HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

COAL AND ALLIED OPERATIONS PTY LTD APPELLANT

AND

THE FULL BENCH OF THE
AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION & ORS RESPONDENTS

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47
31 August 2000
S158/1999

ORDER

1. Appeal allowed.

2. Orders of the Full Court of the Federal Court of Australia made 6 November 1998 set aside. In lieu thereof, the application for relief under s 75(v) of the Constitution is dismissed.

On appeal from the Federal Court of Australia

Representation:

J N West QC with G J Hatcher for the appellant (instructed by Freehill Hollingdale & Page)

No appearance for the first respondent

W R Haylen QC with R Reitano for the second, third and fourth respondents (instructed by R L Whyburn & Associates)

S Crawshaw SC with I Taylor for the fifth respondent (instructed by Crown Solicitor for New South Wales)

2.

CATCHWORDS

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission

Administrative law – Judicial review – Prohibition – Mandamus – Whether erroneous finding of appealable error in the exercise of appellate jurisdiction amounts to jurisdictional error – Whether such an error is an error within jurisdiction – Whether misconception of appellate function amounts to jurisdictional error – Whether discretionary decision may be challenged if error in decision-making process can be demonstrated or inferred.

Appeals – Industrial tribunal – Forms of appeal – Character of appellate jurisdiction – Whether misconception amounts to error within jurisdiction or error permitting judicial review.

Industrial law (Cth) – Australian Industrial Relations Commission – Appeals – Nature of an appeal to the Full Bench of the Australian Industrial Relations Commission from discretionary decision of single member – Whether appeal under s 45 of the *Workplace Relations Act* 1996 (Cth) permits Full Bench to exercise discretionary power afresh in absence of appealable error – Whether appeal in strict sense or by way of rehearing.

Words and phrases – "appeal" – "discretionary decision" – "jurisdictional error".

Constitution, s 75(v).
Workplace Relations Act 1996 (Cth), ss 45, 170MW(1), (3).

1 GLEESON CJ, GAUDRON AND HAYNE JJ. The question raised in this appeal is whether the Full Court of the Federal Court of Australia ("the Full Court") erred in granting relief under s 75(v) of the Constitution with respect to a decision and orders of a Full Bench of the Australian Industrial Relations Commission ("the Commission"). The Full Bench of the Commission had allowed an appeal from a decision and orders of a Presidential Member, Boulton J, terminating a bargaining period under s 170MW of the *Workplace Relations Act* 1996 (Cth) ("the Act") and declaring that no new bargaining period should be initiated until 11 March 1998.

2 In order to understand the issues in this matter, it is necessary to say something as to Div 8 of Pt VIB of the Act. The provisions of that Division are concerned with the procedures to be adopted with respect to the negotiation of certified agreements under the Act. Those procedures include procedures for the initiation of a bargaining period[1] and, also, for its suspension or termination. Pursuant to s 170MW(1) of the Act, the Commission has a discretion to suspend or terminate a bargaining period if, but only if, satisfied as to one of the circumstances set out in sub-ss (2) to (7) of that section. Section 170MW(3) provides:

> " A circumstance for the purposes of subsection (1) is that industrial action that is being taken to support or advance claims in respect of [a] proposed agreement is threatening:
>
> (a) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
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> (b) to cause significant damage to the Australian economy or an important part of it."

3 In 1997, during a bargaining period, industrial action was taken at the Hunter Valley No 1 Mine of Coal and Allied Operations Pty Limited ("the Company"). The action, which involved the Construction, Forestry, Mining and Energy Union ("the Union") and its members, was taken in support of claims in a proposed agreement. During the course of that action, application was made to the Commission to terminate the bargaining period. That application was heard by Boulton J. His Honour was satisfied that the industrial action was "threatening to endanger the welfare of part of the population, namely the people of the Hunter Valley region"[2] and, also, that it was "threatening, through its

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1 Section 170MI of the Act.

2 *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1997) 77 IR 269 at 281.

potential for escalation, to cause significant damage to the Australian economy or an important part of it."[3] And being so satisfied, his Honour exercised his discretion to make the orders earlier referred to.

4 The Company sought leave to appeal from the decision of Boulton J to a Full Bench of the Commission. In due course, leave was granted, the appeal upheld and the orders of Boulton J set aside[4]. The Union then applied to this Court for relief under s 75(v) of the Constitution[5]. That application was remitted to the Federal Court[6] and, in due course, that court held that, by allowing the appeal from Boulton J, the Full Bench of the Commission had constructively failed to exercise its jurisdiction[7].

5 The question whether, in allowing the appeal from the decision and orders of Boulton J, the Full Bench of the Commission constructively failed to exercise its jurisdiction necessitates a consideration of the nature of an appeal under s 45 of the Act. That section relevantly provides:

> "(1) Subject to [the] Act, an appeal lies to a Full Bench, with the leave of the Full Bench, against:

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3 (1997) 77 IR 269 at 284.

4 *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14.

5 Section 75 of the Constitution provides:

> " In all matters:
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> ...
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
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> the High Court shall have original jurisdiction."

6 See s 44 of the *Judiciary Act* 1903 (Cth).

7 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200 at 245 per Spender, Moore and Branson JJ.

(a) a decision of a member of the Commission by way of a finding in relation to an industrial dispute or alleged industrial dispute;

(b) an award or order made by a member of the Commission, other than an award or order made by consent of the parties to an industrial dispute;

...

(d) a decision of a member of the Commission under paragraph 111(1)(g);

...

(f) a decision (other than in relation to a prescribed matter) in a proceeding before a designated Presidential Member acting in that capacity; and

...

(2) A Full Bench shall grant leave to appeal under subsection (1) if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.

...

(6) For the purposes of an appeal under this section, a Full Bench:

(a) may admit further evidence; and

(b) may direct a member of the Commission to provide a report in relation to a specified matter.

(7) On the hearing of the appeal, the Full Bench may do one or more of the following:

(a) confirm, quash or vary the decision or act concerned;

(b) make an award, order or decision dealing with the subject-matter of the decision or act concerned;

(c) direct the member of the Commission whose decision or act is under appeal, or another member of the Commission, to take further action to deal with the subject-matter of the

decision or act in accordance with the directions of the Full Bench;

(d) in the case of an appeal under paragraph (1)(d) – take any action (including making an award or order) that could have been taken if the decision under paragraph 111(1)(g) had not been made.

..."

In the present case, the appeal was an appeal under par (b) of s 45(1) of the Act.

6 In their separate decisions allowing the appeal from the decision of Boulton J, the Presidential Members of the Full Bench, Giudice and Munro JJ, each referred to the nature of an appeal under s 45 of the Act. The President, Giudice J, referred to the practice of the Commission, based on the decision of this Court in *House v The King*[8], to treat "the demonstration of error as the determinative consideration on the merits of an appeal from the exercise of a discretion" and suggested that there was a distinction between that practice and an appeal by way of rehearing[9]. Munro J was of the view that there was a clear distinction to be drawn between the application of the principles in *House v The King*[10] and an appeal by way of rehearing and proceeded on the basis that the former necessitated the identification of error at first instance whereas the latter did not[11]. The third member of the Full Bench, Larkin C, concurred with and adopted the decision of Giudice J, albeit subject to a reservation[12]. That reservation did not relate to the nature of appeal under s 45.

7 The genesis of the distinction suggested by Giudice J and asserted by Munro J in the decision allowing the appeal from Boulton J can be traced to the decision of this Court in *Re Coldham; Ex parte Brideson [No 2]*[13]. That case concerned an appeal from a decision by the Registrar of the Commission to

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8 (1936) 55 CLR 499.

9 (1998) 80 IR 14 at 27-28.

10 (1936) 55 CLR 499.

11 (1998) 80 IR 14 at 63.

12 (1998) 80 IR 14 at 65-66.

13 (1990) 170 CLR 267.

register an association as an organisation of employees under the *Conciliation and Arbitration Act* 1904 (Cth). The appeal was governed by s 88F of that Act which relevantly provided, in sub-ss (3) and (4), that:

> " The Commission may take further evidence for the purposes of an appeal under this section"

and

> " Upon the determination of an appeal under this section ... the Commission shall make such order as it thinks fit and may confirm, quash or vary a decision of the Registrar appealed from."

8 It was held in *Brideson [No 2]* that, by reason of the terms of sub-ss (3) and (4) of s 88F and by reason, also, of the nature of the decision with respect to which an appeal might be brought under that section, "the Commission was bound to make its own decision on the evidence before it, including evidence of events which had occurred since the [decision under appeal]"[14]. It was also held that, although the question whether there had been some error on the part of the Registrar was relevant to the grant of leave to appeal, once leave was granted, "the Commission was bound to make its own decision on the evidence before it, including any further evidence [received on appeal]"[15].

9 The Full Court noted that s 45 of the Act allows for an appeal to a Full Bench of the Commission from various different decisions, some of which involve discretionary powers and others of which do not. It identified decisions to dismiss a matter or refrain from hearing an industrial dispute under s 111(1)(g) of the Act as truly discretionary and decisions with respect to the existence of an industrial dispute as involving no discretion, even though both might be the subject of an appeal under s 45(1)[16]. The Full Court also noted that decisions with respect to the registration of an association as an organisation of employees, which are now made by a designated Presidential Member, may also be the subject of an appeal under s 45(1)(f) of the Act[17].

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14 (1990) 170 CLR 267 at 274.

15 (1990) 170 CLR 267 at 275.

16 (1998) 89 FCR 200 at 229. In the case of a decision under s 111(1)(g), an appeal may be brought under s 45(1)(d). In the case of a decision as to the existence of an industrial dispute, an appeal may be brought under s 45(1)(a).

17 (1998) 89 FCR 200 at 230.

10 Because s 45(1) of the Act is concerned with appeals from a variety of different decisions, the Full Court held that "s 45 was intended to create several types of appeal with differing characteristics having regard to the power, act or function against which an appeal can be brought."[18] In the view of the Full Court, "[i]f the power, act or function ... is truly discretionary ... the appellate function ... involves ascertaining whether the exercise of the discretion was attended by appealable error of the type discussed in *House v The King*."[19] On the other hand, it was said, "the powers and functions of the Full Bench are not so constrained" in the case of "a function that must be exercised by reference to current facts ... such as a decision of a designated presidential member under s 189 to register an association of employees as an organisation of employees"[20].

11 It was pointed out in *Brideson [No 2]* that "the nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]"[21]. The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. There is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another[22].

12 It is common and often convenient to describe an appeal to a court or tribunal whose function is simply to determine whether the decision in question was right or wrong on the evidence and the law as it stood when that decision was given as an appeal in the strict sense. An appeal to this Court under s 73 of the Constitution is an appeal of that kind[23]. In the case of an appeal in the strict

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18 (1998) 89 FCR 200 at 229.

19 (1998) 89 FCR 200 at 229.

20 (1998) 89 FCR 200 at 230.

21 (1990) 170 CLR 267 at 273-274. See also *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 per Mason J; *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] per Gaudron J.

22 See *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA.

23 See *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

sense, an appellate court or tribunal cannot receive further evidence[24] and its powers are limited to setting aside the decision under appeal and, if it be appropriate, to substituting the decision that should have been made at first instance[25].

13 If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing[26].

14 Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law[27], a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker[28]. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error[29]. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance[30].

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24 See *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

25 See *Allesch v Maunz* [2000] HCA 40.

26 See *Allesch v Maunz* [2000] HCA 40.

27 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-108 per Dixon J.

28 *Allesch v Maunz* [2000] HCA 40. See also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ.

29 See *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ.

30 *R v Pilgrim* (1870) LR 6 QB 89 at 95 per Lush J; *Sweeney v Fitzhardinge* (1906) 4 CLR 716; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at

(Footnote continues on next page)

15 The provision considered in *Brideson [No 2]* conferred power on the Commission to take further evidence, a provision which is indicative of an appeal by way of rehearing. It also required the Commission to "make such order as it [thought] fit"[31]. The latter requirement indicated that the Commission's appellate powers were not constrained by the need to identify error on the part of the primary decision-maker, but, rather, that the Commission was obliged to give its own decision on the evidence before it.

16 The terms of s 45 of the Act are different from the terms of the provision considered in *Brideson [No 2]*. Unlike that provision, s 45 does not require a Full Bench of the Commission to "make such order as it thinks fit". Nor is there anything else in the terms of s 45 to suggest that the powers of a Full Bench are exercisable or, as in *Brideson [No 2]*, are required to be exercised in the absence of error on the part of the primary decision-maker.

17 Because a Full Bench of the Commission has power under s 45(6) of the Act to receive further evidence on appeal, an appeal under that section is properly described as an appeal by way of rehearing. And because there is nothing to suggest otherwise, its powers under sub-s (7) are exercisable only if there is error on the part of the primary decision-maker. And that is so regardless of the different decisions that may be the subject of an appeal under s 45.

