all. Similarly, only if the tribunal has full knowledge of the operation of the agreement or arrangement in an individual case can it hold that it is unfair, or harsh, or unconscionable. 10

If the legislature had envisaged the proceedings being brought by a union, and in such proceedings the Commission would exercise its powers under sub-s(2), it was to have been expected that the legislature would have provided for the disposition of the proceeds of this litigation in a manner analogous to the provisions of s. 92(4A), which provide for the disposal by the union of moneys which it has obtained in proceedings brought on behalf of the worker.

Counsel for the union pointed out that the Commission was not compelled to exercise all its powers and even if it is 20 impossible for the Commission to make all the orders at the behest of the union which it could have made at the behest of an individual applicant, the way would still be open for the individual to enforce his rights arising from the situation brought about by the avoidance of the contract or its variation. However, the powers which the Commission can exercise under sub-s(2) at the behest of an individual applicant are more extensive than arise merely from the avoidance of the contract or

arrangement. As Barwick, C.J. pointed out in the passage quoted above, the Commission can make orders which affect those who indirectly participate in the benefits from the impugned contract. Though it is impossible to anticipate all the remedies which would be available to a party to such a contract or arrangement which has been declared void or varied, I am at a loss to see how proceedings could be brought against some persons who may be reached by orders of the Commission in every case. For example, though arrangements are declared void or varied, I doubt whether such declaration that an arrangement with a company is void could be effective to permit ordinary court proceedings to recover money from its directors. Orders of this kind are common in the Commission (Manni v. Scully, 1967 A.R. 606; Henrick v. Star Carrying Co. Pty. Ltd., 1968 A.R. 445, and other cases discussed in Nolan & Cohen: New South Wales Industrial Laws, 4th ed. 554B).

The absence of any provision by which a union is accountable to the individual who has been a victim of an impugned contract or arrangement is in my opinion a strong reason for holding that it was the intention of the legislature that the union's power to obtain orders should be confined to the power to obtain orders declaring void or varying the contract or arrangement. The situation which here exists with both parties to the contract actually resisting the intervention of the union on the basis upon which union power is upheld that awards are not to be circumvented, must be common. The union

could not even advance the proposition that it was acting to protect this worker or was acting as his representative or agent. It was his enemy. The Commission could not, in my opinion, make an order for the payment of money to the union on the basis that it was accountable to a party to the invalidated contract without special statutory authority, of which there is none. It is noteworthy that in the only case in which an application has been made by a trade union, one in which the parties to the contract had no desire for union intervention, the only order was to declare the contract void (re Women's College and Miscellaneous Workers Union, 1970 A.R. 336). It does not appear from the report that the contractors were made parties to the proceedings, though I assume they were. They took no part in the proceedings and it would have been impossible for the union to look after their interests because it was engaged in frustrating them.

However, it does not follow that because proceedings by unions cannot result in the comprehensive orders which can be made in favour of individual applicants, and that orders made on the application of a union may leave a contractor in a worse position from that in which he would have been if he had been an applicant, there is no jurisdiction to entertain them. It does not justify an inference that the legislature intended to take away the jurisdiction it had already invested.

Even if the proper inference was that applications by unions for orders had been taken away by implication, it is not

to be inferred that the authority of the Commission to make an award on the application of a union had gone. How an award could be made is somewhat difficult for me to see, but the statutory power is there and this application includes a request for an award. This court cannot speculate in advance as to what will be the result of the hearing. Only if no order or award could be made which was within jurisdiction could prohibition go. In The King v. Wallis, 78 C.L.R. 529 at 554, Dixon, J. said in respect of an argument that an application for prohibition was premature: 10

> "The objection was taken to the jurisdiction of the Commissioner to make any award or order falling at all within the description claimed. The Commissioner has nevertheless accepted jurisdiction over the application and the claim or demand. In my opinion those facts form a sufficient foundation for the remedy of prohibition."

