HIGH COURT OF AUSTRALIA

Queen

Vs.

President

(Dixon C.J.(1), McTiernan(2), Fullagar(3), Kitto(4), Taylor(5) and Windeyer(6) JJ)

9 September 1959

CATCHWORDS

Constitutional Law (Cth) - Conciliation and arbitration - Jurisdiction of Commission - Log of claims by professional engineers - Employment described by reference to professional qualifications - Engineers employed by State governments, agencies of State governments or municipal bodies - Governmental character of employers - Whether inconsistent with work being industrial in character - Jurisdiction where some employees described in log not industrially employed - The Constitution (63 & 64 Vict. c. 12), s. 51 (xxxv.) - Conciliation and Arbitration Act 1904- 1958 (Cth), s. 4 (1), definitions of "industry" and "industrial dispute".

HEARING

Sydney, 1959, April 2, 3, 6-10, 13-15; September 9. 9:9:1959

ORDERS NISI FOR MANDAMUS AND PROHIBITION.

DECISION

September 9.

DIXON C.J. The Association of Professional Engineers, Australia, is an organization of employees registered under Pt VIII of the Conciliation and Arbitration Act 1904-1958 (Cth). To be a member it is necessary to have a professional qualification in engineering. It appears that in October 1956 the Federal Council of the body resolved upon a log of claims to be served upon employers with respect to the salaries to be paid for professional engineering work. The document adopted is that with which this Court dealt in Reg. v. The Association of Professional Engineers of Australia ; Ex parte Victoria (1957) 100 CLR 155 The Judgment of the Court contains a full description of the instrument, a discussion of its effect and an account of the classification of professional engineers upon which it appears to be based. It is unnecessary to repeat what is there said. It is enough to say that the log concerns rates of salary and that two minimum rates are specified. For a "qualified engineer" a minimun of 1,650 pounds per annum : for a "chartered engineer" a minimum of 2,200 pounds per annum. These are defined terms; they depend on the attainments and experience of the engineer. The actual rates payable in a particular case are left to the agreement of the parties but there is a demand that the professional engineer should be at liberty to invoke the Association to represent him in the negotiation and of course the rate agreed may not go below the appropriate minimum. The work in respect of which the demands are made is described simply as professional engineering duties but these words are defined to mean "duties carried out by a person in any

particular employment the adequate discharge of any portion of which duties requires qualifications of the employee as (or at least equal to those of) a graduate of The Institution of Engineers, Australia". There is a long schedule of the recognized qualifications. They are described in the judgment of the Court to which reference has already been made and nothing more need be said about them now. What is important for present purposes is that there is nothing to indicate the place which the performance of these duties may have in industry or to distinguish the kind of employment in which the professional skill of the engineer may be called for or applied. All that is left to experience and general knowledge. The specific application of the log of demands was to be shown only by the choice of the employers or potential employers upon whom the log was served. In fact the document was served upon a large number of bodies and persons in whose service professional engineering duties in the defined sense are performed. These bodies included State Governments, agencies of State Governments, and some municipal bodies. The failure of parties served to reply to or to agree in or comply with the demands, as the case might be, was treated by the Association as evidence of an industrial dispute. For some reason which cannot be said to be self-explanatory the Association adopted the view that a number of divisible industrial disputes arose out of this process of serving the log of demands and obtaining no compliance therewith within a reasonable time. Accordingly, in purported pursuance of s. 28 (2) the officers of the Association gave notifications of the existence of a number of industrial disputes. In the present proceedings we are concerned with two of these alleged industrial disputes. They were the subject of notifications to the Industrial Registrar made on 8th July 1957 and he numbered the disputes C630 and C631 of 1957. In these two matters many respondents were named having a governmental connexion. In particular they included the Public Service Board of New South Wales, the Public Works Department of that State, the Water Conservation and Irrigation Commission, the Maritime Services Board, the Metropolitan Water Sewerage and Drainage Board, the Department of Main Roads, the Hunter District Water Board, the Electricity Commission, the Housing Commission, the Forestry Commission, the State Coal Mines, all of New South Wales. The Joint Coal Board was included and in addition to other municipal bodies, the Sydney City Council. There were, it is almost superfluous to add, parties in other States served with the log and listed as parties to these disputes. Findings were made under reg. 17 that industrial disputes existed in the two matters between the Association and the employer parties listed in the respective affidavits supporting the notifications. They together with other "disputes" arising from the log came before Mr. Commissioner Portus, but before he could deal with the merits the order nisi for a writ of prohibition was granted which forms the subject of the report already cited [1957] HCA 95; (1957) 100 CLR 155 . That order nisi was discharged on 19th December 1957. The matters again came before Mr. Commissioner Portus and on that occasion an application was made by respondents that the disputes should be heard by the Commission constituted by not less than three members including a Presidential member. The application was made under s. 34, on the ground of the great importance of the matters in the public interest. Eventually a direction was obtained to that effect and on 19th August 1958 the two alleged disputes together with seven others came on to be heard before the Commission composed of five members including the learned President. An objection was then raised and argued that the Commission had no jurisdiction to bind by award, in purported settlement of the alleged disputes, the State of New South Wales or any of the departments or agencies of the State already enumerated. The ground was that the employment of professional engineers by the State or the departments or agencies of government mentioned could not in that character become the subject of an industrial dispute raised by the service of the log of demands and non-compliance therewith. After a very full argument a majority of the Commission ruled that with certain exceptions the employment of professional engineers by the departments or bodies concerned might or did form the subject of an industrial dispute the settlement of which would fall

within the authority of the Commission. The exceptions are these. In the first place the majority of the Commission considered that professional engineering duties performed within the Public Works Department of the State of New South Wales would not be of a description falling within a power to settle industrial disputes. But to that proposition there was a necessary qualification. For it happens that the State Dockyard and the State Brickworks are both carried on under the Department of Public Works and these undertakings seemed naturally to lie within the conception of industrial enterprises so that the employment of any professional engineer therein to perform professional engineering duties in the defined sense might well be considered as subject to the authority of the Commission. In the second place the majority of the Commission were of opinion that the employment of a professional engineer to perform such duties in the Water Conservation Commission could not be subject to the authority of the Conciliation and Arbitration Commission to settle an industrial dispute. Here again their Honours thought there must be a qualification ; for they were not prepared to treat the supply and sale of water as outside the scope of industrial activity. That seemed commercial. But without qualification they considered that it was impossible that employment to perform professional engineering duties for the Metropolitan Water Sewerage and Drainage Board, for the Hunter District Water Board and for the Department of Main Roads should form the subject of an industrial dispute the settlement of which would lie within the authority of the Commission. (at p231)

2. The foregoing represents the conclusion of the President (Kirby J.), of Gallagher J. and of Mr. Senior Commissioner Chambers. Wright J. regarded the whole matter as within the Commission's powers and Mr. Commissioner Portus examined the activities or purposes of the various sections within the departments and agencies in contest and gave a considered list of all the various sections wherein the performance of professional duties would or might be in the learned Commissioner's opinion the lawful subject of regulation by award settling an industrial dispute. The decision of the majority meant of course, on the one hand, a refusal by the Commission to exercise authority with respect to the five departments and bodies last named but, on the other hand, an acceptance by the Commission of authority over the remaining bodies covered by the objection that had been taken. The Association of Professional Engineers thereupon obtained an order nisi for a writ of mandamus commanding the members of the Commission to exercise the authority or jurisdiction that had been refused. That was not how the order nisi was expressed but it is the effect. The affidavit by which the application was supported sought a mandamus the tenor of which would command the Commission to hear and determine according to law industrial disputes numbered C630 and C631 of 1957 and the order nisi was expressed in that form accordingly. Then on the other side the State of New South Wales and five bodies or agencies of the State which the Commission had held to be subject to its authority to settle an industrial dispute obtained as prosecutors an order nisi for a writ of prohibition restraining the Commission from proceeding to exercise the authority thus asserted. The five bodies are the Housing Commission, the Forestry Commission, the Water Conservation and Irrigation Commission, the Maritime Services Board and the Electricity Commission. The tenor of the writ sought was to prohibit the Commission from proceeding further with the hearing of industrial disputes numbered C630 and C631 of 1957 and the order nisi for prohibition was granted in that form. Finally the Council of the City of Sydney obtained an order nisi for a writ of prohibition in the same terms, qualified however by the words "so far as they" (viz. the industrial disputes) "relate to the prosecutor". The three orders nisi were argued together before this Court. (at p232)

3. It will be seen from the foregoing account of the proceedings that what is in controversy between the State of New South Wales and its agencies and the Association is the liability of the former to the authority of the Commonwealth Conciliation and Arbitration Commission to determine by

award the salaries to be paid to officers of the character of professional engineers. So far as the State of New South Wales is concerned the question is confined to the departments and agencies that have been enumerated above in reference to the writ of mandamus and the writ of prohibition sought on one side and the other. But both the State of Victoria (on behalf of the State itself and of certain agencies of the State) and the State of Western Australia obtained leave to intervene in the argument and these States supported the contentions of New South Wales. (at p232)

4. In terms none of the learned counsel representing the interests of the States attempted to contest or to qualify the principles laid down in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129 as explained in Australian Railways Union v. Victorian Railways Commissioners [1930] HCA 52; (1930) 44 CLR 319 . In other words there was no denial of the general rule that apart from certain qualifications not presently material, unless the contrary intention appears a legislative power of the Commonwealth is to be interpreted as extending to operations of the States so far as otherwise they fall within the subject matter of the power. And there was no denial of the specific application of the rule to s. 51(xxxv.) of the Constitution which had been made in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . That means that the Parliament may make laws which apply to the States and to agencies of the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Where the legislation giving authority to the Commission applies it is enough that there is an industrial dispute extending beyond the limits of any one State and it is not an objection to the exercise of the authority that a party affected bears the character of a State or an agency of the State. But while in terms all this was left uncontested by the learned counsel for the States the condition that the dispute must be industrial was insisted upon and the character of the State and the agencies of a State was used as showing that in the case before us the condition could not be fulfilled. Sitting as an Acting Deputy President of the Arbitration Court Starke J. said that officers in the administrative branches of the States, such as clerks in the Treasury, in the Lands Department and in the Law Department are not engaged in, or in connexion with, any industry and are not persons over whom the Commonwealth Arbitration Court could have any authority whatever (Commonwealth Public Service Commissioner v. Government Service Women's Federation (1920) 14 CAR 794). This forms an apt contemporaneous statement of the inapplicability of the federal industrial power to the administrative services of the States notwithstanding the interpretation placed upon it in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . The fact that prima facie the administrative services of the States do not constitute a description of employment in which an industrial dispute could arise forms the basis of the objection upon which the States rely. It is not an over-simplification to say that in substance the position of the States is that "professional engineering duties" as defined in the log when performed in the departments or bodies enumerated above can never be the subject of an industrial dispute or be governed by an award or determination settling an industrial dispute. But in the argument by which the States attempt to make good this position an antithesis has been instituted between what is "governmental" and what is "industrial". Unfortunately neither of these terms has any very definite meaning and moreover, let the terms be used ever so carefully, it is impossible to fix meanings upon the words which would make them mutually exclusive. Nevertheless constant resort in the argument to the notion of "governmental function" as a category almost inevitably effected a tacit re-introduction of the same tests of the application of s. 51(xxxv.) to employment by the States or their agencies as were in use before the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . Indeed this actual but unacknowledged return to old discarded tests went so far that reliance was placed upon the Australian Workers' Union v. The Adelaide Milling Co. Ltd. [1919] HCA 27[1919] HCA 27; ; (1919) 26 CLR 460 , the case which proved to be the last of the successive applications of the

doctrine so soon afterwards overthrown by the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . An attempt under cover of the word "industrial" in this fashion to go back and to re-employ former tests of immunity is quite inadmissible. There is only one question and that is whether an industrial dispute exists extending beyond one State for the settlement of which it is relevant or appropriate to make an award regulating the terms and conditions of the employment of the Professional Engineers by the State or the State agency or body. The industrial character of a dispute or part of a dispute may be open to doubt, but the resolution of the doubt is not made easier if the supposition is adopted that the "governmental" character of the service is actually inconsistent with its having an industrial character. That which is naturally within s. 51(xxxv.)