18 The Full Court was in error in thinking that the nature of an appeal under s 45 differs according to the nature of the decision under appeal. However, it was correct to hold that, in the case of a discretionary decision, the exercise by a Full Bench of the Commission of its powers under s 45(7) of the Act depends on the decision at first instance being attended by appealable error[32]. That being so, it is necessary to consider the manner in which the Full Bench determined the appeal from Boulton J. Before doing so, however, it is convenient to say something as to the concept of "a discretionary decision".

19 "Discretion" is a notion that "signifies a number of different legal concepts"[33]. In general terms, it refers to a decision-making process in which "no

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297-298 per Glass JA; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 at 7-8 per Kearney J.

31 (1990) 170 CLR 267 at 272.

32 (1998) 89 FCR 200 at 229.

33 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ.

one [consideration] and no combination of [considerations] is necessarily determinative of the result."[34] Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made[35]. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion[36]. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

20 In the present case, the decision by Boulton J to terminate the bargaining period involved, in effect, two discretionary decisions. The first was as to his satisfaction or otherwise that the industrial action being pursued posed a threat for the purposes of s 170MW(3) of the Act. Although that question had to be determined by reference to the facts and circumstances attending the industrial action taken in support of claims with respect to a certified agreement, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision. And if Boulton J was satisfied that there was a threat for the purposes of s 170MW(3), that necessitated the making of a further discretionary decision as to whether the bargaining period should be terminated.

21 Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process[37]. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* in these terms:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he

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34 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 per Gaudron J.

35 See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 75-76 per Gaudron J; *Russo v Russo* [1953] VLR 57 at 62 per Sholl J. See also Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 5-6.

36 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49.

37 See *Norbis v Norbis* (1986) 161 CLR 513 at 518-519 per Mason and Deane JJ.

> does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."[38]

22 The members of the Full Bench considered whether there was error in the decision-making process in which Boulton J engaged. In this regard, it is sufficient to refer to the decision of the President, Giudice J. As already noted, his Honour's decision was adopted by Larkin C subject to one reservation. That reservation bore neither on the question whether the decision of Boulton J was attended with error nor on the final disposition of the appeal to the Full Bench. Rather, the stated reservation was concerned to endorse the view expressed by Munro J that because negotiating parties could not be put back in the same bargaining position even though an order setting aside a bargaining period was quashed, there was a need for principles stated by the Bench to be observed in future applications under s 170MW(1) of the Act[39]. Accordingly, the decision of Giudice J is to be treated as the decision of the Full Bench.

23 In the view taken by Giudice J, the decision of Boulton J to terminate the bargaining period involved error in a number of respects. For present purposes, it is sufficient to note only one, namely, that, "on the material and evidence ... no positive finding could properly be made pursuant to s 170MW(3)."[40] Giudice J identified a number of respects in which the evidence was deficient.

24 So far as concerns the satisfaction of Boulton J that industrial action was threatening the welfare of a part of the population, namely, the population of the Hunter Valley, Giudice J noted that there was no evidence of "the size of its workforce, the number of contractors the mine regularly engaged compared with the number of contractors in the region, the number of businesses effected [sic] compared with the number of businesses within the region, or the size of the regional economy."[41] And so far as concerns the finding that the action was threatening significant damage to the economy of Australia or an important part of it, Giudice J noted that there was "[n]o data concerning the size of the economy of the region ... the size of the economy of New South Wales or any other data which would have enabled relevant quantifications to be made"[42].

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38 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

39 (1998) 80 IR 14 at 65-66.

40 (1998) 80 IR 14 at 52.

41 (1998) 80 IR 14 at 48-49.

42 (1998) 80 IR 14 at 51.

25 Notwithstanding that Giudice J found error on the part of Boulton J, set out the statement of principle in *House v The King*[43] and stated his conclusion in terms indicating observance of that principle[44], the Full Court held that that approach involved a constructive failure to exercise the appellate jurisdiction conferred by s 45 of the Act[45]. In concluding that the Full Bench of the Commission constructively failed to exercise its jurisdiction, the Full Court described the approach taken by Giudice J in these terms:

> " What his Honour appears, in substance, to have done was to characterise, correctly, the nature of the power conferred by s 170MW(1) and identify, correctly, the scope of the grounds upon which its exercise could be impugned but also to lay a foundation for some wider basis for reviewing the exercise of the power by Boulton J having regard to 'the supervisory function' of a Full Bench. That this was the approach of [Giudice J] is apparent from his later detailed analysis of Boulton J's reasons for decision and criticisms of it. It resulted in [Giudice J] misconceiving the nature of the power exercised by Boulton J and identifying errors that, in truth, were not errors but incidents of the proper exercise of [his] power[s]"[46].

26 In thus characterising the approach taken by Giudice J, the Full Court analysed the decision of Boulton J and concluded that there were no errors in his Honour's approach[47]. That being so, in the view of the Full Court, the Full Bench had proceeded on the basis that "an appeal against the exercise of a discretionary power of the type conferred by s 170MW(1), was by way of rehearing and that [it] was not only competent, but obliged, to determine for itself whether it is satisfied that a circumstance within the meaning of s 170MW(3)(a) existed at the time of Boulton J's decision"[48]. And that, in the view of the Full Court, "[was]

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43 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

44 (1998) 80 IR 14 at 51.

45 (1998) 89 FCR 200 at 245.

46 (1998) 89 FCR 200 at 233.

47 (1998) 89 FCR 200 at 233.

48 (1998) 89 FCR 200 at 245.

not error within jurisdiction" but "a constructive failure to exercise the jurisdiction conferred ... by s 45"[49].

27 For reasons that will be given shortly, it is not necessary to decide whether the Full Bench of the Commission was correct in ascribing error to Boulton J. However, it may conveniently be noted that the process by which the Full Court concluded that Giudice J "[identified] errors that, in truth, were not errors"[50] is not beyond criticism. For example, the Full Court considered that Giudice J mistook the nature of the exercise involved in forming the satisfaction that industrial action is threatening "to cause significant damage to the Australian economy" for the purposes of s 170MW(3)(b) of the Act because he implied "that a measurable likely effect on the economy must be identified and then an assessment made whether that was 'threatening ... to cause significant damage'."[51] In the view of the Full Court, Giudice J was in error because all that was necessary was that "there [be] some material that might reasonably found that satisfaction"[52].

28 As already explained, the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment. A decision under that sub-section would involve appealable error if, for example, regard was had to irrelevant material, relevant material was disregarded, or, although there was some factual material by reference to which the decision-maker might be satisfied, he or she mistook those facts. If the Full Court intended to suggest otherwise, it was wrong. More to the point, however, is that a decision under s 170MW(3)(b) that industrial action is "threatening ... to cause *significant* damage to the Australian economy or an *important* part of it" (emphasis added) is not simply a matter of impression or value judgment. The presence of the words "significant" and "important" in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question. That was the point of the observations of Giudice J with respect to the absence of economic data.

29 As already noted, the Full Court held that the Full Bench of the Commission fell into jurisdictional error by treating an appeal under s 45 as an

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49 (1998) 89 FCR 200 at 245.

50 (1998) 89 FCR 200 at 233.

51 (1998) 89 FCR 200 at 242.

52 (1998) 89 FCR 200 at 242.

appeal of the kind which obliged the Full Bench to determine, in the absence of error on the part of Boulton J, whether there was or was not a circumstance within the meaning of s 170MW(3) of the Act. It may be noted that, had the Full Bench proceeded on that basis, it would have exceeded its jurisdiction. It would not have failed to exercise its jurisdiction, whether actually or constructively.

30 The Full Court concluded that the Full Bench of the Commission fell into jurisdictional error because it proceeded on the basis that the decision of Boulton J was attended by appealable error when it was not. And it did so, in the view of the Full Court, because of its "fundamental misconception ... of the Commission's role arising from the combined operation of s 170MW(1) and (3)."[53] To misconceive the role of the Commission under s 170MW of the Act (assuming that that is what the Full Bench did) does not constitute jurisdictional error on the part of the Full Bench.

31 There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[54], it "misunder[stood] the nature of [its] jurisdiction ... or 'misconceive[d] its duty'[55] or '[failed] to apply itself to the question which [s 45 of the Act] prescribes'[56] ... or '[misunderstood] the nature of the opinion which it [was] to form'[57]". The Full Bench did none of those things.

32 In his reasons for decision, Giudice J proceeded on the basis that the Full Bench could intervene only if there was error on the part of Boulton J. In this his Honour was correct. Giudice J held that there was error on the part of Boulton J. If he was wrong in that view (a matter upon which it is unnecessary to express an opinion), that was an error within jurisdiction not an error as to the nature of the jurisdiction which the Full Bench was required to exercise under s 45 of the Act. Accordingly, it was not an error in respect of which relief could be granted by way of prohibition or mandamus under s 75(v) of the Constitution.

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53 (1998) 89 FCR 200 at 239.

54 (1947) 47 SR (NSW) 416 at 420.

55 Referring to *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243.

56 Referring to *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243.

57 Referring to *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

33 The appeal should be allowed, the orders of the Full Court of the Federal Court set aside and, in lieu thereof, the application for relief under s 75(v) of the Constitution should be dismissed.

34 KIRBY J. This appeal from orders of the Full Court of the Federal Court of Australia[58] ("the Full Court") follows a grant of special leave confined to a limited point[59]. So confined, the issue is whether the Full Court erred in finding jurisdictional error on the part of the Full Bench of the Australian Industrial Relations Commission ("the Commission") grounding an entitlement to constitutional writs and the relief ancillary thereto ("constitutional relief"[60]) addressed to the Commission.

35 By its orders, the Full Court directed that writs of certiorari and Mandamus issue to the members of the Full Bench, comprising Giudice J (President), Munro J and Commissioner Larkin ("the Full Bench"). The writ of certiorari removed the decision of the Full Bench that had upheld an appeal against the decision and orders of Boulton J, a member of the Commission, and quashed those orders. The writ of Mandamus directed that the Commission hear the appeal to it in accordance with law. The question before this Court is whether, in making such orders, the Full Court itself erred.

The facts

36 In order to understand the point in issue, it is essential to describe what happened before and after this litigation commenced. However, because of the limited grant of special leave, it is unnecessary to record more than an outline of the complex background facts.

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58 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200 ("*CFMEU v AIRC*").

59 *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1999) 20(17) LegRep SL 5. Special leave was granted by the Court (Gaudron ACJ and Callinan J) confined to the supposed error of the Full Court in finding "an error on the part of the Full Bench of the Australian Industrial Relations Commission grounding an entitlement to prerogative relief".

60 I have used the expression "constitutional relief" to refer to relief pursuant to s 75(v) of the Constitution and the supplementary powers belonging to this Court (and the Federal Court on remitter) to make such constitutional relief effective. The use of the expression "prerogative relief" should be avoided where the relief claimed arises under the Constitution. There is no room there for intrusion of the Royal prerogative. Although it lies in the background of the history of the relief afforded by s 75(v) of the Constitution, that relief is not confined to such history. Nor does its validity rest upon the incidents of that history but only on the Constitution and any federal legislation lawfully supplementing it. Use of "prerogative relief" may tend to mislead and so should be discarded.

37 In 1997, the Construction, Forestry, Mining and Energy Union (the second respondent), the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the third respondent), and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the fourth respondent) ("the unions") and their respective members employed by Coal and Allied Operations Pty Ltd ("the appellant") were engaged in an industrial dispute. The dispute concerned the wages and conditions of members of the unions working at the Hunter Valley No 1 coal mine in New South Wales.

38 In March 1997, the unions initiated bargaining periods pursuant to s 170MI of the *Workplace Relations Act* 1996 (Cth) ("the Act") with the consequence that the Commission could not arbitrate the dispute[61] and the unions enjoyed immunity from civil suit in relation to industrial action whilst the bargaining periods continued[62]. The industrial action included picketing which seriously interfered with access to, and egress from, the mine. It eventually resulted in proceedings in the Supreme Court of New South Wales where an interlocutory injunction was granted against the unions[63]. However, despite this injunction, a strike of the workers at the mine which commenced in September 1997 continued until November 1997 when Boulton J, by order, determined that the bargaining periods should be terminated[64]. The power to so order is contained in s 170MW of the Act.

39 As Boulton J expressed it, the exercise of the power under s 170MW to suspend or terminate a bargaining period under the Act is a course "only available in exceptional circumstances"[65]. The exercise of the power gave rise to obligations on the part of the Commission to conciliate between the parties, and failing this, to exercise its arbitration powers[66]. The appellant appealed against the order of Boulton J. That appeal was heard by the Full Bench ("the first Full

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61 The Act, s 170N.

62 The Act, s 170MT.

63 *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 76 IR 50.

64 *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1997) 77 IR 269 ("decision of Boulton J").

65 Decision of Boulton J (1997) 77 IR 269 at 284.

66 The Act, s 170MX.

Bench") and its decision and orders were delivered on 29 January 1998[67] ("the first Full Bench decision"). It unanimously upheld the appeal and quashed the orders of Boulton J. However, as will appear, each member constituting the Full Bench gave separate reasons for decision. The differences between those reasons have occasioned some of the disputes in the litigation that followed.