No objection to this court intervening at this stage in the proceedings was advanced by either party. However, the assumption of jurisdiction is very unsatisfactory and if jurisdiction to grant an order in the nature of the prohibition is discretionary, I would have favoured refusing the exercise of it even if a case had been made out. The question as to whether prohibition is discretionary or ex debito justitiae has given rise to an extraordinary measure of judicial and learned conflict (The King v. President of Commonwealth Court of Conciliation and Arbitration, 22 C.L.R. 261 particularly at 267; Thio: Locus Standi & Judicial Review Ch.4; Yardley: Prohibition & Mandamus, 73 L.Q.R. 534; DeSmith: Judicial Review of Administrative Action, 3rd ed. 367). Without the benefit of argument 20 30

I do not propose to deal with the question, but my acquiescence in dealing with the substance of the case should not be stretched to acceptance of it being proper to do so.

The application here made has all the vices which the application which succeeded at first instance in World Hosts Pty. Limited v. Mirror Newspapers Ltd. had. On the second time the case was heard in the Court of Appeal (World Hosts Pty. Limited v. Mirror Newspapers Ltd., 1978 1 N.S.W.L.R. 189 at 203, 10 I said:

> "The decision already given by the court was in peculiar and unsatisfactory circumstances. The issue before the court was whether it was possible for the plaintiff to make a case against the defendant ... This drove the court into speculating about possible situations, not proved in evidence ....."

It may be that the orders when made will be beyond jurisdiction by reason of their terms or the manner under which the hearing is conducted. The applicants may even win on the facts. 20

I would also wish to reserve the question as to whether, and at what stage of the proceedings, prohibition can go to the Commission where the proceedings are brought by a union for an order or award. I have the greatest difficulty in seeing that at this stage of the proceedings they do not on their face relate to a matter which appears to be or relate to an industrial matter (see s.84(1)(b) and s(5(1)). The decision of the High Court in Stevenson v. Barham, 136 C.L.R. 190, was given in relation to an application in the nature of mandamus. Whether it is proper to grant an order of this nature against the 30 Commission which is a superior court of record or consistently

with s.84 was not argued. In Brown v. Rezitis, 127 C.L.R. 157, the orders challenged were final, and after they had been made the Commission was functus officio, and it was a pure question of law as to whether the privative provisions of s.84 applied. The status of the proceedings of the Commission at an interlocutory stage (as these are) is in my opinion quite different. Unassisted by argument, I cannot see that on their face they do not relate to an industrial matter. 10

The propriety of intervention by prohibition at this stage is in my opinion also made dubious by the decision of the High Court in In the Matter of an Application for a Writ of Prohibition Against the Judges of the Federal Court of Australia and McDowell Pacific Ltd. ex parte Pilkington ACI (Operations) Pty. Ltd., 53 A.L.J.R. 230, especially at 233. Again, no argument was addressed to the court on this matter.

The court was told that it was the intention of both parties to take any judgment of this court to the High Court, if possible. The Industrial Commission of New South Wales, 20 though a party, was represented by the Crown Solicitor but submitted and took no part in the argument. Where important matters of principle involving the relationship between the Supreme Court and the Industrial Commission are involved, the court should have the assistance of a detailed argument. Where, as here, neither party is anxious to challenge the court's jurisdiction to interfere with the decisions of the Industrial Commission, it would seem to me appropriate for the

Commission to do more than just submit. It should appear as a contestant in order to protect its interests and to assist the Court. If leave is granted by the High Court it would, in my opinion, be appropriate for the argument on jurisdictional questions to be presented by counsel appearing for the Commission so that what I regard as fundamental problems do not go by default or have to be decided without the benefit of full argument. 10

There are precedents for courts whose jurisdiction or constitution are in issue playing an active role; for example, The Attorney General of the Commonwealth of Australia v. The Queen & Ors.; Kirby & Ors. v. The Queen & Ors. (the Boilermakers' case) 95 C.L.R. 529, is such an instance.

