IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY

No: S127 of 2012

BETWEEN

THE PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED OF NSW

Appellant

and

DIRECTOR OF PUBLIC EMPLOYMENT

First Respondent

ROADS AND MARITIME SERVICES

Second Respondent

NSW ATTORNEY-GENERAL

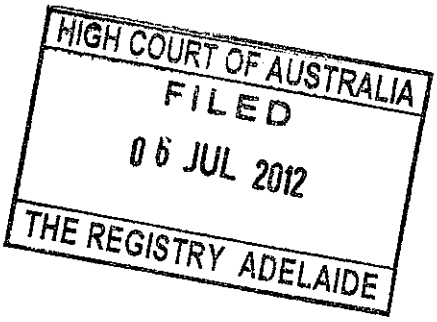
Third Respondent

NSW MINISTER FOR FINANCE & SERVICES

Fourth Respondent

UNIONS NSW

Fifth Respondent



WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I. Suitability for Publication

1. The Attorney-General for South Australia certifies that these submissions are in a form suitable for publication on the internet.

Part II. Intervention

2. The Attorney-General for South Australia ("South Australia") intervenes pursuant to s78A of the *Judiciary Act 1903,* adopts the Respondents' written submissions and provides these submissions to supplement the Respondents' submissions.

Part III. Grounds for leave for intervention

3. Not applicable

Part IV. Applicable constitutional and legislative provisions

4. South Australia accepts the Appellant's and Respondents' identification of the applicable constitutional provisions, statutes and regulations and also relies upon s31 of the *Interpretation Act 1987* (NSW).

Part V. Argument

Issue

5. Does the operation of s146C of the *Industrial Relations Act 1996* (NSW) ("**the Act**"), which has no direct application to the exercise of the jurisdiction vested in the Industrial Court of New South Wales ("**Industrial Court**"), undermine the institutional integrity of that Court by reason of the members of that Court also being members of the Industrial Relations Commission of New South Wales ("**Commission**") to which the Act does have direct application, requiring the Commission to give effect to Government policy on conditions of employment of public sector employees, or by reason of the interrelationship of the functions of the Commission and the Court?

The Appellant's argument

6. The Appellant argues that s146C of the Act, by requiring the Commission to give effect to government policy embodied in regulations, is invalid[1] because;

    a. given the requirement that judges of the Industrial Court must also be members of the Commission, the independence or the appearance of independence of the Industrial Court is undermined[2]; and

    b. in light of the absence of a clear delineation between the Commission and the Industrial Court and the manner in which matters transfer between the two, the independence of[3] or the appearance of independence[4] of the Industrial Court is undermined.

7. In order to succeed, the Appellant must establish that the relationship between the Industrial Court, its judicial officers and the Commission, is such that the operation of s146C on the Commission, impairs or appears to impair the institutional integrity of the Industrial Court.

South Australia's arguments in summary

8. This is not a case where complaint is made about functions conferred on a State Court.[5] This is one step removed. Nor is this a case where complaint is made about functions conferred on a person in their capacity as a judge of the Industrial Court.[6] Again this case is a step removed. In this case complaint is made about functions conferred upon the

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1 The Appellant impugns the 2011 Amendment Act, but its only substantive provision was to insert s146C into the *Industrial Relations Act 1996* (NSW).

2 See particularly Appellant's Written Submissions at [48]-[50].

3 See Appellant's Written Submissions at [45]-[46].

4 See particularly Appellant's Written Submissions at [51]-[54].

5 Cf *South Australia v Totani* (2010) 242 CLR 1 where the complaint related to conferral of functions on the Magistrates Court

6 Cf *Wainohu v New South Wales* (2011) 243 CLR 181 where the complaint related to conferral of functions on "eligible judges" of the Supreme Court of New South Wales.

Commission, to be exercised by Commissioners some of whom happen to be judicial officers of the Industrial Court.

