HIGH COURT OF AUSTRALIA

RE THE MANUFACTURING GROCERS' EMPLOYEES FEDERATION OF AUSTRALIA AND ANOTHER; EX PARTE THE AUSTRALIAN CHAMBER OF MANUFACTURES AND ANOTHER

Gibbs CJ,
Mason,
Wilson,
Brennan,
Deane and
Dawson JJ

1986
:
April 15, 16;
May 15

160 CLR 341

Industrial Law (Cth) — Conciliation and Arbitration — Industrial dispute — Demand for contribution by employers to superannuation schemes — Conciliation and Arbitration Commission — Jurisdiction — The Constitution (63 & 64 Vict. c. 12), s. 51(xxxv) — Conciliation and Arbitration Act 1904 (Cth), ss. 4 — "Industrial dispute", s. 58.

Section 4 of the *Conciliation and Arbitration Act* 1904 (Cth) defined "industrial dispute" by reference to industrial matters pertaining to the relations of employers and employees, including "(b) the privileges, rights and duties of employers and employees, (c) the wages, allowances and remuneration of persons employed or to be employed" and "(h) the mode, terms and conditions of employment".

Demands for the payment during the currency of an award of employer contributions to superannuation schemes, the benefits from which would arise not under the award but under the trust deed constituting the funds, and for the continuance of which there was no dependence upon any award, *held* to relate to an industrial matter which was capable of being the subject of an industrial dispute within the meaning of the Act.

Reg. v. Hamilton Knight: Ex parte Commonwealth Steamship Owners' Association (1952), 86 C.L.R. 283, *distinguished*.

Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union (1983), 152 C.L.R. 632, at p. 650, and *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* (1972), 127 C.L.R. 353, at pp. 360, 371, *considered*.

PROHIBITION.

The Manufacturing Grocers' Employees Federation of Australia and the Association of Professional Engineers, Australia, made claims for the variation of existing awards so as to require employers to provide superannuation benefits for employees. When the matter came before the Australian Conciliation and Arbitration Commission, the Australian Council of Trade Unions made submissions of behalf of the Manufacturing Grocers' Employees Federation seeking an increase in all wages and salaries by 4 per cent, with power reserved to the Commission to exempt an employer from the obligation to pay the increased wages if in lieu thereof he made certain superannuation payments for the benefit of his employees. On the application of the Australian Chamber of Manufactures and the Victorian Employers Federation, orders nisi for prohibition were

granted by the High Court directed to the members of the Commission on the ground that the Commission did not have jurisdiction to hear and determine the applications so far as they involved any claim for superannuation benefits because such claims could not give rise to industrial disputes within s. 51(xxxv) of the Constitution and they were not industrial matters within the *Conciliation and Arbitration Act* 1904 (Cth). The orders nisi were returnable before the Full Court.

M J L Dowling Q.C. (with him *T J Ginnane*), for the prosecutors. For there to be an industrial dispute within s. 51(xxxv) and s. 4 of the *Conciliation and Arbitration Act*, the demand forming the basis of the dispute must be with respect to matters pertaining to the relations of employer and employee, and not of another character such as political, social or managerial. The demand must remain "inherently associated with the relationship of employer and employee and not with some other type of relationship": *R. v. Kelly; Ex parte Victoria* 1 ; *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 2 ; *Federated Clerks' Union (Aust.) v. Victorian Employers' Federation* 3 . The relief sought in the proceedings before the Commission contemplates an award providing for payments by employers to third parties, namely, to the trustees of superannuation funds. Payments of such a kind involve relationships beyond those of employer and employee, that is to say, relationships between employers and the trustees of a fund and between employees and the trustees of a fund. Demands for payments of such a kind are beyond the sphere of the relations of employer and employee, being for a provision whose character is essentially of a social nature: *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* 4 . Demands for payments of such a kind do not remain inherently associated with the relationship of employer and employee. The employee can become entitled to exercise rights relating to the payment at a point of time when the relationship of employer and employee no longer exists or is not sufficiently proximate. Demands of this type are not capable of giving rise to an industrial dispute within the constitutional or the legislative provision. To give effect to demands having the characteristics of those in the proceedings before the Commission, an award would necessarily have an operative effect beyond the period of five years from its date, because rights acquired

by an employee that are associated with a payment by an employer of the kind in issue here may be exercised beyond the period of five years specified in s. 58: *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* 5 .

