

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY) No. NI 11 of 1990
INDUSTRIAL DIVISION)

Between: ERNEST CHARLES ECOB

Applicant

and: MR P LUDWIG, MR E R HODDER,
MR M G FORSHAW, MRS D SWAN,
MR B K MEILKEJOHN,
MR F LAKE, MR M O'SHEA,
MR B SMITH, MR J TURLEY,
MR J DUNNERY,
MR I CAMBRIDGE,
MR V J KEENAN, MR B WILSON,
MR E J BUTLER, MR V JACOBS

Respondents



RULING ON ONE ISSUE IN PROCEEDINGS

Einfeld J

Sydney

22 March 1991

On 3 July 1990, the applicant, a member and New South Wales branch secretary of the Australian Workers Union (the union) sought and obtained from Justice Lockhart an ex parte order nisi calling upon the respondents, members of the union's federal executive council, to show cause why a resolution of the executive council adopted at its meeting on 28 June 1990 (the resolution) should not be invalidated as being ultra vires the union's rules (the rules).

Upon the return of the order on 6 July, nine respondents (the participating respondents) were represented by counsel to oppose the order being made absolute. By the time of the hearing on 12 July, six other respondents had notified the Court by letter that they submitted to any order the Court

might see fit to make. Counsel also sought leave to intervene for what he called "the federal organisation of the union" by which I took him to mean the union itself. This was granted subject to later objection. No objection was ever made.

The challenged resolution was as follows:

That in accordance with the rules of the Union and in the interests of the general management of the affairs of the Union this Executive Council determines:-

1. *That Bruce Wilson be appointed as an organiser as of 2nd July 1990 to advocate the principles of Unionism, to participate in the enforcement of the rules of organisation and to promote the organisation and enrolment of members, and that Mr Wilson be based in Perth WA and the appointment be until 1st February, 1994 at which time it shall be reviewed by Executive Council, and further that subject to removal as provided in the Rules of the Union, he may only be removed from office by a vote of not less than two thirds of the total number of votes allocated to the members of Executive Council, provided that he shall have the right of appeal to the succeeding convention if so removed.*
2. *That for the purposes of developing policies and strategies on issues affecting particular industry groupings and to assist in co-ordinating industrial research and campaigns, and to ensure effective communication amongst the Branches and Head Office, Mr Wilson is to be responsible for establishing industry committees in Western Australia so that such committees may participate in a National Committee structure as envisaged by the 1990 Convention, and as further refined by the Executive Council at its meeting held between 19-25 January 1990. The industries include:-*
 - rural
 - oil and hydrocarbons and gas
 - construction
 - mining and smelting
 - manufacturing
 - chemical
 - timber and forest products
 - aluminium
 - industrial catering
 - public sector

and further that Mr Wilson liaise with the various Branches of the Union and Head Office as necessary to assist in the co-ordination of a National approach to the formation of such committees. It is acknowledged by Executive Council that this will require Mr Wilson to visit such Branches from time to time with such visits to be at the Branches' request and with the authorisation of the Federal President.

3. That in view of the Executive Council's recent decision to consolidate the position of the Australian Workers' Union in the mining industry Mr Wilson is to have special responsibility as the organiser responsible for the following areas in Western Australia:-

- all BHP-Utah Iron Ore Project
- Hamersley Iron Iron Ore Projects

It is the view of Executive Council that this will assist in the developing of the National Mining Industry Committee and importantly the Executive Council's decision to pursue National Award coverage in the Mining Industry and be of assistance to the West Australian Branch. In the performance of these duties Mr Wilson shall be required to give monthly reports to the Branch secretary of the Western Australian Branch.

4. That upon this appointment Mr Wilson will be authorised to:-

- (a) make the necessary arrangements for the employment, by the Union, of one full time person to perform the necessary office/clerical functions so as to assist him effectively perform his prescribed duties in Western Australia.
- (b) purchase on behalf of the Union, an appropriate motor vehicle of a standard similar to that used by W.A. Branch officials which he shall be entitled to use in the performance of his duties in the same manner as vehicles being used by W.A. Branch officials.