9. The proper characterisation of s 146C is that it is a requirement that the Commission give effect to a matter prescribed in or by regulation. This is no more than a prescription by Parliament of a limit on the exercise of the Commission's power to make or vary an award or order. The fact that s146C directs the Commission to give effect to the policy does not invalidate the section. Section 146C should be construed to be within legislative power, and consequently should be read so as to not pick up a regulation to be made that offends the *Kable* doctrine. If a regulation goes beyond that limitation, the regulation will be beyond the ambit of the regulation making power and invalid. However s146C will not be invalid.

10. Section 146C does not operate directly on the Industrial Court; consequently there is no direct impairment of the institutional integrity of the Industrial Court.

11. The nature of the imposition by s146C is not such that an ordinary reasonable member of the public would perceive that the impartiality and independence of the Industrial Court are impermissibly compromised by s 146C.

12. Further, when the terms of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) (the "**Regulation**") are carefully examined, it is apparent that government policy defines and in some respects constrains but does not remove or impermissibly limit the Commission's discretion in such a way that it interferes with the Court's independence or the appearance of the Court's independence from the Executive.

The applicable principles

13. The Industrial Relations Commission of New South Wales as established by s145(1) of the Act is not a "court" or "court of a State" within the meaning of covering clause 5 and ss71, 73 (ii) and 77(iii) of the *Constitution*. It is not a body in which the judicial power of the

Commonwealth has been vested under s77(iii) of the *Constitution* by s39(2) of the *Judiciary Act 1903* (Cth). As much appears accepted by the parties, hence the argument centres on the impact of s146C upon the institutional integrity of the Industrial Court of New South Wales by virtue of the members of that Court also being members of the Commission and the interrelationship of the functions of that Court and the Commission.

14. The Industrial Court, being the Commission in Court Session[7], is a superior court of record[8] with status equivalent to the Supreme Court of New South Wales.[9] It is a "court" and a "court of a State" within the meaning of covering clause 5 and ss 71, 73(ii) and 77(iii) of the *Constitution*.[10] It is also a court in which the judicial power of the Commonwealth has been vested under s77(iii) of the *Constitution* by s39(2) of the *Judiciary Act 1903* (Cth).[11] It is, therefore, a court forming part of the integrated Australian court system and has a role and existence that transcends its status as a State court.[12] In consequence of this Ch III of the *Constitution* requires by implication that, in order that it remain a fit repository of the judicial power of the Commonwealth, the Industrial Court must be, and must appear to be, an independent and impartial tribunal - the *Kable* doctrine.[13]

15. Thus a State Parliament may not confer upon a State court a function, or alter the structure or composition of a State court, if in doing so the consequence is that the institutional integrity of the court is distorted 'because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other

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7 *Industrial Relations Act 1996* (NSW) s151A.

8 *Industrial Relations Act 1996* (NSW) s152(1).

9 *Industrial Relations Act 1996* (NSW) s152(2).

10 Chapter III of the Constitution also requires that there be a body fitting the description "the Supreme Court of a State"; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 566, [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

11 *Judiciary Act 1903* (Cth), s39(2).

12 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J).

13 *South Australia v Totani and Another* (2010) 242 CLR 1 at 49 [72] (French CJ), 82 [205] (Hayne J) *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 552-3 [10] (Gummow, Hayne, Heydon and Kiefel JJ), 562 [48] (Kirby J), 591 [162] (Crennan J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-8 [41] (Gleeson CJ), 76 [63]-[64] and 81 [78] (Gummow, Hayne and Crennan JJ); *K-Generation Pty Ltd v Licensing*

decision-making bodies'.[14]

16. Importantly, the doctrine focuses upon protecting *capacity* and what is *essential* to the role of the judicial arm of government and the maintenance of the integrity of the integrated Australian judicial system.[15]

17. Further, and consistent with this, the operation of the doctrine is informed by the fact that at the State level the doctrine of the separation of powers does not apply.[16] That is, implicit in the *Kable* doctrine is an acceptance that the defining characteristics of a court of a State are not distorted by the mere fact that a law vests in such court, or a member of such court, a function that does not involve the exercise of judicial power.[17] It is in this context that the concept of the institutional integrity of a court of a State within the meaning of Ch III of the *Constitution* and the *Kable* doctrine is to be understood. As French CJ noted in *South Australia v Totani*:

> The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.[18]

18. The concept of "institutional integrity" should be understood as incorporating three characteristics. First, a degree of independence from the political branches of government, and in particular from the political executive. Secondly, impartiality as

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Court of South Australia (2009) 237 CLR 501 at 530 [89] (French CJ), 535 [111] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

14 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45] (French CJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164 [32].

