RE POLITES AND ANOTHER; EX PARTE THE HOYTS CORPORATION PTY. LIMITED AND OTHERS.

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April 12; *June* 20; *Aug.* 14.

Brennan, Gaudron and McHugh JJ.

Tribunals — Bias — Australian Industrial Relations Commission — Member of Full Bench previously acting as solicitor for party — Whether disqualified.

Industrial Law (Cth) — Proceedings in matters under Industrial Relations Act 1988 *— Costs — Not to be awarded unless proceeding vexatious or without reasonable excuse — Industrial Relations Act* 1988 *(Cth), s.* 347(1).

The requirement that a member of a tribunal should not hear a case if there is a reasonable apprehension that he might not bring an impartial and unprejudiced mind to its resolution cannot be pressed too far when the qualifications for membership of the tribunal are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issue for determination or to have formed an attitude about the way in which such issues should be determined or the tribunal's powers exercised. Qualification for membership cannot disqualify a member from sitting.

A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or court), from sitting in proceedings before the tribunal to which the former client is a party. However, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal, the former adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the former adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. Much will depend on the nature of the advisor's relationship with the client, the ambit of advice given and the issues falling for determination.

Whether a tribunal member should disqualify or refuse to disqualify himself cannot be finally determined by the member, although some weight must be given to the member's views.

Sankey v. Whitlam, [1977] 1 N.S.W.L.R. 333, at p. 346, approved.

Section 347(1) of the *Industrial Relations Act* 1988 (Cth) provided: "A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable excuse."

Held that an application in the High Court for mandamus to compel a member of the Industrial Relations Commission who had been appointed

under s. 30 of the Act to sit as a member of the Full Bench of the Commission to hear and determine an industrial dispute was a proceeding in a matter arising under the Act.

MANDAMUS.

In November 1989, a Full Bench of the Australian Industrial Relations Commission (Mr. Justice Boulton, Mr. Deputy President Polites and Mr. Commissioner Fogarty) was hearing a number of matters relating to the terms and conditions of employment of employees of The Hoyts Corporation Pty. Ltd. and related companies. The Australian Theatrical and Amusement Employees Association (the "A.T.A.E.A.") had coverage of many of the employees in Hoyts theatres and was a party to some of the matters before the Commission. After the proceedings before the Commission had been in progress for some time, Mr. Deputy President Polites accepted a submission made by the A.T.A.E.A. that, by reason of certain advice tendered by him to Hoyts in 1986 when he was in practice as a solicitor, his continued presence created a situation where a fairminded observer might reasonably perceive that he could not determine the issues in accordance with the evidence. He decided to cease sitting, and to ask the President of the Commission to appoint another Deputy President to sit in his place. On the application of The Hoyts Corporation Pty. Ltd. and the related companies Dawson J. granted an order nisi for mandamus directing Mr. Deputy President Polites to hear and determine the pending proceedings as a member of the Full Bench. The order nisi was returnable before a Full Court. Further facts relating to the proceedings before the Commission and the Deputy President's previous involvement with Hoyts are contained in the judgment of the Court.

R. Merkel Q.C. and *L. Kaufman*, for the prosecutors, referred to *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty. Ltd.* (1); *Reg. v. Industrial Commission (S.A.); Ex parte Adelaide Milk Supply Co-operative Ltd.* (2); *Livesey v. New South Wales Bar Association* (3); *Sankey v. Whitlam* (4); *Re J.R.L.; Ex parte C.J.L.* (5); *Committee for Justice and Liberty v. National Energy Board* (6); *Reg. v. Industrial Appeals Court; Ex*

(1) (1953) 88 C.L.R. 100.
(2) (1978) 18 S.A.S.R. 65.
(3) (1983) 151 C.L.R. 288.
(4) [1977] 1 N.S.W.L.R. 333.
(5) (1986) 161 C.L.R. 342.
(6) (1976) 68 D.L.R. (3d) 716.