5. That sufficient office space and facilities be made available to Mr Wilson by the West Australian Branch at the West Australian Branch office and that West Australian Branch officials co-operate and assist Mr Wilson in his duties as required.

6. That the salary, superannuation and other entitlements for Mr Wilson and the above-mentioned office person be the same as those that apply to W.A. Branch organisers and staff respectively.
7. That the funding for Mr Wilson and the above-mentioned office person be made available from Head Office funds, however held from time to time, with all administration arrangements being handled through the West Australian branch accounts section.
8. That Mr Wilson report directly to the National Industry Co-ordinating Committee as required from time to time by the Executive Council, and shall conform to the direction of the National Industry Co-ordinating Committee as appropriate in relation to the matters within the province of the said Committee, subject to the authority of the Executive Council to alter, vary or negate such directions or issue other directions unrelated to directions of the said Committee.
9. The General Secretary is directed to do all things necessary to give effect to and facilitate the implementation of clauses 1-8 inclusive of this motion.

The applicant's affidavits raised much wider questions than had been placed before Justice Lockhart and me in the initial stages of the case. They included whether the actions of the first and thirteenth respondents in particular lacked bona fides in that the first respondent (Ludwig), the federal president, procured the resolution appointing the thirteenth respondent (Wilson) to this position as compensation for his loss to the second respondent (Hodder) of a recent election for the position of general secretary of the union. The inferential assertion of an unmerited "pay off" is clear. As the respondents' affidavits did not in substance address this issue, their counsel presaged an application for an

adjournment to permit additional evidence to be adduced. Because of this prospect, as well as the constraints of time available to the Court on the day of hearing and the undesirability of cross examination on such an emotive issue if it was not necessary, the parties asked me to deal with the ultra vires issue first.

As the argument proceeded, it became clear that the matter possessed none of the urgency which was represented to Justice Lockhart. It is quite improper to present cases for priority about which the parties are in fact casual and the issues not urgent. From the statements and attitudes of the parties at the hearing, this appears to be one such case.

The determination of the ultra vires argument requires an examination of the union's rules. They show that the union is a federation of six state branches, with both the central or federal body and the state branches having functions to perform. The union is governed by a national convention but an executive council conducts its day to day activities. The powers of the executive council are stated by rule 36 to include:

- . the general management of the affairs of the union

- . to fix salaries for officers and staff including organisers

- . to make, vary or rescind industrial agreements
- . to decide matters submitted by branches and to assist branches
- . to fill certain casual vacancies, including that of branch organiser in limited circumstances
- . to approve matters being placed before the Australian Industrial Relations Commission
- . and other matters

Rule 89(j) defines "organiser" as

... a member elected in accordance with these Rules or appointed by a Branch Executive or Convention or the Executive Council to advocate the principles of unionism, to participate in the effective management of the affairs of the organisation or Branch and to promote the organisations and enrolment of members.

Sub-rule (k) defines "employed organiser" as "a member employed and paid to work at the direction of the branch secretary".

By sub-rule (g) elected, appointed or employed organisers are included among a list of officeholders called "officers" so long as they have been elected or appointed in accordance with the rules. Organisers may by rule 48(m) be delegated to call

meetings of members or to represent branches in disputes before a tribunal.

Rule 75 mandates each branch to determine before the regular elections the number of organisers desired to be elected. Elected organisers may by rule 43(c) be dismissed for causes such as misappropriation of funds, substantial breach of the rules, gross misbehaviour or neglect of duty, or ineligibility. Branch organisers are responsible to the respective branch secretary. Rule 79 gives a branch executive one month to fill certain casual vacancies including branch organisers.

The executive council consists of the president, who is the unsalaried chief executive officer of the union, one vice president from each branch, a general secretary, an assistant general secretary and one councillor from each branch. The president, general secretary and assistant general secretary are elected by a general franchise of members quadrennially. The president's duties include "to further the wellbeing and objects of the Union". The general secretary is inter alia "responsible for the administration of the Union" and exercises "control over all employees" (rule 38). The branch secretaries have identical functions in relation to branch employees through rule 48(a).