15 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 600-1 [41]-[42] (McHugh J).

16 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67 (Brennan CJ), 77-8 (Dawson J), 92-4 (Toohey J) and 109-10 (McHugh J).

17 *Wainohu v New South Wales* (2011) 243 CLR 181.

18 *South Australia v Totani* (2010) 242 CLR 1 at 45 [66], (French CJ).

between the parties to disputes to be decided.[19] The third aspect is that a court makes decisions in the exercise of judicial power by reference to a reasoned rather than an arbitrary or capricious process.[20] Hence in *Fardon* Callinan and Heydon JJ said:

> So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, the legislation in question will not infringe Ch III of the Constitution.[21]

And in *Forge* Gummow, Hayne and Crennan JJ stated:

> An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial.[22]

19. Further, those characteristics extend beyond reality to the appearance of the court's independence and its impartiality.[23] In this connection French CJ and Kiefel J noted

> A legislatively prescribed detachment of a State judge from his or her court when performing a non-judicial function may weigh in the balance against a finding of impairment of the institutional integrity of the court. Such a detachment may make it less likely that the exercise of the non-judicial function undermines the reality or the appearance of the court as an institution independent of the executive government of the State. But so long as that function is conferred upon the judge by virtue of his or her office as a judge, the distinction is difficult to grasp and the fact that the function is conferred persona designata should not be given great weight. It would generally not be determinative of the question of compatibility.[24] (*footnote omitted*)

Further:

> It is a logical extension of the remarks of McHugh J in *Kable*, quoted above, that a function conferred upon a judge of a State court is incompatible with the role of the court under Ch III if the conferral and exercise of the function substantially impairs the institutional integrity of the court. It is, however, important that the requirement of compatibility within the *Kable* doctrine, which is functionalist rather than formalist in character, be approached with restraint. The principle does not apply so as to infringe the freedom that State legislatures enjoy with respect to the organisation and arrangements of their courts. It is not a surrogate for the application of a separation of powers doctrine to the States. Allowance must be made in assessing incompatibility for the long history in the States of the appointments of judges to extra-judicial roles, a history which predates Federation. It is necessary to bear in mind the caution issued by the late Professor Enid Campbell:

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19 Inextricably linked to independence and impartiality is the open-court principle; *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] (French CJ).

20 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] (French CJ), 156-7 [426] (Crennan and Bell JJ), 163 [445] (Kiefel J).

21 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 656 [219].

22 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [64].

23 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66] (Gummow, Hayne and Crennan JJ).

24 *Wainohu v New South Wales* (2011) 243 CLR 181 at 211-2 [50] (French CJ and Kiefel J).

> "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."[25]
> (Footnotes omitted)

20. Because "institutional integrity" is a shorthand expression for the defining characteristics of a "court", it is not helpful to identify this Court's task, when faced with a challenge to State or Territory legislation, as merely being to decide whether the legislation "impairs" or "detracts from" the institutional integrity of a State or Territory court. The true question is whether the 'court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every respect of its judicial role, of its defining characteristics as a court'.[26]

21. The descriptor, "substantial", is important. As Heydon J said in *South Australia v Totani*:

> For in the case of a body like the Magistrates Court, which otherwise has the defining characteristics of a court, it is wrong lightly to reach the conclusion that it lacks the "minimum requirements of independence and impartiality." The legislative conferment on a court of a particular function is not invalid unless that function "*substantially* impairs [the court's] institutional integrity". The legislation struck down in *Kable's* case was "extraordinary" and "almost unique". So was the legislation in the only other case in this Court in which the *Kable* doctrine was successfully invoked. The *Kable* doctrine is attracted "only in very limited circumstances" and in "rare situations". It is "of very limited application." "State legislation must have a quite exceptional character" to contravene it. The legislation must generate "repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system". It must be "repugnant to the judicial process in a fundamental degree". Just as State legislation compelling a departure to a significant degree from traditional methods and standards in carrying out judicial functions may be invalid, the absence of significant departure from those methods and standards points to validity.[27] (footnotes omitted)

22. The constitutional test is fundamentally objective: it is to be distinguished from a free-standing concept of impairment of institutional integrity that may tend to depend upon individual judges' views as to what activities are appropriate or acceptable for courts to be engaged in. The Court is required to engage in an "evaluative process".[28] The task is not

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25 *Wainohu v New South Wales* (2011) 243 CLR 181 at 212-3 [52] (French CJ and Kiefel J).