R C Kenzie Q.C. (with him *J W Shaw*), for the respondent Federation. A claim for the payment by an employer to a superannuation fund of an amount fixed by reference to his wages during the subsistence of the contract of employment is one in respect of an "industrial matter" as defined in s. 4(1). It is in respect of a matter falling within the wide opening words of the definition, and also within pars. (b), (c) and (h): *Australian Tramway Employees' Association v. Prahran and Malvern Tramway Company* 6 ; *Reg. v. Findlay; Ex parte Commonwealth Steamship Owners' Association* 7 ; *Reg. v. Booth; Ex parte Administrative and Clerical Officers' Association* 8 ; *Reg. v. Portus; Ex parte City of Perth* 9 ; *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 10 ; *Reg. v. Coldham: Ex parte Fitzsimmons* 11 . Nothing to the contrary was decided in *R. v. Kelly; Ex parte Victoria*. That case concerned the requirement that, to fall within the opening words of the definition, a matter must pertain directly to the employment relationship. The hours of business of shops is a matter which, at best, pertains only indirectly to that relationship. *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* did not decide to the contrary. Although three judges considered that the demand for pensions — which clearly contemplated obligations on the part of the employer extending beyond the termination of the contract of employment — was not a demand in respect of an industrial matter, two judges thought otherwise and the Chief Justice did not deal with the question. The evidence before the Commission established that superannuation is a component of a substantial proportion of contracts of employment in Australia. Furthermore, a demand for payment by an employer to a superannuation fund of an amount referable to an employee's wages would not cease to be a demand in respect of an industrial matter merely because it contemplated the continuation of the employer's obligation to pay, and the corresponding vesting of rights, after the

termination of a relevant contract of employment. In so far as the claim for workers' compensation was concerned, *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* is authority for the proposition that an industrial matter may involve the creation of rights and obligations after the termination of the contract of employment: *Reg. v. Findlay; Ex parte Commonwealth Steamship Owners' Association*. The Court has indicated that *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* may require reconsideration: *Metal Trades Industry Association v. Amalgamated Metal Workers' Union* 12 . A dispute arising from a claim for payment by an employer to a superannuation fund is an industrial dispute within the contemplation of s. 51(xxxv) of the Constitution: *Reg. v. Coldham; Ex parte Australian Social Welfare Union* 13 ; *Federated Clerks' Union v. Victorian Employers' Federation* 14 .

G Griffith Q.C., Solicitor-General for the Commonwealth, (with him *R. Merkel* Q.C. and *D J Rose*), for the Minister of Employment and Industrial Relations, intervening by leave. Whether or not there exists an industrial matter within s. 4(1) of the Act or an industrial dispute within the meaning of s. 51(xxxv) of the Constitution involves questions of fact and degree in relation to which the prosecutor bean the onus: *Reg. v. Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* 15 ; *Reg. v. Cohen; Ex parte Attorney-General (Q.)* 16 . "Industrial dispute" is not a technical or legal expression. The words are to be given their popular meaning: *Reg. v. Coldham; Ex parte Australian Social Welfare Union* 17 . Each of the statutory and the constitutional issues depends on whether claims that employers make payments by way of contributions to superannuation funds, limited to the period of employment, for the benefit of the employees, pertain to the relations of employees and employers as such: *R. v. Kelly; Ex parte Victoria* 18 ; *Reg. v. Findlay; Ex parte Commonwealth Steamship Owners' Association* 19 ; *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 20 ; *Reg. v. Coldham; Ex parte Fitzsimmons* 21 ; *Reg.*

v. Coldham; Ex parte Australian Social Welfare Union 22 (22). The claims here are demanded by employees as such of employers as such. Such claims are inherently associated with the relationship of employer and employee. Alternatively, they are truly incidental to that relationship: *Reg. v. Commonwealth Industrial Court Judges; Ex parte Cocks* 23 ; *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 24 ; *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* 25 ; West v. Commissioner of Taxation (N.S.W.) 26 . Superannuation arises in the context and out of the relationship of an employer as such and employee as such. The only reasons for the provision by employers of superannuation benefits are to attract staff by providing reward for service by an employee and to maintain staff by encouraging long and faithful service by the employee. Superannuation has therefore promoted security and stability for an employer in respect of the employment of employees by providing security for them in retirement. For the employee the entitlement to employers' contributions arises as a reward for employment and as a condition of employment. The claims pertain to the relations of employers and employees within the definition of "industrial matter" in s. 4(1). They also fall within pars. (c), (d) and (h) of the definition. The dispute over superannuation has already resulted in dislocation of industrial relations and can be expected to continue to do so: *Reg. v. Coldham; Ex parte Australian Social Welfare Union* 27 ; *Federated Clerks' Union of Australia v. Victorian Employers' Federation* 28 . It is not a bar to claims pertaining to the relations of employer and employee as such that the immediate recipient of an employer's payment is not employees but the trustee of a superannuation fund: *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 29 . *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* 30 accepted that a claim for payment for injury (where death results) to the personal representative of the employee was an industrial matter. It is no objection that the retirement benefit payable by the trustee may be paid only upon or after the employment has ceased: *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship*