In my opinion the summons should be dismissed with costs.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 391 of 1978
COURT OF APPEAL)

CORAM: STREET, C.J.
HOPE, J.A.
HUTLEY, J.A.

Wednesday, 16th May, 1979

WILSON PARKING (N.S.W.) PTY. LIMITED
v.
INDUSTRIAL COMMISSION OF NEW SOUTH WALES AND ANOR. 10

JUDGMENT

STREET, C.J.: I agree with the judgment of Hope J.A. and with the order he proposes.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 391 of 1978
COURT OF APPEAL)

CORAM: STREET, C.J.
HOPE, J.A.
HUTLEY, J.A.

Wednesday, 16th May, 1979.

WILSON PARKING (N.S.W.) PTY. LIMITED & ANOR. v.
INDUSTRIAL COMMISSION OF NEW SOUTH WALES & ANOR.

Summons for declaration as to jurisdiction of Industrial Commission of New South Wales under s.88F of the Industrial Arbitration Act 1940 and orders in the nature of a writ of prohibition directed to the Commission - application for orders or an award by an industrial union of employees - orders which may be made on an application under s.88F by a trade union - whether application is premature - effect of s.84 of the Act - need for assistance to this court when questions of the jurisdiction of the Industrial Commission arise for determination. 10

ORDER 20

Summons dismissed with costs.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 391 of 1978
COURT OF APPEAL)

IN THE MATTER OF THE INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (NSW) PTY. LIMITED

Plaintiff

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Defendants 10

MINUTE OF ORDER

The Court Orders that -

1. The Summons be dismissed with costs.

Ordered 16th May 1979

Entered 17 July 1981

By the Court

A.W. Ashe (S'gd) (L.S.)
Registrar

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 350 of 1980
COURT OF APPEAL)

IN THE MATTER OF

WILSON PARKING (NSW) PTY. LIMITED

Appellant

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH
TORE JOHN LENNART SUNESON
HAROLD SIMPSON 10
JOHN McCORMACK
WILLIAM SMITH
LIONEL DOUGLAS WHITTINGHAM
NORMAN RICHARDSON
ALLAN O'NEIL
GEORGE WILLIAM WILKS
INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Respondents

MINUTE OF ORDER

The Court orders that: 20

1. Final leave to appeal to Her Majesty in Council from the Judgement of this Court be and the same is hereby granted to the Appellant.

2. Costs of the Motion be the costs in the Appeal.

Ordered 20 July, 1981.

Entered 24 July, 1981.

By the Court

A.W. Ashe (S'gd) (L.S.)

Alyson Wendy Ashe
Registrar

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 350 of 1980
COURT OF APPEAL)

IN THE MATTER OF

WILSON PARKING (NSW) PTY. LIMITED

Appellant

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH
TORE JOHN LENNART SUNESON
HAROLD SIMPSON 10
JOHN McCORMACK
WILLIAM SMITH
LIONEL DOUGLAS WHITTINGHAM
NORMAN RICHARDSON
ALLAN O'NEIL
GEORGE WILLIAM WILKS
INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Respondents

I, ALYSON WENDY ASHE, Registrar of the Court of Appeal of the Supreme Court of New South Wales DO HEREBY CERTIFY AS FOLLOWS: 20

1. That this Transcript Record contains a true copy of all such Orders, Judgements and Documents as have relation to the matters of this Appeal and a copy of the reasons for the respective Judgements pronounced in the course of the proceedings out of which the Appeal rose.

2. That the Respondents herein have received notice of the Application to the Court of Appeal of the Supreme Court of New South Wales for Final Leave to appeal to Her Majesty in Council AND have also received notice of the despatch of this Transcript Record to the Registrar of the Privy Council. 20

DATED at Sydney in the State of New South Wales

THIS 27th day of July 1981

A.W. Ashe (S'gd) (L.S.)