26 *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ), 63 [131] (Gummow J); *Crump v New South Wales* (2012) 86 ALJR 623 at 682 [31] (French CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ).

27 (2010) 242 CLR 1 at [264].

28 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 530 [90] (French CJ). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] (Gleeson CJ) and 655 [219] (Callinan and Heydon JJ).

'unlike that involved in determining whether a body can be said to be exercising judicial power'[29] and consistent with that task, transcends "purely abstract conceptual analysis" and "inevitably attracts consideration of predominant characteristics", together with "comparison with the historic functions and processes of courts of law"'.[30]

Section 146C and application of the principles

23. The starting point when applying the *Kable* principle is to analyse the impugned legislation[31] to determine its practical effect on the exercise of judicial power.

24. Section 146C does not apply directly to the Industrial Court.[32] Section 146C does not itself confer a function on the Commission. It is a prescription by Parliament of a limit on the exercise of the Commission's power to make or vary an award or order. The Commission's functions include setting awards,[33] varying and rescinding[34] and reviewing[35] awards, approving enterprise agreements[36] and making State decisions.[37] In each case, the function is expressed in broad terms; however the exercise of that function is qualified by the applicable provisions of the Act. For example, the Act stipulates maximum ordinary hours of employment,[38] minimum sick leave entitlements[39] and equal remuneration for men and women[40] that must be applied by the Commission when making an award. These requirements should properly be seen as limitations upon the power to be exercised by the Commission in the discharge of its functions. Section 146C operates similarly.

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29 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 530 [90] (French CJ).

30 *International Finance Trust v NSW Crime Commission* (2009) 240 CLR 319 at 352 [50] (French CJ) quoting *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J).

31 *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] (French CJ).

32 *Industrial Relations Act 1996* (NSW) Section 146C(5).

33 *Industrial Relations Act 1996* (NSW) Section 10.

34 *Industrial Relations Act 1996* (NSW) Section 17.

35 *Industrial Relations Act 1996* (NSW) Section 19.

36 *Industrial Relations Act 1996* (NSW) Section 35.

37 *Industrial Relations Act 1996* (NSW) Section 51. State decisions set principles or provisions for the purposes of awards and other matters under the Act: s51(1) of the Act.

38 *Industrial Relations Act 1996* (NSW) Section 22.

39 *Industrial Relations Act 1996* (NSW) Section 26.

40 *Industrial Relations Act 1996* (NSW) Section 23.

25. In order for an award or order to "give effect to" a government regulation containing a policy, the Commission will consider and apply the policy in so far as it applies to the case at hand. The policy is an operative influence on the manner in which the Commission reaches its decision about the award or the order. The fact that s146C gives the Commission no choice whether or not to give effect to the policy in the exercise of its function does not invalidate the section.[41]

26. The effect of the requirement for the Commission to give effect to government policy will depend upon the specific policy contained in or adopted by the regulations. The policy may simply require the Commission to take into account a particular governmental aim and in so doing be completely aspirational. Or, it may go further and prescribe specific matters to be contained within an award, and in that way it may constrain or remove the Commission's discretion to make an award. But, even if the policy goes so far as to effectively remove the exercise of a discretion by the Commission, that does not impugn the validity of s146C.

27. The use of the phrase "government policy" in s146C highlights that a decision of the Commission concerns matters of political and public interest, which may make a decision politically divisive or sensitive. But that is not an indication of the law's invalidity:

> The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.[42]

28. A law is not invalid simply because it implements a particular policy of the government of the day.[43] Statutes necessarily involve legislative choice as to what conduct ought to be regulated and how.[44] In *Thomas v Mowbray*, the impugned law required the Court to consider whether "making the [interim control] order would substantially assist in

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41 *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ), 62 (McTiernan J), 64-5 (Menzies J), 67 (Owen J), 70 (Walsh J). *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 48 [71] (French CJ).