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parte Maher (7); *S. & M. Motor Repairs Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd.* (8); *Tomko v. Nova Scotia Labour Relations Board* (9); and *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* (10).

There was no appearance by or on behalf of the respondents, though Mr. Deputy President Polites informed the Court that he would abide by any order the Court might make.

Cur. adv. vult.

June 20.

THE COURT delivered the following written judgment:—

BRENNAN, GAUDRON AND MCHUGH JJ. A Full Bench of the Australian Industrial Relations Commission (Mr. Justice Boulton, Mr. Deputy President Polites and Mr. Commissioner Fogarty) have been hearing a number of matters relating to the terms and conditions of employment of employees of The Hoyts Corporation Pty. Ltd., Delarene Pty. Ltd. and Rampton Pty. Ltd., the prosecutors. Delarene and Rampton were incorporated in 1988 and are wholly-owned subsidiaries of Hoyts. Hoyts is a motion picture exhibitor and each of the prosecutors employs staff in various capacities in Hoyts theatres throughout Australia.

The second respondent, the Australian Theatrical and Amusement Employees Association (the "A.T.A.E.A.") is an organization registered under the *Industrial Relations Act* 1988 (Cth) ("the Act") having coverage of many of the employees in Hoyts theatres. It is a party to some of the matters before the Commission. Others of the employees are members of the Theatre Managers' Association (the "T.M.A."), another registered organization which is a party to other matters before the Commission but is not a party to these proceedings.

The hearing of the proceedings before the Commission commenced on 23 November 1989 and has occupied thus far twenty-seven days during which 2,500 pages of transcript have been taken and ninety-six exhibits have been tendered. Mr. Commissioner Fogarty has conducted inspections on five days in Australia and on eight days in the United States of America. Though the proceedings were far advanced, Mr. Deputy President Polites (the first respondent) accepted a submission made on behalf

(7) [1978] V.R. 126.
(8) (1988) 12 N.S.W.L.R. 358.
(9) (1974) 9 N.S.R. (2d) 277.
(10) [1949] A.C. 134.

of the A.T.A.E.A. that, by reason of certain advice tendered by him to Hoyts in July and August 1986 when he was in practice as a solicitor, his continued presence as a member of the Full Bench of the Commission created what he described as "a situation where a fairminded observer might reasonably perceive that I could not ... determine the issues" on the material before the Commission in the proceedings.

Mr. Deputy President Polites decided to discontinue sitting in those proceedings and to request the President of the Commission to appoint another Deputy President to sit pursuant to s. 34 of the Act. If the Commission is reconstituted pursuant to s. 34, the member appointed in place of Mr. Deputy President Polites will not have had the benefit of hearing the evidence and arguments thus far presented, though that member will have regard to that evidence and those arguments as they have been recorded (11). The prosecutors obtained from this Court an order nisi for a writ of mandamus directing Mr. Deputy President Polites to hear and determine as a member of the Full Bench the proceedings there pending. They now move the Court for an order absolute.

A relationship of solicitor and client existed between Mr. Polites (as the Deputy President then was) and Hoyts for a short time in July and August 1986 at a time when Hoyts proposed to open a "multiplex cinema complex" at Chadstone. That is a building containing a number of theatres for the screening of motion pictures from a central projection room. Hoyts was concerned to ensure that staffing levels for the Chadstone complex would be lower than those obtaining in its other theatres. At or about that time, negotiations were under way with respect to wages and conditions to be applied generally in the industry. It was expected that, in the ordinary course, those negotiations would result in some variation to agreements, known as "the Canberra agreements", which applied generally in the industry and supplemented the terms and conditions laid down for the industry by the Federal Theatrical Employees (Cinema and Drive-in Industry) Award 1983 ("the A.T.A.E.A. Award"). Those negotiations had stalled. Hoyts sought advice from Mr. Polites, then a partner in the firm of Messrs. Freehill, Hollingdale and Page, as to the options open to that company with respect to the new complex. By letter of advice dated 1 August 1986 Mr. Polites advised Hoyts as follows:

"Re: *Multiplex Cinema Complexes*

We refer to our meeting of 28 July 1986.