Owners' Association 31 ; *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 32 . The employee is to receive an immediate entitlement to the benefits of the employer's contributions. The award obligation to be imposed upon the employer does not survive either the employment or the duration of the award. Neither of the difficulties confronting the pensions log in *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* arises. The s. 48 issue, and the lack of a subsisting employment relationship, which rounded the rejection of the pensions log, do not arise here.

C E K Hampson Q.C. (with him *A K Herbert*), for the Attorney-General for the State of Queensland, intervening. A demand that superannuation payments should be made by an employer to a third party for the benefit of an employee making the demand has no proximate or relevant connexion with any industrial relationship between employer and employee. A claim for superannuation contributions by employers is not an "industrial matter" within the meaning of the Act. It does not pertain to the relations of employers and employees. Nor is it included by necessary implication or express reference in the statutory definition of that expression. It offends *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association*. The matter is indistinguishable from *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd*. Any consensual practices which may have arisen over a period cannot enlarge the jurisdiction conferred by the Act or the Constitution. If a matter is not properly characterized as an industrial matter, the actions of certain employers and employees cannot alter the powers and duties of the Commission with respect to it.

M J L Dowling Q.C., in reply.

Cur adv vult

15 May 1986

THE COURT delivered the following written judgment:—

This is the return of an order nisi for a writ of prohibition directed to members of the Conciliation and Arbitration Commission ("the Commission") prohibiting them from further hearing certain proceedings to the extent to which they involve any claim for superannuation benefits for employees. There are two claims which involve superannuation benefits made in the proceedings before the

Commission, one by the Manufacturing Grocers' Employees Federation of Australia and the other by the Association of Professional Engineers, Australia, and each claim is for the variation of an existing award. In the case of the Manufacturing Grocers' Employees Federation of Australia, the log of claims upon which the existing award is based contains a demand for a superannuation scheme to cover members of the union. No similar demand appears to have been made in the log of claims which is the basis of the award in the case of the Association of Professional Engineers, Australia, and the variation formally claimed by that organization is limited to an increase in salaries of "4.0 per cent to take account of movements in national productivity and to give effect to" certain principles of wage fixation previously handed down by the Commission. On the other hand, the claim for variation by the Manufacturing Grocers' Employees Federation of Australia, whilst it is also for a 4 per cent increase in wages and salaries "on account of national productivity", "acknowledges that to the extent to which improvements in superannuation arrangements are consistent with the National Wage Principles, made by agreement between the union and an employer, the productivity increase or part thereof shall not apply to the employees covered by such agreement". When the matters came on for hearing before the Commission, submissions were made by the Australian Council of Trade Unions ("the A.C.T.U.") on behalf of the Manufacturing Grocers' Employees Federation of Australia and by the Australian Council of Professional Associations on behalf of the Association 'of Professional Engineers, Australia. Submissions were made on behalf of the respondent employers by the Confederation of Australian Industry and on behalf of the Commonwealth government by the Minister for Employment and Industrial Relations ("the Minister").

The actual claim pursued by the A.C.T.U. is contained in the order sought by that organization which, so far as is relevant, is as follows:

> "1. An increase in all wages and salaries and those allowances which are conventionally adjusted with wages and salaries by 4%. This variation shall operate on and from 1 July 1988.
>
> 2. Leave is reserved to any employer bound by this award to apply to the Commission for exemption from Clause 1 of this variation, in whole or in part, on the grounds that:
>
> (a) The employer has improved the benefits of an existing employee superannuation fund by increasing the employer's contributions by an amount equal to a 3% wage equivalent, or;
>
> (b) The employer has become a participant in an employee

> superannuation fund requiring the employer to make contributions equal to a 3% wage equivalent.
>
> For the purposes of this clause `wage equivalent' means those benefits accruing to employees as a result of a 3 % wage rise."