42 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592-3 [21] (Gleeson CJ).

43 *Thomas v Mowbray* (2007) 233 CLR 307 at 350 [88] (Gummow and Crennan JJ).

44 *Thomas v Mowbray* (2007) 233 CLR 307 at 348 [82] (Gummow and Crennan JJ).

preventing a terrorist act".[45] Whilst considering this issue in determining an application for an interim control order necessarily involved questions of policy, it nonetheless involved an application of objectively determinable criteria and was not repugnant to the exercise of federal judicial power.[46]

29. By requiring the Commission to "give effect" to "government policy" s146C does not deprive the Commission of the ability to make an independent and impartial decision.[47] As in *Thomas v Mowbray*, there is no anterior determination by the Legislature contained in s146C that is an essential element in the decision.[48]

30. A law can require a court exercising federal jurisdiction to make specific orders if it is satisfied that pre-conditions have been met, even if satisfaction of those conditions depends upon a decision or decisions of the executive.[49] The practical operation and effect of s146C on the Commission's exercise of its functions is less intrusive into its decisional independence than cases where a court is required to make orders if certain condition is met. Hence, the decisional independence of the Commission cannot be said to be substantially compromised. A law can also place limits upon a jurisdiction conferred as s146C does. Provided there remains a genuine adjudicative function the outcome is not dictated by either Legislature or Executive.

31. Section 146C must be construed subject to s31 *Interpretation Act 1987* (NSW). Thus s146C is to be construed as picking up only those policies declared by regulation that are within the regulation making power in s407 of the Act, the construction of which is also subject to s31 of the *Interpretation Act 1987*. The Act must be construed as not permitting the making of a regulation that offends the *Kable* doctrine. Any regulation made pursuant to

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45 See *Criminal Code* (Cth) s 104.4(1)(c)(i) set out at *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [64] (Gummow and Crennan JJ).

46 *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [92] (Gummow and Crennan JJ).

47 *South Australia v Totani* (2010) 242 CLR 1 at 157 [428], 160 [436] (Crennan and Bell JJ).

48 *South Australia v Totani* (2010) 242 CLR 1 at 65 [140] (Gummow J).

49 *Palling v Corfield* (1970) 123 CLR 52 at 58-9 (Barwick CJ), 62-3 (McTiernan J), 64-5 (Menzies J), 65 (Windeyer J), 66-7 (Owen J), 68-70 (Walsh J), 70 (Gibbs J); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 48 [71] (French CJ).

s407 of the Act that offends the *Kable* doctrine will be invalid as being beyond the power conferred by s407.[50] But s146C itself will not, and cannot, be invalid on that ground.

32. Further, s146C does not "involve the enlistment" of the Industrial Court, or render the Court "an instrument of the Executive".[51] The requirement on the Commission to give effect to government policy control does not materially effect the Industrial Court's exercise of judicial power.[52]

The Regulation

33. The Regulation declares policies for the purposes of s146C, divided into paramount policies and other policies.[53] The paramount policies are that:

10 a. Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).[54] and

b. Equal remuneration for men and women doing work of equal or comparable value.[55]

The "other policies" "are subject to compliance with the declared paramount policies".[56] Effectively, the "other policies" limit the Commission's power to make increases in remuneration or other conditions of employment to those which increase employee related costs by no more than 2.5%.[57]

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50 *Interpretation Act 1987 s* 31(2).

51 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] (French CJ), 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

52 *South Australia v Totani* (2010) 242 CLR 1 at 35 [42] (French CJ), 157-8 [428]-[429] (Crennan and Bell JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 335 [30] (Gleeson CJ), 355 [111] (Gummow and Crennan JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] (Gleeson CJ), 602 [44] (McHugh J)

53 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Regs 5 & 6.

54 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 5(a).

55 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 5(b).

56 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6(1)(a).