cannot cease to be so because it is "governmental". It is enough to take a simple example. It may be easy enough to say that a dispute between a State and the officers of the State employed in assessing State land tax is not an "industrial dispute". As a matter of the use of English terms most people would feel that this must be so and if they were called upon to give an analytic statement of the reasons why, they would say that it stood outside the whole world of productive industry and organized business. They might, by way of contrast with that, point to its governmental purpose. But if they were then faced with the question whether a dispute arising from the demands of lift attendants, office cleaners and the like upon their employers, industrial as otherwise it might be, ceased to be "industrial" when it extended to or affected the land tax office because that was governmental, surely the answer would be that the character of the building could not make a dispute about the wages and conditions of employees doing such work any less industrial. I have not overlooked the fact that in his dissenting judgment in Federated State School Teachers' Association of Australia v. State of Victoria [1929] HCA 11[1929] HCA 11; ; (1929) 41 CLR 569, at p 584 Isaacs J. distinguished between Crown officials of the State engaged in administering true, essential governmental authority who could not fall within s. 51(xxxv.) and those performing other duties particularly "trading employees". "There is", said his Honour, "a line of demarcation inherent in all British Constitutions which inexorably divides the two classes of cases" [1929] HCA 11[1929] HCA 11; ; (1929) 41 CLR 569, at p 584 . This of course derives through the well-known passage in the judgment of Lord Watson in Coomber v. Justices of Berks (1883) 9 App Cas 61, at p 74 , in which the administration of justice, the maintenance of order and the repression of crime are described as being "among the primary and inalienable functions of a constitutional government". But I must confess that it is a line of demarcation which I have never been able to trace for myself in what may be described as the applied constitutional law or practice of today or to discover in legal history. In all the developments of modern times it seems better to read s. 51(xxxv.) of the Constitution without reference to such preconceptions whether well or ill founded and simply to determine whether according to a proper understanding of what the State is doing and the nature of the services the employees who may be in question perform the relevant operations in which it is engaged may be affected by the Commission's award. I should add, with all respect to Isaacs J., that I cannot think that when he applied the word "regal" to what he regarded as essential functions of government, it was a happy choice to convey his meaning; no more happy than the choice of the phrase "corpuscular wealth" in his discussion in the same case of the connotation of industrial dispute. (at p235)

5. The expression "industrial dispute" in s. 51 (xxxv.) of course does not of itself amount to a definition and is in fact merely a descriptive name of the dislocations, differences and tensions among employers and employees which in various forms had grown only too familiar in production, business or other organized work. The varying and sometimes discordant results of the attempts to formulate some inclusive and exclusive definition of "industrial dispute" may be seen in the judgments given in Federated Municipal and Shire Council Employees' Union of Australia v.

Melbourne Corporation (1919) 26 CLR 508 , particularly in the judgment of Gavan Duffy J. (1919) 26 CLR, at pp 579, 580, 582-584 . Until Proprietors of the Daily News Ltd. v. Australian Journalists' Association [1920] HCA 43; (1920) 27 CLR 532 and the Insurance Staffs and Bank Officials' Case [1923] HCA 61; (1923) 33 CLR 517 it had not been made clear that employment in a form of business involving neither manual labour nor the production or handling of material things, a financial business for example, might form the subject of an industrial dispute, because it was found to be ancillary or incidental to the organized production, transportation and distribution of commodities or other forms of material wealth. Before that it might have been considered that employment in a business could not be the subject of an industrial dispute if, as in banking and insurance, it was concerned directly only with intangibles. However, at length it became clear that the propriety of applying the word "industrial" to a dispute might depend upon any one of a number of factors. If the dispute is about employment to do work of a manual character always it has been regarded as typically industrial and I doubt if it was ever considered necessary to go further. Indeed that would be a sufficient reason for regarding the dispute as within s. 51(xxxv.) although there was no "industry" or business organized for profit. Thus it was that the Municipalities' Case (1919) 26 CLR 508 brought within the conception a dispute between local councils and a union of employees concerning the making, maintaining, controlling and lighting of public streets. On the other hand the dispute might arise in an industry organized as an undertaking for some productive purpose or some purpose of transportation and distribution. Then whatever the capacity in which a man is employed, however removed he might be from the performance of manual work or labour, he has been regarded as capable of being involved in an "industrial" dispute. One might not, for example, look upon nursing as in itself industrial but the casualty staff forming part of a very large undertaking would be regarded as involved in an industrial dispute if the undertaking as a whole were dislocated in consequence of a disagreement about the terms and conditions of employment. (at p236)

6. It would be possible to point to many other elements or aspects of disagreements and differences among employers and employees any one of which would or might be considered enough to bring the dispute within the category of industrial dispute. That is because it is natural that such a very wide and flexible phrase should apply according to conceptions of usage and of practical life rather than to some logical connotation or precise analysis. In the State School Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 in the judgment of Knox C.J., Gavan Duffy and Starke JJ. the argument is referred to "that if the activities were carried on by a private person, such as a schoolmaster, then the operations would be described as a business, a trade or an industry" (1929) 41 CLR, at p 575 . The "operations" are those of the State Education Department. The argument appears to imply that the private schoolmaster would carry on the operation for profit. In other words it seems to have been assumed that possibly it might have been considered enough to bring school teaching within the conception of the industrial organization of society except by those who regarded the intrinsic nature of school teaching as taking the profession completely out of the field of business and industry and out of any category incidental or ancillary thereto. But the close examination to which that judgment in that case was submitted in the argument before us shows that a basal proposition in the judgment is that the occupation which the State school teachers pursued is not by nature industrial; something must be added to it to make it so, as for example, the pursuit of private profit. The sentence that follows is condensed but it is clear - "An occupation confined to teaching in the schools of the States has impressed upon it the character of the activity in which it is exercised" (1929) 41 CLR, at p 575 . It means that unless the character of the State educational system makes it so, there is nothing in the profession to bring it within the industrial arbitration power. What precedes these sentences is directed to negativing successively the application of one possible reason after another for saying that a dispute is industrial. (at p237)

7. If one turns from the case of the State school teachers to that of engineers you find that you are concerned with a profession whose province is the higher control of the construction of physical things and the higher control of the application of mechanics, electronics and chemical engineering to the creation, maintenance and operation of material structures and objects. There is no prima facie reason why the work of the profession should be considered to stand apart from the wide conception of what is "industrial". In other words there is nothing in the nature of the duties usually performed by a "professional engineer" which creates any prima facie presumption that a "dispute" in which he or an association representing him or the interests of his profession is engaged with employers concerning the terms and conditions of his employment should not fall within the description "industrial" as that word is used in s. 51 (xxxv.). One should perhaps add that that means according to the interpretation given to that power by the decisions of this Court. In considering the present case it is important to bear in mind that there is no prima facie reason to suppose that the employment of a professional engineer is not "industrial" within the meaning of s. 51 (xxxv.). Important, however, as it is for the purposes of this case to note this point, it is paradoxically enough much more important to grasp the fact that the case made on behalf of the States and their agencies treats it as an irrelevancy. Doubtless they do not concede the correctness of the proposition that prima facie the duties of a professional engineer are such that a dispute with his employers about his salary and conditions of employment will form an industrial dispute. But the case for the States does not turn on the inherent or presumptive character of the professional engineer's duties. It rests on the character or functions of the department or agency he serves. The contention is that these departments or agencies stand apart from the conceptions of the industrial organization of the community and form arms or organs of government in which employees (at all events unless actually engaged in some recognized industrial task) can answer to none of the tests which have from time to time been propounded of what is "industrial" for the purpose of s. 51 (xxxv.). The qualification expressed by the words "unless engaged in some recognized industrial task" means no more than that the proposition in its application is not pushed beyond those whose task is not recognized as industrial. To this extent perhaps it may be said that the nature of a professional engineer's work was used as a foundation for the argument of the States. But all it comes to is that this case is not concerned with actual manual workers in a regular pursuit or calling. It remains true that it is the governmental character of the State department or body that is relied upon as taking the dispute arising from the log of demands outside s. 51 (xxxv.). Now it must be said at once that the question whether it takes the dispute outside s. 51 (xxxv.) of the Constitution is entirely independent of another question which arises. That other question is whether the statutory definition of the expression "industrial dispute" in s. 4(1) of the Act is inapplicable and whether by consequence the case to some and what extent falls outside the Act by which the Parliament has exercised its legislative power derived from s. 51 (xxxv.). That question ought not to be confused with the States' case under the Constitution and accordingly its consideration will be left until the case for the States under the constitutional power has been dealt with. Now for the purpose of that case the exact duties of the various descriptions of professional engineers in the service of the Government of the State of New South Wales or its agencies have not been investigated. One reason no doubt is that the case for the State is put on the functions of the departments and agencies of the State and not on the duties of the man. A general notion only has been given of what engineers do in the agencies and departments involved. It is what the departments and agencies do that has been shown and what a close relation the operations of those departments and bodies have to the central government of the State, its policies and its administration. This I repeat appears to be returning by another route to the doctrine abandoned in 1920. Much may be said, and at the time was said, against the course then taken in abandoning the doctrine that had been pursued. The general propositions expressed in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 were expressed with a certain emphasis and

perhaps copiousness of epithet which no doubt were to be accounted for by the conscious change in fundamental doctrine which the judgment made. At the same time a close study of the text might suggest that it was not without ellipses. Perhaps in these circumstances the reservations and qualifications therein expressed concerning the federal power of taxation and laws directed specially to the States and also perhaps the prerogative of the Crown received too little attention. These are matters on which I have expressed my views in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . But there could be no doubt of the interpretation that s. 51 (xxxv.) received. It simply was that the legislative power conferred by s. 51 (xxxv.) applied to the States and the organs and agencies of the States. Nothing remained, so it has appeared to me, except to determine whether any given dispute arising between a State or the agencies of a State and its or their employees can amount to or be included in an industrial dispute. Since that date interpretations of s. 51 (xxxv.) in respect of other questions have been established which have resulted in a marked widening of the application previously made of the legislative power. Perhaps the most important and far-reaching is the conception given form in Burwood Cinema Ltd. v. Australian Theatrical and Amusement Employees' Association [1925] HCA 7; (1925) 35 CLR 528 , and the very large extention of that conception in the Metal Trades Employers Association v. Amalgamated Engineering Union [1935] HCA 79; (1935) 54 CLR 387 . The difficulties which have been felt over the present case are perhaps in no small degree traceable to the almost uninhibited use of this conception made by the framer of the log of demands put forward by the Professional Engineers' Association. For in that log a claim has been made on behalf of professional engineers considered as a class defined by nothing but their qualifications, and moreover the claim has been made in respect of work identified only by the need to possess the qualification in order to perform the work or some part of it. But it is a case where the selection of the parties to be served has also operated of necessity as a further identification of the subject of the dispute. For the department, body, or other employer served with the log of demands was apprised of the intention to insist on the terms and conditions described therein in relation to those performing professional engineering duties in that service. Suppose nevertheless there be persons in the employ of a particular department or agency qualified but doing work which could not fall within the scope of the constitutional power conferred by s. 51 (xxxv.). Obviously they are not for that reason outside the demand. If the demand creates a dispute in fact based on disagreement they are not outside the dispute, considered independently of its "industrial" character. What they are outside is the constitutional power which would enable the Commission to deal with the dispute so far as it is industrial. But that cannot mean that the dispute so far as it affects all the other professional engineers in that employ and the employ of other employers is outside the power. The dispute so far as it concerns employment within s. 51 (xxxv.) remains subject to the authority of the Commission. Of course all this is hypothetical and it is stated only to bring out more clearly the fact that what we are here dealing with is simply a denial of the possibility of the parties served becoming subject to the authority of the Commission to settle this dispute. We are not following the ramifications of the various services to see if there are professional engineers whose work an award of the Commission could not cover. This may seem to leave a situation which is administratively ver undesirable. If so the discretion of the Arbitration Commission is wide enough to meet it, laborious and intricate as the task of doing so might prove to be. Strange situations arise under s. 51 (xxxv.) but that is a consequence of the peculiarity of the legislative power. The steps which the decisions of the Court took by which the enlargement of earlier conceptions of the power was effected may not have been all necessary but it is useless to attempt to go behind the principles they establish; and it appears to me that it is firmly established that given an industrial dispute to which the jurisdiction attaches there is no constitutional reason why States may not be bound with respect to the employment of persons within the ambit of the dispute. (at p240)