40 The unions applied to this Court for the constitutional writs of Mandamus and prohibition and for the ancillary relief of certiorari[68] to have the decision and orders of the first Full Bench quashed. By order[69], the proceedings on that application were remitted to the Federal Court. The application was then heard by a Full Court of that Court and determined in November 1998 in favour of the unions[70]. The first Full Bench orders were quashed. The matter was returned to the Commission for determination in accordance with law.

41 The appeal against Boulton J's orders was then relisted before the same members of the Commission. In May 1999, the Full Bench ("the second Full Bench") delivered its decision[71] ("the second Full Bench decision"). A single set of reasons was given for that decision. Although granting leave to appeal (on the basis that an important question was raised) the second Full Bench then decided that the appeal should be dismissed. In consequence, the original orders of Boulton J stand.

42 The appellant contends that the Full Court erred in disturbing the original decision and orders of the first Full Bench. The submission is that, in effect, the Full Court treated the proceeding as if it were a general appeal to that Court from the first Full Bench decision and orders. The appellant complains that the Full Court effectively concerned itself with its view of the merits of the appeal to the Full Bench and did not confine itself to the strictly limited circumstances in which constitutional relief might be granted by a court such as the Federal Court, addressed to a tribunal, such as the Commission.

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67 *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14.

68 Pursuant to *Judiciary Act* 1903 (Cth), ss 32, 33.

69 *Re Coal and Allied Operations Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* unreported, High Court of Australia, 23 March 1998 per McHugh J. Jurisdiction is conferred on the Federal Court by the Act, s 412(2) and (3).

70 *CFMEU v AIRC* (1998) 89 FCR 200.

71 *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1999) 94 IR 37.

The key legislative provisions

43 Before embarking on a description of the successive decisions of the Commission and the decision of the Full Court that give rise to this appeal, it is useful to note the key provisions of the Act. The power of the Commission to suspend or terminate a bargaining period appears in s 170MW of the Act. It is stated in the following terms, relevantly:

> "(1) Subject to subsection (8), the Commission *may*, by order, suspend or terminate the bargaining period if, after giving the negotiating parties an opportunity to be heard, *it is satisfied* that any of the circumstances set out in subsections (2) to (7) exists or existed.
>
> ...
>
> (3) A circumstance for the purposes of subsection (1) is that industrial action that is being taken to support or advance claims in respect of the proposed agreement is threatening:
>
> (a) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
>
> (b) to cause significant damage to the Australian economy or an important part of it." (emphasis added)

44 Section 45 of the Act allows for an appeal against an order of the Commission made under s 170MW(1) of the Act to the Full Bench of the Commission. The relevant provisions of s 45(1), (2), (6) and (7) are set out in the reasons of the other members of this Court[72] and I will not repeat them.

The decision of the primary decision-maker

45 In his decision of November 1997, Boulton J outlined the limited circumstances in which he was authorised to terminate a bargaining period under the Act[73]. His Honour described the course of the industrial dispute between the appellant and the unions which had resulted in strike action and set out a history of the previous proceedings. He noted the explanation of s 170MW contained in the Explanatory Memorandum which accompanied the Bill inserting that provision in the Act as being to set out "certain circumstances in which the

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72 Reasons of Gleeson CJ, Gaudron and Hayne JJ at [5]. See also reasons of Callinan J at [100].

73 Decision of Boulton J (1997) 77 IR 269 at 269-270.

Commission may arbitrate if bargaining for an agreement is producing seriously harmful effects for the country or the economy"[74]. His Honour acknowledged the Second Reading Speech of the Minister introducing the Bill to the effect that the emphasis of the new Act was to be on "the need for conciliation to be exhausted before any consideration is given to arbitration"[75]. He set out various submissions relating to the intended operation of s 170MW and referred to earlier consideration of the section by Full Benches of the Commission[76]. Boulton J then collected "all the material and evidence presented"[77] from which he derived the following conclusions:

> "On the basis of the material before me, *I am satisfied* that the strike action being taken at the Mine is threatening to endanger the welfare of part of the population, namely the people of the Hunter Valley region."[78]
>
> "On the basis of the material before me, *I am also satisfied* that the industrial action at the Mine is threatening to cause significant damage to an important part of the Australian economy."[79]

46 These preconditions being established, Boulton J then turned to exercise "[t]he discretion given under s 170MW(1)"[80]. He accepted that "very careful

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74 Australia, Senate, *Explanatory Memorandum: Workplace Relations and Other Legislation Amendment Bill 1996* at [9.164]: see decision of Boulton J (1997) 77 IR 269 at 276.

75 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 May 1996 at 1303: see decision of Boulton J (1997) 77 IR 269 at 277.

76 eg *Re Public Sector Union (Australian Broadcasting Corporation) (Interim) Award 1992* unreported, Australian Industrial Relations Commission, Dec 1383/94 S Print L4605, 31 August 1994; *Re Department of Health and Community Services (Victoria)* unreported, Australian Industrial Relations Commission, Dec 466/95 S Print L9810, 3 March 1995; *Re South Australian Health Commission* unreported, Australian Industrial Relations Commission, Dec 1575/95 Print M3485, 12 July 1995; *Re Citipower Pty* unreported, Australian Industrial Relations Commission, Dec 856/97 M Print P3359, 21 July 1997 noted in decision of Boulton J (1997) 77 IR 269 at 278-279.

77 Decision of Boulton J (1997) 77 IR 269 at 280.

78 Decision of Boulton J (1997) 77 IR 269 at 281 (emphasis added).

79 Decision of Boulton J (1997) 77 IR 269 at 282 (emphasis added).

80 Decision of Boulton J (1997) 77 IR 269 at 284.

consideration"[81] had to be given before the discretion provided by that sub-section could be exercised. He listed numerous considerations as relevant, including the prolonged character of the dispute, the social tensions and disruptions which it had caused which had the potential to "inflict serious damage on the Australian, New South Wales and regional economies"[82], the hard-fought character of the conflict and the low possibility (as he assessed it) that further negotiation would result in resolution of the dispute through an orderly process that was fair both to the appellant and to the workers concerned. Having expressed his "satisfaction" in the stated terms and the reasons for exercising his discretion, Boulton J proceeded to make orders under s 170MW. In accordance with the practice of the Commission, he also made certain recommendations designed to discourage further picketing and to facilitate a resumption of work. His final remarks indicated that further conciliation discussions would ensue and "if appropriate, arbitration by a Full Bench of the Commission"[83].

The decision of the first Full Bench

47 The principal reasons of the first Full Bench were given by Giudice J, President of the Commission. Part of his reasons were addressed to the principles governing an appeal from a decision of a single member of the Commission to the Full Bench[84]. His Honour acknowledged the threshold requirement established by s 45(1) of the Act that an appellant should secure the leave of the Full Bench to appeal. He also noted the obligation imposed by s 45(2) of the Act that the Full Bench must grant such leave if, in its opinion, the matter "is of such importance that it is in the public interest that leave should be granted"[85].

48 In an important passage of his reasons, Giudice J turned to a point critical to these proceedings, namely that the condition precedent to the exercise of the discretion provided by s 170MW of the Act is not the objective *existence* of specified facts and circumstances, but the *satisfaction* of the Commission member with the primary duty to decide the matter. His Honour said[86]:

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81 Decision of Boulton J (1997) 77 IR 269 at 284.

82 Decision of Boulton J (1997) 77 IR 269 at 284-285.

83 Decision of Boulton J (1997) 77 IR 269 at 286.

84 This is Part 4, "Principles applicable to appeal", of the reasons of Giudice J: see first Full Bench decision (1998) 80 IR 14 at 27.

85 First Full Bench decision (1998) 80 IR 14 at 27.

86 First Full Bench decision (1998) 80 IR 14 at 29-30 (emphasis added).

> "There is well established authority to the effect that a tribunal's or public officer's '*satisfaction*' in such a context must not be capricious. The Commission may only be satisfied if its decision to that effect is based upon relevant considerations and the evidence. However, unless such satisfaction is shown to be unreasonable, an appeal or judicial review tribunal would not generally intervene to set aside such an assessment. Certainly, it would not ordinarily do so merely to substitute its own view on how the discretion should be, or should have been, exercised in the matter[87]. That principle does not preclude the Commission at Full Bench level from exercising a supervisory function on the merits of particular instances. It may choose to do so in order to ensure a consistency of approach to the exercise of the discretion. That function is a concomitant of the appellate function under s 45. Having regard to the policy and objects reflected in the Act, the likelihood is that any arbitration under s 170MX will be in the nature of a special case. It may be expected therefore that any decision made in relation to s 170MW(3) that is not made by a Reference Bench under s 107 will be open to scrutiny at Full Bench level should an appeal be instituted."

49 Having concluded that the appellate function conferred on the Full Bench by s 45 of the Act was to be approached in this way, and that the Full Bench enjoyed a general "supervisory" function (with the power, if it chose to do so, to review the merits "of particular instances" and to impose "consistency of approach [on] the exercise of the discretion" throughout the Commission), Giudice J proceeded to an examination of the specific evidence on which Boulton J had acted in reaching the double "satisfaction" that he had expressed. His Honour continued[88]:

> "[T]he main thrust of the appeal was that the evidence before Boulton J was not sufficient to support the findings made. The force of a challenge of that kind is dependent upon the nature of the evidence available and the use made of it in the presentation. It is necessary to understand the evidence in that perspective. It would also be necessary for the Commission to itself form a view on that evidential material should leave to appeal be granted."

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87 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 29-30.

88 First Full Bench decision (1998) 80 IR 14 at 34.

50 There then follow elaborated reasons which can only be understood as representing the reconsideration by Giudice J himself of the evidence that had been before Boulton J and upon which the latter had reached the "satisfaction" referred to. It seems clear from the passages which I have cited that Giudice J's conception of the "supervisory" role of the Full Bench was such that he felt that it authorised him to consider whether or not as a member of the Full Bench he was "satisfied" of the conclusions to which Boulton J had come on the basis of the same evidentiary material. I say evidentiary material because, as is the case in many tribunals (and as has long been the case in the Commission and its predecessors), decisions are made on materials that could not be described as "evidence" strictly so called. The entitlement of the Commission to act in reliance on such materials, at least in given circumstances, has been acknowledged by this Court[89]. Accepting the broad terms in which the Parliament has expressed the relevant criteria for evaluation by members of the Commission in exercising their respective powers and functions under s 170MW[90], what is obviously required of the decision-maker is an evaluative decision. It must be addressed to very large questions which cannot be proved as objective facts and which are highly dependent upon impression and subjective judgment by a specialist decision-maker.

51 At the conclusion of his analysis, Giudice J expressed a view that whatever construction was accepted of s 170MW(3)(b), the "economic evidence" to which Boulton J had referred "was not adequate to support"[91] the latter's conclusion. Giudice J then cited from the reasons of this Court in *House v The King*[92], concerning appeals against the exercise of a discretion, and expressed his own conclusion that Boulton J's "findings under that section were wrong"[93]. He was not in doubt that the public interest required leave to appeal to be granted. And, "[t]o avoid doubt", he recorded his own view "that on the material and

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89 *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation [No 1]* (1930) 42 CLR 527 at 547; *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54 at 92; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243; *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 389-390; *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 411.

90 Notably s 170MW(3)(a) and (b).

91 First Full Bench decision (1998) 80 IR 14 at 51.

92 (1936) 55 CLR 499.

93 First Full Bench decision (1998) 80 IR 14 at 51.

evidence before the Commission no positive finding could properly be made pursuant to s 170MW(3)"[94]. It was on this basis that Giudice J concluded that it was unnecessary to review Boulton J's exercise of discretion under s 170MW(1), the preconditions for that exercise not having been established.

52 The second member of the Full Bench, Munro J, concurred in Giudice J's determination about the outcome of the appeal. However, he arrived at his conclusion by a different route. In short, Munro J was of the opinion that "a jurisdictional prerequisite to Boulton J's exercise of the discretion in s 170MW(1) was established"[95]. This was a conclusion quite opposite to that which Giudice J had expressed. Nevertheless, Munro J was of the view that an appeal to the Full Bench was by way of "a rehearing"[96]. This opinion, without more, led Munro J to conclude that once leave to appeal was granted, it was the duty of the Full Bench, on the materials before the primary decision-maker, to reach its own conclusion. In effect, it would be unrestrained by the primary decision-maker's conclusions about the significance of the evidentiary material. Munro J put his position succinctly[97]:

> "It follows, in my view, that upon the hearing of the appeal, the Appeal Bench in determining whether to confirm, quash or vary the decision subject to appeal must, because the appeal is by way of rehearing, determine for itself how the power in s 170MW should have been, or should be, exercised.
>
> On that view, manifest error in the decision subject to appeal is not a condition precedent to a determination to quash it."