57 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6(1)(a) and (b). Employee related costs are "costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees: *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 8.

34. The paramount policy of guaranteed minimum conditions puts the Commission on notice of legislative constraints[58] upon employees' minimum conditions and other commonly accepted or presently applicable employment conditions.[59] In giving effect to this paramount policy, the Commission retains discretion, subject to the "other policies" and the provisions in the Act, as to whether to allow employees conditions over and above the guaranteed minimum. Similarly, the paramount policy to provide equal remuneration for men and women doing work of equal or comparable value[60] repeats a requirement contained within the Act.[61] It merely identifies pre-existing statutory limits upon the Commission's discretion. The Commission, in making an award or order, has work to do in determining what is work of equal or comparable value.

35. The "other policies" are subsidiary to the paramount policies.[62] The Commission may award increases where employee related costs do not increase by more than 2.5%[63] and may award increases that increase employee related costs by more than 2.5% provided that cost savings have been achieved to offset the increased employee related costs.[64] In order to give effect to the policy, the Commission is required to assess the material placed before it to determine the extent of increased employee related costs. It is then able to exercise its discretion within a specific range of remuneration and condition increases.

36. Neither the paramount policies nor the other policies are constraints on the Commission's functions such that the Commission is deprived of its decisional independence. The Regulation identifies specific factors that must be taken into account when making or

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58 The guaranteed minimum conditions include recognition of legislative minimum conditions contained within the *Industrial Relations Act 1996*, the *Long Service Leave Act 1955*, the *Annual Holidays Act 1944* and the *Public Holidays Act 2010* and superannuation entitlements under Commonwealth legislation (*Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 7(1)(c) and 7(2)).

59 Employees are entitled to "unpaid parental leave that is the same as that provided by the National Employment Standards" and "paid parental leave that applies to the relevant group of public sector employees at the commencement of this clause": *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 7(1)(a) and (b).

60 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6.

61 *Industrial Relations Act 1996* (NSW) section 23.

62 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6(1).

63 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6(1)(a).

64 *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) Reg 6(1)(b).

varying an award or order. As identified, the Commission retains a broad discretion in making or varying an award or order. Of itself, a legislative constraint requiring the Commission to take into account specific matters is not enough to compromise its decisional independence.[65] It is not materially different to mandatory sentences to be applied upon a finding of guilt, which are of course permissible.[66]

37. The Regulation, when applied by the Commission pursuant to s146C of the Act, is analogous to the impugned law in *Fardon v Attorney-General (Qld)*[67] which required the Supreme Court of Queensland to consider a number of matters when deciding whether to make an order, and to observe a "paramount consideration" to protect the community.[68] However, the law was found not to impair the institutional integrity of the Supreme Court. There was "nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits".[69] Consequently, the regulation which defines and limits the Commission's discretion does not impermissibly impair the Industrial Court's independence, nor does it create the appearance of impermissible interference.

The appearance of the Industrial Court's independence

38. Public confidence cannot be the measure of constitutional validity in determining whether or not the institutional integrity of a court of a State has or appears to have been impermissibly undermined.[70]

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65 In the context of a Court, it is clear that a lack of discretion does not compromise the independence of the Court from the Executive. As Gummow J stated in *South Australia v Totani* (2010) 242 CLR 1 at [133]:
"There is, however, a distinction between a legislative grant of jurisdiction and a legislative direction to the courts as to the manner and outcome of the exercise of the jurisdiction....It is also true that a law such as s14(1) of the Act, which confers upon a court a power with a duty to exercise it if the court decides that the conditions attached to the power are met, on that ground alone is not to be classified as a legislative attempt to direct the outcome of the exercise of jurisdiction."
See also *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ), 64 (Menzies J), 67 (Owen J) and 70 (Walsh J); *South Australia v Totani* (2010) 242 CLR 1 at 48-9 [71] (French CJ).

66 *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ), 64 (Menzies J), 67 (Owen J) and 70 (Walsh J).

67 (2004) 223 CLR 575.

68 See *Dangerous Prisoners (Sexual Offenders) Act 2003*, sub-ss13(4) and (6).

69 At 592 [19] (Gleeson CJ); see also 596-7 [34] (McHugh J).

70 *South Australia v Totani* (2010) 242 CLR 1 at [73] (French CJ).