The submission made by the Minister differed from that made by the A.C.T.U. and supported only the claim for payments by way of contribution to superannuation benefits and not the claim for wage increases. The proposal put forward by the Minister was that payment be made by the respondent employers to an approved superannuation fund in respect of each employee of an amount equivalent to 3 per cent of the employee's ordinary time rate of pay. An approved superannuation fund was identified as one which complied with guidelines laid down by the Commonwealth government. Those guidelines, it would appear, would lay down standards which superannuation funds would be required to meet in order to obtain taxation concessions under the *Income Tax Assessment Act* 1936 (Cth). It was proposed that the responsibility for ensuring that approved funds were available for the employees covered by the relevant awards could be discharged either by the union or the employer concerned. The establishment of an approved fund by an employer, or the improvement of an existing fund to meet the standards of an approved fund, was to be a matter of choice for an employer. In the event of more than one fund being available for the receipt of contributions, it was proposed that the Commission should decide which fund might receive contributions in satisfaction of the obligation under the relevant award. There was to be no compulsion upon an employer to do anything in relation to the provision of an approved fund.

It is clear that both the proposal made by the A.C.T.U. and that made by the Minister are based upon the existence, outside the provisions of any award, of superannuation funds which are to be administered by their own trustees in accordance with the provisions of their own trust deeds.

The position taken by the Australian Council of Professional Associations was somewhat equivocal. Whilst its claim on behalf of the Association of Professional Engineers, Australia for a share in any increase in national productivity was confined to a demand for wage increases, it expressed its recognition of the fact that the benefit might be passed on in alternative ways and supported both the proposal of the A.C.T.U. and that of the Minister. No reliance appears to have been placed by the respondent employers upon any limitation upon the ambit of the relevant dispute by reason of the failure of the Association of Professional Engineers, Australia to make any demand for superannuation in its log of claims.

The employers at the outset challenged the Commission's jurisdiction to deal with the applications upon the basis that it lacked the power to make any order or award relating to superannuation benefits. The Commission declined to rule upon the submission at that stage, saying that it had no doubt that it could make valid orders upon the claims for increases in wages based upon movements in national productivity and that it was not convinced that it was unable to make an order providing that superannuation benefits could be offset against wage increases.

The grounds upon which prohibition is sought are that the Commission does not have the jurisdiction to hear and determine the applications before it in so far as they involve any claim for, or relief by way of, superannuation benefits for employees because to that extent they do not comprise industrial disputes within the meaning of s. 51(xxxv) of the Constitution and do not comprise disputes as to an industrial matter within the meaning of the *Conciliation and Arbitration Act* 1904 (Cth) ("the Act"). There is an additional ground that the Commission lacks jurisdiction in so far as the applications involve any claim for, or relief by way of, superannuation benefits for employees because no award giving effect to such a claim or granting such relief could be made consistently with s. 58(1) of the Act. Section 5811) provides that an award continues in force for a period specified in the award, not exceeding five years from the date on which the award comes into force, and s. 58(2) provides that after the expiration of the period so specified, the award shall, subject to variation or being set aside, continue in force until a new award has been made.

The prosecutors before us, who represent the employers, have sought to draw heavily upon the decision of this Court in *Reg. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* 33 , but that case, in which opinion was divided, does not carry them the distance which they must go in order to make out the grounds upon which they rely. The case concerned a claim for prohibition against a conciliation commissioner dealing with an alleged industrial dispute based, in pan, upon a demand for pensions for employees who had served for a certain time and had reached the age of sixty-five years or become unfit for service. The demand was for rights which were to be embodied in an award and it therefore envisaged the continuation in force of the award so long as it was needed to give effect to those rights. Dixon C.J. and Fullagar J. were of the view that a demand in this form, whether or not it concerned an industrial matter, was opposed to the requirements of

s. 48(1) of the Act, that being the then equivalent of the present s. 58(1). As Fullagar J. put it 34 :

> "The very nature of the claim made is such that it cannot be granted without making a provision which will bring rights into existence after the expiration of the allowable period of operation of the award."

They were of the view that because of s. 48(1) the Commissioner could not lawfully make an award in terms operating beyond a period to be specified therein not exceeding five years, with the result that the claim went beyond the power of the conciliation Commissioner.

Webb and Kitto JJ. took a contrary view. They were of the opinion that the claim clearly concerned an industrial matter. As Webb J. put it 35 :

> "But I think that such a provision, being an incentive to and a reward for long service with an employer, can properly be said to pertain to the relations of employers and employees in almost any industry. Although the pension necessarily is paid after the relationship ceases it is still remuneration for service during the relationship. It does not cease to be such because the payment is deferred until after the service is finally performed, and is then spread over the life of the employee or the lives of the employee and his widow."