8. It is now possible to go back to the departments and bodies enumerated earlier in this judgment as respectively the subjects of the application for mandamus and the application for prohibition. The first in order is the Department of Public Works. It is almost needless to say that the State Dockyards and the Brickworks, subdivisions or sections contained within the Department, were rightly regarded as, so to speak, belonging to the industrial system and as undeniably forming partof the organization of production, so that no reason existed why an engineer's employment in either subdivision should not be the subject of an industrial dispute extending beyond the limits of any one State. But there is nothing in the character of the Department as a whole to provide a prima facie reason why a professional engineer, being an officer of the Public Works Department, should be incapable in that capacity of falling under an exercise of the power which the Parliament is enabled by s. 51 (xxxv.) to confer upon the Conciliation and Arbitration Commission. However high a place such a professional engineer may take in the planning of constructional works or in the making of policy concerning them there is no prima facie reason for supposing that his employment is of a kind falling outside the possible application of the conception of an industrial dispute. Investigation of the position of a given man may show that his particular employment could not be the subject of an industrial dispute but, as I have endeavoured to emphasize, the point of these orders nisi is not that this professional engineer or the other professional engineer is engaged in work which lies outside the application of the federal legislative power with respect to conciliation and arbitration to prevent and settle industrial disputes. The foregoing observations are even more directly applicable to the Water Conservation and Irrigation Commission. The distinction between the purposes of the Commission in supplying or selling water and the remainder of its work does not appear to me to be a valid distinction for the purpose in hand but it is hardly necessary to say that the employment of officers in the section of the Water Conservation and Irrigation Commission even more clearly falls under the federal power conferred by s. 51 (xxxv.). All this is true of the Metropolitan Water Sewerage and Drainage Board and of the Hunter District Water Board and is doubly true of the Department of Main Roads. It necessarily follows from what has been said that the Conciliation and Arbitration Commission properly asserted authority and jurisdiction over the Maritime Services Board, the Electricity Commission of New South Wales, the Joint Coal Board and the State Mines Control Authority. As to the Sydney County Council, St. George County Council, Northern Rivers County Council, and the Sydney City Council and the Newcastle City Council there can, in my opinion, be no ground for excluding them from the authority with respect to the alleged disputes of the Commonwealth Conciliation and Arbitration Commission. (at p242)

9. If there be any professional engineer who, applying the principles suggested above, is found to be outside the industrial field because of the character of his individual work, that would be a matter for the Commission to consider in making its award. (at p242)

10. Up to this point this judgment has dealt only with the extent to which the constitutional power enables the Parliament to arm the Conciliation and Arbitration Commission with authority or jurisdiction to make an award binding the States and the agencies of the States. There remains the important and somewhat difficult question of the extent to which in the Conciliation and Arbitration Act 1904-1958 the constitutional power has in fact been exercised in reference to the States and the agencies or organs of the States. In effect that question is how far the powers and functions entrusted by Pt III of the Conciliation and Arbitration Act 1904-1958 to the Commission are meant to operate in relation to the States. The question depends on par. (c) in the definition in s. 4(1) of the term "industrial dispute". Section (4)(1) contains the definitions upon which the provisions of the Act depend. The definitions are for the most part obviously not designed as restrictive. Their purpose is to extend the application of the jurisdictional provisions of the Act. The definition of "industrial dispute" however begins with the word "means" and that of course operates to give the

expression which it introduces an exhaustive effect. But the word "means" governs only two paragraphs of the definition, pars. (a) and (b), and they contain general words covering only the abstract elements which will amount to an industrial dispute, applying equally to natural persons, corporations and States and agencies of States. After pars. (a) and (b) there follow the words "and includes", words which of course make it clear that what follows is not necessarily exhaustive. Three paragraphs follow, pars. (c), (d) and (e). They relate to specific points. Paragraph (c) says that an industrial dispute "includes such a dispute in relation to employment in an industry carried on by, or under the control of, a State or an authority of a State". Paragraph (d) has similar words in relation to the Commonwealth but it is an enactment made as an exercise of the power conferred by s. 52(ii.) and s. 51(xxxix.) of the Constitution and as it is not enacted in reliance on s. 51(xxxv.) the paragraph is expressed to cover disputes whether extending beyond the limits of any one State or not. Paragraph (e) deals with a special question arising from the Public Service Arbitration Act. It is not presently material and it is unnecessary further to notice it. The first question which arises is whether par. (c) is a positive statement which implies a negative. Does it imply that an industrial dispute to which a State is a party is not to be counted as an industrial dispute unless it can be correctly said that there is an industry carried on by or under the control of the State and that the dispute is in relation to employment in that industry? It is of course a question of interpretation. But if the question were answered that par. (c) is an exhaustive statement of the authority of the Commission in a dispute concerning a State, there then must arise the question what is the meaning and application of the expression "an industry carried on by, or under the control of, a State or an authority of a State". The first of these two questions, having regard to the definitions, cannot be satisfactorily dealt with unless the problem involved in the second of them is understood. It will therefore be convenient to deal with the latter at once. The word "industry" is defined in s. 4(1) as "including (a) any business, trade, manufacture, undertaking, or calling of employers; (b) any calling, service, employment, handicraft, or industrial occupation or avocation of employees; and (c) a branch of an industry and a group of industries". Doubtless the word "avocation" is a mistake for "vocation", a mistake so commonly made. If one turns to the definition of "employer" it will be found that the word is defined to mean any employer in any industry and to include any person who is usually an employer in an industry and to include a Club. The word "employee" is defined to mean any employee in any industry and to include any person whose usual occupation is that of employee in any industry. It will be seen that the definition of "industry" depends upon the two words employers and employees, while the definition of those words depends upon the persons to whom they apply being employers or employees in an industry. This circular method of definition is of course logically indefensible but, notwithstanding what was said by Latham C.J. in the State Public Service Case (1942) 66 CLR 488, at pp 499-501 , I do not think that it operates to narrow or exclude the application of the definition of "industry" contained in the three pars. (a), (b) and (c) of the definition in s. 4(1). The question is, however, whether that definition applies to par. (c) of the definition of "industrial dispute". There is no difficulty in treating a business, trade, manufacture or undertaking of employers as carried on by the State. That is the phrase which results from combining four of the words contained in par. (a) of the definition of "industry" with the words of par. (c) of the definition of "industrial dispute". And as to the fifth word "calling", although the phrase is somewhat awkward there is little difficulty in the conception of a "calling" of employers being carried on by or under the control of the State. When, however, one passes to par. (b) of the definition of "industry", that relating to employees, there is a little more difficulty if in place of the word "industry" in par. (c) of the definition of "industrial dispute" a literal substitution is made of the words used in par. (b) of the definition of "industry". The substitution results in a combination which says "such a dispute in relation to employment in a calling, service, employment, handicraft, or industrial occupation or avocation of employees carried on by or under the control of a State".

We know that in the development of the Act these incongruities have arisen from changes in the definitions as they originally stood. But it is right to construe the Act as it now stands. What in effect is the contention for the States is that in par. (c) of the definition of "industrial dispute" you must first reject the definition of "industry" as inapplicable or at all events reject par. (b) of the definition of "industry" and, having done so, construe "industry" in the narrow sense of a business or enterprise or an undertaking regarded as an organized unit. If par. (c) of the definition of "industrial dispute" could be limited to employment in an industry in the narrow sense of such an enterprise or business or undertaking and if the definition were interpreted as applying only to an industry in that sense when carried on by or under the control of the State or an authority of the State and further interpreted as implying that otherwise the Act should not touch the State, then there would be much to be said for limiting the operation of the Act in the way contended for by the State of New South Wales. But one cannot read the definitions without feeling confident that it was not the intention to limit the application of the word "industry" in this way. Plainly the principle it was sought to establish by the definition of the word "industry" was that it would embrace all that might be regarded as an industry from the point of view of the pursuit or craft of the men or the undertaking, the business or the vocation of the employer. It may be clumsy to apply the definitions literally to the State but the general intention is plain enough. The words "carried on" are susceptible of a very extended meaning or application, a meaning or application covering such conceptions as conducting, directing or operating. The word "by" may be regarded as meaning no more than through the instrumentality of the State, while the words "under the control of" refer rather to a less direct relation. I do not think that a restrictive interpretation can be given to the Act based upon par. (c) of the definition of "industrial dispute". Perhaps the correct view is that no negative is implied by the positive statement contained in par. (c). But in any event it seems to be contrary to the true intention of the provisions of Pt III construed in the light of all the definitions in s. 4(1) if the authority of the Commission to settle the dispute raised by the log by a binding award be treated as insufficient to include any of the departments or bodies that have been enumerated on the ground that the operations for which the department or body is responsible do not answer the narrow conception of a business, an enterprise or an undertaking constituted as a single organized unit. (at p245)

11. For the foregoing reasons the objections to the jurisdiction of the Conciliation and Arbitration Commission appear to me to fail. But it is necessary to restate again that the objections are founded on the character of the State as an employer and of the State bodies as employers. It would not be inconsistent with my decision for the Conciliation and Arbitration Commission to exclude given officers who happen to be performing duties falling within the definition given by the log of the duties of professional engineers on the ground that the officers are not in fact concerned with anything but bare administrative service to the State unconnected with any kind of constructional work or preparation for constructional work or with any other matter which might be regarded as providing a sufficient connexion with operations that might be described as industrial within the meaning of s. 51 (xxxv.) of the Constitution. (at p245)

12. There was some discussion at the hearing of the orders nisi as to what possible effect a discharge of the orders nisi without qualification might have in precluding an investigation of some given case, if, for example, an engineer's title to benefit from a future award were questioned. However, it clearly could not preclude any such inquiry by the Conciliation and Arbitration Commission. What operation it might have on issues which the State might otherwise wish to raise in connexion with the form of any award which the Commission may make hereafter is entirely a speculative question. Probably no situation is to be expected in which the question could really arise or matter. (at p245)

13. In my opinion the orders nisi for prohibition should be discharged and the order nisi for mandamus should be made absolute. To make the order nisi for mandamus absolute in its present form requires the Commission to hear and determine the whole dispute, but that is not incompatible with the use by the Commission of such powers as, for example, that conferred by s. 41(d). I would make the order nisi for mandamus absolute as it stands, moulding it in such a way as to admit of a reconstitution of the Commission for the purpose of the hearing of the disputes. (at p246)

McTIERNAN J. In my view the bodies which make common cause in these proceedings with the State of New South Wales are governmental or quasi-governmental authorities. As in the case of the State of New South Wa les, none of them is an industry, government and industry being essentially different. I do not, however, regard government as merely a closed category of "indispensable" and "regal" functions. The description "governmental" is wider than "executive" or "administrative" (Maitland, The Constitutional History of England, p. 196). Executive or administrative functions are at the heart of government. They are not industrial activities. But a governmental industry is a well-known entity. That does not mean that the management of such an industry is itself an industrial activity; it is, on the contrary, an administrative function. The materials before the Court show that all the employers concerned in the present proceedings carry on substantive activities which the provisions of s. 4 of the Conciliation and Arbitration Act relating to the meaning of "industry" include in that term. I think that the apt terms here are "business", "trade" or "undertaking". But to be included in "industry", such an activity must be "industrial" from the point of view of s. 51(xxxv.) of the Constitution. Under our system of polity the activities in question are such as might be carried out either by the State or a public authority or by private enterprise. They are activities which pertain to industry. The fact that any one of them is carried on by the Government or by a public body does not deprive it of its industrial character. A State or a governmental body is within the range of s. 51(xxxv.) of the Constitution so far as it is an employer in an "industry": Section 4 (a) of the Conciliation and Arbitration Act defines "industrial dispute". In my opinion, par. (a) of the definition would, apart from par. (c), apply to an industrial dispute in which the State of New South Wales or any other of the authorities was involved as an employer in an industry within the meaning of the Act, and par. (c) of the definition is declaratory as to the width of par. (a). (at p246)

