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"Muted Sirens":

***DEMARCATIION AND UNION COVERAGE
IN THE AUSTRALIAN COAL MINING INDUSTRY***

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AUSTRALIAN COAL MINING INDUSTRY**

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Michael Wright is the National Industrial/Research Officer of the United Mine Workers Division of the Construction, Forestry, Mining and Energy Union (UMW/CFMEU). The views expressed herein are the authors, and do not necessarily reflect the views of the UMW/CFMEU. This paper is a work in progress. As such the author would appreciate any comments from interested readers.

ABBREVIATIONS USED:

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| <i>ACSA</i> | Australian Collieries Staff Association |
| <i>ACSEF</i> | Australasian Coal and Shale Employees' Federation (the Federation) |
| <i>AEU</i> | Amalgamated Engineering Union |
| <i>AMWU</i> | Amalgamated Metal Workers' Union |
| <i>CMMPA</i> | Colliery Mechanics Mutual Protective Association |
| <i>CIT</i> | Coal Industry Tribunal |
| <i>COA</i> | Colliery Officials Association of NSW |
| <i>CRB</i> | Coal Reference Board |
| <i>ETU</i> | Electrical Trades Union of Australia |
| <i>FEDFA</i> | Federated Engine Drivers' and Firemen's Association of Australasia |
| <i>FMMA</i> | Federated Mining Mechanics Association of Australasia |
| <i>UMFA</i> | United Mineworkers' Federation of Australia |
| <i>UMW/CFMEU</i> | United Mine Workers' Division of the Construction, Forestry, Mining & Energy Union |
| <i>VCMA</i> | Victorian Coal Miners Association |

Industrial relations in the Australian Coal Industry have long been assessed from varying disciplinary perspectives; economists¹, industrial relations academics², historians³ and sociologists⁴ have all made contributions to understanding both the structure of the system and the outcomes it produces.

Analyses from a legal perspective however have been sparse. Brooks (1983) examined developments in industrial law for the whole mining industry up until 1983. Romeyn (1982) and Patterson (1991) looked at the role of the Coal Industry Tribunal and its 'subordinate' agencies.

The aim of this paper is to look at legal developments in relation to the registration, coverage and demarcation issues that relate to unions in the coal mining industry, in particular the United Mineworkers' Division of the Construction, Forestry, Mining & Energy Union (UMW/CFMEU) and its predecessors.

Demarcation within the coal industry has been subject to a unique array of legal and institutional influences. The distinctive institutional character of this industry provides an opportunity for comparing the handling of demarcation under regulatory structures different to the mainstream of Australian Industrial Relations. This comparison also enables us to examine how the separate regulatory streams have influenced one another. The demarking of union membership or functions of different employees has, since the 1920s, been within the realm of specialist tribunals, unlike questions relating to registration and eligibility, which have been set by mainstream federal tribunals, and continue to be set by the Australian Industrial Relations Commission.

The industry is also highly prone to demarcation - indeed, an analysis of demarcation in the period 1952 to 1954 found that for all demarcation disputes in NSW, between 72% to 99% of them were in the mining industry (dominated as it was then by the Black Coal Industry).⁵ More recent statistics lead to the conclusion that demarcation disputes within the industry are still prevalent. In the year ending June 1990, 26% of all working days lost in the NSW coal mining industry were because of inter-union disputes. In 1990/91 it was 19%.⁶ It was in

1 Mauldon (1929) and McColl (1982)

2 Walker (1970) & Smith (1990)

3 Sheridan (1989)

4 Metcalfe (1988)

5 see Cruise (1957) p.243. This survey must also be seen in the context of the post war rivalry between the AWU and the Miners Federation relating to the metalliferous mining industry.

6 calculated from Joint Coal Board (1992) Table 66, p.137.

this unique context that principles have been determined concerning the registration of unions and the demarcation of their coverage.

Before looking at the specifics of industrial relations in the coal industry, it is important to briefly place it in its broader industry perspective. The Australian coal mining industry has been typified by a number of features that have shaped its industrial relations system and the organisations that operate within it. The product market for coal has primarily been responsible for a series of booms and busts within the industry.⁷ This has had a significant influence on the stability of employment and the earning capabilities of mineworkers. The spatial 'separateness' of workers in the coalfields communities has given mine workers an identity apart from the rest of the Australian community, especially mine owners.⁸ The actual work of coal miners has traditionally been dangerous and burdensome. Underground production, up until the age of mechanisation in the 1950s, was controlled to some extent by the miners themselves, through a system of contract mining made necessary because of the difficulty of supervision underground.⁹ Due to these factors, the industry was for a long time described, in the words of Drake-Brockman C.J. as "an unbridled and unregulated contest between the employers and employees without restraint and actuated only by the rules of the jungle"¹⁰

The first major decision relating to the regulation of union coverage was *Jumbunna Coal Mine (NL) v VCMA (1908)*¹¹. It was a watershed case in terms of the registration of trade unions in particular, and the definition of concepts such as 'industry', 'industrial dispute' and interstateness more generally. It involved a High Court challenge (on appeal from the Commonwealth Court of Conciliation and Arbitration) to the federal registration of the Victorian Coal Miners' Association (VCMA) by the Registrar. It was made primarily on the grounds that the VCMA "could not be concerned in an industrial dispute extending beyond the the limits of one state" (at 310) and that the registration provisions of the Act were ultra vires in terms of the Constitution. After upholding the the registration powers of the Act, Griffith C.J. stated, "the association registered in this case is one of employees in an industry, namely coal mining, which is clearly within the Constitution, and that they might become parties to an industrial dispute extending beyond Victoria." (at 340).

7 Beaumont (1975)

8 see Metcalfe (1988) for study of the NSW Coalfields communities

9 see Gollan (1963) & Fisher (1987).

10 quoted in Gollan (1963) p.214.

11 (1908) 6 CLR 309

A number of comments need to be made about the *Jumbunna* decision. First, the High Court was compelled by both logic and circumstances to find, as a question of fact, that the VCMA was "capable of being at any time one of a combination of organisations engaged in a dispute extending beyond the limits of any one state" (at 354). Indeed, in the years before the Decision, the VCMA was active in discussions on closer unity with the NSW coal unions.¹² During a long strike by the VCMA against a number of companies (including *Jumbunna* (NL)), the 'NSW unions' had provided financial assistance for four years.¹³ Clearly, to find that the VCMA lacked 'interstateness' (put simply) would have flown in the face of its increasing integration within an emerging Federation of mining unions, and at a broader level, limited the registration provisions of the Act quite considerably.

It is ironic to note that after having the High Court uphold its right to federal registration in 1908, only five years later, the Commonwealth Court of Conciliation and Arbitration's President Higgins J., rejected the self deregistration of the VCMA, prior to it 'amalgamating' with a national federation of coal mining unions in *VCMA; ex parte Murphy*.¹⁴ Higgins stated: "As soon as the new organisation is properly registered, and as soon as you can show me that you have cleared up everything of the past, I will entertain the order nisi, and not before." (at 42).

As can be seen the Victorian coalfields were the testing grounds for the registration and deregistration of federally registered unions. The decisions were made within the mainstream industrial relations system - as yet the Coal Industry had not been given "island industry" status. It was the creation of such special industry tribunals by the Hughes Government in the early 1920s that led to the most significant case in terms of defining the coal mining industry and as a consequence, the scope of the Australasian Coal and Shale Employees' Federation's¹⁵ eligibility rule and the jurisdictional limits to specialist tribunals that followed.

In *R v Hibble & Ors; ex parte BHP Co Ltd (1921)*¹⁶, the definition of "employees engaged in or in connection with the coal and shale industry" was considered by the Full Bench of the High Court. Indeed, it was the first time that the eligibility rule of the Federation had been analysed.

12 Ross (1970) p.137-139.

13 *ibid.* p.137.

14 (1913) 7 CAR 41

15 hereafter referred to as the Federation, the Miners Federation or the ACSEF.

16 29 CLR 290.

The case related to the jurisdiction of the Coke Industry Special Tribunal, convened by Charles Hibble, under the *Industrial Peace Acts, 1920*.¹⁷ Originally, ACSEF issued a log of claims that included in its scope, the cokeworks within BHPs' Steelworks. Once the hearing was convened, BHP obtained a rule *nisi* for Hibble and the ACSEF to show cause why the proceedings should not be prohibited.

In the majority High Court judgement, Knox C.J., Gavan Duffy, Powers, Rich and Starke, JJ. reduced the seven grounds of appeal to two issues. They considered i) what the dispute was and ii) whether "that dispute or any dispute actually existed" between BHP and its employees (at 296).

The High Court found that the dispute originated from a log of claims made by the Federation on companies for improved wages and conditions for *members* of the Federation. By relying on this definition of the dispute, the Court upheld BHP's contention that none of its cokeworkers were lawfully *members* of the Federation, relying on the true construction of the rules of the Federation and therefore the company established that "it was no party to the dispute".

In particular, the High Court relied on the eligibility rule of the Federation which stated that the Federation "shall consist of an unlimited number of employees engaged in or on connection with the coal and shale industry" together with a section which enabled appointed officers to be members. After referring to the Arbitration Act's need for a registered organisation to be based either on industry or occupation lines, the Court interpreted the Federations rules as "industry based" or referring to the "trade or business of the employer". (at 297).

The Court then proceeded to define the "coal and shale industry" -

the "question whether a particular trade or business is or is not part of the coal and shale industry must in all cases be a question of fact. ...Thus, some employers extract coal from the earth, convert some of it into coke, and distribute both coal and coke to consumers. Such a business would in point of fact be part of the coal or shale industry, and all persons employed in that business are properly said to be employed in or in connection with that industry." (at 297)

However in relation to cokeworkers being covered by the Federation's eligibility rule the Court held:

17 for a thorough analysis of the *Industrial Peace Act*, see Lee (1980).

"We hold that a steel and iron manufacturer who for the purpose of his business uses coal in its natural state or after it has been transformed by him into coke is not engaged in the coal or shale industry, and that his employees are not employed in or in connection with that industry." (at 297).

After finding that the Federation did not lawfully have any members in BHP's cokeworks, the Court held that the Federation under the Act may have incorporated other groups in its eligibility rule, but in the case before it, it was compelled to "decide the matter on the words that were in fact chosen for the qualification of membership" (at 298).