A.W. ASHE
Registrar
Certificate of Registrar
Verifying Transcript Record

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL) No. 350 of 1980

IN THE MATTER OF THE INDUSTRIAL ARBITRATION ACT, 1940

WILSON PARKING (NSW) PTY. LIMITED

Appellant

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

TORE JOHN LENNART SUNESON

HAROLD SIMPSON 10

JOHN McCORMACK

WILLIAM SMITH

LIONEL DOUGLAS WHITTINGHAM

NORMAN RICHARDSON

ALLAN O'NEIL

GEORGE WILLIAM WILKS

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Respondents

AFFIDAVIT OF SERVICE

Deponent: Vivian Shead 20
Sworn: 17.7.81

I, VIVIAN SHEAD of 111 Elizabeth Street, Sydney, in the State of New South Wales, Process Server duly make oath and say:-

1. I did on the 15th day of July, 1981 duly serve TORE JOHN LENNART SUNESON with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1" by delivering them to a Mr Dillon a Solicitor in the employ of the firm of Solicitors Messrs Smithers Warren and Tobias at 20 Bond Street Sydney. 30

2. At the time of service I said to Mr Dillon "Do you have the instructions of Tore John Lennart Suneson to accept service of this Notice of Motion and Affidavit?" and he replied that he did.

3. I did on the 15th day of July, 1981 duly serve HAROLD SIMPSON with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1" by delivering them to HAROLD SIMPSON personally at 31A Kitchner Street, Maroubra, his usual place of abode. 10

4. At the time of service I said to the person served "Are you Harold Simpson?", and he replied that he was.

5. I did on the 15th day of July 1981 duly serve JOHN McCORMACK with a true copy of a Notice of Motion

V. Shead Stephen Ingate

and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by delivering them to JOHN McCORMACK personally at 55 Torrington Road, Maroubra, his usual place of abode. 20

6. At the time of service I said to the person served "Are you John McCormack?" and he replied that he was.

7. I did on the 15th day of July 1981 duly serve WILLIAM SMITH with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by

delivering them to WILLIAM SMITH personally at 28 Gannon Street, Tempe, his usual place of abode.

8. At the time of service I said to the person served "Are you William Smith?" and he replied that he was.

9. I did on the 15th day of July 1981 duly serve LIONEL DOUGLAS WHITTINGHAM with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by delivering them to LIONEL DOUGLAS WHITTINGHAM personally at 22 Nicholson Street, Crows Nest, his usual place of abode. 10

10. At the time of service I said to the person served "Are you Lionel Douglas Whittingham?" and he replied that he was.

11. I did on the 15th day of July 1981 duly serve NORMAN RICHARDSON with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by delivering them to NORMAN RICHARDSON personally at Unit 2, 37 Nelson Street Woollahra, his usual place of abode. 20

12. At the time of service I said to the person served "Are you Norman Richardson?" and he replied that he was.

13. I did on the 15th day of July 1981 duly serve ALLAN O'NEIL with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by delivering them to ALLAN O'NEIL personally at the Cnr. Market and Sussex Streets, Sydney, his usual place of employment.

14. At the time of service I said to the person served "Are you Allan O'Neil?" and he replied that he was.

V. Shead Stephen Ingate

-3-

15. I did on the 15th day of July 1981 duly serve GEORGE WILLIAM WILKS with a true copy of a Notice of Motion and Affidavit of Brian Thomas Agnew dated 14th July 1981 a copy of which is now produced and shown to me and marked with the numeral "1", by delivering them to GEORGE WILLIAM WILKS personally at Unit 20 J. Northcott Place Surry Hills his usual place of abode. 10

16. At the time of service I said to the person served "Are you George William Wilks?" and he replied that he was

17. I did on the 16th day of July 1981 collect from Mr Dillon at 20 Bond Street Sydney a letter of acknowledgement duly signed by TORE JOHN LENNART SUNESON hereunto annexed and marked with the letter "A".

18. I did on the 15th day of July collect from HAROLD SIMPSON at 31A Kitchener Street, Maroubra, a letter of acknowledgement hereunto annexed and marked with the letter "B". 20

19. I did on the 15th day of July 1981 collect from JOHN McCORMACK at 55 Torrington Road, Maroubra, a letter of acknowledgement hereunto annexed and marked with the letter "C".

