HIGH COURT OF AUSTRALIA

McHUGH J

RE VICE PRESIDENT McINTYRE, SENIOR DEPUTY PRESIDENT HARRISON AND COMMISSIONER HARRISON (MEMBERS OF THE FULL BENCH OF THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION)	FIRST RESPONDENTS
THE COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)	SECOND RESPONDENT
EX PARTE JOSEPH TONI MARKS	APPLICANT

Re Commonwealth of Australia & Anor; Ex parte Marks
[2000] HCA 67
14 December 2000
C17/2000

ORDER

1. *The notice of motion is dismissed.*

2. *No order as to costs.*

Representation:

No appearance for the first respondents

T M Howe for the second respondent (instructed by the Australian Government Solicitor)

Applicant appeared in person

CATCHWORDS

Re Commonwealth of Australia & Anor; Ex parte Marks

Practice and procedure – Extension of time – Factors to be considered.

Constitutional law – Constitutional relief – Jurisdictional error – Whether Full Bench of Australian Industrial Relations Commission made a jurisdictional error – Role of Full Bench on appeal.

Practice and procedure – Costs – Whether s 347 of the *Workplace Relations Act* 1996 (Cth) applied – Whether proceedings commenced "vexatiously or without reasonable cause".

Constitution, s 75(v).
Workplace Relations Act 1996 (Cth), ss 45, 347.
High Court Rules, O 55, r 17; O 55, r 30; O 60, r 6

1 McHUGH J. The applicant seeks an extension of time in which to apply for an order nisi. If the extension is granted (or not needed), he seeks remittal of the application for an order nisi to the Federal Court of Australia.

Background

2 The second respondent, the Department of Defence ("the Commonwealth"), hired the applicant as a "Trainee Administrative Services Officer" on 15 July 1996. The applicant was appointed as an "Administrative Services Officer" on 6 February 1997. On 21 July 1997, the Commonwealth informed the applicant by letter that his employment was to be terminated effective from 20 August 1997. As it transpired, the Commonwealth terminated the applicant's employment effective from 13 August 1997.

3 Pursuant to s 170CE of the *Workplace Relations Act* 1996 (Cth) ("the Act"), the applicant applied for relief against the termination of his employment. On 2 October 1998, Commissioner Jones ("Jones C") of the Australian Industrial Relations Commission ("the AIRC") determined that the applicant came under s 170CB(1) of the Act because he was a Commonwealth public sector employee but that:

> "[B]ased on the evidence placed before me the methods applied by the respondent in terminating the applicant's employment, was [sic] *not* harsh, unjust or unreasonable and ... the respondent had [a] valid reason for carrying out the applicant's termination in terms of s 170CE and [s] 170CG(3)." (original emphasis)

On 18 December 1998, Jones C delivered his reasons for judgment.

4 The applicant appealed to a Full Bench of the AIRC ("the Full Bench") out of time. The application for an extension of time to appeal and the appeal were listed for hearing on 19 February 1999. On that day, the Full Bench granted the applicant an extension of time to appeal, but refused the application for leave to appeal. The Full Bench delivered its reasons for the decision on 16 April 1999.

The application for an extension of time

5 The applicant filed a notice of motion in this Court on 21 July 2000 seeking an order for an extension of time to apply for writs of certiorari and mandamus and for the grants of orders nisi in respect of such writs. His applications for the orders nisi were 11 months out of time for the issue of certiorari and 15 months out of time for the issue of mandamus.

High Court Rules

6 Order 55, r 17(1) of the High Court Rules provides:

> "An order *nisi* for a writ of *certiorari* to remove a judgment, order, conviction or other proceeding, for the purpose of its being quashed, of an inferior court or tribunal, or of a magistrate or justices, shall not be granted unless the application for the order is made not later than six months after the date of the judgment, order, conviction or other proceeding, or within such shorter period as may be prescribed by any law." (italics in original; emphasis added)

Order 55, r 30 provides:

> "An application for a writ of *mandamus*, or an order in the nature of mandamus, to a judicial tribunal to hear and determine a matter shall be made within two months of the date of the refusal to hear or within such further time as is, under special circumstances, allowed by the Court or a Justice." (italics in original; emphasis added)

Order 60, r 6 gives a Justice of the Court power to enlarge the time appointed by the High Court Rules.