The rules make no express provision for the employment of organisers or, for that matter, any staff but they do make

clear that organisers may be employed or appointed as well as elected. Apart from rule 22 which distinguishes between them in permitting an elected but not an employed organiser to receive complaints of and deal with industrial disputes, there does not appear to be any other specific differences in function.

Section 4(1) of the Industrial Relations Act 1988 (the Act) provides:

"office", in relation to an organisation or branch of an organisation, means:

- (a) an office of president, vice-president, secretary or assistant secretary of the organisation or branch;*
- (b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions;*
 - (i) the management of the affairs of the organisation or branch;*
 - (ii) the determination of policy for the organisation or branch;*
 - (iii) the making, alteration or rescission of rules of the organisation or branch;*
 - (iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules;*
- (c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:*
 - (i) existing policy of the organisation or branch; or*
 - (ii) decisions concerning the organisation or branch;*

- (d) *an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or*
- (e) *the office of a person holding (whether as trustee or otherwise) property:*
 - (i) *of the organisation or branch; or*
 - (ii) *in which the organisation or branch has a beneficial interest;*

"officer", in relation to an organisation or branch of an organisation, means a person who holds an office in the organisation or branch;

Inter alia section 197 of the Act requires that all officers be elected, section 195 requires that union rules must establish their powers and duties and provide for their removal and section 196 requires that the rules not conflict with the Act. Thus organisers employed by this union, who are officers under the rules, cannot be officers under the Act.

The applicant's primary point is that the federal body through the executive council cannot employ an organiser because the union is clearly intended to be a federation of state branches with the work of organisers being done at branch level. This much is made clear, so he says, by the provision that branch executives fix the number of organisers (rule 75(a)). He says that the definition of "organiser" in rule 89(j) does not imply any power in the executive council to employ organisers, especially as "employed organiser" is defined in rule 89(k) by reference only to a branch secretary. The applicant says that "appointed" organisers are only those who fill casual vacancies.

Alternatively, the applicant says that if the executive council can create an office of organiser, then the position must be an elected office, both because of the rules and the Act.

In his affidavit the applicant criticises the disputed resolution for affecting to give power to the president to direct or authorise various duties and functions of Mr Wilson as organiser other than as provided by rule 38, for authorising Mr Wilson to hire a clerical assistant at union expense contrary to rules 38 and 48 which allocate such powers to the general and branch secretaries, and for permitting Mr Wilson to purchase a motor vehicle at union expense when the executive council has no such powers. There is also a general quotation of rule 37 in support of invalidity although this allegation is not particularised.

All this entitles the applicant, it is submitted, to an order under section 209(1) and (9) of the Act directing the treatment by the respondents of the resolution as null and void and its non-implementation by them.

It seems to me that sub-rules (j) and (k) of rule 89 make for a troika of organisers:

1. organisers elected under the rules

2. organisers appointed by a branch executive, the convention or the executive council

the duties of both 1 and 2 being:

- (a) to advocate the principles of unionism
 - (b) to participate in the effective management of the affairs of the organisation or branch
 - (c) to participate in the enforcement of the rules of the organisation or branch
 - (d) to promote the organisation and enrolment of members
3. organisers employed and paid by branches to work at the direction of the branch secretary.

Although rule 89 is a definition provision, it seems hardly possible that the second of the above categories of organisers could exist only for organisers appointed to fill casual vacancies in the ranks of elected organisers. In my experience these are the day to day functions of all organisers, especially those professionally employed. People filling casual vacancies replace others who would have had the same duties. I cannot see why the duties in 2 above would only be those of elected and not paid organisers. Furthermore, if "appointments" of organisers were limited to

filling casual vacancies, organisers could never be "appointed" by the convention, despite rule 89(j), because the convention has no power to fill vacancies in elected positions.