They saw no reason why s. 48(1), by imposing a time limit upon any award, deprived the Commissioner of the power to make an award giving effect to the claim for pensions. They recognized that an award could support pension rights only during its currency and that its termination within the time limited by the Act might produce unsatisfactory, even absurd, results which would tell against the claim being granted. But, they said, this did not go to the jurisdiction of the Commissioner.

McTiernan and Williams JJ. were both of the view that the claim for pensions did not relate to an industrial matter, being a claim for benefits payable after the relations of employer and employee had ended. In addition, McTiernan J. thought that the obligation which the employees sought to impose upon the employers was to provide, by payments of money, for the social security or welfare of persons who had been in their employment and that this obligation "transcended" the relations which arose out of the contractual relationship of employer and employee.

It will be seen that McTiernan and Williams JJ. alone found that the claim for pensions did not relate to an industrial matter. Webb and Kitto JJ., on the contrary, held that the claim concerned an

industrial matter, whatever difficulty there might have been in meeting the claim fully because of s. 48(1). And whilst Dixon C.J. and Fullagar J. each based his decision firmly upon the ground that s. 48(1), by imposing limits upon the duration of an award, placed the claim beyond the jurisdiction of a conciliation commissioner, Fullagar J. expressed the following view 36 :

> "If the provisions of s. 4 [of the *Conciliation and Arbitration Act*] had alone to be considered, it might be difficult to maintain that the matter in question was not an `industrial matter'. On its face the claim made seems to seek, in each case, the conferring of a right on an employee and the imposition of a corresponding duty on an employer."

The actual decision in *Hamilton Knight* 37 was dependent upon the form of the claim made. It sought rights under an award but they were rights which might never have arisen at all if the award was to have had the limited duration which the Act required. In other words, entitlement to a pension might not have been reached by any employee within the permitted life of an award. This difficulty was recognized by those who framed the demand in that case. An attempt to solve it was made by the proposal of a provision that the award should be of indeterminate duration. That, of course, was flatly opposed to s. 48(1) and could not be upheld and the differing views which were expressed in *Hamilton Knight* proceeded upon the basis that the proposed provision could have no operation.

The claims which are before the Commission in these proceedings are quite different. To the extent to which they relate to superannuation benefits, they are no more than claims for payments to be made by employers by way of contributions to superannuation funds answering a particular description. The right to the payments in each instance is to arise out of the employment of the employee by the employer; it is to arise during the currency of an award; and it is to arise during the currency of the mutual relations of employer and employee. The right to the superannuation benefits themselves is to arise, not under the award, but under the trust deed by which the particular superannuation fund is constituted and for the continuance of which there is no dependence upon any award. The circumstances are not covered by the decision in *Hamilton Knight*, which is not authority for the proposition that pension benefits or superannuation benefits, however organized, stand outside the area of industrial matters.

Perhaps *Hamilton Knight* has been thought to decide more than it does and to hold that superannuation benefits are not matters

which might validly be the subject of an award: see, e.g., *Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union* 38 . If, however, such a view has been current, it has not been consistently held, for in *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 39 , Menzies J., in considering whether a demand that an employer be obliged to deduct union dues from its employees' salaries and pay them to the union could give rise to an industrial dispute, said:

> "The identity of the payee does not seem to me to be significant in determining the character of such a dispute, unless, of course, the payment relates to an incident of the employment such as a deduction for and payment to a superannuation fund. In my opinion, the relationship that would be affected by such an obligation is a financial relationship of debtor and creditor arising from the earning of salary, not the industrial relationship in which the salary has been earned and has become payable. What is sought, in reality, is to make the employer the financial agent of the employee for the benefit of the association."

And in the same case, Stephen J. said 40 :

> "Not every demand for reward for work performed will render the subject matter of the demand an industrial matter. The matter demanded must always pertain to the employer-employee relationship so that the subject matter of demands by either party which are, for example, of a political or social or managerial nature will not be industrial matters. The necessary quality of a subject matter demanded which is concerned with reward for work performed is, I think, that it be, of itself, inherently associated with the relationship of employer and employee and not with some other type of relationship. Reward by way of remuneration of course conforms most clearly to such a test; the payment of wages or salary is inherent in the relevant relationship. Likewise demands for, for instance, paid annual holidays or retirement benefits (disregarding, for present purposes, any consequences arising from the fact that awards are necessarily of limited duration) would, I think, satisfy this requirement; even if the relationship existing between parties to a demand of this character was unknown it would, nevertheless, from its very nature, be seen to be associated with some employer-employee relationship."