We are instructed that your Company, Village Theatres Ltd.

(11) See s. 34(4).

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and The Greater Union Organization Pty. Limited are respondents to the *Federal Theatrical Employees (Cinema and Drive-in Industry) Award* 1983 ('the Award') which covers employees of the companies working in cinemas as projectionists, booking clerks/cashiers and ushers. We have also been provided with copies of two private agreements between the companies and the Australian Theatrical and Amusement Employees' Association ('the A.T.A.E.A.') which contain additional terms and conditions of employment. The original agreement operated from 1981 to 1983 when it was superseded by the second agreement which was to operate for a further two years. We are instructed that the second agreement has now expired and a new agreement has been agreed in principle but not yet executed.

The Company proposes to construct and operate 12 to 15 multiplex cinema complexes throughout Australia the first of which is due to open in Chadstone in December 1986. Both Village Theatres and Greater Union are also proposing to develop and operate a series of multiplex cinema complexes. We are also instructed that an overseas corporation known as American Multi Cinema ('A.M.C.') is seriously considering moving into the Australian market and developing such complexes.

By letter dated 24 July 1986 the Company has suggested appropriate manning levels for the Chadstone complex. We understand that the company considers the manning levels suggested to be in excess of minimum requirements but can be justified on the basis that they should ensure a high level of customer service. We understand that the union is probably of the view that the Company's suggestion is unsatisfactory and considerably more persons should be employed.

We are asked to advise the Company upon the options available to it in conducting negotiations for suitable staff levels particularly as the Award contains provisions which are inappropriate for such complexes and competition from an overseas company is imminent.

Upon the basis that The Hoyts Corporation Pty. Limited is to be the employer of the labour and on the assumption that at some time in the future A.M.C. will be competing in the market place we would suggest the following course of action:

1. As the Company has already proposed its suggested manning levels in its letter of 24 July it should strongly maintain that position and advise the A.T.A.E.A. of those changes to the Award and agreement which it requires which relate to employees in multiplex cinema complexes. In support of this position the Company should prepare an explanation as to the inappropriateness of certain award provisions and emphasise the dangers for both the Company and the union when A.M.C. enters the market place.

   From the Company's point of view if there is a real apprehension that A.M.C. will be a competitor in the

future we understand that labour costs will be an important factor in determining its level of competitiveness and the market share which it will attract. Depending upon the tactics used it may be able to avoid A.T.A.E.A. involvement and Federal Award coverage for a considerable time and may be able to negotiate more appropriate and satisfactory terms and conditions of employment with the A.T.A.E.A. than those currently applicable to your Company, Village Theatres and Greater Union.

If the threat preserved to the A.T.A.E.A. by the entrance of A.M.C. into the market place can be exploited it may be an extremely useful negotiation device. The threat referred to is the effect on the profitability and employment of members of the A.T.A.E.A. presented by A.M.C. particularly as A.M.C. may enter into a protracted argument with the A.T.A.E.A. over union and award coverage. It must be emphasized to the A.T.A.E.A. that, in view of the A.M.C. threat to all parties, it is important that all of the multiplex cinema operations are efficient and competitive before the first operation commences business in December 1986.

2. If the A.T.A.E.A. rejects the arguments proposed in (1) then it is open to the Company to make application to the Australian Conciliation and Arbitration Commission to vary the Award to insert appropriate provisions covering multiplex cinema complexes and/or remove or amend inappropriate Award provisions.

It may also be appropriate to refuse to enter into the proposed agreement until a suitable compromise is found which would ensure that multiplex cinema operations will be competitive with any A.M.C. operation. Such a course of action *may* result in a stoppage of work or the industrial action in existing cinemas. The Company must satisfy itself that the danger presented by A.M.C. and the possibility of negotiating more favourable terms and conditions for persons employed in the multiplex cinemas regardless of the A.M.C. threat, are sufficient to run the risk of such a stoppage.