2. The remaining question to be determined is whether the employees on whose behalf the Association of Professional Engineers framed the log of claims are employees in any "industry". It must be an industry which is "a calling &c. of employees" under par. (b) of the provisions of s. 4 relating to the meaning of "industry". (at p247)

3. If the employees in whose interests the Association framed its log are in an "industry" within the meaning of the Act, the Association should succeed in all the present matters. The part of the log of claims which is material for present purposes is in these words: "'Employer' shall mean any employer, council, board, commission, Government department, authority, trust, corporation, company or other body or person upon whom this Claim is served, or the successor of any of the above. 'Professional Engineering Duties' shall mean duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires qualifications of the employee as (or at least equal to those of) a Graduate of The Institution of Engineers, Australia. The said qualifications are those prescribed for or as granting complete exemption from the examination for Associate membership of The Institution of Engineers, Australia and are set out in Schedule 'B' hereto. 'Professional Engineer' shall mean a person qualified to carry out Professional Engineering Duties as above defined. The term 'Professional Engineer' embraces and includes 'Qualified Engineer' and 'Chartered Engineer' as hereinafter defined. 'Qualified Engineer' shall mean a Professional Engineer, other than a 'Chartered Engineer' as hereinafter defined, that is, it shall mean

a person who is or is qualified to become a Graduate of The Institution of Engineers, Australia or a member of The Association of Professional Engineers, Australia. 'Chartered Engineer' shall, for the purposes of this Claim, mean a Professional Engineer in any particular employment the adequate discharge of any portion of the duties of which employment requires qualifications of the employee as (or at least equal to those of) an Associate Member of The Institution of Engineers, Australia. Division 2. Salaries: For an employment involving the performance of Professional Engineering Duties. (i) Qualified Engineer. The minimum rate of salary which shall be paid to a Qualified Engineer shall be 1,650 pounds per annum. (ii) Chartered Engineer. The minimum rate of salary which shall be paid to a Chartered Engineer shall be 2,200 pounds per annum". The qualifications set out in "Schedule B" mentioned in this extract are degrees and diplomas conferred by Australian Universities and Technical Colleges. (at p247)

4. The Institution of Engineers, Australia, referred to in the extract, is essentially a professional body. Clearly it is not an industrial organization. It would appear from the extract that its members include engineers who are employees, and that "Qualified" and "Chartered" engineers on whose behalf the claims are made may be members of the Institution. The reference in the definition of "Professional Engineering Duties" to the Institution in prescribing the criterion of such duties indicates the truly professional nature of the employment covered by the log of claims. (at p248)

5. There is no decision of this Court which says that the profession of engineering is within either par. (a) or par. (b) of the provisions in s. 4 relating to the meaning of "industry". Here the Court is concerned only with the question whether when the profession of engineering is the occupation of employees it is within par. (b). That this question remains open would follow from an observation of Fullagar J. in The King v. Blakeley; Ex Parte Association of Architects, &c. of Australia [1950] HCA 40; (1950) 82 CLR 54 regarding certain kindred occupations. His Honour said: "I may add that it has occurred to me to wonder whether members of the prosecuting Association are engaged in industry within the meaning of the Constitution and of the Commonwealth Conciliation and Arbitration Act. That question, however, has not been raised in these proceedings" (1950) 82 CLR, at p 96 . (at p248)

6. The profession of engineering when carried on by employees is not an "industry" unless what s. 4 enacts as to "industry", from the point of view of employees, applies: Melbourne and Metropolitan Tramways Board v. Municipal Officers' Association of Australia [1944] HCA 7; (1944) 68 CLR 628, at p 634 . The word "profession" is not in par. (b). This paragraph of s. 4 reads: "'Industry' includes - (b) any calling, service, employment, handicraft, or industrial occupation or avocation of employees". However some of the terms used there are capable of referring to professions followed by employees but such professions must be of an industrial nature to be included in "industry" for the purposes of the Act and the constitutional power. Referring to a similar provision regarding the meaning of "industry" Knox C.J., Gavan Duffy J. and Starke J. said in the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 : "It is engagement in an occupation, and not employment in the business or industry of the employer that is the feature of this definition. But even if this be so, the definition cannot enlarge the meaning of the phrase 'industrial dispute' in the Constitution, and the occupation must be of an industrial nature" (1929) 41 CLR, at p 575 . In that case the same members of the Court rejected a view that the word "industry" includes for the purposes of the Constitution "processes which are concerned with services such as the administrative services of public officials and skilled professional advice of doctors and lawyers" (1929) 41 CLR, at pp 573, 574 . It seems to me that it would be correct to add members of the engineering profession to the list mentioned by the Court. "Skilled" is an important word in the quotation. The practice of the profession under consideration consists in giving skilled advice and services regarding matters in the

field of the special knowledge or training of a professional engineer. The advice or services may be given to the client by the principal in a practice, or by a professional engineer who is an employee. I think that neither the professional business of the principal nor the occupation of the employee - professional engineer - is an "industry". If it is not, surely neither principal nor employee would become an industrial worker by following his profession in the Public Service. (at p249)

7. I think that it is inappropriate to apply here the principle that an employee need not be a manual worker to be an employee in an "industry". To say of a professional engineer merely that he is not a manual worker obviously leaves out all that is important about his occupation for present purposes. Workers who are not manual workers may, nevertheless, be part of the labour force, for example, foremen, timekeepers, clerks and so forth, engaged on an industrial job. But a professional engineer giving his advice or services in connexion with the operations cannot properly be classified with such workers. I do not feel impelled by the decisions regarding municipal workers, clerks in gas companies, bank clerks, insurance clerks and journalists, to decide that the engineering profession is an occupation of an industrial nature. I think that it is better to classify professional engineers with members of the learned professions. In the present state of the authorities, it could not in my opinion be successfully contended that under the definitions of "industry" in s. 4 of the Commonwealth Conciliation and Arbitration Act or for the purposes of the Constitution lawyers and doctors either as the principals in a practice or as employees are industrial workers. The argument advanced to the Court that the engineering profession is an industrial occupation rests mainly on the word "engineering". In my opinion that word, used as a description of the profession, points to the art in which a professional engineer has been educated and trained and signifies an employment which involves the conception of a project, suitable and practicable for his client's purposes, the expression of its form in plans or blue prints and the performance of services requiring special skill and scientific knowledge upon which the successful materialization of the project and its maintenance and operation depend. The products of the professional engineer's labour are the designs, specifications, plans and reports, and the giving of professional advice and supervision on the job. But the building or structure in respect of which he gives his services is the product of the industrial workers of all classes engaged on it. In my opinion the employment covered by the log of claims is not work of an industrial nature. Performance of "Professional Engineering Duties" does not become an industrial occupation simply because the employer of the professional engineer chooses to apply the latter's scientific knowledge, skill and advice to certain industrial ends. The occupation of a professional engineer does not partake of the industrial nature of the business, trade or undertaking carried on by his employer. (at p250)

8. Of course, the decision which I have given does not affect the jurisdiction of any industrial tribunal of a State. (at p250)

9. In my opinion, the Association and its members cannot raise an "industrial dispute" upon the basis of the log of claims. The result is that the order nisi for mandamus should be discharged, and the orders nisi for prohibition should be made absolute. (at p250)

FULLAGAR J. I agree with the judgment of the Chief Justice in this case, and I have nothing to add. (at p250)

KITTO J. The endeavour which has been made on behalf of the government departments and governmental bodies represented before the Court to maintain that the governmental nature and purpose of their functions excludes the possibility of their being engaged with members of their staffs in an industrial dispute in the constitutional sense of the expression, could not succeed without

a radical departure from established constitutional principle. The alternative endeavour, to place upon the provisions of the Conciliation and Arbitration Act which define "industrial dispute" for the purposes of that Act a construction which excludes disputes, even though they be industrial disputes in the constitutional sense, which arise between the departments and bodies referred to and members of their staffs, finds support in verbal considerations but fails to give effect to the intention which nevertheless appears from the Act with sufficient clearness. For both these conclusions I respectfully adopt the reasons which have been stated by the Chief Justice. (at p250)

2. This means that the Association is entitled to succeed in the proceedings in this Court, but it succeeds only by a modification of the attitude which the log was, as I read it, intended to maintain. It put forward claims in respect of salaries and conditions of employment "for its members and all other Professional Engineers eligible for membership" when in "an employment involving the performance of Professional Engineering Duties". The expression "Professional Engineering Duties" was defined to mean "duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires qualifications of the employee as (or at least equal to those of) a Graduate of the Institution of Engineers, Australia". The definition seems to have been carefully framed to give effect to a view that on the question whether a dispute arising from the rejection of the log is industrial (in the constitutional and statutory senses) the nature of the duties involved need not be considered for any other purpose than to see whether the qualifications required for the performance of any part of them are of the order which is indicated. The contention thus intimated is logically pursued in the definition of "Professional Engineer" as meaning a person qualified to carry out Professional Engineering Duties as previously defined. It is not weakened by the fact that eligibility for membership of the Association, which needs to be considered because the claiming clause of the log refers not only to members but to Professional Engineers eligible for membership, is confined to persons temporarily, permanently or "usually" employed in or in connexion with "the industry of engineering" (whatever that may mean). (at p251)

3. It seems that at one stage of the argument before the Commission counsel for the Association used language which was apt to express the view apparently held by the draftsman of the log; for the judgment of the majority of the Commission attributes to him the contention that "every time an engineer is employed as an engineer he is employed industrially". This, however, goes beyond the general tenor of the submissions made. Another quotation seems to show more accurately the proposition that was being put forward: "This Commission", Mr. Gillard said, "has jurisdiction to examine the activities of the engineer engaged by the respondent and to discover whether that activity is industrial. . . . Is it an activity in regard to which, if the employer were a private person, the employee would be said to be industrially employed; or, putting it another way, looking through the eyes of an employee, can he be said to be employed in an industrial way". (at p251)

4. In substance this submission was sound, as the judgment of the Chief Justice shows; but perhaps the point may usefully be underlined that to give effect to it is to hold that even though a single demand, intended to be inseverable, is made in respect of a mass of employees of whom some only are so employed that a dispute in relation to them exclusively would be an industrial dispute in the constitutional sense, a refusal of the entire demand creates an industrial dispute in relation to the employees who are so employed. The point is important here, because the Association sent its log to employers with a letter which stated the Association's intention, if the employers were not prepared either to grant the demands or to meet the Association in conference, to seek to have "the whole matter in dispute" brought before a commissioner with a view to the obtaining of awards. If, in pursuance of the intention which seems to have animated both the log and the letter, the Association had maintained before the Commission and this Court that between the Association and all the

employers served, or between it and each employer served, or (as the form of the proceedings in the Commission would seem to suggest) as between it and each of ten groups of the employers served, there was one indivisible dispute as to all employees of the description contained in the claiming clause at the head of the log, and that that one dispute was an industrial dispute, the contention must have failed. It would not have been correct, in my opinion, to hold that, because (as no doubt the fact is) the employees are very few who fall within the description but are employed on work of such a kind that a dispute limited to them would not be industrial, the entire dispute must be allowed the general character of an industrial dispute. The reason why the Commission has authority to proceed is that the parties are in dispute as to employees the character of whose work would make a dispute as to them alone an industrial dispute. There is for that reason an industrial dispute as to those employees, and none the less so because the dispute as to them forms part of a wider dispute. To the former dispute, but not to the latter, the constitutional power extends and the authority of the Commission exists. (at p252)

5. In my opinion the applications for prohibition should be refused, and on the application for mandamus there should be an order absolute so expressed that the Commission will proceed to ascertain in relation to each employee concerned, by considering the duties of his employment, whether the dispute or disputes created by the making and non-acceptance of the demands in the log is or are industrial (in the constitutional sense and within the meaning of the Conciliation and Arbitration Act) in so far as it relates or they relate to him, and will proceed to settle so much of the dispute or disputes as is thus found to be industrial. (at p253)