53 Starting from this point, Munro J did not address himself to the question whether Boulton J had erred in reaching the "satisfaction" referred to in s 170MW(1). He simply proceeded to ask himself whether, on the evidence, the "circumstance" propounded by s 170MW(3) had been established. In Munro J's opinion, it was not necessary to determine whether Boulton J "could reasonably have been satisfied to the existence of a circumstance under s 170MW(3)(b)"[98]. This was because Munro J took the view that it "was reasonably open to Boulton J, on a proper construction of s 170MW(3)(a), to be satisfied that the

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94 First Full Bench decision (1998) 80 IR 14 at 52.

95 First Full Bench decision (1998) 80 IR 14 at 52.

96 First Full Bench decision (1998) 80 IR 14 at 52.

97 First Full Bench decision (1998) 80 IR 14 at 54.

98 First Full Bench decision (1998) 80 IR 14 at 61.

industrial action being taken was threatening to endanger the welfare of part of the population"[99]. These conclusions notwithstanding, Munro J reached the same order as Giudice J because, in his opinion, it was necessary for the Full Bench *itself* to determine whether or not it was satisfied on the points argued under s 170MW.

54 To make this result absolutely clear, Munro J expressed his conclusions in these words[100]:

> "... I add to the observations I have just made, my view that Boulton J was entitled to exercise the discretion under s 170MW(1). ...
>
> [I]f the appeal were to be determined on an application of the principle ... derived from *House v The King*, I would not quash the order made by Boulton J in exercise of the discretion available to him under s 170MW(1). The considerations that caused that exercise of discretion to be reasonably open to him are reinforced on the appeal. A significant reinforcement is the reluctance which an Appeal Bench would normally have about removing the operative effect of an order that brought the industrial action to an end, and has resulted in a change to the dynamic of the bargaining process.
>
> However ... this appeal is properly conceived to be a rehearing. It is not merely reviewing Boulton J's decision for correctable errors. In my view this Full Bench, on hearing of the appeal, must appropriately determine for itself whether it is satisfied that a circumstance within the meaning of s 170MW(3)(a) existed at the time of Boulton J's decision, and may itself exercise the discretion under s 170MW(1)."

55 The third member of the Full Bench, Commissioner Larkin, in her separate reasons, referred to the reasons of Giudice and Munro JJ. She continued[101]:

> "I will concur and adopt ... the President's decision with the following reservation.
>
> I have weighed most carefully the reasons for decision of their Honours in relation to Boulton J's finding of the existence of a

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99 First Full Bench decision (1998) 80 IR 14 at 61.

100 First Full Bench decision (1998) 80 IR 14 at 63.

101 First Full Bench decision (1998) 80 IR 14 at 65.

> circumstance under s 170MW(3)(a). ... Justice Munro's analysis and determination on this point has force in many respects.
>
> It is not necessary for me to detail aspects on which I would agree or disagree in any relevant sense with their Honours' reasons which lead to their respective conclusions. On balance, and in taking a holistic view[,] I conclude that I am satisfied that it is appropriate that I adopt and concur with ... the President's conclusions.
>
> In adopting ... the President's determination on the outcome of the appeal[,] I would concur with the following view expressed by ... Justice Munro in his decision".

Commissioner Larkin then cited a passage from Munro J's reasons calling for "the principles stated by this Full Bench to be observed consistently"[102] by individual members of the Commission in future applications under s 170MW(1).

The decision of the Full Court

56 The Full Court acknowledged repeatedly the limited jurisdiction which it enjoyed on remitter from this Court[103]. It pointed out that the proceedings were "not by way of an appeal from the orders of the Full Bench of the Commission"[104]. Where constitutional relief was sought, it was necessary, relevantly, to establish "jurisdictional error"[105]. As I read the reasons of the Full Court, the judges constituting it were fully alive to the limited nature of the jurisdiction which they were exercising. They were aware that it was impermissible to convert that jurisdiction into an appellate review of the first Full Bench decision, or a reconsideration of the substantive merits of that decision. They said so.

57 Necessarily, the Full Court was required to analyse the several bases upon which the three members constituting the first Full Bench had reached their respective conclusions. In the end, the Full Court concluded that the reasons of the members of the first Full Bench, although expressed differently and in one

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102 First Full Bench decision (1998) 80 IR 14 at 66 citing Munro J at 65.

103 *CFMEU v AIRC* (1998) 89 FCR 200 at 203, 245.

104 *CFMEU v AIRC* (1998) 89 FCR 200 at 203.

105 *CFMEU v AIRC* (1998) 89 FCR 200 at 203 citing *Craig v South Australia* (1995) 184 CLR 163 at 175-176; Shaw and Gwynne, "Certiorari and Error on the Face of the Record", (1997) 71 *Australian Law Journal* 356 at 357.

case uncertainly, had amounted to an assertion of an appellate function on the part of the Full Bench which the Full Court considered to be fundamentally mistaken. Such mistake had been brought about by a failure to attend to a consideration to which the Full Bench gave prominence, namely that the decision which was the subject of appeal was not only "discretionary" in the ordinary sense (a matter signalled by the use in s 170MW(1) of the verb "may"[106]). It was also expressed by reference to "the satisfaction" of the member of the Commission concerned.

58 A substantial part of the Full Court's reasoning is concerned with this point and with the distinction noticed in many previous cases between:

1. preconditions to the exercise of a discretion (expressed in terms of the existence of objective facts and circumstances enlivening a discretion); and

2. preconditions expressed by reference to the "satisfaction" of the decision-maker that certain facts and circumstances "exist or existed"[107].

59 Although both Giudice J and Munro J had, in their respective reasons, made reference to the "satisfaction" of Boulton J concerning the existence of the "circumstance" upon which his Honour had relied[108], neither had ultimately considered that provision as affecting, still less controlling, the approach which the first Full Bench should take to the appeal before it. In essence, this was because Giudice J considered that a general "supervisory" power was provided to the Full Bench which obliged it to reach its own conclusions on the evidence. For Munro J, expressing the opinion that a full reconsideration was the duty of the Full Bench because of the nature of the "appeal" once leave was granted, a "rehearing" by the Full Bench was required on the materials before it or any further evidence which it admitted (or received in a report provided) pursuant to s 45(6) of the Act.

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106 See also *Acts Interpretation Act* 1901 (Cth), s 33(2A).

107 *CFMEU v AIRC* (1998) 89 FCR 200 at 208-210. See eg *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-277; *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 29-30. See also *Guss v Johnstone* (2000) 74 ALJR 884 at 894 [65]; 171 ALR 598 at 611 for a recent discussion of this distinction.

108 Namely that referred to in s 170MW(3)(a) and (b).

60 The Full Court concluded that both of these approaches to the appellate function represented a serious misunderstanding on the part of the Full Bench of the "appeal" for which s 45 of the Act provided. Each demonstrated a basic error. So far as Munro J was concerned, he had simply bypassed Boulton J's expression of "satisfaction". So far as Giudice J was concerned, the result was much the same because of the assertion of a general "supervisory" jurisdiction. In neither case had there been an appropriate consideration of whether the "satisfaction" of Boulton J referred to in s 170MW(1) had been shown to be in error. In neither case had the establishment of error on the part of the decision-maker been clearly accepted as a precondition to upholding the appeal.

61 As to the third member of the Full Bench, the Full Court concluded[109]:

> "What Commissioner Larkin was saying is not clear. It is not clear whether, for example, she was adopting the conclusions of Giudice J and the reasons he gave for reaching them, or the conclusions only. If the latter, her reasons for doing so are not clear. If the former, it is difficult to understand her support, albeit tentative, for the analysis of Munro J concerning the existence of a circumstance under s 170MW(3)(a). It may be that, in referring to a holistic approach, she was indicating that she felt it was necessary to adopt all or nothing of the decision and reasons for decision of either Giudice J or Munro J. That is, she effectively had to elect between them. If so, then she was not discharging the duty reposed in her as a member of the Full Bench of deciding the appeal on its merits rather than preferring one or other of the decisions of the other members of the Full Bench."

62 It was by this analysis that the Full Court came to its conclusion that there had been a constructive failure on the part of the first Full Bench to exercise its appellate function in accordance with law[110]. The Full Bench had applied a "wrong and [an] inadmissible test"[111]. This had led it to a basic misunderstanding of the nature of its appellate jurisdiction. Its orders rested upon what was a purported, but not a lawful, exercise of that jurisdiction, leaving the jurisdiction in law constructively unexercised. On that footing, the purported order of the first Full Bench was removed into the Federal Court and quashed, pursuant to a

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109 *CFMEU v AIRC* (1998) 89 FCR 200 at 244-245.

110 *CFMEU v AIRC* (1998) 89 FCR 200 at 245 citing Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420. See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *R v Board of Education* [1910] 2 KB 165.

111 *CFMEU v AIRC* (1998) 89 FCR 200 at 245 citing *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917.

writ of certiorari. The Full Bench was directed, by a writ of Mandamus, to proceed to determine the appeal from Boulton J on the basis that the first appeal had, in law, miscarried.

The decision of the second Full Bench

63 In its subsequent decision[112], the second Full Bench appears to have understood the correction of the approach of the first Full Bench. The joint reasons of the three members of the second Full Bench recorded the submission of the appellant thus[113]:

> "that the Commission may not intervene on appeal unless it can be shown that Justice Boulton's *satisfaction* was not reasonable on the evidence before him. Underlying this submission is an acceptance that the decision under appeal is a discretionary decision which may only be reviewed in the case of error, regardless of the public interest considerations[114]. The Full Court stipulated that the approach to be followed by a Full Bench on appeal from the exercise of a discretion is that in *House v The King*[115] and *Norbis v Norbis*[116]. Error in this context would have occurred if Justice Boulton's *satisfaction* 'was not reasonably open to him having regard to the logically probative evidentiary material before him'[117]."

64 The second Full Bench also cited the argument of counsel there appearing for the Commonwealth, who[118]:

> "submitted that the gist of the Full Court's decision is that appellable error is established if it can be shown that Justice Boulton's *satisfaction* was not reasonably open to him having regard to the logically probative evidentiary material before him".

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112 Second Full Bench decision (1999) 94 IR 37.

113 Second Full Bench decision (1999) 94 IR 37 at 39 [6] (emphasis added).

114 *CFMEU v AIRC* (1998) 89 FCR 200 at 229, 239-245.

115 (1936) 55 CLR 499 at 505.

116 (1986) 161 CLR 513 at 518-519.

117 Citing *CFMEU v AIRC* (1998) 89 FCR 200 at 239.

118 Second Full Bench decision (1999) 94 IR 37 at 40 [11] (emphasis added).

In my view each of the foregoing passages represents a correct summary of the instruction of the Full Court.

65 The second Full Bench accepted that it was "not open to [it] to disturb the decision under appeal in the absence of appellable error"[119]. Repeatedly throughout its reasons, it returned (as the first Full Bench had not done) to a consideration of whether error had been established which undermined the "satisfaction" which Boulton J had expressed himself to have reached[120]. Furthermore, the second Full Bench accepted the Full Court's instruction that it was open to Boulton J in reaching, or not reaching, the state of "satisfaction" to draw upon evidence taken in the formal sense, evidentiary materials placed before the Commission in an informal way, and also his own substantial experience as a member of the Commission.

66 In contrast to the detailed reassessment of the evidence upon which the first Full Bench had embarked in its decision, the second Full Bench approached the question before it from the standpoint of whether *error* had been shown in the primary decision. This, and not the Full Bench's own opinion about the strengths and weaknesses of that evidence and the satisfaction which it would have drawn from that evidence, was the focus of the second decision[121]:

> "[T]he appellant's submission ... fails to acknowledge that Justice Boulton was in a position by virtue of his experience in the coal industry and generally to draw conclusions about the effect of strike action and lawful picketing on contractors. [Counsel for the unions] also drew our attention to material contained in the Supreme Court affidavits filed by the present appellant indicating that contractors had stated that they did not want to provide services to the mine while the dispute continued. We are not in a position to say that it was not open to Justice Boulton to form the opinion that the strike was having a relevant effect on contractors. As the Full Court said, the satisfaction required by s 170MW(1) may be based on impressions. Of their nature, impressions are extremely difficult for an appeal bench to assess."

67 Given that the Full Bench in its second decision reversed its first decision and then dismissed the appeal, two questions are presented. They lie at the heart of the appeal to this Court. They are (1) what was the nature of the "appeal" against the decision and orders of Boulton J under s 170MW(1) of the Act; and

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119 Second Full Bench decision (1999) 94 IR 37 at 41 [13].

120 Second Full Bench decision (1999) 94 IR 37 at 47-48 [18], 48-49 [22], 51 [29]-[30], 56 [38].

121 Second Full Bench decision (1999) 94 IR 37 at 49 [22]. See also at 51 [29]-[30].

(2) did the Full Bench in its first decision misapprehend the nature of such appeal in a way that amounted (as the Full Court found) to a constructive failure to exercise its jurisdiction according to law? Or, if it did misapprehend the nature of the appeal, was that error such that it was made within jurisdiction (as the appellant contends)? An error within jurisdiction would have afforded no warrant to the Full Court to provide the orders that it did.