A further option available to the Company is to have a separate and distinct company employ the labour in such complexes. The advantage of this is that the separate company would not automatically be bound by the provisions of the Award and the A.T.A.E.A. would have to serve a log of claims with a view to either creating a new Federal Award or roping-in the Company to the existing Award. In our opinion the A.T.A.E.A. would most likely attempt to rope-in the Company to the existing Award. Again, having a separate company employ the labour may be considered provocative by the union and could result in industrial action. However, it would have the advantage of the Company taking the initiative and may be useful in negotiations.

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> We trust that this advice has been of assistance to you and if you would like us to expand or develop the matters raised in this letter please do not hesitate to speak with our Mr. Polites or Mr. Smith.
> Yours faithfully,
> FREEHILL, HOLLINGDALE & PAGE.
> MELBOURNE INDUSTRIAL PRACTICE."

The advice dealing with the creation of a separate company to employ staff at the new Chadstone complex was not followed. Instead, they became employees of Hoyts and the wages and conditions applying generally in the industry were extended to them and, later, to employees at other complexes as they were opened in other places. It seems that Hoyts intended that those wages and conditions should be applied only as an interim arrangement. However, the arrangement continued until 1988 when industry negotiations were again under way. At or about that time, various of the Hoyts theatres were affected by strike action on the part of some members of the A.T.A.E.A. It seems that those who participated in the strike were, in the main, casual employees. Their employment was not renewed. Instead, new employees were engaged for the various theatres involved. The new employees were engaged by the subsidiaries, Delarene and Rampton. According to an affidavit filed on behalf of the prosecutors in these proceedings, that merely "enabl[ed] labour to be employed on terms and conditions other than those prescribed by the awards". And, it enabled that course to be taken with respect to all Hoyts theatres, not merely those located in a multiplex complex.

The proceedings now pending before the Commission arose out of the events of 1988. The significance to those proceedings of the relationship of solicitor and client in 1986 and of the advice tendered by Mr. Polites to Hoyts at that time is a matter of dispute. The prosecutors contend that the once and brief relationship of solicitor and client is immaterial and that the advice given in 1986 does not touch the issues in the proceedings; the A.T.A.E.A., on the other hand, takes the opposite view. An affidavit filed on behalf of the A.T.A.E.A. in opposition to the order absolute for mandamus states its perception of the position of Mr. Deputy President Polites in these terms:

> "Essentially, the letter of advice of 1 August 1986, which was settled by Mr. Polites, suggested a 'course of action' consisting of methods of negotiation and specific industrial tactics to be used against the A.T.A.E.A. to promote Hoyts' plan to achieve fundamental and extensive changes to the terms and conditions of employment prescribed by the relevant award in view of the trend towards multiplex cinemas. Hoyts' plan has been put into

> effect by the very 'course of action', ie the very methods of negotiation and industrial tactics, suggested in the letter, culminating in the making of the present application to the Commission. Further, at the forefront of the A.T.A.E.A.'s case in the Commission has been a contention that Hoyts' negotiating methods and industrial tactics have been so unsatisfactory that the Commission should exercise the discretion conferred on it by s. 111(1)(g) of the Act to dismiss or refrain from further hearing the prosecutors' application or alternatively should include highly prescriptive provisions in any new award."