Applicant's affidavit

7 The applicant's affidavit in support of his claim for an extension of time recounts the efforts to which he has gone in order to obtain favourable advice about his application for constitutional relief. He states that, since the Full Bench's decision, he has consulted "at least 12 legal firms and at least 24 barristers", spent "well over 800 hours" of his own time and incurred "legal costs of over $8,000". The affidavit sets out nine reasons why an extension of time should be granted. In broad terms, the applicant says that the time should be extended because it was difficult and time-consuming for him to get competent legal advice about his prospects. According to the applicant, there are few lawyers who have the relevant expertise and who do not act for the Commonwealth, and so:

> "It was not until 18 July 2000 that I was finally advised by [a barrister] that there was an arguable case that the Full Bench … made a reviewable error [by] refusing me leave to appeal. Until that date all legal advice, which I had received and accepted, was to not go ahead without 'expert' advice to do so."

In addition, the applicant asserts that "[a]t no stage after the decision, did I 'sleep on my rights'".

Applicant's submissions

8 The applicant's written submissions list several matters in support of his application for an extension of time. Some of the matters which the applicant sought to raise – for example, an analogy between the time limits in the High Court Rules and the time limits in some insurance contracts – are not relevant to the issues before the Court. However, the gist of the applicant's submissions is as follows.

9 First, the AIRC is not "an inferior court or tribunal" for the purpose of O 55, r 17; nor is it "a judicial tribunal" for the purpose of O 55, r 30. That being so, the applicant submits that the time limits in rr 17 and 30 of O 55 do not apply to his application for constitutional relief against the Full Bench. Second, this Court's Practice Direction No 1 of 1994 provides that applications for industrial orders nisi should be remitted to the Federal Court[1]. The applicant submits that nothing in the Practice Direction requires or suggests that the application for an extension cannot be remitted to the Federal Court. Third, the applicant submits that the effect of s 44 of the *Judiciary Act* 1903 (Cth) and s 412 of the Act is to give this Court the power to remit the application for an extension of time to the Federal Court. Fourth, the applicant submits that there is an arguable case that the Full Bench erred in refusing to grant him leave to appeal.

The applicant's substantive grounds

10 The applicant's notice of motion requests that a "writ of certiorari issue to the [AIRC]" quashing the decision of the Full Bench, and further that a "writ of mandamus issue to the [AIRC], directed to it to hear and determine, in accordance with law" the applicant's application for leave to appeal from the orders of Jones C.

11 Exhibited to the applicant's affidavit in support of his notice of motion was a draft order nisi which relied on the following grounds:

> "1. In coming to [its] decision not to grant [the applicant] leave to appeal [the Full Bench] demonstrated errors of law or errors in the exercise of discretion in the nature set out in *House v The King* (1936) 55 CLR 499. By failing to determine the application for leave to appeal according to law the [Full Bench's] decision was beyond [its] jurisdiction or [it] otherwise erred, such as to justify prerogative relief. (These errors constituted jurisdictional errors or errors of law on the face of the record).

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1 Practice Direction No 1 of 1994 deals with the Industrial Relations Court of Australia.

> 2. In particular, these errors concerned the rights to procedural fairness afforded to persons employed under the *Public Service Act* 1922 and that these rights in relevant areas were not overridden, or caused to be read down, by the termination of employment provisions of the *Workplace Relations Act* 1996. These included that natural justice was not observed in making the decision to terminate the employment of [the applicant], that the procedure required by law to be observed was not observed, that irrelevant factors were taken into account or relevant factors were not taken into account; leading to an improperly made decision.
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> 3. On the premise that [the applicant] was not offered procedural fairness, the decision of the delegate of [the Commonwealth] to terminate [the applicant's] employment should have been found to be harsh, unjust or unreasonable. If the purported dismissal was a nullity, then the decision made by the … Full Bench … was passed under an error of law since the Full Bench had a discretion which it failed to exercise.
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> 4. In the alternative, if the *Workplace Relations Act* 1996 is held to prevail over the *Public Service Act* 1922 then the length of probation is determined by the former Act, and [the applicant] was not a probationer at the time of dismissal contrary to the decision of the Commission.
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> 5. The Full Bench … erred in finding that it was not in the 'public interest' for leave to appeal to be granted. In particular, the Full Bench erred in that issues of natural justice and questions going to the 'correct' interpretation and application of statutory [provisions] and common law are in the public interest; and on the proper construction of the applicable laws there was an arguable case that the appeal would have a chance of success.
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> 6. And, upon the grounds appearing in the affidavits of [the applicant] sworn the 21st day of July 2000."