The nature of the appeal

68 Appeal, as such, was unknown to the common law[122]. It is a creature of statute. It is not possible to adopt any hard and fast or universal approach to the process called "appeal" in a particular statute. The word encompasses "different litigious processes which have few unifying characteristics"[123]. No fewer than six forms of a procedure loosely called an "appeal" have been identified[124]. Within these broad categories are various subcategories reflecting the particular nature of the "appeal" in question, the issues which the appeal presents and the purpose for which it exists, derived from the language in which it is expressed.

69 In every case where the issue is that of the duty and function of an appellate court or tribunal, the only safe starting point is a careful examination of the language and context of the statutory provisions affording the appellate right, together with a consideration of the powers enjoyed by, and duties imposed on, the body to which the appeal lies.

70 The range and variety of the decisions that may, with leave, be the subject of an appeal under the Act[125] is such as to suggest that generalities will be dangerous. So different are the various decisions amenable to appeal that it will only be of limited help to catalogue the process within the broad class of an "appeal in the strict sense" or an "appeal by way of rehearing", as if, without more, such classification dictates the way in which the particular appeal must be approached. True, such broad categories will offer a limited measure of guidance. But it remains for the appellate body in every case to discharge its

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122 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322 [72]; 160 ALR 588 at 609 and cases there cited.

123 *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297 per Glass JA. See also *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622.

124 *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA set out in the reasons of Callinan J at [119]; cf *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685 at 690-691.

125 Under s 45(1) of the Act.

functions in a way apt for all of the statutory provisions that are brought into play.

71 It is necessary to make this point because some of the discussion of the nature of the appeal to the Full Bench of the Commission, both within the Commission and in the reasons of the Full Court, might, on a superficial reading, be taken to suggest that there is a particular classification of appeals generally, being "appeals against discretionary decisions", which is in some way to be distinguished from "appeals by way of rehearing". This is a false dichotomy. Many appeals by way of rehearing involve appeals from discretionary decisions. The rehearing identifies the materials upon which the appellate body acts. It will have relevance for any supervening changes in the facts or in the applicable law.

72 On the other hand, the character of the decision under appeal (as discretionary, interlocutory, final or otherwise) will govern the approach to be taken by the appellate body in discharging its function. In the case of discretionary decisions, that approach in the case of an appeal is one of caution and restraint. This is because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will be only one admissible point of view. Disputation and litigation are expensive, distracting and time-consuming. Therefore, the law, for policy reasons, recognises these features of discretionary decisions. Except in appeals involving a complete hearing de novo, all other appeals will approach with restraint the reconsideration of discretionary decisions which are based on the same material that was before the primary decision-maker[126].

73 Because of the necessity to ascertain the ambit of the appellate function in a particular case by reference to the legislation in question, it is obviously useful where the task of classification has already occurred to accept the guidance of a previous decision. In an unelaborated passage in *Re Construction Forestry Mining Energy Union; Ex parte W J Deane & Sons Pty Ltd*[127], three members of this Court were prepared to accept that an appeal to the Full Bench under s 45 of the *Industrial Relations Act* 1988 (Cth)[128] was by way of rehearing and they referred in a footnote to *Re Coldham; Ex parte Brideson [No 2]*[129].

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126 *House v The King* (1936) 55 CLR 499 at 504-505; *Norbis v Norbis* (1986) 161 CLR 513 at 518-519.

127 (1994) 181 CLR 539 at 546 per Mason CJ, Dawson and McHugh JJ.

128 Now the Act, s 45.

129 (1990) 170 CLR 267 at 272.

74 However, *Re Coldham; Ex parte Brideson [No 2]* was concerned with the statutory predecessor to the Act, namely the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"). Specifically, it was concerned with the right of appeal to the Commission given by s 88F of the 1904 Act against a decision of the Registrar of the Commission. In concluding that the appeal given by s 88F was by way of rehearing, this Court mentioned two statutory considerations in s 88F of the 1904 Act as pointing to that conclusion. The first of these was the power which that section conferred on the Commission to "take further evidence for the purposes of an appeal under this section"[130]. That power remains in the present Act in s 45(6)(a). The second was the presence in s 88F(4) of the power conferred on the Commission, where leave to appeal was granted by it to determine the appeal, to make "such order as it thinks fit"[131]. This last-mentioned power does not exist in s 45 of the present Act. The power of the Full Bench in disposing of the appeal, once leave is granted, is limited to the orders permitted by s 45(7). At least where the Full Bench is considering the exercise of the power under s 45(7)(a) (and not the more exceptional action contemplated by pars (b), (c) and (d)), the focus of attention is placed squarely on the "decision or act" of the Commission, the subject of the appeal.

75 The appeal to the Full Bench under the present Act is by way of rehearing. However, it is not a hearing de novo. Absent a demonstration of error on the part of the member of the Commission whose decision or act is the subject of an appeal, it is not open to the Full Bench to quash or vary the decision or act concerned. I would not rest that conclusion on the supposed "presumptive rule that in an administrative appeal to an administrative body the issue is whether the decision was correct when it was made"[132]. Nor would I place much weight on the withdrawal of the statutory power of the Commission to "make such order as it thinks fit". Instead, I consider (as the Full Court did) that the critical determinant is that the process that is contemplated by the Act: (1) is described as an "appeal"; (2) lies from a member of the Commission enjoying large powers, functions and discretions conferred by the Act; (3) can be undertaken in relation to an extremely broad range of appellable decisions as mentioned in s 45(1) of the Act; and (4) in the particular case, involves an appeal against a decision of a member of the Commission under the unusual provisions of s 170MW.

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130 *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 272.

131 *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 272.

132 *Strange-Muir v Corrective Services Commission of New South Wales* (1986) 5 NSWLR 234 at 250 per McHugh JA. See also *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273; cf *McDonald v Guardianship and Administration Board* [1993] 1 VR 521; *Maritime Services Board v Murray* (1993) 52 IR 455 at 463.

76 The terms of that section are critical to the way in which the appeal by way of rehearing by the Full Bench is to be approached. In four respects, s 170MW suggests that an appeal against a decision made under the section will be limited to a case where error is first demonstrated on the materials before the Full Bench:

1. the use of the word "may" in s 170MW(1) confers a discretion on the Commission as constituted, once the preconditions have been established, to exercise the power;

2. the use of the word "satisfied" in s 170MW(1) makes it plain that it is the evaluation by the repository of the power (rather than the demonstrable objective existence of specified circumstances) that is the essential precondition;

3. the evaluative nature of the "circumstance" contemplated by s 170MW(3) is such that respect must be accorded, as the Act contemplates, to the evaluation of the primary decision-maker within the Commission in reaching "satisfaction" (or the lack thereof); and

4. the very nature of the considerations to which s 170MW(3) refers is such that factors relevant to "personal safety or health, or the welfare, of the population or of part of it" and "damage to the Australian economy or an important part of it" will often be greatly altered by the passage of time. Quite possibly they will be altered by the primary decision itself. If it had been intended that the repository of the power should in every case be the Full Bench, exercising its own evaluation and judgment and reaching its own "satisfaction", the Act would have so provided. By the Act, some matters are reserved to a Full Bench. A decision under s 170MW(1) is not one of those matters. The language and scheme of the Act therefore reinforce the other considerations. They support the conclusion of the Full Court.

77 For these reasons, it was not for the Full Bench, in disposing of an appeal from such a decision, to proceed directly to its own evaluation of the evidence in order to consider whether, in its opinion, the preconditions to the exercise of the discretion conferred by s 170MW(1) were made out, as it did in the first Full Bench decision. No supposed general "supervisory function" permitted that course. Nor does a view that the appeal is by way of "rehearing" do so. I take this conclusion to be consonant with decisions about the proper approach to such appeals recently delivered by this Court[133]. The basic mistake of the approaches

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133 *DJL v Central Authority* (2000) 74 ALJR 706; 170 ALR 659; *Allesch v Maunz* [2000] HCA 40; cf *Lowndes v The Queen* (1999) 195 CLR 665 at 678 [35] where a

(Footnote continues on next page)

to the appellate function of the members of the Commission was that which the Full Court detected. It was a serious mistake. In this case, the influence of the mistake upon the decision of the first Full Bench is put beyond argument by the unusual circumstance that reference may be had to the second Full Bench decision. The latter approached the appellate function in the correct and lawful way. It reached precisely the opposite result.

A constructive failure to exercise jurisdiction

78 A question remains as to whether the error of the first Full Bench was simply an error of law made by that Bench within its own jurisdiction or whether it constituted an error that took the first Full Bench outside its jurisdiction, warranting the relief which the Full Court provided. This I take to be the critical point in the appeal to this Court.

79 No appeal lies, whether on a point of law or otherwise, from the Full Bench of the Commission to the Full Court of the Federal Court. That Court has certain powers under the Act[134] in relation to the interpretation of an award or of a certified agreement. But there is not the relationship between the Federal Court and the Commission that, for example, exists in respect of "appeals" or the reference of questions of law that are provided under the *Administrative Appeals Tribunal Act* 1975 (Cth)[135]. The Full Court acknowledged these limitations in its reasons. The appellant, however, complains that the Full Court failed to observe the proper limits in the orders which it ultimately made.

80 Obviously, in so far as the Act confers on the Full Bench a power to determine appeals without any further appeal from it, it must be accepted that this envisages the possibility that decisions of the Full Bench will sometimes be made which contain errors of fact or law. Such errors will be made *within* the exercise of the Full Bench's appellate jurisdiction. They are not susceptible to any appellate correction. In the nature of the functions of the Commission, it may sometimes be possible for a fresh industrial dispute to arise occasioning new decisions and orders which have the practical consequence of remedying such earlier errors. However, in the determination of an appeal from a particular decision or order under s 45 of the Act, it must be allowed that not every error,

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decision of a Court of Criminal Appeal in an appeal against sentence was quashed for failure to identify an error on the part of the primary judge.

134 The Act, ss 413, 413A.

135 ss 44, 45.

even a serious one, will be capable of correction either in this Court or by the Federal Court by the invocation of constitutional relief[136].

81 The remedies of judicial review invoked in this case are only available to require the correction of a category of legal mistake that goes beyond an "error within jurisdiction" and amounts (relevantly) to a "jurisdictional error". Where a constitutional writ of Mandamus is invoked, it will rarely be the case that an officer or authority with the power to decide defiantly refuses to exercise powers or functions conferred by legislation whilst acknowledging their existence and applicability. Ordinarily, in modern circumstances, what is involved is a constructive failure on the part of the officer or authority concerned to exercise such functions and powers. Such constructive failure may be traced to a seriously mistaken view of the facts or an error of law concerning the scope of the decision-maker's functions or powers.

82 Distinguishing cases where the officer or authority has simply made a factual or legal error in the course of reaching a decision from cases where that error is classified as a constructive failure to exercise jurisdiction is not at all easy[137]. What is ordinarily involved in the latter is a misapprehension on the part of the decision-maker of the nature of the powers and functions which the decision-maker is called upon to exercise or of the essential conditions by reference to which that exercise must occur. The misapprehension must be such that, in truth, it can be said that a purported exercise is not a performance of the powers and functions entrusted to the decision-maker at all. It is a pretended or assumed discharge. But in the eye of the law, the powers and functions have never been lawfully performed.

83 In *R v Gray; Ex parte Marsh*[138], Gibbs CJ explained that it is now more clearly understood than previously it was that "an error of law may amount to a jurisdictional error even though the [decision-maker that] made the error had jurisdiction to embark on its inquiry". So much was earlier made clear by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*[139]. The difficulty of drawing a line between a real (but arguably erroneous) exercise of

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136 Constitution, s 75(v); *Judiciary Act*, s 44; the Act, s 412(2) and (3).

137 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 647; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 141; *Craig v South Australia* (1995) 184 CLR 163 at 176-180.

138 (1985) 157 CLR 351 at 371.

139 [1969] 2 AC 147 at 194, 195.

jurisdiction and such an erroneous exercise as amounts to a constructive failure to discharge the jurisdiction as the law requires has frequently given rise to differences of opinion in this Court[140]. The present case is no exception. The distinction between jurisdictional error and error within jurisdiction has been seen as effectively abolished in England. However, it has not been discarded in Australia[141]. Moreover in Australia, the constitutional context which separates the federal judicial power from other governmental powers has required a sharper distinction to be drawn than has been done in some other countries where there is often a significant overlap between administrative tribunals and courts of law[142].

84 It was this consideration which, in *Craig v South Australia*[143], occasioned the following remarks of the Court:

> "At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law ... The position is ... a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

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140 See eg the dissents in *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 373 per Mason J, 383 per Deane J, 392 per Dawson J; *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 398 per Brennan J, 399 per Deane J; 72 ALR 1 at 11, 12; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 152-153 per Deane J, 164-165 per McHugh J.

141 *Craig v South Australia* (1995) 184 CLR 163 at 179.

142 *Craig v South Australia* (1995) 184 CLR 163 at 179.

143 (1995) 184 CLR 163 at 179.