(Although this affidavit was filed by the A.T.A.E.A., the A.T.A.E.A. did not appear on the return of the order nisi for mandamus to argue against the making of an order absolute.) Mr. Deputy President Polites' decision to discontinue sitting as a member of the Full Bench flowed from his appreciation of the issues in the part-heard proceedings. He said:

> "A perusal of the letter confirms that advice which I participated in and for which I was responsible, was given to Hoyts dealing with, (a) the conduct of negotiations with the A.T.A.E.A. in relation to the manning of the Chadstone multiplex cinema complex, including the possibility of proceedings in the Commission.
>
> And, (b) the possibility of a separate company employing labour at such complexes as Chadstone. It is clear to me from the proceedings so far that (a) the issue of what happened in fact between Hoyts and the A.T.A.E.A. between 1986 and 1988 may be relevant to questions which ultimately have to be determined by the Commission in this case. And, (b) the effect of separate corporations employing labour, not only in multiplex theatres but throughout the Hoyts group and, thus perhaps escaping the operation of the award and the relevance of this conduct to the claims of the A.T.A.E.A. in this case are material issues to be determined."

The prosecutors challenge that appreciation of the situation. The relevant test has been prescribed by this Court in a number of cases and is expressed in *Livesey v. New South Wales Bar Association* (12) in these terms:

> "[The] principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. ... Although statements of the principle commonly speak of 'suspicion of bias', we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning."

(12) (1983) 151 C.L.R. 288, at pp. 293-294.

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In applying this test, it is necessary to bear in mind the caution expressed by Mason J. in *Re J.R.L.; Ex parte C.J.L.* (13):

> "It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* (14) and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way."

In *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (15), Dixon CJ., Williams, Webb and Fullagar JJ. said:

> "when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded', per Charles J., *Reg. v. London County Council; Re The Empire Theatre* (16)."

Again, the test in *Livesey* cannot be pressed too far when the qualifications for membership of the tribunal are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issues for determination or to

(13) (1986) 161 C.L.R. 342, at p. 352.
(14) (1976) 136 C.L.R. 248.
(15) (1953) 88 C.L.R. 100, at p. 116.
(16) (1894) 71 L.T. 638, at p. 639.

have formed an attitude about the way in which such issues should be determined or the tribunal's powers exercised. Qualification for membership cannot disqualify a member from sitting. The qualifications for appointment as a Deputy President of the Commission are prescribed by s. 10(2) of the Act. Appointments are made by the Governor-General of judges or legal practitioners (par. (a)) or persons possessing the qualifications prescribed by par. (b) or par. (c). The relevant parts of s. 10(2) read as follows:

> "The Governor-General may only appoint a person as a Deputy President if:
> (a) ...
> (b) the person has had experience at a high level in industry or commerce or in the service of:
> (i) a peak council or another association representing the interests of employers or employees; or
> (ii) a government or an authority of a government; or
> (c) the person has, at least 5 years previously, obtained a degree of a university or an educational qualification of a similar standard after studies in the field of law, economics or industrial relations, or some other field of study considered by the Governor-General to have substantial relevance to the duties of a Deputy President;
> and, in the opinion of the Governor-General, the person is, because of skills and experience in the field of industrial relations, a suitable person to be appointed as a Deputy President."

The prior involvement of a Deputy President with associations or with governments who are frequently parties to proceedings before the Commission cannot be sufficient by itself to amount to a disqualification from sitting in a particular case; nor can the prior acquisition of "skills and experience" amount to such a disqualification. Deputy Presidents who are appointed on account of their industrial background are not disqualified merely because persons with that background have a measure of knowledge or are likely to have a particular attitude to the exercise of the Commission's powers. To adopt the words of the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* (17), their background will not necessarily lead them "to act otherwise than judicially, so far as that word connotes a standard of conduct", even though the background which carries experience and knowledge acquired extra-judicially "assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the courts ..."

A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal

(17) [1949] A.C. 134, at p. 151.

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(or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination.

To decide on which side of the line this case falls, this Court must examine the circumstances for itself. The question whether, in the circumstances of a particular case, a tribunal member should disqualify or refuse to disqualify himself or herself cannot be finally determined by the tribunal member. Moffitt P. was right to say, in *Sankey v. Whitlam* (18), that:

> "The conclusion I reach, therefore, is that a superior court, under its prerogative powers, can and should itself examine the question whether in fact bias, or possible bias, exists in an inferior tribunal bound to act judicially, and can intervene and order the tribunal to continue, or not continue, to exercise jurisdiction."