12 The substance of the applicant's complaint is indicated by his written submissions in this Court. He submitted, inter alia, that:

> "[T]here was an arguable case that [Jones C] at first instance committed errors which on the merits in relation to those errors would justify me being given leave to appeal, and the [Full Bench] in not recognizing the errors [itself] made an error now amenable to prerogative relief."

The application for an order nisi should not be remitted

13 In *Gallo v Dawson*[2], I said that the grant of an extension of time under O 60 r 6 is not automatic[3]. This is as true of an application for constitutional relief under s 75(v) as it is in respect of an appeal. I also said that, when the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal[4]. A similar inquiry must be made when the application is for an extension of time in which to commence s 75(v) proceedings to quash an act, decision or judgment. A "case would need to be exceptional"[5] before the time for commencing proceedings was enlarged by many months. The explanation for such a delay is also a relevant consideration[6].

14 In this case, the Full Bench gave its orders on 19 February 1999 and delivered its reasons for the decision on 16 April 1999. The applicant did not file his notice of motion in this Court until 21 July 2000. Assuming that the time limits in rr 17 and 30 of O 55 of the High Court Rules apply when constitutional relief is sought against the AIRC and that his delay is reasonably explained – which I very much doubt in this case – I would not grant the applicant an extension of time. For the reasons that I give below, the applicant has not been able to advance even an arguable case of jurisdictional error by the Full Bench.

15 An extension of time for seeking relief against a decision or judgment can only be granted if it is necessary to do justice between the parties. That means that it is necessary to have regard to the history of the matter, the conduct of both parties, the nature of the litigation and the consequences for the parties of a grant or refusal of the extension[7]. Where an applicant seeks the issue of the constitutional or prerogative writs, a further factor must be considered. Those writs are directed at the acts or decisions of public bodies or officials, and the public interest requires that there be an end to litigation about the efficacy of such acts or decisions. In that respect, the present case, although important to the applicant, is not as important as many other cases. Nevertheless, the applicant is seeking the quashing of a decision of the AIRC made 17 months before he filed his application for relief in this Court.

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2 (1990) 64 ALJR 458; 93 ALR 479.

3 (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480.

4 (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480.

5 (1990) 64 ALJR 458 at 459; 93 ALR 479 at 481.

6 (1990) 64 ALJR 458 at 459-460; 93 ALR 479 at 480-481.

7 (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480.

16 Independently of the merits of the case, I find it difficult to see how a person who, with knowledge of the decision, delays 17 months before seeking relief could ever be granted an extension of time to quash such a decision unless some conduct of the respondent or the public body or official had brought about the delay. As the Judicial Committee of the Privy Council said in *Ratnam v Cumarasamy*[8], "[t]he rules of court must prima facie be obeyed". The time for seeking certiorari is six times, and the time for seeking mandamus is twice, the period in which an application for special leave to appeal to this Court can be brought against a judgment or decision[9]. The periods for applying for certiorari and mandamus give a person affected by an adverse decision or judgment ample time in which to commence proceedings in this Court. In all but very exceptional cases, they should be rigidly applied when, as here, more than one year has elapsed between the decision and the commencement of proceedings in this Court.

17 An applicant's inability to obtain favourable legal advice is not a ground for extending the time for seeking mandamus or the ancillary writ of certiorari. Upon the expiry of the time for the issue of a constitutional writ against a decision or judgment, the respondent has a vested right to retain the judgment or decision. Its rights should not be dependent on whether the applicant can at some future time obtain a favourable legal opinion that he or she has an arguable case. In addition, the efficacy of public acts, decisions and judgments cannot be the hostage of an applicant's search for favourable legal advice. In all but exceptional cases, the inability of an applicant to obtain favourable advice within the two month period for mandamus and the six month period for certiorari is a strong indicator that he or she has no case for relief. That is the case here. The applicant has no arguable case for relief. If it should turn out that, by reason of negligent advice, an applicant was deprived of the right to quash a decision or to have it made or to have some duty carried out, the applicant will have his or her remedy against the lawyer or lawyers concerned.

18 However, as I have indicated, the applicant says that the time limits in rr 17 and 30 of O 55 of the High Court Rules do not apply when constitutional relief is sought against the AIRC because the AIRC is not "an inferior court or tribunal" for the purpose of O 55 r 17 or "a judicial tribunal" for the purpose of O 55 r 30. Even if this submission is correct, the matter should not be remitted to the Federal Court. The threshold for obtaining an order nisi is a low one: an applicant must show merely an arguable case. *A fortiori*, the threshold for having an application for an order nisi remitted from this Court to the Federal Court

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8 [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935.