Prior to considering whether the dispute was real or 'genuine', the Court considered a submission made by the Federation's advocate regarding whether "the association putting forward the log was not the registered organisation known as the Coal and Shale Employees' Federation, but some new and larger unregistered association of the same name with different objects and rules" (at 298). Whilst the Court stated that such a situation was inherently improbable, it is interesting to see how this point has developed since *Federated Ironworkers Association v Commonwealth* (1951)¹⁸ where it was 'conceded' by the High Court that a Federal Union may be both an incorporated body plus another unincorporated body.¹⁹

Higgins J. whilst coming to the same conclusion that the rule nisi should be made absolute, concentrated on one ground for the order, namely that no industrial dispute existed. Higgins J. agreed with his fellow judges when he stated:

"when one speaks of "the coal and shale industry," as a single industry, the meaning is surely the industry of extracting coal and shale. ... It is not enough to show that coke is "connected with" coal, or jam with sugar; the employees must be engaged in the industry, or in connection with it (eg. as surface-men or engineers in connection with coal mining, or as carpenters with jam factories)" (at 302).²⁰

18 (1951) 84 CLR 265

19 see Rawson (1981) p.303

20 The meaning given to the expression "or in connection with" has subsequently been made less restrictive in *Re FLAIEU; ex parte AWU* (1976) 51 ALJR 266 (Poon Brothers Case) and *R v Moore & Ors; ex parte FMWU* (1978) 140 CLR 470 (the Uranium Mining Case).

Unlike his fellow judges, Higgins J. appreciated the *reality* of inter-union relations and the inability for unions to alter their eligibility rules. Whilst the majority of the judges stated: "Our decision does not prevent the association of workmen in any form they think fit" (at 297-8), Higgins J. acknowledged that the Federation had attempted to change its constitutional coverage under the Commonwealth Conciliation and Arbitration Act to include cokeworkers, but had failed (at 302). The determination of union coverage using the existing (relatively fixed) rules of the organisation did in fact make the interpretation of these rules crucial.

Higgins J. took a different approach with the unregistered organisation referred to previously. He states that given the definition of an "organisation" in the *Industrial Peace Act*, this "mixed body of men" (ie. workers in the coal and shale industry and cokeworkers) may have been "an organisation for the purposes of the Act even though it is not registered" (at 303). However, Higgins J. then went on to discount this factor as the log and associated letter was "for the members of the Federation". He stated (at 303) "[I]f it be said that the Federation meant to claim for these coke workers, loosely associated, the letter and the log do not say so; and a dispute is created not by what one thinks but by what one expresses." Thus Higgins J. seems to be indicating that if the claim was on behalf of the "mixed body of men" and was made explicit to the employers, then under the 'looser' *Industrial Peace Act*, it may have proved the existence of a dispute.

Further, while not related to demarcation or union coverage, this case was interesting in terms of 'judicial politics'. Higgins J. had just resigned from the Court of Arbitration stating that "A tribunal of reason cannot do its work side by side with executive tribunals of panic."²¹ While quiet in his deliberations on the validity or rationality of the *Industrial Peace Act*, which created these "executive tribunals of panic", he did criticise Hibble, in his incorrect interpretation of a "person" under the Act (at 301). Despite this, Higgins was restrained in commenting in his role as a High Court judge in spite of the bitterness between his Honour and the Hughes Government.²²

In 1924, a state registered cokeworkers union amalgamated officially with the Federation's Southern District.²³ A consequence of this is that the cokeworkers are only members of the state-registered Southern District Branch which explicitly

21 quote from statement made by Higgins J. in the Court of Arbitration, announcing his resignation, as quoted in Lee (1980).

22 see Lee for details of this debate p.174-177.

23 see Ross (1970) p.263 for brief details.

recognises their membership. As such they have always had their award determined within the State jurisdiction.

The next major case defining the the coverage of work in the coal mining industry related to the federal registration of the Colliery Mechanics Mutual Protective Association (CMMPA). In *ACSEF v CMMPA (1926)*²⁴, Beeby J. upheld that Deputy Registrar's registration of the CMMPA (known as the "Mechanics"). In this case, it was ironic, given their experience at Jumbunna that the ACSEF, together with the Federated Engine Drivers and Firemens' Association of Australasia (FED&FA), the Amalgamated Engineering Union (AEU) and the Blacksmiths Society appealed the decision to the Court on grounds that "the applicant association was incapable of registration under the Act in that its members were not capable of being involved in an industrial dispute within the meaning of the Commonwealth Constitution and of the Act." (at 91). The Mechanics were only based in NSW at the time of application, as were the VCMA two decades before.

The major principle discussed by Beeby J. related to the power of the registrar to register an organisation where its membership might "conveniently belong" to another (or other) registered organisations. In this case Beeby J. stated that s.59 (later s.142) of the *Conciliation and Arbitration Act* 1904 should authorise "the Registrar *in all the circumstances* to grant registration even though he is of the opinion that members of the applicant organisation might conveniently belong to other registered organisations" (at 92). Thus it was held that "in all the circumstances" the CMMPA would be exempt from the "conveniently belong" provisions. The "circumstances" included its long history of representation in the state system. Beeby J. also considered that its membership had separate interests from the ACSEF as the latter organisation was primarily an organisation of "underground workers engaged in the actual getting and handling of coal". Yet in rejecting the logic of industry based unionism, he also rejected the claim by the AEU and the Blacksmiths that they should be organised along craft lines. He followed the NSW Tribunals in their deliberations regarding the existence of an industry based craft union.

24 24 CAR 90. It is interesting to note that the CMMPA federal registration was initially refused because in shaping its constitution to the requirements of the Federal act under s.56, it had, in the words of Webb D.P., "*sought to completely alter its constitution and to include in the amendments alterations of which it could not in any way be said that they were necessary to enable it to comply*". (Re. CMMPA 23 CAR 744 at 744)

Beeby J.'s decision, when assessed in the light of events of the day was significant. It went against the general principle that it "is undesirable that rival unions covering the same field of operations should function under the Act" (at 92). The ACSEF and the craft unions had both the constitutional coverage and the willingness to organise the craft workers in NSW. The registration of an industry craft union, in the context of a period where the ACSEF was strongly influenced by syndicalist ideas and was embracing the idea of "One Big Union", may have been a reaction by Beeby J. to limit the "expansionist" and "revolutionary" ideals of the Federation. The CMMPA, by contrast was a conservative organisation, which shared none of the revolutionary fervour of the Miners Federation.²⁵ The registration of an industry craft union was arguably the product of judicial creativity to limit the influence of the Federation in the coalfields as well as a recognition of the CMMPA's long existence.

Beeby's decision, together with the operation the Coal Industry Tribunal convened by Hibble under the *Industrial Peace Act* 1920 was part of the trend to give the coal industry a 'separate identity', recognising the industry's unique place in the economy and its unique industrial relations patterns. Whilst the Hibble Tribunal did not survive into the 1930s, the separateness of the industry flourished and was codified in the form of the *Coal Industry Acts* which are discussed later.

In a refinement of *R v Hibble* (1921), the decision of the High Court in *R v Hickman & Ors; ex parte Fox & Clinton* (1945)²⁶ decided the meaning of the "coal mining industry" as it related to the Local (Mechanics) Reference Board's ability to apply an award to coal haulage contractors in the Burragorang Valley. This decision further limited the definition of the term "coal mining industry" and as a consequence, limited the coal unions' ability to enforce coal industry awards where contractors were used that were not exclusively servicing the industry. Dixon J. (at 613) stated that the definition adopted by the Court may have been different if it were "evidenced by words by awards, determinations, reports and other papers dealing with the industrial side of coal mining". In the absence of such documentation, the Court had to look at the case in terms of the "natural meaning of the expression 'coal mining industry'".

As organisations became registered under the Federal Act, the registration of organisations became less 'contestable'. The boundaries between organisations had been roughly determined, as had the boundaries of the industry itself as

25 see Ross (1970) Chapter 12 for details of this period.

26 70 CLR 598

determined by High Court cases such as the one just discussed. As such, demarcation disputes and their settlement by the arbitral authorities became the main area of 'contestability' in the industry. It was into such a period in the development of inter-union boundaries that the Coal Industry Tribunal came into being. The Coal Industry Tribunal (CIT) was, and continues to be a specialist arbitration body, operating separately from the general federal and state based arbitration systems.

The history behind the creation of the Tribunal has been explored in detail by Fisher (1987). The Joint Coal Board (JCB) and Coal Industry Tribunal (CIT) were created by joint Commonwealth and NSW legislation, the *Coal Industry Act(s)* 1946 as a response to the acute post war coal shortage, the lack of coordinated development of the coalfields and the poor record of industrial relations in the industry. The Minister for Post War Reconstruction argued that, "this legislation [will] lay the framework for a new deal for the New South Wales industry, which produces over 80% of our black coal. It is a problem industry, and, in order to understand it, we must appreciate the essential features of its history. At bottom, there was the incapacity of an individualistic industry to re-organise itself."²⁷ The essential features of the industry were its concentration of ownership and its integration into steel and shipping firms, the nature of its product market and the consequent boom-bust cycles, and a 'unique' system of industrial relations.

The powers of the Coal Industry Tribunal under the original joint legislation were contained in s.33 and s.34 of *Coal Industry Act (Cth)*²⁸.

Under s.33 the Tribunal was to "have cognizance of": (a) "any industrial dispute, extending beyond the limits of any one state" or (b) "any industrial dispute in the State, not extending beyond the limits of the State" of NSW either of which must be between the Federation and employers or associations of employers, referred to it by either of the parties or by the Board.

It also was to have cognizance of: (c) "any industrial matter arising under any award ... relating to the coal mining industry" in NSW referred to it by either of the parties or by the Board; (d) "any industrial dispute or matter referred to it by a Local Coal Authority" and (e) "any other matter affecting industrial relations in that industry which the Board declares is in public interest proper to be dealt with under

27 *Hansard Debates* (H of R) 24/7/46 p.3007.

28 unless stated otherwise, any references to specific sections of the *Coal Industry Acts*, refers to the *Coal Industry Act 1948*

this Act." The reference to the Board was a reference to the Joint Coal Board, which under the s.14 had extensive powers to regulate the industry in its own right.

S.34 (1) of the original Act stated that the Tribunal, for the purpose of "considering and determining any industrial dispute or any matter, is "to have (in addition to any other powers conferred on it by this Act or the State Act) all powers which are given to the [Commonwealth Court of Conciliation and Arbitration] or the Chief Judge of the Court as regards an industrial dispute of which the Court has cognizance. A similar provision in the *Coal Industry Act (NSW) 1946* gave the CIT all of the powers of the NSW Industrial Commission at the same time simultaneously.²⁹

In interpreting these sections, the terms "industrial dispute" and "industrial matter" were defined in s.4 of the Act. "Industrial dispute" means

- "(a) any dispute as to an industrial matter; or
- b) any threatened or impending or probable dispute as to any industrial matter."

"Industrial matter" was defined as "any industrial matter in relation to the wages, rates of pay or terms of conditions of employment of members of the Federation in the coal mining industry, other than members of the Federation excepted by the Board by order."