TAYLOR J. The questions which we are called upon to consider in these matters have arisen in the course of proceedings before the Commonwealth Arbitration Commission in which the Association of Professional Engineers, Australia, an organization of employees registered under the Conciliation and Arbitration Act 1904-1958, is seeking an award in settlement of an industrial dispute, or industrial disputes, created, it is said, by the service and rejection of a log of claims. The log, with modification in some cases, was served upon a number of employers in the various States and also upon a number of State Government Departments and other public authorities. Among the latter were a number of public bodies in New South Wales and these included the Public Service Board, the Department of Main Roads, the Department of Public Works, the Housing Commission, the Forestry Commission, the Water Conservation and Irrigation Commission, the Maritime Services Board, the Metropolitan Water Sewerage and Drainage Board, the Hunter District Water Board and the Council of the City of Sydney. Not dissimilar authorities in the other States were also served with the log and the States of Victoria, South Australia, and Western Australia have intervened in these proceedings to support the objection that the Commonwealth Arbitration Commission has no authority to make an award prescribing the conditions to be observed by the public authorities referred to in the employment of members of the organization. This objection rests primarily upon the contention that disputes concerning the conditions upon which the specified authorities may employ members of the organization are not "industrial disputes" within the meaning of that expression in s. 51 (xxxv.) of the Constitution and, alternatively, upon the view that the same expression as defined and used in the Conciliation and Arbitration Act, 1904-1958 has a narrower significance and does not extend to cover disputes as to conditions of employment between an organization of employees on the one hand and, on the other, a State of the Commonwealth or authorities which represent it or which it has created for specified public purposes. (at p253)

2. It will be seen that the primary and alternative contentions relate to two separate and distinct questions. The first is concerned with one aspect of the relevant legislative power and the question must be solved by considering what are, in the sense in which that expression is used in par. (xxxv.),

"industrial disputes extending beyond the limits of any one State". The alternative contention, on the other hand, is concerned with the construction of the relevant provisions of the Conciliation and Arbitration Act and the determination of the question whether or not the expression "industrial dispute" is used in the Act with the fullest significance permissible under the constitutional power. (at p254)

3. Prior to the Engineers' Case (Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.) [1920] HCA 54; (1920) 28 CLR 129 the effect of the generally accepted doctrine of the immunity of State instrumentalities made it inevitable, in cases which affected a State or some one or more of its statutory authorities, that these substantive questions should assume a secondary importance. In effect, the question specifically examined on a number of occasions was not so much the extent of the legislative power which the words of par. (xxxv.) purport to confer as the nature and extent of the restrictions imposed by the doctrine in question. The earliest case of this character was, of course, the Railway Servants' Case (The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association) [1906] HCA 94; (1906) 4 CLR 488 in which it was held that the doctrine enunciated in D'Emden v. Pedder [1904] HCA 1; (1904) 1 CLR 91 was reciprocal and that, since the "State Railways" should properly be regarded as a State instrumentality, the Commonwealth Conciliation and Arbitration Act 1904 was invalid to the extent to which it purported to affect "State Railways". At that time the expression "industrial dispute" was defined to mean a dispute in relation to industrial matters "including disputes in relation to employment upon State railways". These words were omitted from the Act in 1910 when the amending Act of that year (No. 7 of 1910) substituted in the Act a modified definition of "industrial dispute". But the decision in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 meant that in future cases affecting a State or State authorities a more precise examination of the content of the constitutional power would be necessary. To some extent, however, a somewhat similar task had been undertaken some two years before the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 when it was held by a majority of the Court that municipal corporations with powers of local government were not "instrumentalities of State Government" and, therefore, not exempt from the operation of legislation enacted by the Commonwealth Parliament pursuant to par. (xxxv.). In that case the question raised by the case stated and as amended during the hearing (see (1919) 26 CLR, at p 516) was whether the Commonwealth Court of Conciliation and Arbitration had power or jurisdiction to determine by an award a dispute between the organization and the municipal corporations concerned so far as it related "to such operations of the said municipal corporations as consist of the making, maintenance, control, and lighting of public streets or any of them" and this question the majority answered in the affirmative. In dealing with the case Isaacs and Rich JJ. expressed the view that the concept of "industrial disputes" might be stated as follows: "Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation. This formula excludes the two extreme contentions of the claimant and the respondents respectively. It excludes, for instance, the legal and the medical professions, because they are not carried on in any intelligible sense by the co-operation of capital and labour and do not come within the sphere of industrialism. It includes, where the necessary co-operation exists, disputes between employers and employees, employees and employees, and employers and employers. It implies that 'industry', to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone effected the result, but it must be acting and be considered in association with its co-operator 'capital' in some form so that the result is, in a sense, the outcome of their

combined efforts. It also implies that 'an industry', in the relevant sense, is not confined to a single enterprise, but means a class of operations in which all persons, employers and employees, are engaged on the same field of industry - not necessarily of commerce - provided by the society in which they exist." (Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation (1919) 26 CLR 508, at pp 554, 555). The concept is, of course, widely stated and later experience may provide grounds for thinking that its limits are not sharply defined. Indeed, there may be reasons for thinking that the literal application of these observations may cover a field, in some respects too wide and, conversely, exclude disputes which according to later authority are truly "industrial disputes". But the expression "industrial disputes" is an expression of wide denotation and in the complexity of modern industrial and economical development it is no criticism of an attempted definition that it does not once and for all provide a certain guide for all future cases. In the same case Higgins J. was impressed by the difficulty of attempting a complete definition and observed that it was not necessary "in order to determine whether this dispute (a dispute between street cleaners, street lighters, &c., and their employer, the municipality) is an industrial dispute, to define fully 'industrial dispute' - to enumerate even all the characteristics, the full connotation of an industrial dispute; any more than it is necessary for us to define what is a dog when we determine that a certain animal is a dog" (1919) 26 CLR, at p 574 . To his Honour, it seemed, "a great deal of time is wasted and harm done by the premature efforts of Courts to define exhaustively expressions of common speech" (1919) 26 CLR, at p 574 . (at p256)

4. The majority of the Court in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 held "that States, and persons natural or artificial representing States, when parties to industrial disputes in fact, are subject to Commonwealth legislation under par. (xxxv.) of s. 51 of the Constitution, if such legislation on its true construction applies to them" (1920) 28 CLR, at p 155 , and then went on to hold, further, that a dispute between named organizations of employees and the Minister for Trading Concerns (W.A.) was an "industrial dispute" within the meaning of s. 51 (xxxv.). The dispute to which the Minister was a party was, it was said, "manifestly and admittedly one which no one would deny was an 'industrial dispute' if a private person were the employer" (1920) 28 CLR, at p 155 , and it followed, therefore, that the dispute was within par. (xxxv.). (at p256)

5. In reaching their conclusion in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 the majority of the Court expressly overruled the Railway Servants' Case [1906] HCA 94; (1906) 4 CLR 488 , but in doing so they did not express any view on the question whether the dispute in that case was an "industrial dispute". But there can be no room for doubt that if it had been necessary to pronounce on this question the decision would have been that it was an "industrial dispute". Even if this does not sufficiently appear by implication from the decision in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 itself it must be taken to have been put beyond doubt by the decision in Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association (No. 2) [1920] HCA 55; (1920) 28 CLR 436 . The argument in this case took place immediately after that in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 and the judgment in each case was delivered on the same day. The effect of the decision was that the dispute which the Commonwealth Court of Conciliation and Arbitration had found to exist was an "industrial dispute" of which the Court properly had cognizance and in respect of which it might make an award. The dispute in question was between the Merchant Service Guild on the one hand and, on the other, "the Sydney Harbour Trust, the Melbourne Harbour Trust, the Colonial Treasurer of New South Wales in respect of pilot steamers and tenders thereto and a steam tug at Clarence River, the Minister for Public Works of New South Wales in respect of vessels conveying workmen to and from dockyards, State metal quarries, and dredges, ferry services between Newcastle and Stockton and the Chief Secretary of New South Wales in respect of (the State) trawling industry" (1920) 28 CLR, at pp 454, 455 . If a

dispute as to the conditions upon which these authorities might employ masters, engineers and officers constituted an industrial dispute then there could be no reason for thinking that a dispute between the Commissioner for Railways and his employees with respect to conditions of employment in the service of the Commissioner did not. (at p257)

6. Before the Arbitration Commission the matters with which we are concerned took a somewhat curious course. The Commission examined the various activities undertaken by the public authorities previously specified and came to the conclusion that some of them were wholly engaged in industry. In respect of others, it took the view that some part of their activities constituted "industry" and that an award might be made prescribing conditions of employment with respect to members of the organization who were engaged in those activities. In respect of the remainder the conclusion was reached that their activities were "governmental" and not "industrial" in character and that their employees were outside the award-making power. The matters now come before us upon competing applications for mandamus and prohibition. Mandamus is sought by the Association on the basis that each and every one of these public authorities is engaged in industry whilst prohibition is sought by a number of the authorities concerned on the basis that disputes between them and members of the organization as to conditions of employment in their service are not industrial disputes in the true sense. But, upon the evidence, it is reasonably apparent that the relationship between each of the public authorities and many, at least, of the employees engaged in the activities which the former undertake are no less industrial in character than those which were the subject of examination in the Railway Servants' Case (1906) 4 CLR 488 , the Municipalities' Case (1919) 26 CLR 508 , the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 and the Merchant Service Guild's Case (No. 2) [1920] HCA 55; (1920) 28 CLR 436 . One may, therefore, be disposed to think that the substantive questions now raised are not open. But it is said that two later decisions have virtually undermined, or, perhaps, displaced, the reasoning upon which the decisions in the earlier cases rest. The first of these is the Teachers' Case (Federated State School Teachers' Association of Australia v. State of Victoria [1929] HCA 11; (1929) 41 CLR 569) in which it was held that a dispute as to the conditions upon which State school teachers might be employed by the respondent was not an industrial dispute within the meaning of par. (xxxv.). In the second - Victoria v. The Commonwealth [1942] HCA 39; (1942) 66 CLR 488 (the Public Service Case) - the Court unanimously rejected the contention that the members of the Public Service of the State of Victoria were engaged in "industry" and that, therefore, a dispute between the organization which represented them and the State of Victoria concerning the conditions of their employment was not an industrial dispute within the meaning of the placitum. But these cases do not touch the present problem. They do not deny the proposition that a State may engage in industry or undertake industrial activities. They merely decide that neither State school teachers nor State Public Servants, collectively, are engaged in industry however widely that expression may be understood. Nevertheless, it was urged that the decisions in the two cases rested ultimately upon a single fact. The decision in the Teachers' Case [1929] HCA 11; ; (1929) 41 CLR 569 , it was said, rested exclusively upon the fact that the educational activities of the State did not constitute an industry and that school teachers were not, therefore, engaged in industry. Likewise, it was said that the basis of the later case was the in-escapable view that the aggregate activities in which members of the Public Service were collectively engaged were not industrial in character. But it is erroneous to a degree to say that considerations of this character must be decisive in every case for the character of the services which employees are engaged to perform are, as will appear, of considerable significance. Indeed, this was not lost sight of in the Teachers' Case (1929) 41 CLR 569 as appears from the joint reasons of Knox C.J. and Gavan Duffy and Starke JJ. There, after disposing of the contention that the State of Victoria was not, as regards teaching in State schools, engaged in

industry, their Honours proceeded to consider the character of the occupation of the employees concerned. (at p258)

7. On this point their Honours said: "Looking now at the matter from the point of view of the teachers, can their occupation be described as an industrial one? Industry includes, by force of s. 4 of the Commonwealth Conciliation and Arbitration Act, 'any calling, service, employment, handicraft, or industrial occupation or avocation of employees on land or water.' It is engagement in an occupation, and not employment in the business or industry of the employer that is the feature of this definition. But even if this be so, the definition cannot enlarge the meaning of the phrase 'industrial dispute' in the Constitution, and the occupation must be of an industrial nature. It was argued that it is inapplicable in the case of State activities, because industrial dispute means, so far as the States are concerned, any dispute in relation to employment 'in an industry carried on by or under the control of . . . a State', etc. (see s. 4). But we need not determine this point, for the occupation of the State school teachers is not industrial" (1929) 41 CLR, at p 575 . These observations involved a clear acknowledgment that the character of the occupation of State school teachers was a matter for consideration in determining whether a dispute as to the conditions of their employment was an "industrial dispute" in the constitutional sense though they recognized, also, that, in relation to disputes between States and their employees, the argument was open that the Act, upon its true construction, applied only to disputes as to conditions of employment in substantive forms of industry carried on by the State. In my view neither the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 nor the Public Service Case [1942] HCA 39; (1942) 66 CLR 488 furnish any grounds for requiring us to reconsider the earlier cases to which reference has been made. (at p259)