85 There are many similar observations both in this Court[144] and in other Australian courts[145]. This Court should not diminish the insistence of Australian law on the correct ascertainment and application by administrative tribunals and other administrative decision-makers of the lawful preconditions to the discharge by them of their functions and powers. To the extent that it does so, this Court will withdraw from the scrutiny by which it earlier examined, for itself, the conduct of the predecessors of the present Commission in the exercise of their powers. The justification of such scrutiny in Australia was given voice in the classic remarks of Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[146], cited by the Full Court in this case[147]. A special vigilance is required to ensure that non-court repositories of functions, powers and discretions act in accordance with their statutory mandate. Where such bodies misunderstand the nature of the functions, powers and discretions which they are to exercise or apply a wrong and inadmissible test and where they misconceive their duties or fail to apply themselves to the question which the law prescribes, such departures will be classified, in a case such as the present, as a constructive failure to exercise their functions and powers in accordance with law.

86 This Court should not adopt a different standard in relation to the performance by the Federal Court of the function of judicial review in matters remitted by this Court to that Court than it has adopted in relation to its own scrutiny of administrative tribunal decisions and orders (including those of the Commission) when itself exercising its constitutional jurisdiction. Were it to do so, not only would the facility of the remitter be frustrated, but this Court would then be adopting double standards which have no foundation in the language of the Constitution, in the legislation permitting remitter, or otherwise.

87 A conclusion to the foregoing effect does not result in a substitution by a court performing judicial review of its opinion on the merits. A court has no such power. Nor does it involve an unauthorised conversion of a limited process of judicial review into, in effect, an appeal for which no legislative warrant is provided. All that it permits is a quashing of the decision and order to the decision-maker to ensure that the latter performs the functions and exercises the powers and discretions in a way that the law envisages. This is nothing more than insistence on the rule of law. The lawful discharge of those functions, powers and discretions remains for the decision-maker so empowered and it

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144 *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 350.

145 See eg *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

146 (1947) 47 SR (NSW) 416 at 420.

147 *CFMEU v AIRC* (1998) 89 FCR 200 at 245.

alone. So much was recognised by the Full Court in the present instance. Indeed, so much was also recognised by the Full Bench in its second decision. Corrected, as it was, as to the performance of its appellate function in accordance with law, it reached the opposite conclusion. Could there be a clearer demonstration, than in this case, of the fundamental error of approach which the first Full Bench took to the exercise of its powers? Could there be a starker illustration of a misconception going to the root of the exercise of its powers, that is, to its jurisdiction?

88 I therefore agree with the conclusion of the Full Court[148] that the errors which it identified in the decision and orders of the first Full Bench did not constitute errors *within* jurisdiction. They amounted to a constructive failure by the first Full Bench to exercise its jurisdiction as s 45 of the Act obliged. The Full Court was correct to so hold.

89 If I may say so, the Full Bench acted honestly and creditably, as might be expected, in conforming to the Full Court's correction and in substituting a new and different outcome. For this Court now to say that any error was made *within* the jurisdiction of the Commission to make errors will, I venture to suggest, strike those concerned in this field of operations as puzzling. It will inevitably appear as a withdrawal of insistence by this Court on the legal duty of the Commission to approach its appellate functions in the manner, and only in the manner, that the Parliament has provided. To restore, in effect, the earlier (since corrected) decision and orders of the Full Bench, and to hold that they are beyond the healing balm of judicial review in accordance with the Constitution, will be to rub salt into the wound. The constitutional guarantee of the rule of law in Australia is not so puny and ineffective.

An alternative analysis results in the same conclusion

90 The foregoing analysis is sufficient to uphold the orders of the Full Court. However, there is an additional and alternative analysis which results in the same conclusion. I will mention it briefly. The decision and orders of the first Full Bench rest for their validity upon the separate reasons which each member of the Full Bench gave. Even if, upon one reading, Giudice J might be taken as adequately addressing the requirement that the Full Bench first establish that it was not reasonably open on the evidentiary material before Boulton J for him to be "satisfied" as he twice expressed himself to be, neither the published reasons of Munro J nor of Commissioner Larkin could be so read[149].

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148 *CFMEU v AIRC* (1998) 89 FCR 200 at 245.

149 *CFMEU v AIRC* (1998) 89 FCR 200 at 243-245.

91 So far as Munro J's reasons are concerned, his Honour expressly found that the satisfaction which Boulton J had identified was "reasonably open to him on the cases presented"[150]. It was only Munro J's view of the nature and duties imposed on the Full Bench by the appeal that persuaded him, notwithstanding that conclusion, to join in the decision quashing Boulton J's orders. For the reasons I have given, this was a misunderstanding of the relevant appellate function.

92 So far as Commissioner Larkin's reasons are concerned, in my respectful view, the Full Court was correct to say that the Commissioner's reasons fell short of a discharge of the duty imposed upon her to decide the appeal according to her own view of the merits. That duty was not discharged by simply selecting between the differing opinions expressed by the other members of the Full Bench. On any view of the matter, the decision of the first Full Bench was therefore seriously flawed. The flaws, in my opinion, derived fundamentally from a misunderstanding of the nature of the appellate jurisdiction which the Full Bench was exercising. The Full Court was correct to discern this. It was therefore correct to provide the relief which it did.

Order

93 The appeal should be dismissed.

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150 First Full Bench decision (1998) 80 IR 14 at 52.

94 CALLINAN J. In 1996 and 1997 the second, third and fourth respondents ("the unions") and their members employed by the appellant at the Hunter Valley No 1 coal mine made industrial claims, supported by industrial action, upon the appellant with respect to wages and conditions of employment at the mine.

95 In March 1997 the unions initiated bargaining periods pursuant to s 170MI[151] of the *Workplace Relations Act* 1996 (Cth) ("the Act"). The

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151 "**Initiation of bargaining period**

(1) If:

(a) an employer; or

(b) an organisation of employees; or

(c) an employee acting on his or her own behalf and on behalf of other employees;

wants to negotiate an agreement under Division 2 or 3 in relation to employees who are employed in a single business or a part of a single business, the employer, organisation or employee (the ***initiating party***) may initiate a period (the ***bargaining period***) for negotiating the proposed agreement.

(2) The bargaining period is initiated by the initiating party giving written notice to each other negotiating party (see subsection (3)) and to the Commission stating that the initiating party intends to try:

(a) to make an agreement with the other negotiating parties under Division 2 or 3; and

(b) to have any agreement so made certified under Division 4.

(3) In this Division, each of the following is a ***negotiating party*** to a proposed agreement:

(a) the initiating party;

(b) if the initiating party is an employer who intends to try to make an agreement under section 170LJ or 170LL or Division 3 – the organisation or organisations who are proposed to be bound by the agreement;

(c) if the initiating party is an employer who intends to try to make an agreement under section 170LK – the employees at the time whose employment will be subject to the agreement;

(Footnote continues on next page)

consequences were that the Australian Industrial Relations Commission ("the Commission") could not arbitrate in the dispute and that the unions had immunity from civil suit in relation to industrial action taken during the bargaining periods (s 170N[152] and s 170MT[153] of the Act).

96 The unions and their members took industrial action during the bargaining periods. There was also picketing. In June 1997 the Commission (Boulton J) refused an application by the appellant for the termination of the bargaining

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(d) if the initiating party is an organisation of employees – the employer who is proposed to be bound by the agreement;

(e) if the initiating party is an employee acting on his or her own behalf and on behalf of other employees – the employer who is proposed to be bound by the agreement and the employees whose employment will be subject to the agreement."

152 "Commission not to arbitrate during bargaining period

(1) During a bargaining period, the Commission must not exercise its arbitration powers under Part VI in relation to a matter that is at issue between the negotiating parties.

(2) Subsection (1) does not prevent the Commission exercising its arbitration powers to deal with an application to vary an award by making a safety net wage adjustment."

153 "Immunity provisions

(1) An order made by the Commission under section 127 does not apply to protected action.

(2) Subject to subsection (3), no action lies under any law (whether written or unwritten) in force in a State or Territory in respect of any industrial action that is protected action unless the industrial action has involved or is likely to involve:

(a) personal injury; or

(b) wilful or reckless destruction of, or damage to, property; or

(c) the unlawful taking, keeping or use of property.

(3) Subsection (2) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action."

periods (ss 170MW(1) and (2)[154]). In September 1997 the Commission (Boulton J) undertook a consideration of whether to terminate the bargaining periods of its own motion and decided not to do so. In October 1997, at the suit of the appellant, the Supreme Court of New South Wales (Bruce J) issued an interlocutory injunction in relation to tortious conduct (illegal picketing). The parties to that suit were the CFMEU[155], the AMWU[156] and officers and delegates of those two unions.

97 On 31 October 1997 the unions sought termination of the bargaining periods (s 170MW(3)). On 7 November 1997 Boulton J made orders terminating the bargaining periods and forbidding the initiation of fresh ones for one year. His Honour's orders were made under s 170MW(1) which provides as follows:

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154 "**Power of Commission to suspend or terminate bargaining period**

(1) Subject to subsection (8), the Commission may, by order, suspend or terminate the bargaining period if, after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2) to (7) exists or existed.

(2) A circumstance for the purposes of subsection (1) is that a negotiating party that, before or during the bargaining period, has organised or taken, or is organising or taking, industrial action to support or advance claims in respect of the proposed agreement:

(a) did not genuinely try to reach an agreement with the other negotiating parties before organising or taking the industrial action; or

(b) is not genuinely trying to reach an agreement with the other negotiating parties; or

(c) has failed to comply with any directions by the Commission that relate to the proposed agreement or to a matter that arose during the negotiations for the proposed agreement; or

(d) has failed to comply with a recommendation of the Commission under section 111AA that relates to the proposed agreement or to a matter that arose during the negotiations for the proposed agreement."

155 Construction, Forestry, Mining and Energy Union.

156 Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

"**Power of Commission to suspend or terminate bargaining period**

(1) Subject to subsection (8), the Commission may, by order, suspend or terminate the bargaining period if, after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2) to (7) exists or existed."

98 Sections 170MW(2), (3), (4) and (5) set out what may constitute "circumstances" for the purposes of s 170MW(1). The sub-section to which regard here was had was sub-s (3) which provides as follows:

"(3) A circumstance for the purposes of subsection (1) is that industrial action that is being taken to support or advance claims in respect of the proposed agreement is threatening:

(a) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or

(b) to cause significant damage to the Australian economy or an important part of it."

99 Boulton J said that he was satisfied that the strike action taken at the mine was threatening the welfare of the people of the Hunter Valley region (par (a) of the sub-section) and that the industrial action at the mine was threatening (both in itself and in its potential for escalation) to cause significant damage to an important part of the Australian economy (par (b) of the sub-section).

100 The appellant appealed to the Full Bench of the Commission. Provision for appeals is made in s 45 of the Act, the text of sub-ss (1) and (2) of which is as follows:

"**Appeals to Full Bench**

(1) Subject to this Act, an appeal lies to a Full Bench, with the leave of the Full Bench, against:

(a) a decision of a member of the Commission by way of a finding in relation to an industrial dispute or alleged industrial dispute;

(b) an award or order made by a member of the Commission, other than an award or order made by consent of the parties to an industrial dispute;

(c) a decision of a member of the Commission not to make an award or order;

(d) a decision of a member of the Commission under paragraph 111(1)(g);

(e) a decision of a member of the Commission refusing to certify an agreement under Division 4 of Part VIB;

(eaa) a decision of a member of the Commission to certify an agreement under Division 4 of Part VIB (but only on the ground that under subsection 170LU(2A) the Commission should have refused to certify the agreement);

(eba) a decision of a member of the Commission to vary, or not to vary, an award or certified agreement under section 298Z;

(ea) an opinion formed by a member of the Commission under section 127A or a decision by a member of the Commission not to form such an opinion;

(eb) an order made by a member of the Commission under section 127B or a decision by a member of the Commission not to make such an order;

(ed) a decision of the Commission to vary, or not to vary, an award that has been referred to the Commission under section 50A of the *Sex Discrimination Act* 1984;

(f) a decision (other than in relation to a prescribed matter) in a proceeding before a designated Presidential Member acting in that capacity; and

(g) a decision of a member of the Commission that the member has jurisdiction, or a refusal or failure of a member of the Commission to exercise jurisdiction, in a matter arising under this Act.

(2) A Full Bench shall grant leave to appeal under subsection (1) if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted."

101 The appeal was heard, and upheld on 29 January 1998 by Giudice and Munro JJ and Commissioner Larkin who said this:

"We have reached a unanimous conclusion as to the outcome of the appeal. Leave to appeal is granted and the appeal is upheld. The decision and orders of Boulton J are quashed. As a consequence there can be no arbitration pursuant to s 170MX of the Act resulting from these proceedings. Each of the three bargaining periods is reinstated. Our

reasons for decision are not unanimous, although we agree, as already indicated, that the appeal must be upheld. We now each publish our reasons for decision."

