IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S127 of 2011

BETWEEN: **PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED OF NSW**
Appellant

AND: **DIRECTOR OF PUBLIC EMPLOYMENT**
First Respondent

AND: **ROADS AND MARITIME SERVICES**
Second Respondent

AND: **NSW ATTORNEY-GENERAL**
Third Respondent

AND: **NSW MINISTER FOR FINANCE & SERVICES**
Fourth Respondent

AND: **UNIONS NSW**
Fifth Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the first to fourth respondents.

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Filed on behalf of: Attorney-General for the State of Queensland

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THE REGISTRY BRISBANE

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the appellant and the first to fourth respondents.

V. ARGUMENT

5. The *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) ('the Amendment Act') amended the *Industrial Relations Act 1996* (NSW) ('the IR Act') to insert, among other things, s 146C.

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6. In simple terms, that section requires the Industrial Relations Commission of New South Wales ('the Commission'), when making or varying any award or order, to give effect to any policy on conditions of employment of public sector employees that it is identified under regulation.

7. The appellant argues that the principle in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[1] invalidates the Amendment Act.

8. Queensland adopts the submissions of the first to fourth respondents regarding
20 the validity of the Amendment Act.

9. Queensland makes these further submissions about the validity of s 146C.

The *Kable* principle

10. The *Kable* principle invalidates laws that substantially undermine the institutional integrity of a Chapter III court. The term 'institutional integrity' refers to the defining characteristics of such courts. In *Forge v Australian Securities and Investment Commission* ('*Forge*'), Gummow, Hayne and Crennan JJ said:[2]

> [T]he relevant principle is one which hinges upon maintenance of the
> 30 defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

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1 (1996) 189 CLR 51.
2 (2006) 228 CLR 45 at 76 [63].

11. Likewise, in *Wainohu v New South Wales* ('*Wainohu*'), French CJ and Kiefel J said:[3]

> Decisions of this Court, commencing with *Kable*, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system. The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality.

12. As these and other descriptions make clear, however, the concern of the *Kable* principle is only with the fitness of Chapter III courts to exercise federal jurisdiction. It is not concerned with the protecting the institutional integrity of bodies that are not courts. This Court has acknowledged that such bodies can be controlled by governments and executives in myriad ways. In *Gypsy Jokers*, for example, Gummow, Hayne, Heydon and Kiefel JJ said:[4]

> [T]he conditions which must exist for courts in this country to administer justice according to law are inconsistent with some forms of external control of those courts *appropriate to the exercise of authority by public officials and administrators*.

13. Furthermore, legislation has required bodies that are not courts to take into account or to give effect to government policy.[5] That is the case even where federal or State judges have been members of those bodies.[6]

14. It is submitted that, in determining whether the *Kable* principle invalidates State legislation, the Court should bear in mind the need for restraint. In *South Australia v Totani*, Heydon J observed in dissent:[7]

> It would...be surprising if the role of the States as jurisdictions in which experiment may be conducted and variety may be observed were to be significantly reduced by doctrines resting on opinions—which are very likely to be divergent—about the fitness of a State court to exercise federal jurisdiction.

15. A more recent acknowledgment of the need for restraint in application of the *Kable* principle is reflected in the judgment of French CJ and Kiefel J in

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3 (2011) 243 CLR 181 at [44].
4 (2008) 234 CLR 532 at [10] (emphasis added).
5 See, for example, *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), s 24FB; *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW), s 5(1)(c) and s 28.
6 See, for example, *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas), s 27; *State Administrative Tribunal Act 2004* (WA), s 28 and s 108(3), 112(3) and 116(1) (dealing with the President, Deputy President and ex officio members).
7 (2010) 242 CLR 1 at [246].

Wainohu. Their Honours quoted the following observations of Professor Enid Campbell with approval:[8]

> While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform.

16. The considerations in paragraphs 12 to 15 have even greater force in the case of legislation, such as s 146C, directed to a body which is not a court, and which expressly provides that it does not does not apply to a court.

Industrial Court and the Commission

17. The appellant's submissions on s 146C rest partly on the claim that the Commission is one entity that can be differently constituted for different purposes. On that basis, it submits that the Amendment Act and s 146C directly affects the independence and impartiality of the Industrial Court, which is a Chapter III court.[9]

18. These claims should not be accepted.

19. The Commission and the Industrial Court of New South Wales are not constituted as a single body. Section 145 of the IR Act establishes the Commission. Section 146, however, establishes the Commission in Court Session as a superior court of record; and s 151A provides that the Commission in Court Session body is to be the Industrial Court. These provisions suggest that the Act establishes two separate but related bodies.

20. The provisions for the membership of the Commission and the Industrial Court reinforce that conclusion. Section 147 provides for the members of the Commission to consist of a President, a Vice-President, Deputy Presidents and Commissioners. Under s 148, members of the Commission are appointed by the Governor by commission.[10] While presidential members of the Commission who meet certain qualifications can be appointed to the Industrial Court as judicial members, the appointment occurs pursuant to s 149 and may be by subsequent commission. Judicial members, moreover, have the protections available under Part 9 of the *Constitution Act 1902* (NSW) because the Industrial Court is a court of equivalent status to the Supreme Court and the Land and Environment Court.[11] No such protection applies to ordinary members of the Commission.

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8 (2011) 243 CLR 181 at [53].
9 Appellant's submissions, para 52.
10 IR Act, s 148.
11 IR Act, s 152(2).