8. The definitions contained in the Act at the time of the Teachers' Case (4) stood in much the same form as they do now and they are not without difficulties of their own. By s. 4 of the Act an "industrial dispute" means a dispute as to industrial matters which extends beyond the limits of any one State and includes (par. (c)) "such a dispute in relation to employment in an industry carried on by, or under the control of, a State or an authority of a State". "Industrial matters" means "all matters pertaining to the relations of employers and employees, and . . . includes" a number of specified subject matters. "Employer" means any employer in any industry and includes any person who is usually an employer in an industry whilst "employee" means any employee in any industry and includes any person whose usual occupation is that of employee in any industry. The expression "industry" is, itself, the subject of definition and the expression includes (a) any business, trade, manufacture, undertaking or calling of employers; (b) any calling, service, employment, handicraft or industrial occupation or avocation of employees; and (c) a branch of an industry or a group of industries. But whatever may be the difficulties created by the unusual interdependence of these definitions one thing is clear. That is that in the general run of cases an industrial dispute may exist concerning conditions of employment by an employer who, though not engaged in some substantive industry of his own, employs members of an organization whose calling, services, employment, handicraft or occupation is essentially industrial in character. It is, however, asserted that the provisions of par. (c) of the definition of "industrial dispute" represent an exhaustive statement of what constitutes such a dispute when the dispute is between an organization of employees and a State or authority of a State. In such a case, it is contended, an industrial dispute exists only when it is "in relation to employment in an industry carried on by, or under the control of, a State or an authority of a State". These words are, of course, the precise words of par. (c) but it is, at least, doubtful whether, for any practical purposes, the contention has any significance in cases where the dispute is concerned with the conditions of employment of employees whose occupations are unequivocally industrial. For instance, it may well be thought that if the State employs bricklayers for the performance of building construction work it has, to that extent, ventured into the building

"industry". Of course, the conclusion would be otherwise in the case of employees whose occupations are not industrial in any real sense unless they are employed as part of the labour force engaged in carrying on some recognizable industrial undertaking. But the argument adduced on behalf of the authorities concerned denies the proposition involved in the first of these illustrations. In the first place, it is somewhat boldly asserted that once it is seen that an activity undertaken by a State, or some authority representing it, is "governmental", there is no room for the conclusion that it is also "industrial". Alternatively, it is said, that a so-called "governmental" activity cannot be regarded as industrial unless it can be seen that in engaging in it the State has "entered the market-place". The difficulty with the first of those propositions is that it does not define what is meant by "governmental". However, in illustrating its application the assertion is made that any activity undertaken by a State or State authority is properly so described. It may be conceded at once that in a sense this is true but to say that it may be so described is no indication of the essential character of the activity itself, or, of the fundamental distinction between essential functions of government and other activities in which, for its own legitimate purposes, a State may engage. It is beyond doubt that the administration of justice is of the former character but is it possible to say that the work of building court houses is of the same fundamental character? Or, does it follow from the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 , as was suggested, that the work of constructing school buildings is an essential function of government? To my mind only one answer can be given to these questions. Clearly they are not. Such activities, though undertaken for legitimate governmental purposes, are clearly industrial in character whether actually undertaken by the State itself or by contractors on its behalf. Indeed, the fact that the State may arrange for such work to be performed by outside agencies is, itself, a denial that work of this character is an essential function of government. (at p261)

9. The alternative proposition must also be rejected as an exhaustive guide to the circumstances in which a State may have industrial relations, and "industrial disputes", with its employees. Once it is seen that "governmental" purposes may be served by the undertaking of industrial activities or by the employment of labour in essentially industrial occupations, the proposed test appears as far too narrow. For the reasons already given it seems to me that employees of a State are employed in industries carried on by the State when, whatever their particular callings or occupations, they are employed as part of the labour force engaged in some substantive form of industry upon which the State has embarked or, failing the recognition of some such form of industry, when employees whose callings or occupations are essentially industrial are employed by the State to perform or discharge the ordinary duties of their callings or occupations. Such a conclusion is, in my view, in accordance with the long trend of authority and consonant with the definitions to be found in the Act. (at p261)

10. Not the least of the remaining difficulties in the case results from the form of the log by which the organization made its claims. Some of the problems arising from this source have already been dealt with by the Court and these may be passed over (Reg. v. The Association of Professional Engineers of Australia; Ex parte Victoria [1957] HCA 95; (1957) 100 CLR 155). But it is now contended that the log was incapable of giving rise to a dispute which is truly an "industrial dispute". The basis for this contention is found in the fact that the log claims on behalf of all members of the organization and "all other Professional Engineers eligible for membership of The Association of Professional Engineers, Australia," minimum rates of remuneration for all forms of employment involving "the performance of Professional Engineering Duties". "Professional Engineering Duties" mean, according to the log, "duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires qualifications of the employee as (or at least equal to those of) a Graduate of the Institution of Engineers, Australia" and

the minimum rates claimed vary as between "Qualified Engineers" and "Chartered Engineers" as defined. With these provisions of the log in mind it is asserted that the dispute created by the rejection of the log is outside the "industrial" field. The claims made, it is said, are neither made with respect to employment in industry nor with respect to employment of an essentially industrial character but, on the contrary, with respect to the employment of professional engineers in whatever duties they may be called upon to perform in any kind of employment. There may be much to be said for the proposition that, literally, this is what the log does but, in my view, this vital question cannot be resolved merely by a literal construction of the provisions of the log. The problem is a practical one and cannot be dissociated from the general character of the duties of an employee who is employed as an engineer or from a consideration of what the log must, in the circumstances, have been taken to convey to those employers upon whom it was served. (at p262)

11. In the present proceedings the employers concerned are the public authorities already specified and it is desirable at this stage to make some reference to the character of the duties which engineers in their employ are called upon to perform and to indicate the views taken by the Arbitration Commission with respect to the extent of their award-making power. (at p262)

12. Department of Public Works: According to the findings of the Commission this Department is a constructing authority which annually expends large sums of money and employs a very large labour force. It employs professional engineers on preliminary investigations, design, construction, operation and maintenance in connexion with its general constructional activities. Included among its activities is the conduct of the State Dockyard and the State Brickworks. In the view of the Commission, these two undertakings engage in "trading activities" and, in effect, it was held that disputes as to the conditions upon which professional engineers might be employed in relation to them are "industrial". However, the Commission considered that the general constructional activities of the Department were "governmental" and, therefore, not "industrial". So far as this Department is concerned the organization now seeks mandamus in so far as the Commission has declined jurisdiction to make an award with respect to professional engineers employed in its general constructional activities. For the reasons already given the Commission was in error in holding that engineers engaged in these general constructional activities are not engaged in "industry"; a dispute as to their conditions of employment is clearly an industrial dispute and, as such, is within the cognizance of the Commission. (at p263)

13. Water Conservation and Irrigation Commission: Professional engineers employed by this authority appear to perform, in the main, duties with respect to construction and maintenance which is industrial in every sense of the word. But the Arbitration Commission regarded the general activities of this Authority as falling into the same category as the general constructional activities of the Department of Public Works. Accordingly, it declined jurisdiction except with respect to professional engineers employed "in or in immediate relation to the supply and sale of water". This activity the Arbitration Commission considered to be a trading activity and, therefore, engineers employed in relation to it were "industrially" employed. In my view, no such distinction can be drawn. The general engineering and constructional activities of this authority are also industrial and a dispute as to the conditions of employment of engineers employed in relation thereto is an "industrial dispute" within the meaning of the Act. (at p263)

14. Department of Main Roads: The Arbitration Commission was of the opinion that this Department was in the "same general position" as the Department of Public Works and that its professional engineers are not engaged in industry. But when it is seen that its engineers are engaged in the general engineering work of road and bridge construction and maintenance there is no room

for holding that a dispute as to the conditions of their employment is not an "industrial dispute". (at p263)

15. With respect to five of the named authorities the Arbitration Commission held that disputes between them and the organization were "industrial disputes" and that it had power to make an award with respect to the conditions upon which professional engineers might be employed by them. These authorities are: (at p263)

16. The Housing Commission of New South Wales: This authority, it is said, buys land, builds homes and sells or lets them to members of the public. It was said that it engaged in trading and carried on its activities as a commercial undertaking. In these circumstances the Commission considered that engineers employed by the Housing Commission for the purpose of carrying on its building activities were industrially employed. (at p264)

17. Forestry Commission: The Arbitration Commission took the view that this authority is engaged in "trading". It pointed out that during the year ended 30th June 1956 this authority effected sales of timber to the value of approximately two million pounds and that, according to the evidence, the professional engineers employed by it were "engaged mainly in the construction of roads through forests from which timber is being taken and that this construction work facilitates the sale of timber and its transport". Accordingly, it was of the opinion that a dispute as to the conditions upon which these engineers were employed constituted an industrial dispute. (at p264)

18. The Maritime Services Board: For the purpose of dealing with this authority the Arbitration Commission assumed that its powers, functions and activities are substantially the same as those of its predecessor - The Sydney Harbour Trust - and, it held, on the authority of the Merchant Service Guild's Case (No. 2) [1920] HCA 55; (1920) 28 CLR 436 , that it was engaged in industry and that the claims of its professional engineers were within the award-making power. (at p264)

19. Electricity Commission of New South Wales: The Arbitration Commission was of the opinion that this Authority was engaged in trading and that its professional engineers were engaged in industry. (at p264)

20. Sydney City Council: Upon earlier authority the Commission felt "constrained to hold that professional engineers employed as such" by this authority fell within the jurisdiction of the Commission. (at p264)

21. Prohibition was sought in respect of so much of the dispute, or disputes, as affected these five named authorities but for the reasons already given it seems clear that a dispute between them and the organization concerning the terms upon which, for the purposes of their activities, they might employ members of the organization is an industrial dispute in the true sense. (at p264)

22. Metropolitan Water Sewerage and Drainage Board and the Hunter District Water Board: The Arbitration Commission was of the opinion that these authorities were in the same general position as the Department of Public Works and that their professional engineers are not engaged in industry. Its view on this point seems to have been influenced to some extent by the fact that these authorities do not sell water but obtain their revenue from rates imposed by law. In my view, this circumstance is of no significance. It is impossible to read the evidence concerning the activities of these authorities without coming to the conclusion that they are extensively occupied with industrial undertakings and the members of the organization employed by them are employed in "industry".