His Honour observed that there were some factors which lead a reviewing court not to place too much weight upon the views of the tribunal as to the existence of bias or possible bias. His Honour said (19):

> "When the inferior tribunal makes the tentative decision concerning its own bias or possible bias or, knowing the facts, declines to raise it, the tribunal is faced with a decision, which by its very nature touches the tribunal itself, so that its decision upon it is prone to be deprived of the objectivity necessary in any judicial decision. ... Further, the superior court does not suffer the subjective involvement such as the inferior tribunal does, and is in a position to give, what is, and will appear to be, an objective decision. Indeed, its decision that it is proper for

(18) [1977] 1 N.S.W.L.R. 333, at p. 346.
(19) ibid., at pp. 346-347.

> the tribunal to continue relieves the tribunal of the burden of suggestions of bias not soundly based."

Though those observations are correct, the views expressed by the tribunal may be of assistance to the reviewing court not only in understanding the issues that are alive in the case but in appreciating the connection between those issues and what is advanced as the disqualifying factor.

In determining the present application, some weight must be given the views of Mr. Deputy President Polites but, at the end of the day, this Court must decide for itself whether grounds appear for reasonably apprehending that Mr. Deputy President Polites might not bring an impartial and unprejudiced mind to the resolution of the issues before the Commission. Some reference to the issues must therefore be made though this Court has not had the benefit of hearing the evidence given before the Commission or of an analysis of the issues made on behalf of the A.T.A.E.A.

As earlier indicated, there are several matters pending before the Commission. Disputes were notified to the Commission by Hoyts and by the A.T.A.E.A. in August and in October 1988 respectively. Those disputes were, in the main, concerned with Hoyts' desire to achieve lower staffing levels and reductions in wages, including reductions to be effected by the introduction of junior rates for employees under 21. The disputes involved all Hoyts theatres and not merely those in a multiplex complex such as the Chadstone complex which had been the subject of advice from Mr. Polites in 1986. In December 1988, the A.T.A.E.A. and T.M.A. served logs of claims on Delarene and Rampton for the purpose of obtaining roping-in awards by which those companies would be bound by the existing awards which, as earlier indicated with respect to the A.T.A.E.A. Award, applied throughout the industry generally. In February 1989, Hoyts made two applications to the Commission: the first was for an order terminating its respondency to the A.T.A.E.A. Award; the second was an application for new awards for employees in Hoyts theatres which would prescribe wages and conditions along the lines desired by Hoyts. Later, A.T.A.E.A. applied, pursuant to s. 111(1)(g) of the Act, for an order that the Commission dismiss or refrain from further hearing Hoyts' application for a new and separate award for its employees.

It was said on behalf of the prosecutors that it was common ground before the Commission that the terms and conditions set by the A.T.A.E.A. Award were no longer appropriate. That is correct to the extent that the A.T.A.E.A. Award had for many years been supplemented by the Canberra agreements. However, it is clear that the position adopted by the A.T.A.E.A. in the Commission was that

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that Award, as supplemented by the Canberra agreements, was not only appropriate, but was preferable to the new and separate award being sought by the prosecutors.

It was also said on behalf of the prosecutors that there was no dispute but that Delarene and Rampton should be roped-in to whatever award should be prescribed for A.T.A.E.A. employees. Again, that is accurate so far as it goes. The major issue before the Commission is whether A.T.A.E.A. members employed in Hoyts theatres should have the benefit of the award which applies generally in the industry or whether they should be governed by a separate in-house award. And there is an important and live question whether employees of Delarene and Rampton, who are employed on terms which are, in the main, less favourable than those set by the A.T.A.E.A. Award, should have the immediate protection of that Award.

