



## HIGH COURT OF AUSTRALIA

7 September 2011

JEMENA ASSET MANAGEMENT (3) PTY LTD & ORS v COINVEST LIMITED  
[2011] HCA 33

Today the High Court dismissed an appeal from a decision of the Full Court of the Federal Court which held that the *Construction Industry Long Service Leave Act 1997* (Vic) ("the State Act") was not inconsistent with federal industrial instruments made under the *Workplace Relations Act 1996* (Cth) ("the Commonwealth Act") in relation to long service leave ("the federal instruments") within the meaning of s 109 of the Constitution.

The appellant companies carried on businesses in the operation of electricity infrastructure assets. In the course of business, the appellants employed persons to perform construction work and were bound by the federal instruments. The federal instruments imposed obligations on employers to grant, and pay for, long service leave in relation to their qualifying employees and governed the circumstances in which such entitlements would accrue. The Commonwealth Act provided for the paramountcy of industrial instruments made under federal legislation over State laws.

The State Act provided for a scheme for portable long service leave benefits in the construction industry. The respondent was the trustee of the Construction Industry Long Service Leave Fund established by the State Act under a trust deed ("the trust deed"). The State Act obliged the appellants to register with the respondent and pay the respondent a long service leave charge in respect of every worker employed by them to perform construction work. Fund Rules made by the respondent under the trust deed provided that every worker was entitled to a long service leave benefit in respect of continuous service performing construction work for an employer.

On 24 February 2006 the respondent requested the appellants to provide relevant details of their workers and to make payments pursuant to the State Act. Between May 2006 and July 2007, the respondent issued the appellants with notices requesting information regarding certain of the appellants' employees. On 3 October 2007, the respondent advised the second appellant that it would commence proceedings against the second appellant in relation to its failure to comply with one of the notices.

On 5 October 2007 the appellants brought proceedings against the respondent in the Federal Court because they feared imminent prosecution under the State Act. The issue was whether the State Act, including the scheme established under it, was inconsistent with certain provisions of the Commonwealth Act embodied in the federal instruments and therefore invalid by reason of s 109 of the Constitution. The primary judge and the Full Court of the Federal Court held that the State Act was not inconsistent with the federal instruments within the meaning of s 109 of the Constitution. The appellants appealed, by special leave, to the High Court.

The High Court held that the State Act was not inconsistent with the federal instruments within the meaning of s 109 of the Constitution. The Court held that employees' entitlements to long service leave benefits under the State Act could only be in the form of payment from the Fund. There was

no provision for the grant of any long service leave, a subject which was covered by the federal instruments. While the federal instruments dealt with all the obligations and entitlements of employers and employees in respect of the grant of, and payment for, long service leave arising in the employment relationship, they did not deal with, or even mention, portable long service leave benefits for workers in continuous service within the construction industry. The Court also held that the State Act did not undermine an employer's obligations under the federal instruments to grant, and pay for, long service leave or an employee's entitlement to receive such leave.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*