It is also difficult to read rule 89(j) other than as extending to convention and executive council the same powers as branches relating to the employment of organisers. True it is that rule 89(j) does not by itself authorise the national bodies to appoint organisers but it imports into all references to organisers found elsewhere in the rules the implication that an organiser can be appointed by any of the three tiers or spheres of the union. The use of the alternative "organisation or branch" in the duties of appointed organisers (see 2 in the earlier analysis of sub-rules (j) and (k) of rule 89) and the unlikelihood that branches could or would even attempt to appoint federal or national organisers underline the intention that organisers may be appointed by the two federal bodies, the executive council and convention, for the organisation as a whole, as well as by branches for their own local purposes. I think that the only meaning of rule 89(k) is that where the rules speak of an "employed organiser", they speak of a person employed by a branch as an organiser. This definition does not mean that organisers may not be employed by the federal organs of the union. It may merely have been thought necessary because the rules seem to make no provision for the election of organisers other than by branches.

Thus in my opinion, an "appointed" organiser is to be compared with and distinguished from an "elected" person. The appointment of federal organisers being a matter to do with the "general management" of the union's affairs, rule 36(a) vest the appointment in the executive council. Looked at from the opposite end, "general management" of the affairs of any organisation would normally include appointment of staff, either directly or as incidental to it. Unless the rules of this union prevented the executive council from appointing organisers to its staff, rule 36(a) would authorise the appointment. In my opinion, there is nothing in the rules that would have this effect.

It is not correct to say that the president cannot exercise any day to day supervision or direction over Mr Wilson. Overall the performance by national staff of their work is the responsibility of the executive council, but I see no reason why the executive council may not delegate such tasks as the setting and supervision of the day to day duties and priorities of staff members from time to time to its president as chief executive. Such delegation does not absolve the executive council of its responsibilities or powers.

The same may be said for the submission that clerical staff can only be appointed by the general secretary. Rule 38 only obligates the general secretary to "control" employees, not to hire them. On the other hand, it can hardly be expected that

every time a casual clerk or receptionist is to be employed or deployed on particular work, there must be a meeting of the executive council to interview applicants and select the appointee, or allocate the person's work. In the absence of express provision as to who is to hire and fire staff, the executive council, whose resolutions are by rule 20(b) binding on all members, is clearly the body which carries that responsibility. But it may authorise an officer such as Mr Wilson to select and appoint his own assistant or secretary. As before, such tasks remain in truth activities and responsibilities of the executive council which it has authorised to be carried out in its name by others. Both the appointer and the appointee remain answerable to the executive council for the appointment and the performance of the work.

The attack on the part of the resolution which authorises the purchase of the car by Mr Wilson at union expense is trivial. Rule 56(b) gives the executive council absolute discretion to expend the union's funds. Property purchased with union funds vests in the union. This vehicle will so vest. Its purchase for the purpose stated is authorised by the rules.

In my opinion any inconsistency of the resolution in question with rule 37 does not invalidate the resolution as a whole or the appointment in principle. If the length and the provision for termination of the appointment exceed the provisions of the rules, the only identifiable possible infringements of rule 37, the appointment is simply to be read as subject to

those rules. I have not been asked to make any findings or ruling on that matter and I therefore do not do so.

I reject the applicant's argument based on sections 4 and 195 to 197 of the Act. Mr Wilson's duties do not fall within the section 4 definitions of "office" and "officer" by reason of the second part of sub-paragraph (c) of those definitions. Clearly, paid organisers would not normally carry the type of connotation referred to in the definitions and the disputed resolution expressly conflicts with such an intention. The question of election therefore does not arise.

In my opinion the resolution was within the power of the executive council to pass. In the light of the arrangement made at the hearing, I shall allow the parties time to consider these reasons before proceeding to the next stage of the case. A date for directions on its further conduct will be fixed when these reasons are delivered.

I certify that this and the 14
preceding pages are a true copy of the
Reasons for Judgment herein of his Honour
Justiceinfeld *Justiceinfeld*
Associate
Dated: 22 March 1991