It is convenient in this case to treat both the actual claims made as containing a demand for payments by employers to a superannuation fund for the benefit of their employees and to disregard the different way in which each claim is framed. In our

view, *Hamilton Knight* leaves open the question whether these claims give rise to a dispute about an industrial matter and this is so whether the question is asked with or without regard to any complication introduced by the requirement under the Act that the awards might be made for a limited duration only. It will be necessary to deal separately with this latter aspect of the prosecutors' argument which is put under s. 58(1) of the Act.

The question whether the dispute is about an industrial matter arises, of course, because the legislative power of the Commonwealth is, under s. 51(xxxv) of the Constitution, confined to laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It is with this in mind that industrial disputes are defined in s. 4 of the Act by reference to industrial matters extending beyond the limits of any one State which are in turn defined as meaning all matters pertaining to the relations of employers and employees. Sixteen matters are specifically included within the general definition of industrial matters of which "(b) the privileges, rights and duties of employers and employees", "(c) the wages, allowances and remuneration of persons employed or to be employed" and "(h) the mode, terms and conditions of employment" appear to us to be of relevance. The powers of the Commission are confined to the prevention or settlement of industrial disputes by conciliation or arbitration.

The words "pertaining to" in the definition of industrial matters mean "belonging to" or "within the sphere of" and the expression "the relations of employers and employees" refers to the relation of an employer as such with an employee as such: *R. v. Kelly; Ex parte Victoria* 41 ; *Reg. v. Commonwealth Industrial Court Judges; Ex parte Cocks* 42 . The matters which will answer that description have been dealt with from time to time and the propositions to be derived from the cases are collected by Mason J. in *Federated Clerks' Union (Aust.) v. Victorian Employers' Federation* 43 . For present purposes, it is sufficient to say that a matter must be connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential for it to be an industrial matter capable of being the subject of an industrial dispute. That is sufficient for present purposes because the argument advanced by the prosecutors is, apart from the submission based

upon s. 58(1), that the claims made in respect of superannuation extend beyond the relations of employer and employee and for that reason are beyond the power of the Commission.

Before dealing with the prosecutors' argument, we should say that, having regard to the broad terms in which the employees' claims are formulated, it is not possible in this case to speak of superannuation benefits otherwise than as a general conception without reference to the particular characteristics of any specific scheme. What is demanded goes no further than the payment, in lieu of wage increases, of contributions by employers to a fund established or to be established by the employer or the relevant employee organization, under its own trust deed, in accordance with standards approved by the Commonwealth government which it would be necessary to meet in order to obtain taxation concessions.

It may be added as a matter of inference that the superannuation schemes which are envisaged are to provide benefits either upon the accumulation principle so that the extent of those benefits will depend upon the level of contributions to the particular scheme, or as defined benefits which will be fixed — e.g., a fixed multiple of the average wage over a period preceding the termination of the employment — and financed by contributions to the scheme. It is said that an employee will have a vested interest in the fund and thus in the contributions when they are made, although his interest will not fall into possession until he retires or otherwise establishes his entitlement. Notwithstanding these observations, the fact remains that no particular form of approved trust deed appears from the claims made and the precise nature of any scheme from which the relevant benefits are to flow is not revealed.

We should also add that if any order is eventually made by the Commission, then depending upon the form which it takes, there may be available some arguable basis for attack upon the same or similar grounds as those now relied upon by the prosecutors. The way in which the claims are put does not reveal that the Commission is to have any direct function in the supervision or control of the superannuation schemes to which contributions are to be made, but the contemplation of such a possibility at least raises some of the questions considered in *Hamilton Knight* 44 , although answers could be provided only in the light of specific circumstances. A submission was made on behalf of the Manufacturing Grocers' Employees Federation that the application for prohibition was premature and that it should not be granted for that reason. There is some substance in that submission. Generally speaking, in a

case of this kind the Court should not be called upon to grant prohibition until the proceedings in the Commission have advanced to such a stage that there is a real likelihood that the Commission will make an award or order in excess of its jurisdiction: *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd* 45 . Indeed, with the proceedings at their present stage, it should be observed, as was done by Dixon C.J. in *Hamilton Knight* 46 , that if a claim is capable of being dealt with substantially as an industrial matter, the possibility of the Commission exceeding its jurisdiction is no sufficient reason for prohibiting it from dealing with the claim. On the other hand, by dealing with the matter on the merits at this stage, we will enable the Commission to make a determination in the light of this Court's view of the Commission's jurisdiction with respect to the claims made in this case, free from such doubts as may have arisen from the reasoning in *Hamilton Knight* and, on balance, we think it appropriate to adopt this course.