(at p265)

23. These are but brief references to the functions of the various authorities concerned but sufficient has been said to indicate that the general work of professional engineers employed as such by them is truly industrial and to show that, subject to one qualification, the logs appear to make claims only with respect to the conditions of employment of engineers who were employed in industrial activities. The qualification which I wish to make is that it is possible, though it does not appear, that some engineers are employed only in consultative work in relation to general matters of policy. Engineers so employed are, of course, not employed industrially and no award can be made with respect to their conditions of employment. But even if some are so employed the fact that the logs made claims wide enough, literally, to refer to their conditions of employment does not mean that the rejection of the logs was not capable of giving rise to industrial disputes concerning the conditions of employment of the general body of employees concerned. In essence, these disputes were industrial disputes, and the fact that there might have been some professional engineers employed in work which was not "industrial" was not sufficient to deny them this character. The substantial objection which was taken was that most, if not all, of the engineers who are employed by these authorities were employed in "governmental" and, therefore, not "industrial" activities and once this objection is disposed of there are no substantial grounds for thinking that the dispute is not within the cognizance of the Arbitration Commission. (at p265)

24. For these reasons, it seems to me, prohibition to restrain the Arbitration Commission from proceeding with the hearing and determination of the dispute, or disputes, should be refused and mandamus granted on the ground that the Commission has erroneously declined jurisdiction with respect to some aspects of the dispute. (at p265)

WINDEYER J. The fundamental question in this case is whether the Commonwealth Arbitration Commission can, by an award binding upon a State and its agencies, regulate the condition of service of professional engineers employed in engineering tasks in the construction or maintenance of State works or in the conduct of public utilities controlled by a State. Those who contend that the Commission has no power to make such an award contend in substance that professional engineers so employed by a State or its agencies are not employed in industry; and therefore that they, or the Association of Professional Engineers as representing them, cannot be, or become, engaged in an industrial dispute; that they are therefore beyond the reach of the constitutional power under s. 51 (xxxv.). (at p266)

2. The claim as formulated in the log is that all professional engineers employed as such by any person anywhere in Australia should be paid salaries at the rates specified. What in terms is sought is, therefore, that the Commission should fix a general scale of remuneration and the conditions of employment for all professionally qualified engineers. The claim purports to be made by the Association on behalf of its members and all other professional engineers eligible for membership. Those eligible for membership are stated to be persons who have certain university degrees or similar qualifications and who are employed "in or in connexion with the industry of engineering". This description seems to me inapt according to the ordinary use of words. There is an engineering industry properly so called. It comprises various business and undertakings in connexion with which engineers, mechanics and others exercise their skills and callings. But "the industry of engineering" seems an inappropriate description of the occupation of engineers, as this Court said in Amalgamated Society of Engineers v. Australasian Institute of Marine Engineers [1909] HCA 41; (1909) 9 CLR 48 and see Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Pty. Co. Ltd. [1911] HCA 31; ; (1911) 12 CLR 398 . An alteration of the definition of

"industry" in the Commonwealth Conciliation and Arbitration Act, made after the latter case, has rendered those decisions no longer applicable in the construction of the Act. Since 1911 it has been permissible, for the purposes of the Act, to describe as industries the trades, crafts and callings of employees as well as the enterprises in which they pursue them. So that in the construction and administration of the Act (including s. 70) such descriptions as, for example, "the industry of engineering" or the barbarous "Local Government, Municipal and Statutory Corporations Industry" have become part of the jargon of industrial law, although sometimes "meaningless in ordinary language" (Melbourne and Metropolitan Tramways Board v. Municipal Officers' Association of Australia [1944] HCA 7; (1944) 68 CLR 628, at p 634). The vocabulary thus engendered may be useful, even necessary, for the exercise of arbitral jurisdiction under the constitutional power; but it cannot be used to determine the scope of that power or to enlarge the meaning of the expression "industrial disputes" in the Constitution. (at p267)

3. Expressions such as "the banking industry" or "the insurance industry" are not really a proper use of words; and the use of such expressions in industrial law does not justify propositions such as "banking is an industry" to be used as major premises in arguments. In the course of the argument in this case the Chief Justice said that the ordinary meaning of terms has shifted over the years and asked: "is it not quite inappropriate to speak of the banking industry?" With this I respectfully agree. We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes. The word "industry" has suffered, as words do, by the attrition of usage and from snobbery and the desire for genteelism, so that now we hear for example of the hire-purchase industry - "trade" or "business" would not suffice - the racing industry, and even the betting industry. Correctly used the word "industry", however, still has a variety of meanings. Sometimes it is used in association with, and without any sure distinction from "trade" and "commerce". In one sense it denotes activities other than agriculture; in another it comprehends agriculture. Sometimes it is used to denote private enterprises carried on by private capital for profit; but often it includes "nationalized" industries. It ordinarily carries a concept of work directly concerned with the production, maintenance, repair, distribution or transport of tangible things and also with the provision of intangible things such as gas and electricity. It is this sense that I think is involved in the expression "industrial dispute" in par. (xxxv.). In Australian industrial law persons employed in banking and insurance businesses can be parties to an industrial dispute (Australian Insurance Staffs' Federation v. The Accident Underwriters' Association [1923] HCA 61; (1923) 33 CLR 517). But this, I think, must now be taken to be because their activities have a direct connexion with industrial operations in the more ordinary sense of the term. They are an adjunct of industry. It was at one time considered that any dispute between employers and employees in any type of undertaking was within the constitutional power. But in the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 this view was rejected as too wide; and we should, I have no doubt, follow this later opinion. (at p268)

4. The dispute here is a "paper dispute". To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par. (xxxv.), especially in the Burwood Cinema Case [1925] HCA 7; (1925) 35 CLR 528 and in Amalgamated Engineering Union v. Metal Trades Employers' Association [1935] HCA 61[1935] HCA 61; ; (1935) 53 CLR 658 have brought a great part of the Australian economy

directly or indirectly within the reach of Commonwealth industrial law and of the jurisdiction of the Commonwealth industrial tribunal. The artificial creation of a dispute has become the first procedural step in invoking its award-making power. Nevertheless, the tribunal cannot follow the course which courts not fettered by statute have followed in the past, and enlarge its jurisdiction by the simple process of allowing all persons who would invoke it to do so by making fictitious but unchallengeable assertions. It is not possible by fictions to transgress the boundaries of the Constitution. A dispute may be a paper dispute. It must still be a real dispute, really extending beyond the boundaries of any one State. That condition, we must assume, has been satisfied in this case according to the accepted doctrine of this Court. But is this dispute an industrial dispute? That is the question here. And the Association of Professional Engineers only begs the question by describing its members as all engaged in the industry of engineering. (at p268)

5. It seems to me unnecessary to attempt any exhaustive definition of the expression "industrial dispute" or to examine in detail all the definitions or explanations of it which have been offered in the judgments in earlier cases. Those judgments are to be read in relation to the circumstances of each case and to the arguments which were then adduced. Some judgments are couched in terms of economic theory, some in sentences clearly intended to be rhetorical rather than exact. Some of the attempted definitions are inconsistent with others. Some have been deliberately discarded in later decisions. To select passages from them and to subject their words to detailed analysis as if they provided a definitive exegesis of par. (xxxv.) can be most misleading. (at p268)

6. Whatever other activities may, for the purposes of par. (xxxv.), be properly described as "industrial", the term ordinarily includes manual labour - which is prima facie industrial - and the direction, superintendence and management of such labour and the working, direction and management of machinery and plant used in connexion with the production or distribution of material things. We need not explore the horizon if the thing we are concerned with lies well within it. To quote Higgins J.: "It is not necessary for us, in order to determine whether this dispute . . . is an industrial dispute, to define fully 'industrial dispute' - to enumerate even all the characteristics, the full connotation of an industrial dispute; any more than it is necessary for us to define what is a dog when we determine that a certain animal is a dog. To my mind, a great deal of time is wasted and harm done by the premature efforts of Courts to define exhaustively expressions of common speech" (1919) 26 CLR, at p 574 . The work of professional engineers engaged upon constructional work in projects such as were described in the evidence in these proceedings, is, in my view, clearly an industrial employment. And so is the work of engineers employed for the maintenance and continuous functioning of undertakings and facilities concerned with production and distribution of material things and with the supply of gas, water and electricity. This is not the less so because these engineers are by virtue of their education properly said to be members of a profession. They are still engaged in industry. But all professional engineers are not engaged in industrial activity. Some engineers employed by the States and by the State bodies which are parties to these proceedings may be engaged upon work not of an industrial character. Their duties may, for example, be directly related to the determination of policy and only indirectly and remotely connected with the translation of policy decisions into industrial activity. But that does not mean that the dispute is not an industrial dispute or that this Court should prohibit the Commission from dealing with it. It means only that the claim that all the persons whom the Association is said to represent are industrially employed may be too wide. But the Commission when dealing with a dispute does not have simply to accept or reject the log of claims out of which the dispute arose. That the log, in so far as it seeks a general scale of salaries for professional engineers, asks more than the Commission could properly award does not mean that the Commission should not be permitted to make a proper award. The duties of some professional engineers have only a remote and indirect relationship with

industrial activities. It would not be proper for the Commission to regulate their conditions. But this is a matter for the Commission to sort out, not a ground for denying it jurisdiction to do so. The manner in which Mr. Commissioner Portus approached the question seems to me, generally speaking, correct. (at p270)

7. In my view, the dispute is thus within, and well within, the ambit of constitutional power. A further question argued was whether the Conciliation and Arbitration Act 1904-1958 confers power on the Commission to entertain the matter. It was argued - and the argument was stated in an attractively succinct way by Mr. Wilson for the State of Western Australia - that the Parliament had not exhaustively exercised its powers under par. (xxxv.); and that in cases where a State or a State authority is the employer Parliament had conferred jurisdiction upon the Commission only when the State or authority is carrying on an industry in the sense of a single organic commercial undertaking. The form of the definitions in the Act gives some scope for the contention, difficult though it would be to apply in practice the distinction said to arise. Nevertheless I do not think the restricted construction contended for is correct. The purposes of the relevant provisions of the Act when read together is, I think, to bring within the jurisdiction of the Commission all industrial disputes with which it can be constitutionally empowered by Parliament to deal, including disputes arising between the States and their organs and agencies as employers and persons industrially employed by them. I have had the advantage of reading the judgment of the Chief Justice and need only say that I agree in his conclusions as to the effect of the statutory definitions. (at p270)

8. That suffices to dispose of the case. But it was elaborately argued and the ground taken by the States raised an important question, on which I will therefore add some comments. After listening to the argument, and later reading the transcript of it and the judgments in other cases which were so carefully canvassed, one comes back, with some relief, to the statement in the majority judgment of the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 that "the Constitution is not a thesis upon economics. It is an instrument of Government dealing, in s. 51, par. (xxxv.), with a subject matter - industrial disputes - in the ordinary and popular acceptation of that term" (1929) 41 CLR, at p 574 . It was urged on behalf of the States that, to determine whether an employee was in industrial employment, attention should be concentrated upon the enterprise or undertaking of the employer rather than the activity of the employee. I have already said that it is sometimes inappropriate to describe a craft or calling as an industry. But this does not mean that the nature of the work actually performed by particular employees is not to be regarded in seeing whether a dispute between them and their employers is an industrial dispute. What, to my mind, has to be considered is the nature of the employee's work and the total setting in which it is performed. A trade or calling may be prima facie an industrial occupation without those who follow or profess it being always industrially employed. For example, shearing is prima facie an industrial occupation; but a shearer engaged to demonstrate his art to classes of agricultural students is prima facie not industrially employed. On the other hand, work indistinguishable from ordinary industrial activity may be done by persons who could not properly be described as industrially employed, for the simple reason that they have a character which puts them outside the sphere of industry. The example most relevant to the present case is that of an army officer in the Corps of Engineers or in the Corps of Electrical and Mechanical Engineers. He is a professionally qualified engineer. His peace-time work may be of a civil engineering and constructional character, or he may be engaged in supervising the electrical and mechanical maintenance and repair of, say, motor vehicles - activities which in themselves differ in no way from similar activities in what may conveniently, for this purpose, be called private industry. Yet soldiers, whatever their duties, can never properly be said to be employed in industry. A mutiny can never become an industrial dispute by miscalling it a strike. This is not because, as was put in argument, soldiers are not employees. They are. Persons in military employment are in

ordinary language, and sometimes for legal purposes, described as employed, although their engagements are not ordinary contracts of service. It is simply that service in the naval, military or air services "would not normally be classed as giving rise to a trade dispute or included in trade or industry" (per Lord Porter in National Association of Local Government Officers v. Bolton Corporation (1943) AC 166, at p 192). Similarly, service in the police force cannot, in my view, lead to an industrial dispute. And this Court has held that school teachers employed in the education service of a State cannot be parties to an industrial dispute. In some States certain occupations which are not industrial may be regulated by the State industrial tribunals. That however is because State legislatures can, if they wish, make the machinery of their industrial law available for the regulation of employment which is not strictly industrial; and, if they choose to, they can do this by statutory definitions twisting the ordinary meaning of words. But the Commonwealth Parliament cannot take liberties with the language in which its powers are expressed. (at p272)