The issues before the Commission range over virtually every aspect of the employment relationship between the prosecutors and their employees. They include the relationship existing since the events of 1988 and the relationship to be prescribed for the future. It must be accepted that the interposition of subsidiary companies for the purpose of "enabling labour to be employed on terms and conditions other than those prescribed by the awards" may be relevant to a number of issues which will fall for decision in the proceedings before the Commission. For example, it may well bear on the terms to be prescribed for employment of labour (including whether the employment of casual labour should be allowed) and for termination of employment.

No narrow view can be taken of the issues before the Commission. Even so, it is difficult to see how the letter of advice of 1 August 1986 could give rise to a reasonable apprehension that Mr. Deputy President Polites might not bring an impartial and unprejudiced mind to their resolution. True it is that Hoyts' aspirations as to staffing levels and rates of pay were being pursued in 1986 as they are being pursued currently before the Commission but the negotiating advice contained in the paragraph numbered "1" in the letter has long since become irrelevant to their determination. The commercial necessity to open the Chadstone multiplex and the consequent incentive to enter into a new agreement appears to have made the negotiating advice outdated and irrelevant. The advice contained in the paragraph numbered "2" as to Hoyts' right to make an application to the Commission is no more than uncontentious legal advice as to the jurisdiction of the Commission (or of its predecessor, the Conciliation and Arbitration Commission). The course of action canvassed in that paragraph that Hoyts might

"refuse to enter into the proposed agreement until a suitable compromise is found" was not acted on in the event: Hoyts did enter into a further Canberra agreement in 1986. That advice is of no more than historical relevance.

However, the advice that companies other than Hoyts might be formed to employ labour at multiplex cinemas comes closer to the issues to be determined by the Commission. Delarene and Rampton were incorporated to employ staff in Hoyts theatres on terms other than those binding on Hoyts under the applicable awards. As earlier indicated, the appropriateness and fairness of that course of action may fall for consideration by the Commission. But, if so, a judgment can be formed only in the context of the circumstances obtaining in 1988 when that action was taken. Those circumstances were very different from the limited and specific circumstances calling for advice in 1986. The position in 1986, at least so far as concerned those giving the advice, was that a new employment situation was about to occur which, according to their instructions, was different from the situation generally obtaining in the industry. In that context, the advice merely detailed available negotiating options. In particular, it carried no recommendation as to the wisdom, reasonableness or appropriateness of the course of action indicated, whether generally or in the limited circumstances in which that advice was given. In the light of these considerations and the fact that appointees to the Commission will often have had a close association with parties before, or with issues to be determined by, the Commission, it would not be open to the parties or to a member of the public to entertain a reasonable apprehension that, by reason of the advice given in the quite different circumstances of 1986, Mr. Deputy President Polites might not bring an impartial and unprejudiced mind to the assessment of the prosecutors' conduct in 1988 or to the determination of appropriate wages and conditions, whether they be determined retrospectively to 1988 or otherwise, for employees in Hoyts theatres.

It is necessary to refer to an argument advanced in the A.T.A.E.A. affidavit which submits that Hoyts' negotiating methods and industrial tactics warrant a discretionary refusal under s. 111(1)(g) of the Act to hear further the prosecutors' application or to include "highly prescriptive provisions" in a new award. At first sight this argument appears to call for a general review of the industrial relations of Hoyts and the A.T.A.E.A. and its members. Such a review would involve a consideration of the events of 1986 and not merely those which occurred in 1988. The argument advanced in broad terms in the A.T.A.E.A. affidavit is revealed as a much narrower question in the transcript of the proceedings. It is

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not the general conduct of Hoyts which the A.T.A.E.A. has relied on in the proceedings as justification for a refusal under s. 111(1)(g) to hear further the prosecutors' application or to warrant the making of a highly prescriptive award. The A.T.A.E.A. has relied only on particular conduct which occurred in April and May 1990 during the currency of the proceedings and which is unrelated to any conduct that might have been engaged in in accordance with the letter of advice. Although Mr. Deputy President Polites said that what happened between 1986 and 1988 "may be relevant" to questions to be ultimately determined, it would be wrong to uphold his decision to disqualify himself on such non-specific and speculative grounds. Especially when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is — not may be — an issue to which a disqualifying factor is relevant.