What is important for the purposes of this case is that the claims made are, as we have said, no more than demands for the payment during the currency of an award of employer contributions to superannuation schemes which will take an approved form. It is because the claims are in this limited form that it is, in our view, impossible to sustain the argument that they are not made with respect to industrial matters, whatever may have been the position had the claims been made in a more elaborate form.

It may be observed generally that superannuation benefits are commonly regarded as being an aspect of the terms or conditions of employment, being in many circumstances in the interests of both employer and employee. They provide a reward for long and faithful service and afford security to an employee which may be conducive to a stable and productive relationship between him and his employer. They encourage loyalty on the part of an employee, although this will be a less important consideration if the benefits are "portable". Superannuation benefits are frequently offered as part of the total remuneration of a prospective employee as a means of attracting his labour and, having regard to the significant proportion of the workforce now entitled to superannuation benefits, no doubt in many instances as a necessary means of doing so. Relief from taxation arises from the provision of superannuation benefits both in the case of an employee and, where there are employer contributions, in the case of an employer. Previously a

feature of employment in the public sector of the economy, the incidence of superannuation schemes in the private sector is frequent and increasing for reasons which may be readily understood. We would reject a submission made by the prosecutors, in reliance upon the observations of McTiernan J. in *Hamilton Knight* 47 , that superannuation entitlements are by way of provision for the social security or welfare of employees or former employees and for that reason cannot form the subject of an industrial dispute. No doubt the payment of remuneration may obviate to a greater or lesser extent the need for government to provide for the social security or welfare of its citizens, but that is not to say that remuneration must be seen as payment of that kind and not as a reward for service — in the case of superannuation benefits, often as a reward for long service. As a matter of common understanding, entitlement to participate in a superannuation scheme and the means by which that scheme is to be funded are matters which pertain to the relations of employers and employees and fall within pars. (b), (c) and (h) of the definition of industrial matters in s. 4 of the Act.

The submissions upon which the prosecutors chiefly relied were more confined. First, it was said that the claims are for payments in respect of which employees will have no entitlement until the relationship of employer and employee has ceased to exist. The answer was made that the employee will receive a vested interest in the money paid, albeit not in possession, when the contributions are made by the employer to the fund. Whether or not this be so, the fact that there is no immediate benefit to employees from the payments to be made by employers, at any rate in any tangible form, does not in our view mean that those payments cannot pertain to the relations of an employee with his employer. The observation made in relation to pensions by Webb J. in *Hamilton Knight* in the passage which we have cited applies a fortiori to contributions made by an employer to a superannuation fund during the continuance of his relationship with his employee. Those payments do not cease to be remuneration for service during the relationship merely because the benefit from them is deferred until after the service has been finally performed and the relationship has ended. The obligation of the employer to make the payments ends with the relationship between him and his employee unlike the obligation of an employer to pay a pension, which necessarily extends beyond the period of employment. It is in our view of no significance that an employee receives no immediate benefit, other than such interest as he might

have in the superannuation fund, from the payment of contributions to the fund by his employer. It may be added that in *Hamilton Knight* a majority saw no difficulty in holding that another claim made in that case, which was for the payment of compensation for injury, dealt with an industrial matter notwithstanding that the right to payment was not to arise until the contract of employment had been determined.

Next, it was submitted that, since the payments claimed are to be made to the trustees of superannuation funds who are third parties, they involve relationships which are not those of employers and employees. It is obvious that the relationship between an employer and the trustee of a superannuation fund is not that of employer and employee, but that is hardly to the point. As the decision in *Reg. v. Portus; Ex parte A.N.Z. Banking Group Ltd* 48 shows, the identity of the payee is ordinarily not of significance in determining whether payments made by an employer to a person other than his employee constitute an industrial matter. But the opposite is the case where the payments are to a superannuation fund, because the character of the payee and the capacity in which he receives the payments provides the very connexion with the relationship between the employer and employee which is necessary if those payments are to be an industrial matter. Because the payments are to a superannuation fund, they form, to use the words of Menzies J., an incident of the employment. Nor can it be said that the payments contemplated by the claims in the present case will be made by the employer as the agent for the employee. There is no reason why those payments should be seen in any other way than as contributions by an employer to a fund for the benefit of an employee. No doubt the payments represent money earned in an industrial relationship, but they do not represent money to which an employee is himself presently entitled. They must be regarded as having been made to the fund by the employer in his capacity as employer and not as an agent acting on behalf of an employee.