It should also be noted that prior to the *Coal Industry Acts* being enacted, a number of other arbitral authorities were operating within the coal industry. The Commonwealth Court of Conciliation and Arbitration and the State Tribunals had given way to the Central Reference Board and Local Reference Boards set up under the *Defence (Transitional Arrangements) Act, 1946*, and the associated *National Security (Coal Mining Industry Employment) Regulations*. As is discussed below, the reference boards continued to operate alongside the Coal Industry Tribunal (and its associated Local Coal Authorities (LCAs) for a number of years.³⁰

The *Coal Industry Acts* were assented to in August 1946 and the Joint Coal Board and the Coal Industry Tribunal were operating by March 1947. Indeed, in what appears to be the CIT's first decision, orders were made on 28th March, 1947, relating to a demarcation dispute between *ACSEF v AEU* over coverage of pipe

29 The Tribunal continues to have the powers of the Federal and State Commissions, together with the specific powers that it derives from the *Coal Industry Acts*.

30 for a very succinct description of these Reference Boards, see Sheridan (1989) p250-259.

layers at *Abermain No.1* in the Northern District Coal fields of NSW.³¹ The dispute was referred to the CIT by the Local Coal Authority as per s.38 of the *Coal Industry Act*.³² Prior to determining the principles and then applying them to the facts at hand, the Chairman dealt with an objection by the AEU as to the Tribunal's jurisdiction in making demarcation orders.

The AEU argued that in reading s.33 & s.34 of the *Coal Industry Act* "in the light of" the expressions "industrial dispute" and "industrial matter" as defined in the Act, the CIT had no jurisdiction to deal with a dispute between the Federation and another trade union.

The Chairman in response, conceded that s.33 (a), (b) and (c) were limited to Federation - employer disputes. However, he then states that the above-mentioned sub-sections "do not have the effect of cutting down the language of" s.33 (d) and (e). As such Gallagher held that s.33 (d) and (e) can be applied by the Tribunal in the light of s.34, the limitations of which are next assessed. The Chairman after stating that s.34, without reference to the definitions section (s.4), is not limited to disputes between the the Federation and employers, nevertheless derived two questions for his focused consideration:

- "(a) Whether, in the light of the meaning given by the act to "industrial dispute" and "industrial matter", it is open to the Tribunal to deal with the dispute between two Unions; and
- (b) If it is so open whether the industrial dispute or matter which arises in this case relates to the wages, rates of pay or terms of conditions of employment of members of the Federation, other than members of the Federation excepted by the Board by order."

In answer to (a), Gallagher J. quoted passages from the decisions of Rich, Williams and Starke JJ. in *R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Australian Paper Mills Employees' Union*³³. In particular he quotes Starke J (at 4):

"Industrial matters include any matter as to the demarcation of functions of any employees or classes of employees and all matters pertaining to being or not being members of any organization..."³⁴

31 Print No. 413

32 all references will be to the *Commonwealth Act* for the sake of convenience.

33 67 CLR 619

34 *ibid.* at 636

The Chairman then goes on to state (at 4-5):

"...I take the view that the definition in the [Coal Industry Acts] is not so restricted that the Tribunal cannot deal with the dispute between two unions.

If this tribunal has no power to intervene in such disputes so might it also be argued that no other authority has the requisite power and the result would be that the warring factions would remain "law free". Although reasoning such as this does not always provide a basis for sound law, I am of the opinion that the seriousness of the situation [demarcation disputes generally] is such that it would be wrong to decline jurisdiction unless the language of the statute is so restricted as to make the adoption of such a course imperative. I see no such restriction."

In terms of satisfying question (b), the Tribunal held that orders for demarcation affect members of the Federation as per the definition of "industrial matter" in that the forced transfer of Federation members to another union would affect seniority rights and more curiously, "it affects the right of an employee to make it a condition of his contract of service that he should be free to join a trades union which it is open to him to join."

Having satisfied the two tests, thereby 'validating' his jurisdiction and stating that the particular case at hand fitted the criteria set out above, he then had to determine the principles to be applied. After rejecting the development of ad-hoc decisions the Chairman stated that the "only rule that I can see which would satisfy the requisites of a working rule is one which, in my opinion, would have the effect of preserving the status quo. That is the one which I intend, so far as I am able, to apply." Thus the custom and practice at the mine was the guide for any demarcation problems at a minesite, and the Tribunal applied it in the particular case at *Abermain No.1*³⁵

Following the decision, the AEU applied to the High Court for a writ of prohibition against the ACSEF & the Tribunal due to its contention that the Tribunal did not have the jurisdiction to make the order under either the Federal or State Acts. The High Court in an unusual move, issued a memorandum in regards to the matter, in which it (under)stated that "this statement of opinion may be sufficient to meet the

requirements of the parties³⁶. The 'view' of Latham CJ., Rich, McTiernan and Williams JJ. was that the CIT did not have jurisdiction to make the order as it was "not a matter in relation to wages, rates of pay or terms of conditions of employment of members of the Federation in the coal mining industry". Further they 'held' that with respect to the Federal powers, the dispute 'failed' due to a lack of interstate nature. In doing so, they stated clearly they they could not question the jurisdiction of the State Act. The Court then came to a point where it had to consider its own powers, and which may have led to its 'statement of opinion': "The question is whether this provision [s.75(v) of the Commonwealth Constitution] gives jurisdiction in a case where the respondent to proceedings in prohibition is discharging State functions as well as Federal functions, and it is sought to prohibit action by him in respect of functions conferred upon him by a State statute" (at 7). In what seems to be a thinly veiled threat to the CIT, made prior to the court inviting the parties to have the matter fully argued before a Full Bench if they desire, the Chief Justice stated: "My brother Starke desires to add that another constitutional question may also arise, namely whether the Coal Industry Tribunal as constituted is within the constitutional powers of the Commonwealth and the State."³⁷

It is unclear from the primary sources at the time what the exact effect of the above memorandum had on the question of demarcation disputes. From the trends that emerge in terms of decisions it appears that demarcation disputes were not handled by the Coal Industry Tribunal until the legislation was amended in 1951.

As indicated, the next next decision relating to demarcation (albeit indirectly) in the industry (*ACSA Compulsory Unionism Case* ³⁸) was given by the Central Reference Board (CRB) operating under the post-war regulations mentioned previously. It is worth noting that the Central Reference Board at the time of the decision was Gallagher J., who was concurrently the Coal Industry Tribunal as well, thus "operating in two separate but watertight jurisdictions" (which in turn accessed further jurisdictions).³⁹ Generally, the CRB's jurisdiction was used to

36 the memorandum is actually published on pages 6-7 of the Tribunal's decision (Print 413).

37 Research has been unable to find whether this case actually went to the High Court for determination - from the records looked at, it appears unlikely.

38 Print CRB 529

39 Sheridan (1989) p.258

deal with matters that included other unions in the industry beyond the ACSEF and after the High Court's memorandum, demarcation disputes⁴⁰.

In this case, the CRB gave the Australian Collieries' Staff Association (ACSA) preference in "the engagement of labour". Whilst the ACSA was actually after coverage of 22 non-unionists, rather than demarking persons or classifications from other unions, it nevertheless was a demarcation dispute of sorts relating to the membership of an organisation. In a log of claims, the ACSA demanded both the compulsory membership of the Association by all persons employed in 'staff' classifications, together with preference at the point of engagement. Using the powers of the newly amended Conciliation and Arbitration Act 1904, (s43s), the Chairman stated (at p.2-3) that when "read with the general powers contained in the Act, [s43s enables] a Conciliation Commissioner to direct preference in the manner or form that he thinks fit" subject of course to jurisdiction". The use of the preference powers available under the *Conciliation and Arbitration Act*, were tempered however by previous decisions by the mainstream federal tribunals. In particular he made reference to *Waterside Workers Federation of Australia v The Commonwealth Steamship Owners*⁴¹ where the Commonwealth Court of Conciliation and Arbitration held that preference shall not be retrospective and "only means that after [the date of the insertion of the clause] preference must be given to the members of the union if any new engagement is entered into with men after that date."⁴²

It is interesting to note that Gallagher J.'s decision, whilst considerably different in how it was reached, was similar to that which followed in the High Court in 1949. In *R v Wallis; ex parte Woolselling Brokers (1949)*⁴³, Latham CJ. stated (at 543-544): "A monopoly of work for unionists, and a fortiori for members of one particular union, and the consequent exclusion of non-unionists or of members of other unions from work in accordance with the terms of an award goes beyond preference to unionists. The provisions of s.56 do not authorise more than preference to unionists." The Court was able to make such a finding by interpreting s.56 (relating to preference) in isolation to the definition of "industrial matter".⁴⁴

40 the Central Reference Board had 'only' the powers of the Commonwealth Court of Conciliation and Arbitration under the *Conciliation and Arbitration Act*.

41 19 CAR 11

42 *ibid.* at 14

43 78 CLR 529.

44 see Latham CJ. judgement at 543

In the mid - late 1940's, two cases came before the High Court regarding the jurisdiction of the Central Reference Board relating to the boundaries of the "coal mining industry" as per the *National Security (Coal Mining Industry Employment) Regulations*. The first related to contract truck drivers in the Burratorang Valley region who were almost exclusively used for the cartage of coal to a washery (*R v Hickman; ex parte Clinton and Fox (1945)*⁴⁵, whilst the 1948 case related to whether an engineering shop located adjacent to, and performing all the repairs from an open cut mine, was in the "coal mining industry" (*R v Central Reference Board; ex parte Theiss (Repairs) P/L (1948)*⁴⁶.

Whilst the jurisdiction of the various coal industry arbitral authorities is not the matter under investigation, it is important, as these cases set the outer boundaries of the "coal mining industry" thereby having implications for the unions in terms of their eligibility rules. In both cases, the operations in question were held not to be in the "coal mining industry". Latham CJ. (*R v Central Reference Board; ex parte Theiss (Repairs) P/L (1948)* at 135) set out the question that must be asked in defining the industry - "What is the substantial character of the industrial enterprise in which the employer and employee are concerned?"

The definition of the "coal mining industry" in these two cases, together with the decision in *R v Hibble & Ors; ex parte BHP Co Ltd (1921)*, had significant implications for the unions as has already been briefly mentioned. Yet the definition of the "coal mining industry" and the "coal and shale industry" were to be the central points of analysis for probably the most dramatic and far reaching decision relating to demarcation within the Australian Coal Mining Industry. The Kemira Tunnel dispute in 1948 created path-breaking legislative 'solutions' to demarcation disputes (albeit in a limited spatial and industrial field (ie. the Kemira Drift/Tunnel). It was made just prior to the explosive 1949 Coal Strike and has been attributed by some commentators as a contributing factor to the dispute.⁴⁷ It involved a variety of dynamic people and organisations, including the Prime Minister, Ben Chifley, the CPA led Federation, the more conservative (and anti-communist) Australian Workers Union and the arbitrator, Kelly J., who could at best be described as a judicial maverick with a politically conservative bent.⁴⁸

45 70 CLR 598.