102 In his reasons Giudice J reviewed the evidence that had been placed before Boulton J at first instance. His Honour said[157]:

"In this case there is no doubt that Boulton J was exercising a discretion reposed in the Commission by s 170MW(1). As his Honour recognised, a pre-condition to the exercise of the discretion was his satisfaction that a relevant threat existed pursuant to s 170MW(3). For the reasons given his Honour's findings under that section were wrong. The findings based on the broad view of s 170MW(3) involved error in the construction and application of the section. Absent those errors the findings could not have been made. The findings based on the narrow view of s 170MW(3) were not reasonably open on the limited facts in evidence. The subject matter of the appeal touches important issues concerning the construction of s 170MW, in particular the operation of s 170MW(3). Section 170MW defines the circumstances in which the Commission may arbitrate to settle enterprise bargaining disputes. Section 170MW(3) is a most important part of the section. The way in which it is interpreted and applied has serious consequences for disputing parties and for the public at large. Its operation involves the resolution of the competing rights of registered organisations and employers to take industrial action against each other with impunity and of the community and the economy to be protected from serious harm arising from such industrial action."

103 Munro J summed up his conclusions in this way[158]:

"I have reviewed the evidence and Boulton J's findings. I consider that, on a proper construction of s 170MW(3)(b), the evidence was not capable of sustaining Boulton J's finding or satisfaction that the industrial action being taken was threatening to cause significant damage to the Australian economy. Boulton J's assessment of that circumstance gave weight to prospective but relatively indeterminate types of potential industrial action. Certainly, there may have been a reasonable basis for apprehending that such action might occur. There were several sources indicating that view and speculations about the likelihood of it eventuating. But no such potential industrial action was sufficiently proximate, and sufficiently identifiable as industrial action of the requisite class. Potential action as described could therefore not properly be

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157 (1998) 80 IR 14 at 51-52.

158 (1998) 80 IR 14 at 60.

considered to be part of industrial action threatening to cause significant economic damage to the Australian economy. There was no sufficient other basis for being satisfied as to that circumstance. I therefore conclude that Boulton J was in error when he was satisfied as to the existence of that circumstance."

104 His Honour added that if the appeal to the Full Bench were an appeal against the exercise of a discretion[159] rather than by way of rehearing he would have dismissed the appeal[160]. Commissioner Larkin agreed with Giudice J with some reservations which it is unnecessary to explore.

105 Application for relief by way of prohibition, mandamus and certiorari directed to the members of the Full Bench was made to this Court. McHugh J made an order by consent remitting the proceedings to the Federal Court of Australia on 23 March 1998.

106 The Full Court of the Federal Court (Spender, Moore and Branson JJ) made orders absolute for certiorari and mandamus in purported reliance on *Public Service Association (SA) v Federated Clerks' Union*[161] on the basis that the Full Bench had fallen into jurisdictional error by a constructive failure to exercise jurisdiction.

107 The appellant draws attention to these holdings by the Full Court:

"(a) [T]he nature of an appeal to the Full Bench of the AIRC depended upon the power, act or function against which the appeal was brought;

(b) the Full Bench of the AIRC had no general supervisory role over the exercise of discretionary powers by single members of the Commission;

(c) an appeal against the exercise of a power of the type conferred by s 170MW(1) was not by way of rehearing but rather was an appeal against the exercise of a discretion and was governed by the principles in ***House v The King*** (1936) 55 CLR 499;

(d) the exercise of the power in s 170MW(1) was conditioned not by the existence of one of the circumstances in s 170MW(3), but upon

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159 *House v The King* (1936) 55 CLR 499.

160 (1998) 80 IR 14 at 63.

161 (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ.

> the satisfaction of the Commission as to its existence – something that may be based on 'impression' and involve 'elements of value judgment'".

108 Accordingly, their Honours said, it was not necessary "for there to have been 'a valid finding of fact … pursuant to s 170MW(3)'"[162]. The Full Court concluded that the unions should have the relief that they sought for these reasons[163]:

> "The error in the reasons of the Full Bench, namely its view that the appellate jurisdiction conferred on it by s 45 in relation to an appeal against the exercise of a discretionary power of the type conferred by s 170MW(1), was by way of rehearing and that the Full Bench was not only competent, but obliged, to determine for itself whether it is satisfied that a circumstance within the meaning of s 170MW(3)(a) existed at the time of Boulton J's decision is not error within jurisdiction. The error identified in this case resulted in a constructive failure to exercise the jurisdiction conferred on the Full Bench by s 45: *Re Coldham; Ex parte Brideson*[164]; *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[165], where Jordan CJ said:
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> > '... if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply "a wrong and inadmissible test"[166]; or to "misconceive its duty" or "not to apply itself to the question which the law prescribes"[167]; or "to misunderstand the nature of the opinion which it is to form"[168], in giving a decision in exercise of its jurisdiction or authority, a

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162 (1998) 89 FCR 200 at 239.

163 (1998) 89 FCR 200 at 245.

164 (1989) 166 CLR 338.

165 (1947) 47 SR (NSW) 416 at 420.

166 *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917.

167 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243.

168 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

> decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law[169]."'

109 The Full Bench of the Commission reconvened and heard the appeal again as directed by the Full Court of the Federal Court. On this occasion the appellant's appeal failed.

110 The appellant however sought, and obtained special leave to appeal to this Court from the judgment of the Full Court of the Federal Court which had granted the Writs of Certiorari and Mandamus. The grounds of appeal are:

> "(a) The Full Court erred in finding that the nature of the appellate function exercised by a Full Bench of the Australian Industrial Relations Commission, pursuant to the provisions of s 45 of the *Workplace Relations Act* 1996, varied depending upon the power, act or function against which the appeal is brought.
>
> (b) The Full Court erred in failing to find that the judgment of the High Court of Australia in [*Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267] was binding and not relevantly distinguishable, and/or that every appeal under s 45 of the *Workplace Relations Act* 1996 was in the nature of a rehearing.
>
> (c) The Full Court erred in failing to find that a tribunal charged with being satisfied as to the existence of a state of affairs was bound to make findings of fact which might reasonably support such satisfaction.
>
> (d) The Full Court erred in failing to distinguish between an appeal from the exercise of a discretion and an appeal from an order or decision involving secondary fact-finding or the application of judgment or evaluation to primary or secondary facts as found.
>
> (e) The Full Court erred in holding that the Full Bench had constructively failed to exercise jurisdiction under s 45 of the *Workplace Relations Act* 1996, and that this was a proper case for *mandamus.*
>
> (f) The Full Court erred in denying the proposition that, in an appeal under s 45 of the *Workplace Relations Act* 1996 involving a

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169 *R v Board of Education* [1910] 2 KB 165.

decision under s 170MW of that Act, the Full Bench was not entitled to review the facts found at first instance in the Commission and to assess, or to re-assess, the sufficiency of those facts for the purposes of the test contained in, for example, sub-section (3) of s 170MW.

(g) In the circumstances where the Full Bench had purported to apply *House v The King* in the appeal before it, the Full Court erred in critically reviewing, in the manner of a court of appeal, the process by which the Full Bench held that the conclusions and findings at first instance in the Commission were not reasonably open on the evidence in the case.

(h) The Full Court erred by assimilating, in effect, the role of a Full Bench under s 45 of the *Workplace Relations Act* 1996 with the role of a court of judicial review."

111 In substance, the appellant contends that the Full Court of the Federal Court erred in two respects: first in holding that the decision of the Commission at first instance was a decision of an entirely discretionary kind; and that, even if it were, the Full Bench might interfere with it if the Commission had erred in exercising the discretion.

112 The nature of appeals conferred by various statutes is a matter that has troubled many courts on many occasions. It is perhaps unfortunate that legislatures in enacting rights of appeal usually do not, as they readily might, descend to the detail of the precise functions, roles, procedures and powers of the appellate bodies they have created and the nature of the appeals which may be taken to them.

113 In England there have been rights of appeal, in limited circumstances, since the Magna Carta. The *Claim of Right* of 1689, declared that it was[170]:

"the right and privilege of the subjects to protest for remeed of law to the King and Parliament against sentences pronounced by the Lords of Session, providing the same do not stop execution of these sentences"[171].

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170 c 28 APS IX 38.

171 *Halsbury's Laws of England*, 4th ed, vol 8(2), par 60, fn 2.

In ecclesiastical causes there had been appeals to Rome until the *Statute for the Restraint of Appeals*[172] prohibited them. Henry VIII enacted a new statute creating a new court of appeal within the realm[173]:

> "For lack of justice at or in any of the courts of the archbishops of this realm ... it shall be lawful for the parties grieved to appeal to the King's Majesty in the King's court of Chancery ... like as in case of appeal from the Admiral's court"[174].

114 There is no doubt that the development and expansion of the use of the great prerogative writs in the common law jurisdictions (as opposed to the Chancery side where appeals on facts could be brought), grew out of a perceived need to review error and injustice in an orderly and predictable way.

115 The English Court of Appeal was established by the *Supreme Court of Judicature Act* of 1873[175]. However, right from the inception of the availability of appeals on questions of fact from the three common law courts, King's Bench, Common Pleas, and Exchequer, appellate courts approached their function with a conservatism that was nowhere dictated by the language of statutes conferring the rights of appeal. The appeal contemplated by the enactment was an appeal by way of rehearing on questions either of law or fact or both. Appellate courts today remain cautious, sometimes unduly so, about reversing findings of fact at first instance, or occasionally, in upholding appeals at all. As late as 1922, for example, Higgins J in *Ross v The King*[176], a criminal appeal, was still resistant to the application, according to its tenor of s 593 of the *Crimes Act* 1915 (Vic) which allowed accuseds to appeal against convictions in Victoria for the first time[177]. There may be several reasons for this but not all of them are equally convincing or provide a sufficient justification for the excessive caution which manifests itself from time to time in appellate jurisdictions, particularly in cases of appeals from judges sitting without juries. This is so notwithstanding that the outcome of most cases depends upon the resolution of disputed matters of fact rather than of law. Certainly a trial judge does enjoy advantages over an

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172 24 Henry VIII c 12.

173 25 Henry VIII c 19; repealed 1 and 2 Philip and Mary c 8; revived 1 Elizabeth c 1.

174 Holdsworth, *A History of English Law*, 7th ed (rev) (1956), vol 1 at 604.

175 36 and 37 Victoria c 66.

176 (1922) 30 CLR 246 at 273-274.

177 See *Gilbert v The Queen* (2000) 74 ALJR 676 at 691 [100] per Callinan J; 170 ALR 88 at 109.

appellate court in resolving the former but the advantages should not be exaggerated. The stressing of the importance of demeanour by appellate courts is a case in point. Whilst I would not suggest that demeanour will not be critical in some cases, recent studies and experiments strongly suggest that too much store may on occasions be placed upon it[178]. So too the importance of the so-called atmosphere of the trial can be over-emphasised as a reason for appellate restraint. Quite properly appellate courts start out in any appeal holding due respect for the competence and experience of the trial judge, but these should not be allowed to stand in the way of the correction of an error of fact when it can be identified, and when the correction involves more than the mere substitution of the appellate court's view on a matter of fact on which more than one view may be open[179]. Nor can the pressure of work upon courts at all levels in modern times provide, of itself, any proper basis for a differential approach to erroneously decided matters of fact from errors of law.

116 Discretionary judgments do stand in a different category but people encountering the legal appellate process for the first time are not, unsurprisingly, reluctant to accept that although all members of a Court of Appeal might say that they would have exercised a discretion in an entirely different way from the court at first instance, the primary decision based upon it cannot be disturbed. And many lawyers would suggest that there is no satisfactory distinction between an unjust decision, or a decision, which is, to use the language of Dixon, Evatt and McTiernan JJ in *House*[180] "clearly unjust".

117 Matters of the kind that I have mentioned have from time to time encumbered the appellate process and have made more difficult the identification of precisely what an appellate court or tribunal may and should do in reviewing, or hearing an appeal against, an earlier decision. In *Eastman v The Queen* McHugh J said this[181]:

> "In a variety of legal contexts, courts still recognise that 'appeal' has at least four different meanings. It may mean an appeal in the true sense, an appeal by re-hearing on the evidence before the trial court, an appeal by way of re-hearing on the evidence before the trial court and such further evidence as the appellate court admits pursuant to a statutory power to do

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178 See Wellborn, "Demeanor", (1991) 76 *Cornell Law Review* 1075.

179 cf *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-326 [72]-[86], 330 [89] per Kirby J; 160 ALR 588 at 609-615, 619.

180 (1936) 55 CLR 499 at 507.

181 (2000) 74 ALJR 915 at 935 [130] per McHugh J; 172 ALR 39 at 65.

so, and an appeal by way of a hearing de novo[182]. Which of these meanings the term 'appeal' has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be."

118 Mason J speaking of appeals from administrative bodies said this in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*[183]:

"Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Despite some suggestion in argument to the contrary, I do not read *Ex parte Australian Sporting Club Ltd; Re Dash*[184] as enunciating such an absolute rule. There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch III of the Commonwealth Constitution. The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.