20. I did on the 15th day of July 1981 collect from WILLIAM SMITH AT 28 Gannon Street, Tempe a letter of acknowledgement hereunto annexed and marked with the letter "D".

21. I did on the 15th day of July 1981 collect from LIONEL DOUGLAS WHITTINGHAM at 22 Nicholson Street, Crows Nest, a letter of acknowledgement hereunto annexed and marked with the letter "E"

22. I did on the 15th day of July 1981 collect from NORMAN RICHARDSON at Unit 2, 37 Nelson Street Woollahra a letter of acknowledgement hereunto annexed and marked with the letter "F".

23. I did on the 15th day of July 1981 collect from ALLAN O'NEIL at the corner Market and Sussex Streets, Sydney, a letter of acknowledgement hereunto annexed and marked with the letter "G". 10

24. I did on the 15th day of July 1981 collect from GEORGE WILLIAM WILKS at Unit 20 J. Northcott Place Surry Hills, a letter of acknowledgement hereunto annexed and marked with the letter "H".

SWORN by the Deponent
at Sydney
on the 17th day of July 1981 V. Shead

Before me: 20

Stephen Ingate

Solicitor Sydney

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

LS 1. I desire to inform you that ~~I am~~/I am no longer involved in the partnership the subject of these proceedings and that

LS 2. I ~~do~~/do not wish to be represented or heard at the hearing of this matter which I am informed has been listed for 20th July, 1981 at 10.15 am at Queens Square Sydney and that

LS 3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 16th day of July 1981

L. Suneson

TORE JOHN LENNART SUNESON

This is the annexure "A" referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate

TORE JOHN LENNART SUNESON
Annexure "A" to the Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

H. Simpson

HAROLD SIMPSON

This is the annexure B referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate

Harold Simpson,
31A Kitchener Street, MAROUBRA.

Annexure "B" to the
Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

John H. McCormack

JOHN McCORMACK

This is the annexure C referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate

John McCormack,
55 Terrington Road, MAROUBRA

Annexure "C" to the
Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

WILLIAM SMITH

This is the annexure "D" referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate Bill Smith William Smith,
28 Gannon Street, TEMPE

Annexure "D" to the
Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

L. Whittingham

LIONEL DOUGLAS WHITTINGHAM

This is the annexure E referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate

Lionel Douglas Whittingham,
22 Nicholson Street. CROWS NEST

Annexure "E" to the Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

N. Richardson

NORMAN RICHARDSON

This is the annexure F referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.
Stephen Ingate Norman Richardson,
2/37 Nelson Street, WOOLLAHRA

Annexure "F" to the Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

A. O'Neill
ALLAN O'NEILL

This is the annexure G referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me. Stephen Ingate

ALLAN O'NEILL
~~58 Pellister Street, PUTNEY~~
Cnr. Market and Sussex Streets,
SYDNEY.

Annexure "G" to the
Affidavit of Service

To: Messrs Moray & Agnew
Solicitors
19th Floor
14 Martin Place
SYDNEY NSW 2000

Dear Sirs

This will serve as acknowledgement by me of a Notice of Notion and Affidavit of Brian Thomas Agnew dated 14th July, 1981 in the matter of Wilson Parking Pty Limited _v_ the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch and ors. No. 350 of 1980 in the Court of Appeal in the Supreme Court of New South Wales. 10

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3. I ~~will~~/will not be represented at the hearing of the appeal before the Privy Council in England. 20

Dated this 15th day of July 1981

G.W.Wilks

GEORGE WILLIAM WILKS

This is the annexure H referred to in the Affidavit of VIVIAN SHEAD sworn at Sydney this 17th day of July 1981 before me.

Stephen Ingate

George William Wilks,
Unit 20, J. Northcott Place,
SURRY HILLS

Annexure "H" to the Affidavit of Service