46 77 CLR 123.

47 *ibid.* pp265-267.

48 *ibid.* For an assessment of Kelly J. judicial career and political views, see Dabscheck (1983)

The legislative mechanism through which the Arbitration was undertaken were joint acts enacted by the Commonwealth and NSW Governments, namely the *Kemira Tunnel (Arbitration) Acts, 1948*. Through the operations of these Acts, the Arbitrator Kelly J. issued his decision, favourable to the Australian Workers' Union (AWU), on 31st March, 1949.⁴⁹

As in the *Coal Industry Acts*, the legislature was innovative, responding to the importance that the coal industry played in the operations of the Australian economy. However, the scope of the legislation was much more precise - the joint *Kemira Tunnel (Arbitration) Acts* were specifically implemented to solve a demarcation dispute between the Federation and the Australian Workers Union (AWU), regarding coverage of workers involved in the construction of the 'Kemira Tunnel'.

The Acts, like the *Coal Industry Acts* mirrored each other and gave the Arbitrator (Kelly J. was subsequently appointed) unprecedented powers relating to the demarcation of functions between members of registered organisations. Under s.6(1) Kelly J. was given the power to conduct an inquiry so as to determine whether "members of any particular industrial union should enjoy the right to carry out the work or any specified part thereof, as the case maybe, to the exclusion of the members of any other industrial union" and where this is the case, to "make such orders as he deems necessary to secure the enjoyment of that right to the members of that industrial union".⁵⁰ The Arbitrator was also given powers to determine the conditions of the employees engaged in the work (s.7) and for all its purposes it was given the full range of powers of both the Commonwealth Conciliation and Arbitration Court and the NSW Industrial Commission (s.8).

Section 6(2) contained an interesting provision. It stated that any order made as outlined above "shall, notwithstanding the provisions of any award, order or determination under any other Act" (of Commonwealth or State) "be final and conclusive".⁵¹

An analysis of the *Conciliation and Arbitration Act 1904* at the time of the *Kemira* legislation, indicates no similar powers, either in terms of completeness nor detailed analysis of solutions to demarcation disputes.

49 Re *Kemira Tunnel (Arbitration) Acts, 1948* (1949) 48 IAR 143.

50 quoted in Kelly J. decision (1949) 48 IAR 143 at 166

51 *ibid.*

The legislation is even more remarkable when one assesses the new demarcation powers in the *Australian Industrial Relations Act* as amended in February 1991. S.118A seems to only spell out in slightly clearer terms what was available to Kelly J under the *Kemira Tunnel (Arbitration) Acts*, 1948 (excepting of course, the dual state/federal powers). The *Kemira Tunnel (Arbitration) Acts*, 1948 were arguably the most developed federal legislative solution to demarcation prior to *Australian Industrial Relations Act* 1988 as amended in 1990.⁵² The Coal Industry again had generated a different set of principles to be applied to the 'industry'. Kelly J. was at pains to point out, that in this period of post war construction, it was "apparent that a greatly increased production of coal from its mines ...[was]... essential".⁵³ The demarcation dispute which it was addressing had resulted in the a state-wide coal strike, leading to the stand down of 200 000 people in other industries and heavy rationing of coal throughout the community.⁵⁴

The dispute itself involved union coverage for the construction of a tunnel known as the "Kemira Tunnel" or the "Kemira Drift", in the Southern District of NSW. Initially, it came before the CIT in the form of a 'conciliatory conference'. The Chairman, from the accounts given in Kelly J's decision indicated a reluctance to make a decision. Upon the AWU and the employer questioning his jurisdiction, the CIT was quick to favour either the referral of the dispute to the NSW Industrial Commission for determination or to leave the matter as one to solved between the parties. This caution, although it is unstated was more than likely a function of the High Court's Memorandum that was 'issued' the previous year relating to the demarcation powers of the CIT. In these proceedings, the Chairman made the following comment to the AWU's representative (quoted at 151 of Kelly J's decision): "If it helps your Association, I may say that if I was deciding the matter I would say that it is the custom and practice of the Miners' Federation to do this work; and I think under those circumstances they ought to be allowed to do it."

What followed was a series of conferences between the ACSEF, the AWU, the Australasian Council of Trade Unions (ACTU), the Joint Coal Board and the Federal and State Governments. Despite the near resolution of the dispute, it eventually escalated into a national coal strike. At this point, the employer railed

52 The 1974 amendments to the *Australian Conciliation and Arbitration Act* (s142A) of course preceded s118/s118A, yet it was more limited in its scope and application. It would be an interesting research task to look for any links between the *Kemira Tunnel (Arbitration) Acts*, 1948 and the drafting of s142A in the old Act and s.118 (&s.118A) provisions of the *Australian Industrial Relations Act* 1988.

53 48 IAR 143 at 144.

54 Sheridan (1989) p.266.

against the intervention of the NSW Industrial Commission and the CIT, as it was argued that the latter tribunal could not sit given his earlier comments regarding custom and practice. This led to the enactment of the *Kemira Tunnel (Arbitration) Acts, 1948* as described above.

Kelly J. after reviewing the history of the dispute, looked at the principles to be used in determining which union was to be given exclusive coverage of the construction of Kemira Tunnel. In doing so he made a number of important points relating to the uniqueness of the joint legislation that he operated under. After stating (at 186) that there was "no analogous enactment" or authorities cited which would help in interpreting his powers, he made reference to the demarcation powers (s.37) in the *Industrial Arbitration Act (NSW), 1940* - however he distinguished these powers and the decisions that flowed from them as "so-called demarcation determinations [that] relate not to the subject of the contending unions but to that of competing callings" and therefore "the question to be determined is itself of a different nature."

His honour then set out the hurdle, namely constitutional coverage, which the parties had to 'jump' before they could cover the Kemira tunnel employees. Kelly J. stated (at 186) that s.6(1)(a) of the Federal *Kemira Tunnel (Arbitration) Act* was "designed to meet the possibility that both, or more than one of, competing industrial unions, may so far as their constitutions go, have power and capacity to enrol as members the workmen under discussion" and that the Acts gave Kelly J. the power "to restrict the constitutional right of one or more unions and to confer a supervening right upon the other of its or their competitors". As such the Acts gave the 'Kemira Arbitrator' very similar powers to those enjoyed by the Australian Industrial Relations Commission (AIRC) under s.118A. It is unclear how the arbitrator would have enforced this restriction of "constitutional right" in the absence of a specific reference to the method as that found in the current Acts s.118A(5) & (6) (although the limited scope of the orders in that related to only the Kemira Tunnel site made this less important).

The question of enforcing a restricted constitutional right never became an issue. Kelly J. went on to state (at 186): "since it is clear that the Arbitrator must look upon the competing industrial unions as entities owing their existence to registration ... he must find in the selected industrial union a constitutional capacity to entertain the workmen concerned as members within its ranks. This I regard as being the first principle to which he must adhere." This self imposed constraint seemed to be at odds with both Kelly J.'s wide ranging powers and his ability to

use them in other parts of his decision - it made his "surprisingly determined" decision much easier to justify.⁵⁵

Using this first principle, his Honour held that the ACSEF's constitutional rules as registered at the Federal and State level, did not cover the work as he had determined in the first part of his decision that "the work of constructing the Kemira Tunnel does not fall within the meaning either of the phrase "in or in connection with the coal . . . industry" or within the meaning of the phrase "in connection with coal . . . mining" (at 187). In particular he relied on *R v Hibble & Ors; ex parte BHP Co Ltd*, (at 176-177) in particular, finding that "coal and shale industry" referred to the "trade or business of the employer". In this case, as their employer was not involved in or in connection with "the extraction of coal" (at 177), the workers involved were not eligible to be covered by the Federation's constitutional rule and therefore the ACSEF could not be given coverage.

His Honour then stated that even *if* the ACSEF had constitutional coverage, he had the discretion to use his powers under s.6(1)(a) to give one union exclusive coverage. As such he details two other principles that he would have applied in such a situation - namely the determination made by the Arbitrator would lead to the work being undertaken "efficiently and expeditiously" and secondly and perhaps more curiously, the "likelihood of a particular industrial union, in the light of its conduct and its known policy participating in the system of conciliation and arbitration" (at 187-188).

In applying these reserve principles he stated (at 188):

"I cannot avoid the conclusion that the overwhelming probabilities of the work proceeding in an orderly fashion, with the reference of differences to the Arbitrator for his decision, and with an acceptance of his decisions upon matters concerning which disputes may arise, are in favour of the work being carried out by men who are members of the Australian Workers' Union."

Again these principles and their application reflect in part similar responses by the Australian Industrial Relations Commission to the new s.118A provisions (ie. the record of NUW relative to the FMWU's was a factor in awarding the FMWU exclusive coverage of most of the paint industry in the *Paint Industry Case (1990)*.⁵⁶ Nevertheless, such self imposed considerations (beyond Acts) and the

55 quote from Sheridan (1989) p.267.

56 35 IR 314. see especially pp.337-338.

decision itself were considered to be a "judgement on the morals of the Miners' Federation" by the Federation.⁵⁷ As a postscript, it is interesting to note that the work was eventually undertaken by Federation members, through an agreement between the Federation and the AWU.⁵⁸

The next case relating to demarcation and union coverage in the coal mining industry was again heard by the Central Reference Board (CRB). In *Deputies and Shotfirers Associations of NSW & ACSEF v J.&A. Brown & Ors (1949)*⁵⁹, the associations of deputies (regionally based state registered organisations) sought the exclusive coverage of deputies in the Maitland field and deputies and shot-firers in the Newcastle field. At the same, the Federation sought exclusive coverage for shot-firers in the Newcastle field, in a move not unlike the s.118A claim/counterclaim scenario of the present day.

Gallagher J. in this case, after referring to his powers under the Board (ie. the same powers as the Commonwealth Court of Conciliation and Arbitration), went on to 'extend' the principles of his previous decision in *Australian Collieries Staff Association v Northern Collieries' Proprietors Association*⁶⁰. He ordered that (at 4):

"Any person appointed on or after the 5th day of June 1949 as a colliery deputy ...in the Maitland District... who ... [performs exclusively] ... the duties ordinarily performed by a deputy, shall within three months of the date of his appointment, become a member of the [Deputies association]".

He made a similar order, including shotfirers for the Newcastle District again favouring the regional deputies association.

As such it was more explicit than his previous order for the ACSA, in that he stated any *new* employees had to become members of the organisation covering deputies. The reasoning behind this order revolved around two concepts - that the deputies associations had either existing coverage and/or had "accepted responsibility for [the classifications] award conditions" (at 4). Whilst the previous order may have had the same effect, it was more ambiguous.