On the other hand the character of the function undertaken by the administrative authority in arriving at its decision may differ markedly from the instances already supposed. The authority may be required to determine justiciable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross-examination; to keep a transcript record; to apply the rules of evidence;

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182 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622 per Mason J with whose judgment Barwick CJ and Stephen J agreed.

183 (1976) 135 CLR 616 at 621-622 per Mason J with whose judgment Barwick CJ and Stephen J agreed.

184 (1947) 47 SR (NSW) 283.

and to give reasons for its determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance.

But in the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi-judicial function, classifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing."

119 In *Turnbull v New South Wales Medical Board*[185] Glass JA said[186]:

"Graded in ascending order, in accordance with the width of the corrective power exercised by the appeal court, they are as follows:

(a) *Appeals to supervisory jurisdiction*. Only errors going to jurisdiction or denials of natural justice can be ventilated.

(b) *Appeals on questions of law only*, eg from the Workers' Compensation Commission. Undetermined or wrongly determined issues of fact must be remitted.

(c) *Appeals after a trial before judge and jury*. The result below will be disturbed if the judge fell into error of law, or if the jury's errors of fact transcend the bounds of reason. But, except for the assessment of damages, issues of fact must be redetermined in a new trial.

(d) *Appeals from a judge in the strict sense*, eg appeals to the High Court. If the judge has fallen into error of law, or has made a finding of fact which is clearly wrong, the appellate court will substitute its own judgment. Only such judgment can be given as ought to have been given at the original hearing. Later changes in the law are disregarded and additions to the evidence are not allowed: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[187].

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185 [1976] 2 NSWLR 281. See also *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685 per Kirby P.

186 [1976] 2 NSWLR 281 at 297-298.

187 (1931) 46 CLR 73 at 107.

(e) *Appeals from a judge by way of rehearing*, eg appeals under s 75A of the *Supreme Court Act* 1970. Judicial opinion differs on whether a power to receive fresh evidence is implied: *Ex parte Currie; Re Dempsey*[188]. Almost invariably, however, it is expressly conferred. If errors of law or wrong findings of fact have occurred below, the appellate court will try the case again on the evidence used in the court below, together with such additional evidence as it thinks fit to receive. Since it will decide the appeal in the light of the circumstances which then exist, changes in the law will be regarded: *Ex parte Currie; Re Dempsey*[189][;] *Edwards v Noble*[190].

(f) *Appeals involving a hearing de novo*, eg appeals from a Court of Petty Sessions to a Court of Quarter Sessions. All the issues must be retried. The party succeeding below enjoys no advantage, and must, if he can, win the case a second time: *Sweeney v Fitzhardinge*[191]."

120 Encumbered, I would hope, by no narrow view of the meaning of appeal when the term is used in an unqualified sense, as it is here, I will proceed to consider the nature of the appellate function to be undertaken by the Full Bench under the legislation by which it was established.

121 In my opinion there is nothing in either the text or the history of s 45 or its predecessors that requires that it be given any narrow operation.

122 The first legislation[192] passed by the Federal Parliament to regulate industrial relations was the *Conciliation and Arbitration Act* 1904 (Cth)[193]. It created a single body, the Commonwealth Court of Conciliation and Arbitration and conferred upon it both arbitral and judicial functions. The Court so operated for more than 50 years until, in 1956, the Federal Parliament legislated to

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188 (1968) 70 SR (NSW) 1.

189 (1968) 70 SR (NSW) 1.

190 (1971) 125 CLR 296 at 304.

191 (1906) 4 CLR 716.

192 Legislation had been passed in Western Australia prior to Federation: *Industrial Conciliation and Arbitration Act* 1900 (WA). The Western Australian Premier at the time made it known that that legislation was based on that of New Zealand, which had apparently been successful: see Wallace-Bruce, *Employee Relations Law* (1998) at 7-9.

193 The Constitution provides the Commonwealth with power under s 51(xxxv).

separate the judicial functions from the arbitral following the decision in *R v Kirby; Ex parte Boilermakers' Society of Australia*[194]. A new body, the Industrial Court, took over the judicial functions that had formerly been performed by the original Court.

123 The *Workplace Relations Act* 1996 (Cth) was formerly known as the *Industrial Relations Act* 1988 (Cth) before it was renamed and substantially amended by the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth). The amending Act changed the name of the principal legislation on 25 November 1996, but did not substantially change s 45[195].

124 The appeal provision, prior to the 1988 legislation, was in two parts: the first was an appeal under what became s 35 (initially s 16U), in 1956[196], of the *Conciliation and Arbitration Act* 1904-1988 (Cth); and the second, under s 88F of that Act. Section 35 regulated the appeal from a Commissioner to a

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194 (1956) 94 CLR 254. Affirmed by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288.

195 The *Workplace Relations Act* 1996 is Act No 86 of 1988 as amended. Section 45 has been amended since 1988 as follows:

a. No 19, 1991 [commenced 1 February 1991] – omitted the previous sub-s (4) and substituted the current sub-section;

b. No 109, 1992 [commenced 23 July 1992] – inserted sub-ss (1)(ea), (eb) and (ec) and (3)(ba);

No 179, 1992 [commenced 13 January 1993] – inserted sub-ss (1)(ed) and (3)(bb);

c. No 98, 1993 [commenced 30 March 1994] – inserted sub-ss (1)(eaa) and (3)(baa);

d. No 60, 1996 [commenced 31 December 1996] – repealed sub-ss (1)(ec) and (3)(ba), omitted in sub-s (3)(b) "party to" and substituted "person who made";

e. No 198, 1997 [commenced 11 December 1997] inserted sub-ss (1)(eaa) and (eba) and (3)(ba), (baa) and (bab).

196 "Appeals from awards": s 35(1) was inserted by Act No 44 of 1956, s 7, sub-s (2) was amended by Act No 44 of 1956, s 55 and second Sched.

Presidential Commission[197]. Section 88F which was examined in detail by this Court in *Brideson [No 2]*[198] provided for an appeal from an Industrial Registrar[199].

125 One difference between the former s 35 and s 45 is that under the repealed provision an appeal did not lie unless, in the opinion of the Commission, the matter was of such importance that in the public interest an appeal should lie (s 35(3)). Section 45 of the current Act provides that the Full Bench *shall* grant leave to appeal if the Full Bench forms the opinion that the matter is of such importance that it is in the public interest, that leave to appeal be granted, but this difference is not relevant to this case.

126 There is nothing in s 110[200] to suggest that in undertaking its functions the Commission (including the Full Bench) should be unduly restricted[201]. Indeed

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197 Not less than three members nominated by the President of whom at least two must be presidential members.

198 *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267.

199 In the United Kingdom there had been a Royal Commission on Trade Unions in 1867. This report led to the passing of the *Trade Union Act* 1871 (UK). However, the United Kingdom legislation contains no provision similar, in any way, to s 45.

200 "**Procedure of Commission**

(1) Where the Commission is dealing with an industrial dispute, it shall, in such manner as it considers appropriate, carefully and quickly inquire into and investigate the industrial dispute and all matters affecting the merits, and right settlement, of the industrial dispute.

(2) In the hearing and determination of an industrial dispute or in any other proceedings before the Commission:

(a) the procedure of the Commission is, subject to this Act and the Rules of the Commission, within the discretion of the Commission;

(b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and

(c) the Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.

(Footnote continues on next page)

the implication is, if anything, to the contrary. There is no textual suggestion that the Full Bench might or should only correct errors of law or of jurisdiction or has to regard findings of fact as sacrosanct, or treat them as discretionary matters. Amplitude is also suggested by s 45(6)(a) which provides that a Full Bench, for the purposes of an appeal under the section may admit further evidence.

127 I would also take s 45(6)(b) to be suggestive of the conferral of the broadest of power upon the Full Bench for the purposes of an appeal. It provides:

> "(6) For the purposes of an appeal under this section, a Full Bench:
>
> (a) …
>
> (b) may direct a member of the Commission to provide a report in relation to a specified matter."

128 For completeness s 45(8) should be quoted:

> "(8) Where, under paragraph (6)(b), a Full Bench directs a member of the Commission to provide a report, the member shall, after making such investigation (if any) as is necessary, provide the report to the Full Bench."

129 It might be that the way in which a discretion has been exercised, or further reasons for the exercise of a discretion by possibly even a member whose decision is under appeal, could each fall within the term "specified matter" in s 45(6)(b). In other words the Full Bench might have power to take issue with a discretionary decision, if such the decision below was, in a way in which other appellate courts could and would rarely do. The appellant need not, and does not contend for such a broad proposition here.

> (3) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an industrial dispute or other proceeding and require that the cases be presented within the respective periods.
>
> (4) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument."

201 See s 110(2).

130 Section 45(9)[202] expressly extends the provisions of the Act relating to the hearing or determination of an industrial dispute, to an appeal under s 45.

131 In *Brideson [No 2]*, Deane, Gaudron and McHugh JJ said[203] of the similar and unconfined provision for appeal from a Registrar, s 88F[204]:

> "In our opinion, upon the correct construction of s 88F, the Commission was bound to make its own decision on the evidence before it, including evidence of events which had occurred since the Registrar's decision. As Higgins J said in *Federated Carters and Drivers' Industrial Union of Australia v Motor Transport and Chauffeurs' Association of Australia*[205]:
>
> > 'the appellant is entitled to have ... a re-hearing, a "review" of the decision ... He is entitled to such judgment as I can bring to bear upon the question, independently of the Registrar, although, of

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202 "Each provision of this Act relating to the hearing or determination of an industrial dispute extends to the hearing or determination of an appeal under this section."

203 (1990) 170 CLR 267 at 274-275.

204 "(1) The Commission may grant leave to appeal to the Commission from an act or decision of the Registrar in relation to a matter and may hear and determine an appeal in respect of which leave is so granted.

(2) Where leave to appeal has been granted under this section, the Commission may, on such terms and conditions as it thinks fit, make an order that the operation of the act or decision of the Registrar be stayed pending the determination of the appeal or until further order of the Commission.

(3) The Commission may take further evidence for the purposes of an appeal under this section.

(4) Upon the determination of an appeal under this section by the Commission, the Commission shall make such order as it thinks fit and may confirm, quash or vary a decision of the Registrar appealed from.

(5) The powers of the Commission under this section in respect of an appeal to the Commission are exercisable by the Commission constituted by the President or by a presidential member of the Commission assigned by the President for the purpose of the appeal or, in a case in which the President so directs, by a Full Bench."

205 (1912) 6 CAR 122 at 123.

course, I should attach a good deal of weight to the Registrar's view.'

This statement was made when the predecessor of s 88F contained the word 'review'. Nevertheless, it is equally applicable to s 88F. Consequently, the statement of the Full Bench in *Re Federated Miscellaneous Workers Union of Australia*[206] that 'the principles relating to the function of a tribunal sitting on appeal from the exercise of a discretion should be applied' in an appeal under s 88F cannot be accepted as a correct description of the Commission's functions under that section. That is not to say, however, that those principles could not be brought to bear on the question whether leave to appeal should be granted. In determining whether leave to appeal should be granted under s 88F(1), it would have been appropriate for the Commission to refuse leave unless it thought that there was an arguable case that the Registrar had acted upon a wrong principle, given weight to irrelevant matters, failed to give sufficient weight to relevant matters or made a mistake as to the facts or that the decision was plainly unreasonable or unjust. But once leave was granted, the Commission was bound to make its own decision on the evidence before it, including any further evidence admitted pursuant to s 88F(3)."

132 Having regard to what their Honours said in that passage in *Brideson [No 2]*[207], the breadth of s 45 of the Act, and its context to which I have referred, I am of the opinion that the Full Court of the Federal Court erred in holding that the appeal to the Full Bench had to be treated as an appeal against the exercise of a discretion. The exercise of the power and the performance of the function of the Commission under s 170MW(1) involved three components: the legal component of identifying the statutory requirements for the exercise of the Commission's jurisdiction; the making of relevant findings of fact on the material available to the Commission; and, if those findings satisfied the factual foundation for it, the making of a decision in part at least discretionary, whether to make any, and if any, what order the Commission was then empowered to make. The appeal to the Full Bench was an appeal by way of rehearing in at least the sense referred to in example (e) provided by Glass JA in *Turnbull*[208] which I have quoted.

133 Once the Full Bench decided, as it did, that the Commission at first instance had made errors of fact on material matters it was bound to reverse the

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206 (1974) 157 CAR 623 at 631.

207 (1990) 170 CLR 267 at 274-275.

208 [1976] 2 NSWLR 281 at 297.

decision of the Commission. That the errors of fact may have been made by reason of an erroneous construction of the Act by the Commission was not a necessary basis for the holding of appealable error by the Commission but it would provide a further reason, if required, why the appeal was bound to succeed.

134 It is unnecessary to deal with the appellant's alternative argument that the Commission erred in any event in exercising its discretion.

135 I would allow the appeal and restore the orders of the Full Bench of 29 January 1998.