21. Furthermore, the functions of the Commission and the Industrial Court are different. The former has the functions set out in s 146, including setting remuneration and other conditions of employment,[12] resolving industrial disputes[13] and inquiring into, and reporting on, any industrial or other matter referred to it by the Minister.[14] The latter deals exclusively with the matters set out in s 153, including proceedings for declarations of right,[15] proceedings relating to unfair contracts[16] and proceedings for contraventions of dispute orders.[17]

22. The processes by which these functions are exercised are different. The Commission is not bound to act in a formal manner, is not bound by the rules of evidence and may inform itself in any way that it considers just; however, the rules of evidence and other formal procedures of a superior court of record apply to the Industrial Court.[18]

23. It is true that some provisions of the IR Act speak of the Commission as an entity. For example, s 164 provides, among other things, that the Commission may exercise the functions of the Supreme Court in relation to compelling the attendance of witnesses and examining them on oath or affirmation. The President of the Commission, moreover, is to direct the business of the Commission, although if the President is not a judicial member, the function of allocating a matter is to be exercised by the most senior judicial member.[19] Such provisions, however, do not deny the inference from the provisions mentioned in paragraphs 19 to 22 above that the Commission and the Industrial Court are separate but related entities. In particular, they do not deny that the bodies are established by different provisions, and have different (but overlapping) membership and different functions.

24. Accordingly, the IR Act does not establish the Industrial Court and the Commission as a single entity. Insofar as the submissions about the application of the *Kable* principle to s 146C depend on that view, they should be rejected.

25. The appellant also submits that, in any event, the Amendment Act is invalid because the relationship between the Commission and the Industrial Court is such that the Amendment Act impairs the reality and appearance of independence and impartiality of the Industrial Court.[20] It relies on cases concerning the persona designate doctrine, particularly *Wainohu*.[21]

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12 IR Act, s 146(1)(a).
13 IR Act, s 146(1)(b).
14 IR Act, s 146(1)(d).
15 IR Act, s 153(1)(b) and s 154.
16 IR Act, s 153(1)(c).
17 IR Act, s 153(1)(d).
18 IR Act, s 163.
19 IR Act, s 159.
20 Appellant's submissions, paras 48-49.
21 Appellant's submissions, paras 50-51.

26. It is difficult, however, to see how s 146C adversely affects the reality of the Industrial Court's independence and impartiality. Not only are the Industrial Court and the Commission distinct entities with distinct functions but s 146C(5) provides that the section does not apply to the Industrial Court. Section 146C thereby leaves the Industrial Court free to make decisions in accordance with the judicial process. To claim that the section denies the reality of independence and impartiality is to ignore this fact.

27. Nor does s 146C deny the appearance of the Industrial Court's independence and impartiality. The appellant's attempt to draw an analogy between the activities of a judge as persona designata and the Commission in making awards or orders is misplaced.[22] In *Wainohu*, a majority of the Court found that the *Crimes (Serious Organisations Control) Act 2009* (NSW) breached the *Kable* principle because it permitted judges as personae designatae to avoid providing reasons for making a declaration. This occurred in circumstances where the making of such a declaration was a prerequisite to the Supreme Court's jurisdiction to consider whether to make control orders. Chief Justice French and Kiefel J described the situation in this way:[23]

> To the extent that the statute effectively immunises the eligible judge from any obligation to provide such reasons, it marks the function which that judge carries out as lacking an essential incident of the judicial function. At the same time, however, the Act creates a connection between the non-judicial function conferred upon an eligible judge by Pt 2 of the Act and the exercise of jurisdiction by the Supreme Court under Pt 3 of the Act. This has the consequence that a judge of the Court performs a function integral to the exercise of jurisdiction by the Court, by making the declaration, but lacks the duty to provide reasons for that decision. *The appearance of a judge making a declaration is thereby created whilst the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the Court, to the detriment of the Court.*

28. Justices Gummow, Hayne, Crennan and Bell JJ identified the problem in similar terms:[24]

> The effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under s 9 and s 12.

29. The Commission in making its awards and orders under the IR Act is not comparable to a judge acting as persona designata. The Commission's functions are not conferred by reference to, or by virtue of, the judicial office of

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22 Appellant's submissions, paras 50-51.
23 (2011) 243 CLR 181 at [68] (emphasis added).
24 (2011) 243 CLR 181 at [109].

persons who are members of the Industrial Court.[25] As a result, the Commission does not draw upon the reputation of the judicial branch for impartiality and reasoned decision-making when it makes awards and orders. Although there is an overlap with membership of the Industrial Court, because presidential members can be appointed to the Industrial Court, the Commission remains a separate entity with distinct non-judicial functions. Furthermore, the making or varying of an award or order by Commissioners is not the legislative prerequisite to the exercise of jurisdiction by the Industrial Court. The contrast with *Wainohu* is stark.

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30. Section 146C is not directed at a court but at an administrative body: the Commission. Given the presence of s 146C(5), no reasonable person would be under the illusion that the members of the Industrial Court were subject to the control of the executive government in the performance of its functions. If there be any doubt on that score (and it is submitted that there is not), then the precept of restraint outlined in paragraph 14 to 15 above suggests that the doubt should be resolved in favour of validity.

31. The appeal should therefore be dismissed.

20 VI. ESTIMATE OF TIME

32. The Attorney-General's oral submissions are estimated to take 20 minutes.

Dated: 6 July 2012

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25 *Hilton v Wells* (1985) 157 CLR 57 at 83-84 (Mason and Deane JJ); *Wainohu* (2011) 243 CLR 181 at 50 (French CJ and Kiefel J) (pointing out that the functions in persona designata cases are conferred upon the judge by virtue of his or her office).