57 a quote from a statement by the ACSEF leadership in the *Sydney Morning Herald* 1/4/1949 as cited in Sheridan (1989) p.267.

58 Ross (1970) p.419. Although this is contradicted in Print CR 1203 (Allied Constructions Case)

59 Print CRB594.

60 op. cit.

However, the Chairman was keen to point out his continued reluctance to compel the transfer of members from one union to another, where they both have constitutional coverage - the status quo regarding the existing work force was considered important, conserving to some extent the principle in *ACSEF v AEU*⁶¹. In discussing this aspect of his decision, Gallagher J. (at 3) was keen to distinguish the powers available to him from those exercised by Kelly J. under the *Kemira Tunnel (Arbitration) Acts* the year before.

It is also interesting to note that this decision was given after submissions ended in *R v Wallis; ex parte Woolselling Brokers* but just before the High Court actually gave its decision in August.⁶² This latter case, as stated previously placed limits on the discretion that Commissioner's could apply under the Conciliation and Arbitration Act - clearly the CRB's order exceeded the High Court's interpretation of its powers.

The following year the Central Reference Board handed down a decision relating to demarcation between classes of work, namely between mechanical and electrical fitters.⁶³ In this case it was not a matter regarding union coverage - nevertheless it had a bearing on inter-union disputes. The Board (at 2) considered that notwithstanding managerial prerogative "where at a colliery a particular class of work has been habitually performed by a particular class of employee management should be hesitant to depart from or interfere with the custom thus created. If either on legal grounds or for practical reasons, such a change of circumstances, it is considered that an alteration is necessary, there should be consultation with the unions, and if necessary ... an approach to an industrial authority." Again, the maintenance of the status quo, in the light of custom and practice was stressed by the CRB.

Changes to the *Coal Industry Acts* in 1951 led to its emergence as the main coal industry tribunal and reasserted its role in determining matters relating to demarcation between unions in the industry. Its jurisdiction was extended to all unions in the industry. The definitions of "industrial dispute" and "industrial matter" were drafted to replicate (subject to minor variations) the definitions in s.4 of the *Conciliation and Arbitration Act*. It is interesting to note that it took five years for the *Coal Industry Acts* to reflect the changes that had occurred to the *Conciliation and Arbitration Act* in 1947.⁶⁴

61 op.cit.

62 op.cit.

63 Print CRB 705.

64 *Conciliation and Arbitration Act* 1947 No.10.

The actual powers of the Tribunal were also changed. S.33 and 34 was substantially amended. The powers to consider matters under the original s.34 were extended to all "industrial disputes", not just those between the Federation and the employers. An additional power was given to the Joint Coal Board under s.34 (1B) & (1C), which enabled the Board to effectively *stop* the Coal Industry Tribunal from making orders which either extended award coverage of classifications to other organisations or removed them from existing organisations. This power was to be by way of an order by the Joint Coal Board.

S.34 (Federal) of the Act, which defines the jurisdiction and powers of the Tribunal, when used in the context of the new definitions of "industrial matter" and "industrial dispute", gave the Tribunal much greater freedom to deal with demarcation disputes than that enjoyed by tribunals preceding the Industrial Relations Commission. Put simply, the Tribunal by virtue of its creation by the Federal and State Governments under the joint *Coal Industry Acts*, did not face the problems that the Federal Commission did in terms of constitutional limits to its operations (although, to a certain degree it was hampered in states other than NSW).

The first major exercise of the Tribunal's restored powers was the *Huntley decision*⁶⁵, which was handed down in January 1953. The Chairman (Gallagher J.) developed a number of principles in the industry relating to the settlement of demarcation disputes within the industry. They were:

- 1) Coverage of a particular classification is generally 'awarded' to either:
 - a) an organisation which is a party to the award covering the classification, or
 - (b) the organisation "which by well-established custom or practice" (at 2) covers the classification at the mine site in question.
- 2) "custom or practice" as used in 1) means that the organisation's members "have over a period worked full time in the classification". (at 2)
- 3) If at a minesite, coverage is shared because one organisation satisfies 1)
 - (a) and the other 1
 - (b) the employee can choose the union which they want to join.
- 4) If an employees performs functions which are part of two different classifications (with different union coverage), the union which they should

join is the one covering the classification "within which he performs the major part of his duties." (at 3).

- 5) If there is not enough work for management to employ a full-time person to perform tasks which fall under a certain classification, then "there should in general be no objection" to management deploying other employees who are not a member of the appropriate union to cover these functions.
- 6) Subject to the recognition of managements right to operate a mine "efficiently and economically", management should, when allocating employees, avoid the promotion of demarcation disputes.
- 7) In matters that relate to union demarcation, an organisation "should not act harshly, unfairly, oppressively or stupidly". (at 3).

Whilst the Chairman stated that it was not his intention to "enunciate strict principles for the settlement of demarcation disputes" (at 1), these principles have been the principles by which demarcation issues have been dealt with in the coal mining industry up until the 1990s (as will be discussed in the following cases).

The origin of the seven principles seems to stem from the previous cases of the CRB which stressed both award coverage and custom and practice as being the primary factors together with the Tribunals rather prescriptive role in the industry. The decision (and transcript) certainly do not show any links to previous decisions of the various coal tribunals nor to the 'mainstream' authorities, as was often the case with the decisions of Gallagher, J.

In the next decision, *FEDFA v Northern Colliery Proprietors Association (1953)*⁶⁶, the FEDFA sought to cover a new underground mine classification of Tractor Driver - Back or Front End Loader (Surface). This coverage was contested by the Federation and the FMMA on the grounds that they had members performing this task at a number of mines and that they should not be forced to switch unions. The FEDFA's main argument was that it already covered the same classification in the Open Cut section of their award, but in the under-ground section it was award-free. Gallagher J. held that as the workers involved should be covered by an award, the FEDFA should be given the classification on the basis of a Joint Coal

Board order made under s.34 (1B) & (1C) of the *Coal Industry Act* as discussed previously. This order⁶⁷ stated (at 3 of the CIT's decision):

"Subject to the exceptions specified in this order there shall be excluded from the powers of the Tribunal vested in it by the *Coal Industry Act* 1946 the power to make an award or order:

- (A) inserting or having the effect of inserting in an award, order or determination, whether of the Tribunal or otherwise, binding upon an organisation of employees, a class of work or classification for the time being described or specified in another award, order or determination, whether of the Tribunal or otherwise, which is subsisting or binding upon another organisation of employees."

In the application of this order, it was held that the fact that the same classification was in the 'open-cut' section of FEDFA's award, it could not be placed in any other award, other than the FEDFA award. In making this award variation however, Gallagher J. referred to the *Huntley* decision and statements by the General Secretary of FEDFA and stated (at 3) that "*the claim should not materially affect the existing position in terms of union membership.*"

This decision showed not only a continuation and refinement of the *Huntley* decision. It also illustrated the power of the Joint Coal Board at that time. This 'power' was reflected in its ability to completely control the industry under s.14 of the *Coal Industry Act* and the 'sway' it had with the Coal Industry Tribunal in major decisions relating to production levels and the economics of the industry.⁶⁸ Whilst the JCB actually relied on the 1951 amendments to the Act, giving it the specific power to make the above order, it may have been quite possible for the Board to make an order under its general powers (s.14).

In *FEDFA, ACSEF & Northern Colliery Proprietors Association (1954)*⁶⁹, the Tribunal again 'applied' the *Huntley* principles. A number of persons employed under a 'FEDFA Award' in the Northern District of NSW were in fact members of the Federation. The FEDFA applied for an order in the following terms (quoted at 1): "An employer ... in the Northern District ... shall not employ or continue in his employ in a classification set out in ... [the 'FEDFA Award'] ... a person who is not a member of the [FEDFA]". Gallagher J. rejected the claim, stating instead (at 2)

67 Joint Coal Board Order dated 14th February, 1951

68 see Fisher (1987), Chapters 7-9 for details of the JCB's influence in major cases.

69 Print CR 1040

that "it should be left to the individual employee to decide whether he will belong to the Union which obtained the award classification or whether he will belong to the Union which by custom and practice covers his class of work." It is interesting to note that Gallagher J. in his decision referred to the Federation's reference to *R v Wallis; ex parte Woolselling Brokers*,⁷⁰ in its considerations to why the FEDFA's orders should be opposed. Gallagher J. did not give any opinion on the High Court decision. However, he refrained from giving orders similar to those he gave to the Deputies organisations in 1949, reflecting in part the agreement by the Federation that new employees would be in the FEDFA and the *influence* of the High Court's decision.

Throughout the rest of the 1950s and the 1960s there were no important developments regarding demarcation in the coal industry, with two exceptions. In a case quite similar to the Kemira dispute, the Federation and the AWU contested the coverage of workers involved in the construction of a ventilation shaft and a drift (between the surface and the coal face) at Coal Cliff mine (*Allied Constructions Case (1957)*)⁷¹. Again the outcome revolved around whether the workers involved were "engaged upon work in the coal mining industry". However, this definition was not important from the perspective of the rules of the Federation but rather in defining the role of the Tribunal in terms of its jurisdiction. In deciding on the question, Gallagher J. found that the project was in the coal mining industry but left the question of coverage to discussions between the parties. His finding however made the Federation's coverage almost certain. In this case he distinguished the Kemira Tunnel decision (at 9): "... the evidence established that the Kemira project was a railway tunnel. Here, both the drift and the ventilation shaft, according to the undisputed evidence, are not merely associated with the coal mine but form an integral part of the mine itself." In distinguishing the case in a legal setting, Gallagher J. was also implicitly recognising the differing 'political' circumstances of the case. This time the owners supported the Federation, in return for more flexible operations. Demarcation disputes between Federation and the AWU had reduced in number since the late 1940s. The decision was made by an arbitrator 'conditioned' to the coal industry, in the absence of negotiations (and a strike) at a national level. Many cases were to follow this decision relating to the jurisdiction of the Tribunal to apply awards to various 'contractors'.⁷² However, most of these did not involve disputes relating to union demarcation.

70 op.cit.

71 Print CR 1203

72 see for example: *Westcliff Case* (Print CR 2501)

The other exception was *FMMA & AEU (1968)*⁷³, where the Local Coal Authority (NSW) as constituted under the *Coal Industry Acts* upheld two principles. First, a union seeking coverage needs to have constitutional coverage of the classifications sought for coverage. Whilst this was a well established principle that had been applied in the coal industry previously (*R v Hibble; ex parte BHP*⁷⁴ & *Re Kemira Arbitration Acts*), as well as in the mainstream tribunals, it was never explicitly referred to in Huntley decision. In this particular case, the Amalgamated Engineering Union (AEU) was seeking coverage of classifications not explicitly listed in its eligibility rule on the basis that the description "all workers engaged in the engineering, shipbuilding and kindred trades" embraced these classifications in the coal mining industry. The Authority chaired by a Mr. Hills found it "difficult to concede that employees in the coal mining industry have a kinship or affinity with workers engaged in the engineering and shipbuilding trades." The other principle 'added' to the Huntley Decision was the binding force of agreements relating to demarcation. In this case the Tribunal found that an agreement registered with the Central Reference Board between the two organisations 18 years previously was still binding, largely because of s.3(2) of the *Coal Industry Act* and because of previous commitments of AEU officials.