39. Greater assistance is to be found in the apprehended bias test.[71] An apprehension of bias may arise where a "fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the judge is asked to decide."[72]

40. The "ordinary reasonable member of the public" or "fair-minded lay observer" is one who is properly informed as to the nature of the proceedings, the matters in issue and the circumstances in which they arise.[73] Whilst a detailed knowledge of the law is not imputed, the reasonableness of any conclusion is to be considered in its proper context.[74] The same regard to context must be used in the test for any appearance of lack of institutional independence for a court exercising federal judicial power.[75]

41. In establishing apprehended bias, it is necessary to first identify what it is that might lead a judge to decide a case other than on its legal and factual merits, and, second, to articulate the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.[76] The bare assertion that a judge has an 'interest' is of no assistance until the nature of that interest and the asserted connection with the possibility of departure from impartial decision making is articulated.[77] Likewise, in the present case, the Appellant must do more than assert an alleged impairment, and must articulate the connection between the function conferred on the Commission and the possibility of the public perception of the Court's independence being impaired.

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71 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 23 (Gaudron J). The use of a fictitious bystander also arises in other areas. For example, as noted by Kirby J in *Smits v Roach* (2006) 227 CLR 423 at 457 [97], the "ordinary reasonable reader" is used in the law of defamation.

72 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

73 *Vakuata v Kelly* (1989) 167 CLR 568 at 585 (Toohey J); *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

74 *Vakuata v Kelly* (1989) 167 CLR 568 at 585 (Toohey J); *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

75 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 [42] (McHugh J).

76 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

77 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Smits v Roach* (2006) 227 CLR 423 at 444 [54] (Gleeson CJ, Heydon and Crennan JJ), 445 [58] (Gummow and Hayne JJ),

42. For the reasons expressed above, the function conferred by s146C does not impair the decisional independence of the Commission.

43. Further, the appearance of the Industrial Court's independence is necessarily informed by the historical context. That context, as outlined in paragraphs 8 to 10 of the Respondents' Submissions, is that the Industrial Court and its predecessors have been part of a legislative scheme in which both non-judicial and judicial functions have been conferred on a combination of judicial and non-judicial bodies.

44. The reasonable member of the public in considering the effect of s146C(1) will have regard to s 146C(5).

10 > A legislatively prescribed detachment of a State judge from his or her court when performing a non-judicial function may weigh in the balance against a finding of impairment of the institutional integrity of the court. [78]

Section 146C(5) weighs against the finding of any impairment of institutional integrity of the Industrial Court.

45. Irrespective of their partially common membership, the provisions of the Act show a clear intention to maintain the historical division between the Commission and the Court. Therefore the operation of s146C would not give rise to a perception in the minds of the ordinary reasonable member of the public that the Industrial Court could not "render invested federal jurisdiction impartially in accordance with federal law".[79]

20 46. Further the Appellant seeks to diminish the effect of the "legislatively prescribed detachment" within s 146C(5), by impugning the integrity of the Court through the application of s105(2). The proper characterisation of s105 is contained within the Respondent's Submissions at paragraphs 38-40. Unlike the "vice" of the impugned law in *Wainohu*, the function conferred upon the Commission is not the necessary foundation for the exercise of the Court's functions, nor is it "necessarily ... unexplained and unable to

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78 *Wainohu v New South Wales* (2011) 243 CLR 181 at 211 [50] (French CJ, Kiefel J).

79 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 602 [44] (McHugh J).

be explained by the Court".[80] That the definition of what is an "unfair contract" under the Act is modified by s105(2) does not lead to the perception that the Court is a mere instrument of government policy; the Court's jurisdiction as to unfair contract proceedings generally is unaffected and determined on its merits.[81]

Conclusion

47. South Australia contends that the appeal should be dismissed.

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80 *Wainohu v New South Wales* (2011) 243 CLR 181 at 219-20 [69] (French CJ, Kiefel J), 229-30 [109] (Gummow, Hayne, Crennan and Bell JJ).

81 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] (Gleeson CJ).