The argument of the prosecutors before this Court, regrettably without a countervailing argument from the A.T.A.E.A., shows that there is no foundation for a reasonable apprehension that Mr. Deputy President Polites will not decide the live issues for determination by the Commission with an impartial and unprejudiced mind. He was mistaken to think that there was. In these circumstances, the order nisi for mandamus should be made absolute.

Order nisi for a writ of mandamus directed to Mr. Deputy President Polites directing him to hear and determine, as a member of a Full Bench, the proceedings in the Australian Industrial Relations Commission in Matters C Nos. 32728, 33189, 33341, 60381 *of* 1988 *and* 30084, 20037, 20364, 30172 *and* 35776 *of* 1989 *be made absolute.*

Costs reserved for further consideration. The prosecutors and the second respondent be at liberty to file and serve on the other or others within fourteen days their written submissions as to costs and file any reply to submissions served on them or it within seven days of such service.

Written submissions as to costs were filed on behalf of the parties.

THE COURT delivered the following written judgment:—

BRENNAN, GAUDRON AND MCHUGH JJ. In this matter, the prosecutors successfully applied for an order directing Mr. Deputy President Polites, the first-named respondent, to hear and determine, as a member of a Full Bench of the Australian Industrial Relations Commission, the proceedings in certain matters pending before the Commission. Their application for the costs of the proceeding in this Court is opposed by the Australian Theatrical and Amusement Employees Association, the second respondent, which relies on s. 347(1) of the *Industrial Relations Act* 1988 (Cth) ("the Act"). That provision reads:

> "A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable excuse."

The matters pending before the Commission and being heard by a Full Bench are clearly matters arising under the Act, but the prosecutors submit that the proceeding in this Court was not a proceeding "in" the matters pending before the Commission. In our view, it is unnecessary to determine that question, because the proceeding in this Court was a proceeding in a matter that was itself a matter arising under the Act. The duties of a member of the Australian Industrial Relations Commission are created, expressly or impliedly, by the Act. When the President of the Commission, in exercise of his power to establish a Full Bench of the Commission (s. 30) appoints a member to sit as a member of a Full Bench to hear and determine an industrial dispute, Pt VI, Div. 2 of the Act imposes on that member a duty to hear and determine the industrial dispute as a member of the Full Bench accordingly. The order made in this case was an order to enforce that statutory duty. As the duty owes its existence to the Act, the controversy between the parties as to the enforcement of the duty is a matter arising under the Act (20). The jurisdiction of this Court conferred by s. 75(v) of the Constitution was invoked to determine that matter. It follows that the proceeding in this Court was itself a proceeding in a matter under the Act. It follows that s. 347(1) of the Act is applicable to the proceeding in this Court, albeit the jurisdiction of this Court

(20) *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945), 70 C.L.R. 141, at p. 154; *L.N.C. Industries Ltd. v. B.M.W. (Australia) Ltd.* (1983), 151 C.L.R. 575, at p. 581; and see *Poulos v. Waltons Stores (Interstate) Ltd.* (1986), 68 A.L.R. 537, at p. 543; *Thompson v. Hodder* (1989), 21 F.C.R. 467, at p. 469.

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invoked in that proceeding is conferred by s. 75(v) of the Constitution.

No challenge is made to the power of the Parliament legislatively to direct this Court as to the award of costs when it is exercising its jurisdiction under s. 75(v) of the Constitution. Accordingly, in conformity with s. 347(1) of the Act, we would refuse an order for costs.

No order as to costs.

Solicitors for the second respondent, *Ryan Carlisle Thomas.*
Solicitor for the prosecutors, *Mark G. Caldwell.*

R.A.S.