It is worth noting at this point the High Court's decision in *R v Commonwealth Conciliation and Arbitration Commission; ex parte Transport Workers' Union (1969)*⁷⁵ This case dealt with the powers of the Commission to make orders relating to demarcations - the Court found that the Commission could make an award or order to demarcate a workplace if it was *framed* as an industrial dispute between the employee and the employer. The isolation of the coal mining industry and its organisations is highlighted by the lack of any reference to this decision in any subsequent CIT decisions.

The history of the principles relating to demarcation between unions in the coal industry in the 1970's and up until the late 1980s followed the path of the Huntley Decision. In the *Bayswater No.2 Decision (1976)*⁷⁶, the Coal Industry Tribunal, as constituted by a new Chairman, Mr. David Duncan⁷⁷ stated (at 2) that: "If the Huntley decision had not been a feature of the industry for such a long time", the Federation's submission that district custom and practice should be taken into account in demarcation decisions "would have been most compelling" In this

73 Print CR 1873

74 op.cit

75 (1969) 119 CLR 529

76 Print CR 2475

77 Appointed 13 March 1975 (see Patterson (1991) p.7)

case, FEDFA members were performing functions at Bayswater No.2 mine that according to district custom and practice were normally undertaken by the Federation. The work being undertaken fell within those of classifications covered under a 'Federation' award.

In summary, this case reaffirmed the *Huntley* decision, notwithstanding the objection by the Federation that it "gave industrial rewards for stalling" in that minesite custom and practice could be 'established' prior to a determination by the Tribunal. The Tribunal did not consider that the FEDFA received such rewards in this particular set of circumstances.

In applying the *Huntley* decision, Mr. Duncan made orders that each employee who was in the disputed classifications should be made aware of Clauses (1) and (3) of the *Huntley* decision and should be "at liberty to transfer his union membership to the Federation". (at 4) In giving the FEDFA members the right to choose whether to remain members of the FEDFA or transfer to the Federation, he explicitly acknowledged *Gallagher J's* decision in *FEDFA, ACSEF & Northern Colliery Proprietors Association (1954)*⁷⁸ where his Honour stated that there should be no interference between the choice of unions in these circumstances.

In April 1976, the issue at Bayswater again came before the Tribunal.⁷⁹ It was submitted by the Federation that the FEDFA did not have constitutional coverage of the three of the classifications in dispute in the previous matter. Using the "plain and ordinary meaning of the words" in FEDFA's rules, the Tribunal found that it could not cover the positions of bathroom attendants and shotfirers. In deciding on their eligibility to cover a "borer on overburden" the Tribunal used the principles expounded by *Richards J.* in *Re. Australian Workers' Union & FEDFA (1968)*⁸⁰ where "engine-driving" as used in FEDFA's constitution was limited in terms of drillers, as "engine-driving was only incidental to the main purpose." The Tribunal also relied on the latter decision's 'principle' that "it was necessary to examine award histories ... in order to come to a conclusion whether a particular class of person came within the meaning of those words within the constitution rule". On applying these two principles, the Tribunal varied his order of February so that the Federation was "entitled to enrol employees at Bayswater No.2 Open-Cut in the classifications bathroom attendants, shotfirers and borer to the exclusion of the Association."

78 op.cit.

79 Print CR 2479

80 1968 (NSW) AR 448 at 458

In 1979, the *Fumini decision*⁸¹ was brought down by the CIT. This decision related to the right of exclusive union coverage of three classifications - carpenter, painter and rigger. As in the Local Coal Authority's decision previously, the Tribunal maintained the validity of the 1950 registered agreement between the FMMA and the AEU. After stating that registered agreements could only be altered in appropriate circumstances by an industrial authority, he ordered that the classifications of carpenter and painter "belong exclusively to the Association." (at 3). In regards to the classification of rigger, the Tribunal held that the FMMA did not have exclusive coverage as it was not part of the 1950 agreement nor was it justified by the criteria of the *Huntley decision*.

In this particular case, a Mr Fumini, a FMMA carpenter of long standing, switched membership to the AMWSU (previously the AEU). After establishing that the FMMA had the right to exclusive coverage under the registered agreement and "both headings of the first principle" of the *Huntley decision*, the Tribunal stated (at 3): "Whatever organisation Mr Fumini elects to belong to is a matter for himself, but whoever occupies the position of rigger at Coalcliff, established and maintained by action of the Association, should be a member of the Association and I so order."

Again whilst not limiting the personal choice of employees in the industry regarding union membership, it was made clear that there was a minimum requirement for the incumbent of that position to be at least a member of the FMMA.

The next major decision relating to demarcation in the industry occurred in the following year. In the *Gregory decision* (1980)⁸², the CIT dealt with an appeal from the Queensland Board of Reference.⁸³ The Board's (Commissioner Mansini) decision was upheld to order the company to employ AMWSU members in the Washery mainly because the company did not follow 'observation (6)' of the *Huntley decision* which read (at 3): "The right of management to operate a colliery effectively and economically should be recognised but there should be avoidance by the management of allocation of labour in a manner which might conceivably give rise to disputes between unions." In this case the company, in exercising its

81 Print CR 2751

82 Print CR 2822

83 the CIT is empowered under s.34 of the *Coal Industry Act (Commonwealth)* and the relevant section of the *Australian Industrial Relations Act* to appoint Reference Boards to handle local matters in states other than NSW. (see Patterson (1991) p.10-11 for details. Queensland is the only state to have a permanent Board of Reference which is presently filled by Commissioner Ken Bacon, who holds a dual appointment with the Australian Industrial Relations Commission.

managerial rights asserted that it could have FEDFA manning its washery, as opposed to accepting the district custom & practice of either the AMWSU or the Federation manning Queensland coal washeries. In taking the district practice into consideration, the Tribunal referred to the *Elrington decision*⁸⁴ where the Central Reference Board had stated:

"In the determination of the nature and extent of duties incidental to a trade or profession, evidence as to custom and usage is always material. Had it been established as a fact that at every colliery in the Northern District with the exception of Elrington, the work in question was performed by mechanical fitters, the Board would have regarded this as some evidence that the practice at Elrington was unreasonable." (at 4 of the Tribunal's decision).

In this decision, the concerns expressed by the Federation in the Bayswater No.2 decision⁸⁵ are addressed, and to a certain extent, the Huntley principles are amended by this decision.

The 1983 *Drayton Control Room Decision*⁸⁶ was the next major decision and the first to explicitly support the existence of a single union in a particular worksite. The dispute between the Federation and the FEDFA relating to the manning of a control tower used to operate an integrated "coal handling system" . Given that there was no local custom and practice at the pit or relevant agreements, nor any specific classification in relevant awards, the main factor which held sway with the Tribunal was "management's desire to have one union in the complex for reasons of 'flexibility'". The Chairman also referred to the reduced potential for disputes in a single union operation. After reviewing district custom and practice, the Tribunal stated (at 3) that "This is sufficient to lead me to conclude that the FEDFA has not established a right to the operation sufficient to disturb what I am satisfied is the most efficient and potentially least disruptive arrangement I therefore determine that at Drayton mine the Miners Federation should cover the task of operating the panel in the control room and I so order."

The *Drayton Control Room Decision*, in the absence of facts to support the application of the *Huntley* decision, was a precursor to the emphasis on improved productivity and reduced demarcation that is now a factor in current demarcation

84 Print CRB 760

85 op.cit.

86 Print CR 3205

proceedings under s.118A of the *Australian Industrial Relations Act* and those in the jurisdiction of the CIT (which are discussed below).

The final application of the Huntley principle in a major case was the *Gunnedah decision*⁸⁷ in 1984. This related to the transfer of tradespersons from the FMMA to the AMF&SU (previously the AMF&SU) at Gunnedah colliery, which up until that point was a FMMA 'closed shop' for tradespersons. A number of workers, dissatisfied with the FMMA decided to switch unions. After a number of LCA decisions, the CIT reduced the problem to one question (at 5): "whether more than one union should be represented amongst the tradesmen at the colliery". Notwithstanding a number of concerns regarding the behaviour of management and the FMMA in the dispute, the CIT upheld the LCA decisions and made them more explicit. An order was made that "the work of tradesmen at the Gunnedah Colliery performed pursuant to the provisions of the Coal Mining Industry 'Mechanics' Award should be performed by members of the FMMA". In making this order, he pointed out that the status quo or long held custom and practice at the mine was for exclusive coverage by the FMMA. In referring to those tradespersons who switched to the AMF&SU and their desire to stay in that organisation the Tribunal stated (at 8):

"When one is reduced to considering the five one is confronted with the submission which made much of the individual's freedom of choice. Before the Tribunal this submission was a siren's song. However it is a siren delivered in muted tones wherever one union has, through custom or practice, come to be the only one in the field. Were I to heed that song on this occasion I would apply as a result a noble principle at variance with long established practice in the coal mining industry and which would, I am satisfied, encourage industrial difficulty wherever there is a closed shop and one or more dissatisfied union member (sic) appears."

The Chairman's allusion to the Classical sirens indicated quite dramatically the CIT's desire to provide more "individual freedom of choice" in the determination of union coverage. It also indicated his distrust of implementing principles such as this within the industry at that time.

The *Gunnedah* decision made the *Huntley* decision stronger in that it created the principle that where members had transferred prior to a decision then there is a precedent for them to be ordered by the Tribunal to remain members of the union that they deliberately left. The decision in a sense was the culmination of the

status quo / *Huntley* approach which had dominated the Tribunal's approach since the late 1940s.

The 1990s has seen a fundamental shift in the Tribunal's deliberations. This shift was due to a number of factors. Primarily, the Tribunal has had to come to terms with changes in the organisation and rationalisation of the Australian trade union movement, including the coal industry unions. In 1990, the FMMA and the Federation amalgamated to form the United Mineworkers' Federation of Australia (UMFA). UMFA was subsequently made the only principle union in the coal mining industry by the ACTU.