9. Counsel for the States started with the proposition that disputes are either industrial or not industrial. That is logically incontestable; and, as was said by counsel in Repton v. Hodgson [1850] EngR 735; (1850) 3 HLC 72, at pp 79, 80 (10 ER 28, at p 31) in a sentence which Jordan C.J. brought to light in an essay, "Like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without a nightcap, it would seem to exhaust the subject". But the presence or absence of the quality "industrial" in a dispute is not as indisputably apparent as the presence or absence of a nightcap on a sleeper. And to collect a miscellany of diverse elements referred to in different judgments as characteristics of industrialism, and treat them all as either collectively or individually significant, so that the presence or absence of one may be decisive is, in my view, fallacious. It can lead to a sophistic sorites. It was, however, contended that these difficulties were surmounted by treating the occupation of the employer as the cardinal factor. Then it was said that, as government is not industry, a complete antithesis exists between activities which are governmental and those which are industrial. Our task it was then suggested was, in counsel's words, to see in each case "whether the particular activity can truly be said to be governmental or industrial". Thus, instead of being asked to say whether a particular project, enterprise or undertaking in which engineers were employed was by reason of its nature one in which an industrial dispute could occur, we were asked to consider whether it was or was not a governmental project, enterprise or undertaking. What for the purposes of this argument was meant by "governmental" was stated only in broad generalities such as "government organization for solving a communal problem", and whether as a way of dealing with "a communal need" it was "akin to the ordinary departments of state". It was also said that whether any activity was industrial or governmental was to be determined by seeing whether it was "more akin to the type-specimen government or the type-specimen industry". This last phraseology was apparently derived from remarks of Latham C.J. in his judgment in the Victorian Public Servants' Case (1942) 66 CLR, at p 501 . It may, no doubt, sometimes be helpful, to adopt for the social sciences this method of classification, familiar in natural history; but it can only be satisfactory if the type-specimens with which comparisons are to be made are postulated, and their relevant attributes so ascertained that in making comparisons propria can be distinguished from accidentia. If not, the result is a mere logomachy. But the dialectical difficulties of following the path suggested can, I think, be disregarded, for the simple reason that it seems to me that here it is the wrong path. The question is not to be solved by asking is a particular activity governmental; because, for the matter in hand, the assumed complete antithesis between industrial and governmental activities does not exist. That a particular activity is carried on by government, is ordinarily considered as inseparable from government and could not be carried on by private enterprise in a society organized as ours is - as, for example, taxation, registration of lands titles, the administration of justice, police - is a vital

circumstance to be considered in determining whether persons connected with such an activity could ever properly be said to be parties to an industrial dispute. But to say that an activity is governmental does not determine that it is not industrial in the relevant sense of that word. It was sought to overcome this by a change of words - in effect, by a new proposition, namely, that a public utility cannot be an industry. What exactly was meant by public utility I am not sure. It is, however, not without interest that Chambers Encyclopedia (New Edition 1950) says under the heading of "Public Utility" that "it is a term difficult to define", and, inter alia, that "the concept now extends to publicly owned industries". It was argued that one would not ordinarily say of, for example, a government water supply that the government was "running an industry". Possibly not. Certainly a person asked to list the principal industries of a country would not ordinarily include among them the supply by the government of electricity or water to the inhabitants. But that again is only because "industry" has more than one meaning. An ambiguous middle term can lead to a seductive fallacy. An accident to a worker at a government power-house or waterworks would be properly called an industrial accident; and a strike of workers employed at a power-house or in the construction of a hydro-electric system or a water reservoir would surely ordinarily be called an industrial dispute? The States' argument drove them to contend that workers in, at all events some, nationalized industries - electricity supply was given as an illustration - were incapable of being disputants in an industrial dispute. Yet they had to concede that immediately before the particular undertaking was taken over by the State, the same workers had been engaged in industry. If at the actual time of the take-over a dispute was in progress at the works it would apparently have begun as an industrial dispute but become translated. This and other extravagant illustrations only expose the fundamental fallacy. A nationalized industry is clearly a government undertaking, but it is still an industry. (at p274)

10. The States relied strongly on the decision in the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 and sought from it to extract support for the proposition that government engineers are outside the field of industry and industrial disputes because their employer is the Crown. I do not think that, properly understood, that case yielded what was sought to be got from it. What the majority judgments there established was that teaching is prima facie not an industrial activity; and that teachers in the State schools are not engaged in industry. That I would have thought was beyond doubt. But I can see nothing in the judgments to aid the proposition that all forms of employment under government are outside the realm of industry. Counsel referred also to the recognition, by Isaacs J. in particular, in other judgments that certain of the more important and ancient functions of government are not of an industrial character and that therefore State servants engaged in them could not be brought within the reach of the Commonwealth industrial tribunals. These statements by Isaacs J. that the Commonwealth industrial power could not be used to trammel the States in the essential functions of government were merely qualifications of his assertion of the wide scope of that power. And they were first made when the doctrine of the immunity of State instrumentalities was being overthrown and the States and their servants industrially employed were being made subject to the Commonwealth industrial law. As convenient descriptions of non-industrial governmental functions of the States he referred to "regal functions" and adopted the phrase "the primary and inalienable functions of government". But these phrases, however expressive of an idea, have no precise legal meaning. It is thus not helpful to ask of any activity of the State "is it a regal, or an inalienable, function?" Blackstones Commentaries, Chitty's Prerogatives and the article on "Constitutional Law" in the last edition of Halsbury's Laws of England would give markedly different pictures of regal functions, in the sense of activities undertaken by the Crown and directed by the Queen's Ministers of State, whether by virtue of the prerogative or by authority of statute. And, as for the "inalienable" functions - usually taken to be such matters as the maintenance of

order and the administration of justice - here too there is no precision. The functions which government in fact undertakes vary with the time in history and the country concerned and the nature of its polity. If what is meant is what should be the functions of government and the sphere of the state, the answer will reflect political philosophy current at a particular time or an individual predilection. Disciples of Herbert Spencer and of Karl Marx would give very different answers. The maintenance of the Post-Office is to-day an established function of government in most countries; and the Postmaster-General is, in Britain and Australia, a Minister. But before the reign of Charles I, the provision of postal services was not a function of government in Britain. To use modern, but now hackneyed language, the government then "entered the market place" when it undertook the carriage of letters. Yet in 1857 the Post-Office was for rating purposes taken to be in exactly the same position as the great Departments of State. Its functions were governmental - regal. (Smith v. Guardians of Birmingham (1857) [1857] EngR 424; 7 El & Bl 483 (119 ER 1326) , Coomber v. Justices of Berks (1883) 9 App Cas 61, at p 73). In 1911, however, an English writer could still say that "the post office and the coinage are as yet our only nationalized industries" (MacGregor, The Evolution of Industry, p. 210). He was referring to the industrial undertakings of the central government as distinct from those of local authorities. (at p275)

11. I cannot see any ground for saying that, in law, any one activity which government undertakes is really any more a true function of government than any other. No fixed criteria for the application of the assumed distinction have been formulated. And it has no firm historical foundation. It is a reflection of political philosophies which may influence men's attitudes to social and economic questions, but which ought not to determine law. This is not to say that there is not a difference between the industrial and trading activities of government and its other activities. There is, and it is fundamental to this case. The fallacy lies in supposing that this difference can in some way to be made to correspond with a distinction between functions which are properly or essentially governmental and those which are not. For lawyers this error has its origin in a misapplication of the eloquent language of Lord Blackburn in Coomber v. Justices of Berks (1883) 9 App Cas 61 and his opinion in Mersey Docks and Harbour Board Trustees [1865] EngR 610; (1865) 11 HLC 443 (11 ER 1405) . But that the distinction is unreal was well brought out by Latham C.J. in an important passage in his judgment in the Uniform Tax Case [1942] HCA 14; (1942) 65 CLR 373, at p 423 . With it may be put the judgments in New York v. United States [1946] USSC 13[1946] USSC 13; ; (1946) 326 US 572 (90 Law Ed 326) . To quote only from Frankfurter J.: "To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers" (1946) 326 US, at p 580 (90 Law Ed, at p 333) . The essential problem here is simply whether the engineers in question can be properly said to be engaged in an industrial dispute with their employers. Enquiries as to the essential functions of government are unproductive in the abstract and irrelevant to this issue. Government, directly or by its corporate agencies has in modern times undertaken much that was previously left to be done by private enterprise, or which was not previously done at all; and government has to a greater or lesser degree controlled, in the interest of the public or as a matter of government policy, many forms of private industry. Some old concepts of public law are in difficulties to keep their places in this new world. The question whether or not particular public corporations enjoy the immunities of the Crown illustrates the problem in one field. In another there are the difficulties attending the immunity from suit of foreign public ships, when today so many sovereign states own trading vessels. (at p276)

12. We heard some muffled echoes of old arguments. But we cannot open our ears to them.

Doctrines discarded by the decision in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 cannot be revived to defeat the claim of these latter-day engineers. The effect of the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 in relation to some of these matters has been stated by Dixon J., as he then was, in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26[1937] HCA 26; ; (1937) 56 CLR 657, at p 681 and in the Essendon Corporation Case [1947] HCA 15; (1947) 74 CLR 1, at pp 19-22 . There is nothing in these cases or in the Victorian Public Servants' Case [1942] HCA 39; (1942) 66 CLR 488 which, as I read the judgments, curtails in any way the rule that the power under par. (xxxv.) applies to industrial disputes to which a State is a party. (at p276)

13. Something was sought to be made of the special circumstances of government employment. But this, so far as it is relevant, is a matter for the Commission to consider. I have already said that the log of claims here seems to assume that the Commission could simply enact a scale of salaries applicable for different grades of engineers wherever employed and that this is a misconception. In making an award the Commission might, I would assume, take into consideration that some engineers are members of permanent government services and have rights in respect of seniority, promotion, superannuation and so forth, while others are employed under very different conditions. (at p277)

14. Support for the main argument of the States was said to be found not only in the Teachers' Case [1929] HCA 11; (1929) 41 CLR 569 but also in the Victorian Public Servants' Case [1942] HCA 39; (1942) 66 CLR 488 . This and Pidoto's Case [1943] HCA 37; (1943) 68 CLR 87 , which was also referred to, were wartime cases. They turned on the extent of the defence power. The circumstances which led to the Public Servants' Case (1942) [1942] HCA 39; 66 CLR 488 were unusual - one hopes so at all events, for reading of them is not inspiring. The first Tuesday in November (Melbourne Cup day) had ordinarily been a public holiday in Victoria, and so too had the last Thursday in September (Show Day). They were not proclaimed as holidays in 1942, and State public servants were required to work on those and other days which in peacetime would have been holidays for them. The Commonwealth Government, however, sought by regulation to compel the State of Victoria to give them extra pay for working on holidays. It was said - one hopes erroneously - that failure to provide this would have been likely to have led to industrial unrest. The case turned upon the validity of those Regulations and on their interpretation and effect. The expression "industrial dispute" and "industrial matter" occurred in them, with the same meaning as in the Commonwealth Conciliation and Arbitration Act. The meaning of these expressions when used in relation to government employment is therefore discussed in the judgments. But the episode leaves an unhappy picture of what was happening in Australia in the middle of the war; and the simple and robust answer to the whole matter was, I venture to think, that given by Starke J. that the Regulations were invalid because: "they have nothing to do with the public safety and defence of the Commonwealth" (1942) 66 CLR, at p 515 , and were subversive of the States. I would respectfully adhere to all that Starke J. said in the last two paragraphs of his judgment. In other judgments in the case there is instructive discussion of general principles. But neither that case nor Pidoto's Case [1943] HCA 37; (1943) 68 CLR 87 is, in my view, directly helpful for the determination of this case. (at p277)

15. One comes back to the expression "industrial disputes". The words are plain, if imprecise, and from them and the facts of the case I think it plainly follows that the orders nisi for prohibition should be discharged and an appropriate order for mandamus made. (at p277)

ORDER

Orders nisi for prohibition discharged.

Order nisi for mandamus made absolute directed to the respondents who are members of the Commonwealth Conciliation and Arbitration Commission commanding them or such of them as continue pursuant to s. 34 of the Conciliation and Arbitration Act 1904-1959 to form the commission constituted for the hearing and determination of the proceedings designated "Dispute C. No. 630 of 1957" and "Dispute C. No. 631 of 1957" to proceed according to law with the hearing and determination thereof.

Order that the costs of the abovenamed Association of Professional Engineers, Australia, of the order nisi for mandamus be paid by the respondents the State of New South Wales the Water Conservation and Irrigation Commission, the Metropolitan Water Sewerage and Drainage Board and the Hunter District Water Board and that the costs of the order nisi for prohibition in which the State of New South Wales and others were prosecutors be paid by the said prosecutors and that the costs of the order nisi for prohibition in which the Council of the City of Sydney is prosecutor be paid by the said prosecutor.

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