For all these reasons, we are of the view that the claims relate to an industrial matter which is capable of being the subject of an industrial dispute within the meaning of the Act. No separate submission was made in relation to s. 51(xxxv) of the Constitution. It remains to deal with the final submission of the prosecutors, which was that in order to give effect to the claim, an award would necessarily have an operation extending beyond the limits set by s. 58 of the Act because the rights of employees entitling them to the benefit of the payments made by employers would be exercisable

beyond the period of five years specified by s. 58(1). The fallacy of this submission should be apparent from what we have already said. Under the claims made, the entitlement of employees to the benefit of the payments made by employers to a superannuation fund will not arise from any right conferred by an award but under the terms of the relevant trust deed. The only obligation to be imposed upon employers by an award will be an obligation to make payments by way of contribution to a fund during the currency of the award, the operation of which will not be required to extend beyond the time allowed by the Act. There is, in this respect, no parallel to be drawn between the claims in this case and that made in *Hamilton Knight* 49 and no assistance is to be drawn from any of the observations made in that case.

We would discharge the order nisi.

Order nisi for a writ of prohibition discharged.

Solicitors for the prosecutors, *Moules*.

Solicitors for the respondents, *Maurice Blackburn & Co*.

Solicitors for the interveners, *Australian Government Solicitor* and *R P Sammon*, Crown Solicitor for the State of Queensland.

R.A.S

1 (1950) 81 CLR 64, at p 84.

2 (1972) 127 CLR 353, at pp 357-358, 371.

3 (1984) 154 CLR 472, at pp 482-483, 488-491.

4 (1952) 86 CLR 283, at pp 301, 305, 306.

5 (1952) 86 CLR, at pp 293, 294, 319-323.

6 (1913) 17 CLR 680, at pp 692-693, 704.

7 (1953) 90 CLR 621, at pp 629-631, 634.

8 (1978) 141 CLR 257, at p 263.

9 (1973) 129 CLR 312, at p 329.

10 (1973) 127 CLR 353, at pp 356, 357, 360, 371.

11 (1976) 137 CLR 153, at pp 163-164.

12 (1983) 152 CLR 632, at p 650.

13 (1983) 153 CLR 297, at pp 305-306, 311-313.

14 (1982) 154 CLR 472, at p 489.

15 (1952) 85 CLR 138, at p 153.

16 (1981) 157 CLR 331, at pp 337-338, 346.

17 (1983) 153 CLR, at pp 312-314.

18 (1953) 81 CLR, at p 84.

19 (1953) 90 CLR, at pp 629-630.

20 (1972) 127 CLR, at pp 359-360, 363-364, 371-372.

21 (1976) 137 CLR, at pp 162-164.

22 (1983) 153 CLR, at p 312.

23 (1968) 121 CLR 313, at p 318.

24 (1972) 127 CLR, at pp 360, 371-372.

25 (1952) 86 CLR, at pp 308, 311, 318-319, 323-324, 332-333.

26 (1937) 56 CLR 657, at pp 666-667.

27 (1983) 153 CLR, at p 314.

28 (1984) 154 CLR 472, at p 491.

29 (1972) 127 CLR, at p 360.

30 (1952) 86 CLR, at pp 296, 307-308, 311, 328-329.

31 (1952) 86 CLR, at pp 295-296, 307-308, 311, 328-329.

32 (1972) 127 CLR, at p 371.

33 (1952) 86 CLR 283.

34 (1952) 86 CLR, at p 323.

35 (1952) 86 CLR, at p 308.

36 (1952) 86 CLR, at p 318.

37 (1952) 86 CLR 283.

38 (1983) 152 CLR 632, at p 650.

39 (1972) 127 CLR 353, at p 360.

40 (1972) 127 CLR, at p 371.

41 (1950) 81 CLR 64, at p 84.

42 (1968) 121 CLR 313, at p 318.

43 (1984) 154 CLR 472, at pp 488-489.

44 (1952) 86 CLR 283.

45 (1953) 88 CLR 100, at pp 117-119.

46 (1952) 86 CLR, at p 296.

47 (1952) 86 CLR, at p 301.

48 (1972) 127 CLR 353.

49 (1952) 86 CLR 283.