It was in the formative period of union rationalisation and industry/award restructuring that the *South Bulli decision (1990)*⁸⁸ was made. It concerned a dispute between the AMWU and the ETU on the one hand, and the UMFA on the other. When the amalgamation between the Federation and the FMMA was complete, 36 members of the AMWU and the ETU joined the UMFA. The craft unions argued that the application of the *Huntley* decision and its subsequent refinements would mean that their members would have to remain as members, the Tribunal referring to this as the 'historical perspective'. The UMFA and management argued primarily that the 'historical perspective' be set aside due to significant developments in the industry including the rationalisation of awards by consent and discussions relating to new work structures. The Tribunal saw it (at 5) as "determining whether or not the goal posts should be moved because in a jurisdiction where equity and good conscience is the ultimate consideration that is what 'a change in circumstances amounts to."

In this particular decision, the Tribunal maintained the 'historical perspective' approach for a number of reasons. Firstly the dispute was mine specific. Secondly there was no solution to the actual dispute other than through the *Huntley - Gunnedah* line of cases. Thirdly, the Tribunal stated that "the public interest is not in the creation of simple competition between unions unless there is a resolution to that competition." Again the Tribunal made effective use of classical metaphors: the UMFA and management "hear the siren song of individual choice on this occasion but do not provide a resolution should it end in discord. It may well be that discord is inevitable but a dispute between unions and individual management where the potential for discord is great is not in my view the circumstances in which a change of significance to the industry as a whole should be taken." (at 6).

The CIT applied the *Gunnedah* principles to the *South Bulli* dispute. Whilst he did order that the representation should return to the AMWU/ETU 'closed shop' arrangements, he did distinguish the *Gunnedah* decision in part when he stated that the change at *South Bulli* was due to 'industry union' developments, rather than a unique minesite situation. He also noted the employers' implicit support for the UMFA's coverage of tradespersons at the mine.

As a precursor to the developments that followed, the Tribunal accepted that "circumstances are undergoing change". As such he made the orders for a three month period only. In a guide to the future actions of the parties the Tribunal indicated (at 9-10) that he was "not convinced that the process of change has reached a point which enables me to ignore the historical perspective principally because nothing is offered in its place to determine disputes of this kind in those changing circumstances."

As a result of the *South Bulli* decision and in the absence of any dispute resolution procedures, in July 1990 "all unions and employers" endorsed a moratorium "on people changing membership and industrial action on the one union issue" before the Tribunal. The CIT endorsed it in a statement on 6th July, 1990. The moratorium was in force until April 1991, when it was lifted in the *Union Membership Moratorium* decision, which is discussed below.

Two months after the *South Bulli* decision was handed down, the Tribunal ratified, subject to some qualifications, an agreement between the UMFA and management of a new mine at Gordonstone that created a mine specific award to replace the national production and engineering award (*Gordonstone decision*⁸⁹). One part of the agreement was for a single union (UMFA) at the site for production and engineering workers thereby 'threatening' the 'traditional' role that the AMWU and the ETU had in the Queensland industry. The two latter unions, particularly the ETU opposed the agreement, arguing that the *Huntley - Gunnedah* continuum of decisions supported the retention of their representation at this minesite. Indeed the CIT acknowledged that there were "overtones" in this matter of the facts in the *South Bulli* decision. However, it distinguished what it called in the past the 'historical perspective' in the form of the *South Bulli* decision because of the 'greenfield' nature of the site and because of statement made to the Tribunal by the Secretary of the ACTU, outlining a procedure for the resolution of inter-union disputes at greenfield sites.

The Tribunal was keen however to keep the *South Bulli* decision as a precedent. Stating (at 7) that it did not accept the 'historical perspective' "in the circumstances of this case but this should not be in any way be seen as a change in the attitude adopted in *South Bulli* at established mines: I emphasise the different circumstances, principally the 'greenfield' nature of the site."

On the support from the ACTU for the agreement and on the views of the ACTU in demarcation disputes generally the Tribunal stated (at 6):

"While it is clearly of great practical importance to know matters of policy in this regard they are in the end no more relevant than for example the policy of an employer about the employment of particular individuals where the Tribunal is required to act on grounds of equity and good conscience."

The views of the employers were also canvassed:

"I have already indicated in earlier proceedings that the wish of an employer is something to be taken into account in such matters I accept that Mr. Stokes is entitled to believe that flexibility will be improved by dealing with one union not three in the area covered by the agreement."

Within the industry, this decision has been highly significant. It is particularly important in an industry which is based on the extraction of materials. There is a continual process of opening and closing of mines, in part determined by the imperfect international coal market, but also due to the exhaustion of reserves available to operating mines. As such there will be a tendency within the coal industry for the proportion of greenfield sites relative to existing sites to be greater than other industries.

Since the decision, less than two years ago, eight new mining operations have already been designated as greenfield sites and most have been accorded single union status by the Tribunal, in terms of production and engineering workers.⁹⁰

One particular greenfields decision, the *Vickery decision (1991)*⁹¹, dealt with the Tribunal's attitude on the need to use the s.118A provisions of the *Australian Industrial Relations Act*. The ETU argued that in the CIT making orders which effectively gave exclusive coverage of all production and engineering employees to the UMFA to the exclusion of itself, it "should be handled formally, for example by

90 for example see *Saxonvale* (Print UR 1991-024) & *United* decision (UR 1991-048)

91 CIT Matter No.390 of 1991 (Decision: 23/4/91)

way of an application akin to that contemplated by s.118 (sic) of the *Industrial Relations Act*". The Chairman rejected this when he stated: (at 2) "This application is at least the third of its kind, *Gordonstone* and *Camberwell* being predecessors. The procedure is contemplated by the *Coal Industry Acts* and is properly addressed on the basis of perceived advantages." As has been by the CIT's attitude in the past, it actively avoided using its specific powers under the *Australian Industrial Relations Act 1988*, where the *Coal Industry Acts* provided an effective jurisdiction.

The changes that occurred in regards to greenfields sites in the coal industry reflected the broader changes that were occurring in terms of ACTU and Federal Government policy, and to a lesser extent the decisions of the Australian Industrial Relations Commission. Union rationalisation was clearly on the agenda when the Federal Government amended the *Australian Industrial Relations Act* in February 1991 to include Objects (j) & (k) of s.3, together with s.118A organisation coverage provisions, easier paths for amalgamation and the review of small organisations (s.193 & s.193A).⁹² The Government's view is fairly plain in light of Object (k) which reads: "to encourage and facilitate the development of organisations, particularly by reducing the number of organisations that are in an industry or enterprise". Whilst it is only one of ten objects, when coupled with Minister's second reading speech made in October 1990, it has been of relevance in s.118A applications, starting with the *Queensland Alumina* decision by the Australian Industrial Relations Commission.⁹³ The ACTU's position has been clearly spelt out in a number of documents ranging from *Australia Reconstructed* in 1987 up to *ACTU Policies and Strategies as Adopted at the 1991 ACTU Congress*. In the latter document, the ACTU actively promoted the amalgamation of unions and the rationalisation of their coverage so as to create "17-20 large, more efficient and democratic union's within which there should be clearly defined industry or occupationally representative streams".⁹⁴ The ACTU policy as it relates to the coal industry has the UMFA as a principal union, the FEDFA, AMWU and ETU as significant and the Colliery Officials Association of NSW (COANSW) (Deputies) in the Other category. As such the UMFA has the "capacity to recruit all employees in [the coal industry] ... and shall recognise significant and other unions in the industry ... and to seek to reach agreement with them as to membership coverage and recruitment ". From the trade union movement's perspective as advocated by the ACTU, the UMFA was clearly the main industry union. Decisions of Industrial

92 Changes introduced through the *Industrial Relations Legislation Amendment Act 1990*.

93 Print J8477

94 quote from *ACTU Policies and Strategies as Adopted at the 1991 ACTU Congress* (1991) p.120.

Relations Commission, have been an 'environmental' influence, despite the CIT's 'silence' in making references to decisions of the IRC that relate to demarcation issues.

Within this context of union rationalisation and award and industry restructuring, the *Huntley* principles which were still applied to existing mines, were to a large extent replaced by the principles that emerged in the *Union Membership Moratorium decision (1991)*⁹⁵. In this decision, the Tribunal lifted the moratorium imposed in July 1990 and effectively allowed "competition between unions" subject to the "Principles of Competition" determined by the UMFA, AMWU, ETU and the FEDFA in consultation with the ACTU. Thus the status quo approach of *Huntley* was heavily modified if not totally replaced by the ability of unions to compete for members, subject to an agreed set of constraints. It is interesting to note that the *Principles of Competition* agreement was not registered as an agreement under the Act. It was attached to the decision by way of appendix only. The principles were not those of the Tribunal - rather the "ACTU has put into place an arrangement for the resolution of competition between unions and is prepared that others should act upon it." (at 3). The principles themselves were as follows:

1. There shall be no denigration of any union by any other union.
2. The main ground on which unions may compete for members is the capacity to effectively service and represent them.
3. Differing union membership fees shall not be used by competing unions where such fees are struck in accordance with ACTU policy.
4. Where individuals wish to exercise a choice to change union membership to a union which has coverage of their award classification the following processes shall apply:
 - (i) They must notify their current on-site union and the on-site union they wish to join;
 - (ii) The unions concerned shall confer before any change;
 - (iii) When conferring, unions shall give consideration to the number of persons in the classification of the individual(s) concerned and the existing on-site coverage of the unions concerned;
 - (iv) Where transfers take place and split shops exist or are established consultation between unions which cover the same

classifications should take place where issues of cross union significance exist. Such consultations should take place before any discussions or arrangements are considered with management which have implications for common classifications.

- (v) The outcome of these discussions must ensure that the position of the Single Bargaining Unit is not impaired; and
 - (vi) Where agreement cannot be reached, either union may notify the ACTU or the relevant state branch that an inter-union membership dispute exists and that assistance, in accordance with the Coverage and Demarcation Disputes policy of the ACTU, is required.
5. Each union shall attempt to accommodate retrenched mineworkers from other mining unions subject to first satisfying its own policy.
 6. There shall not be any increase in the number of unions at a mine site.
 7. Contractors
 - a) Where a contractor performs work on a mine site under the 'Coal Mining Industry Interim Consent Award' (Production and Engineering) 1990, whether a respondent or not, the employees of that contractor who are already members of a coal mining industry union shall not be required to join a second union.
 - b) Where a contractor performs work on a mine site under a 'Minor Construction/Major Maintenance/Contractors' Agreement, the employees of that contractor who are already members of a Coal Mining Industry Union shall not be required to join a second union.
 - c) Where a contractor performs work on or in connection with a mine site under a 'Construction/Project Award/Agreement' the employees of the contractor shall become and/or remain members of the Construction Industry Unions.
 - d) Where a principal contractor performs work on a greenfields mine site under that mine sites Production Award and/or Agreement, the employees of that contractor shall become members of the greenfields site union.
 - e) Where a principal contractor performs work on a greenfields mine site under a 'Minor Construction/Major Maintenance/Contractors Agreement, the employees of that contractor shall remain members of the appropriate off-site coal mining industry union.

- f) Provided however, that in 'd' and 'e' above, employees of a subcontractor of such principal contractor shall remain members of the appropriate off-site coal mining industry union.
8. There shall be no retaliation or discrimination against any employee who has changed membership.
9. Membership shall not be an obstacle to the award restructuring process."

Similar Principles of Competition' have subsequently been made between the UMFA, the ACSA and the COA. The new 'self-imposed' principles allowed significantly more scope for coverage by the UMFA, particularly when interpreted in the light of the ACTU's determination on union status in the coal mining industry. These new principles were needed to give effect to the development of industry unionism within the coal industry in line with general community trends.

In April 1991, the *Deputies decision*⁹⁶ was handed down by the Tribunal. It was a large case, that involved the UMFA applying to the Tribunal for the insertion of the classification of Deputy (NSW) into the Production and Engineering Award. Previously the classification of deputy in NSW was limited to the 'Deputies' award, of which the COA was the only respondent. Whilst it was a matter relating to award coverage, as opposed to strictly union coverage, it dealt with many aspects of demarcation between unions. The NSW Coal Association (NSWCA) supported the application. The main opposition was from the COA, which argued among other things that safety and discipline would be impaired if "people with supervisory duty are in the same union as those they supervise." In making this claim the COA relied on among other things, the findings of the 1930 *Royal Commission on the Coal Mining Industry and Commonwealth Storemen and Packers Union v Commonwealth Naval Storehousemens Association*,⁹⁷ where Dethridge CJ held that where membership of a particular union would "interfere with the proper performance of [ones] duty" then it should be prohibited. The NSW Chief Inspector of Mines made a similar submission. The UMFA and the NSWCA on the other hand argued that the inclusion of the classification would increase flexibility and "is part and parcel of award restructuring, structural efficiency, career path development and union rationalisation." (at 5) Further, they argued that the application would have no effect on safety or discipline, especially given the fact that the UMFA had traditionally covered deputies in Queensland without adverse effects.

96 Print CR 4437

97 27 CAR 56

The Tribunal's decision included the classification of deputy into the production and engineering award. In doing so the Chairman stated that safety and discipline were not dependent on membership or otherwise of a "particular union" and that structural efficiency and award restructuring would be enhanced by extending coverage to UMFA (though not exclusively). Finally he stated the need for conflict resolution provisions between unions that was within the domain of the LCA or CIT rather than the ACTU, as the COA was not affiliated to the latter organisation. A similar decision⁹⁸ was handed down in December 1991, which extended the classification into the *Coal Mining Industry (Supervisory & Administration) Interim Consent Award*, thereby giving the ACSA access to the classification as well.

In 1992, the principles relating to the demarcation of union coverage in the coal industry are still evolving. At present, there are three applications before the Tribunal which seek award and union coverage of employees for one union or group of unions to the exclusion of others. All in fact seek orders worded in the manner of a s.118A application. However, in all three cases the orders sought are either under the *Coal Industry Acts* and/or the *Australian Industrial Relations Act*.

The first application is by the United Mine Workers Division of the Construction, Forestry and Mining Employees Union (UMW/CFMEU) (the UMFA after amalgamation with the ATAIU/BWIU), seeking orders to give it exclusive coverage (including staff) of the Eloura minesite, a 'greenfield' site.⁹⁹ The second is an application by the ACSA for exclusive coverage of all those persons employed under the *Coal Mining Industry (Supervisory & Administration) Interim Consent Award*.¹⁰⁰ The final application is by the COANSW for exclusive coverage of the classification of deputy to the exclusion of the UMW/CFMEU.¹⁰¹ At the time of writing decisions are still pending. Nevertheless, they do raise some interesting points regarding the application of previous CIT decisions and the use by the Tribunal of its powers under the *Australian Industrial Relations Act*.

Given that the general thrust of post-*South Bulli* decisions has been to get away from the 'historical perspective' and 'free-up' union coverage (subject to restrictions determined by the union movement itself), it appears that ACSA and the COA applications will not succeed in their present form. Those applications are essentially aimed at restricting coverage to the status quo within the industry

98 Print CR 4500

99 Awaiting allocation of CIT matter number.

100 CIT Matter 138 of 1992

101 CIT Matter 157 of 1992.

generally. In a sense they are using a mechanism whose aim when applied by the Australian Industrial Relations Commission at least in part is "to encourage and facilitate the development of organisations, particularly by reducing the number of organisations that are in an industry or enterprise." The applications will not achieve this, nor, it is argued, will it satisfy the test of public interest. The UMW/CFMEU application, in so far as it does satisfy object (k) is on a better footing.

The other unusual factor in these cases relates to the powers the Tribunal can use in determining these matters. If the CIT elected to use its powers of the Australian Industrial Relations Commission as allowed under s.34(1A) of the Coal Industry Act and implemented s.118A provisions, the question remains as to which objects it would use and the weight that they would be given to each of them. If the CIT elected to follow this path, would it be constrained by the precedents set by the Australian Industrial Relations Commission? As the CIT has never formally used these powers, this is still an area of uncertainty. Thirdly, could the CIT use the powers under s.118A(5) & (6) so as to refer a needed amendment of an organisations rules to a designated Presidential Member or more interestingly, could it refer it to itself, using its Commission powers? If this were the case and the Tribunal acted in this way, this would be the first time the CIT has ever been involved in a decision relating to an amendment of the rules of a registered organisation. Traditionally, any matters relating to registered organisations have been dealt with by the Australian Industrial Relations Commission.

If on the other hand, the Tribunal were to use its general powers under s.34 (1) to determine whether to make such orders or not, there is still the question of making appropriate rule changes. Further, given that the applications have been made in terms very similar to s.118A, the question is how much weight should be given both to the AIRC's decisions and the legislation from which the words of the orders are 'borrowed'?

It is interesting to note that the coal industry views legislation such s.118A of the *Australian Industrial Relations Act* as a new concept, when in fact in 1948, almost identical legislation was passed by the Federal and NSW governments to settle a demarcation dispute and in a sense rationalise union coverage, in the form of the *Kemira Arbitration Acts*.¹⁰²

In conclusion, it would be fair to say that the principles of demarcation in the coal mining industry have developed in a logical way over time. Initially in the early

registration cases such as *Jumbunna* (1908), and *ACSEF v CMMPA* (1926), it was a matter of defining the initial boundaries of coverage between organisations. Whilst there was some conflict in this phase, it occurred when the principles relating to registration and demarcation were still being formed. In fact, the coal industry cases, they were often the leading decisions, which were followed by the mainstream industries. Whilst the boundaries were being set up through the registration of organisations, another series of cases, starting with *R v Hibble* (1921), were defining the boundaries of the coal industry within which these unions were to operate. In simplistic terms, prior to the Second World War, both the internal boundaries between unions and the external boundaries within which they operated were set (subject to some degree of demarcation dispute which was handled in mainstream State and Federal jurisdictions).

The emergence of *National Security (Coal Mining Industry Employment) Regulations* during World War Two, and perhaps more importantly, the Coal Industry Acts in the post war period, gave the coal mining industry an opportunity to settle demarcation disputes between unions within a specialist Tribunal, namely the Coal Industry Tribunal (and the various Reference Boards). It was in this framework that a set of principles, starting with the *Huntley* decision emerged, that essentially maintained the status quo that developed through award coverage and/or custom and practice. Throughout this time, these principles were developed in largely in isolation of 'mainstream' decisions, as the CIT operated as an 'island industry' tribunal. Whilst the Tribunal was aware of trends within the mainstream, in terms of its decisions, the influence was not strong.

The 'isolation' of the industry and the volatile framework that it operated in up until recently, led to the emergence of innovative solutions to industry restructuring and management. Among them were the Joint Coal Board and the Coal Industry Tribunal. The other strange creation of the industry was the *Kemira (Arbitration) Acts*, the only piece of legislation (yet alone joint legislation!) specifically designed to solve a demarcation dispute. From this legislation and decision emerged an innovative method of providing for exclusive coverage of a designated enterprise. Yet this type of solution did not re-emerge until the 1990s when the amendments to the *Australian Industrial Relations Act* emerged in 1991.¹⁰³

More recently, within the context of industry restructuring that is occurring through forces both internal and external to the coal industry, there has been a change in the principles applied in the industry. The emergence of the *Gordonstone and*

103 although the Cameron amendments to the *Conciliation and Arbitration Act* went some way in attempting to achieve this.

Union Membership Moratorium decisions is a recognition of these trends. They broke down the 'historical perspective' approach of the *Huntley-Gunnedah* line of decisions and to a large extent removed the union coverage barriers imposed by the Tribunal. Instead it has left the regulation of inter-union competition to the Principles of Competition, to be administered largely by the union movement (including the ACTU) (subject to some qualifications). Whilst the Tribunal has expressed some concerns regarding the operations of the principles and could re-impose the boundaries of old, it appears that the Tribunal's retreat from this area is permanent. In a strange twist, within this context, applications for demarcation, seeking orders similar to s.118A are emerging, largely with the intent of returning to the status quo, rather than promoting industry unionism. These matters are yet to be argued but it seems unlikely that the Tribunal will re-impose the old order through a mechanism designed to eliminate it.

In summary, the Coal Industry has produced some unusual mechanisms and solutions to union demarcation in its 'island industry' framework. This has been more of a function of the uniqueness of the industry rather than historical accident or the desire of legislatures and arbitrators to diverge from mainstream trends.

Postscript

On 17 November, 1992, the CIT handed down the first of two decisions relating to the UMW's application for orders to give it exclusive coverage at the Elouera greenfield site.¹⁰⁴ The Tribunal using his general powers under the Coal Industry Act, applied principles similar to those used by the Australian Industrial Relations Commission (AIRC) when evaluating s118A applications and gave the UMW exclusive representation to the exclusion of the MEWU and the ETU. In this decision he stated that he could not exclude the COA using the 'provisions' of s118A as they had no relevance to it as it is only state registered. The Chairman invited the parties to make submissions on the use of s220 and s221 of the *Industrial Relations Act, 1991 (NSW)* to achieve the desired ends.

Following further submissions, the Tribunal on 21 December 1992 made orders¹⁰⁵ again "using powers conferred by and through each of the Coal Industry Acts" (at 4) that excluded the COA under the principles espoused in s221(2)(a) of the *Industrial Relations Act, 1991 (NSW)* and endorsed in a decision of a full bench of the Industrial Relations Commission of NSW (*Public Service Association of NSW*

104 CR Print 4582.

105 CR Print 4594.

*& anor v NSW Teachers Federation*¹⁰⁶). The CIT's ability to be able to act under its own specific powers or those of its federal and state counterparts gave it the flexibility to implement an effective solution in this particular case. In doing so, it has 'beaten' the NSW Industrial Relations Commission in terms of making orders under this section of the Act.

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