9 O 69A, r 3(1).

cannot be higher. But this Court should not burden the Federal Court with cases when, as a result of a recent decision of this Court[10], it is clear that they do not enjoy any prospects of success.

19 That being so, irrespective of the correctness of the applicant's arguments that the O 55 time limits do not apply to his claim or that his conduct in failing to seek relief at an earlier stage was reasonable, I reject his motion that the application for an order nisi should be remitted to the Federal Court. In my opinion, he has no arguable claim for constitutional relief. That being so, I will dismiss the notice of motion.

20 It is unnecessary therefore, and perhaps undesirable, that I deal with his argument that the AIRC is not "an inferior court or tribunal" for the purpose of O 55 r 17 or "a judicial tribunal" for the purpose of O 55 r 30.

The Full Bench did not fall into jurisdictional error

21 The applicant's grounds for constitutional relief seek, for the most part, to challenge what may conveniently be described as the merits of Jones C's decision and the Full Bench's decision. The recent judgment of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[11] ("*Coal and Allied*") illustrates the flaw in this approach. In *Coal and Allied*, Boulton J of the AIRC had terminated a bargaining period under s 170MW of the Act[12]. A Full Bench of the AIRC allowed an appeal from Boulton J's decision. Gleeson CJ, Gaudron and Hayne JJ said[13]:

> "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.
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> 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*[14], it 'misunder[stood]

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10 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348; 174 ALR 585.

11 (2000) 74 ALJR 1348; 174 ALR 585.

12 (2000) 74 ALJR 1348 at 1350 [1]; 174 ALR 585 at 586.

13 (2000) 74 ALJR 1348 at 1356-1357 [30]-[32]; 174 ALR 585 at 594-595.

14 (1947) 47 SR(NSW) 416 at 420.

> the nature of [its] jurisdiction ... or "misconceive[d] its duty"[15] or "[failed] to apply itself to the question which [s 45 of the Act] prescribes"[16] ... or "[misunderstood] the nature of the opinion which it [was] to form"[17]'. The Full Bench did none of those things.
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> In his reasons for decision, Giudice J[18] 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."

For the reasons set out below, this analysis applies with equal force to the present case.

Statutory basis of the appeal to the Full Bench

22 Section 45(1)(b) of the Act provides that, subject to the Act, an appeal lies to a Full Bench, with leave, against (inter alia) an order made by a member of the Commission. The Full Bench "shall grant leave to appeal … if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted"[19]. In the case of an appeal under s 45(1)(b) against an order under Pt VIA[20], an appeal may be instituted "by a person entitled under section 170JF to institute the appeal"[21]. Section 170JF provides:

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

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

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

18 Giudice J's decision was "to be treated as the decision of the Full Bench": (2000) 74 ALJR 1348 at 1355 [22]; 174 ALR 585 at 592.

19 Section 45(2).

20 Part VIA is entitled "Minimum Entitlements of Employees". Division 3 of Pt VIA is entitled "Termination of employment".

21 Section 45(3)(aa).

> "(1) An appeal to a Full Bench under section 45 may be instituted by any person who is entitled under section 170JD to apply for the variation or revocation of an order under this Part.
>
> (2) For the avoidance of doubt, an appeal to a Full Bench under section 45 in relation to an order made by the Commission under Subdivision B of Division 3 may be made *only on the grounds that the Commission was in error in deciding to make the order*." (emphasis added)

The applicant was a person relevantly entitled under s 170JD[22].

The Full Bench understood its role on appeal

23 The Full Bench's role in the applicant's s 45 appeal was to ascertain whether or not Jones C had made an error in dismissing the applicant's application under s 170CE. As Gleeson CJ, Gaudron and Hayne JJ noted in *Coal and Allied*, an appeal under s 45 "is properly described as an appeal by way of rehearing"[23], and the powers under s 45(7) "are exercisable only if there is error on the part of the primary decision-maker"[24]. This is so "regardless of the different decisions that may be the subject of an appeal under s 45"[25].

24 In my view, there can be no doubt that the Full Bench understood that its function was to ascertain whether or not Jones C had made a relevant error. The Full Bench considered the applicant's grounds of appeal, and concluded that, in respect of each of them, Jones C did not relevantly err. If the Full Bench was

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22 Section 170JD(1) provides:

> "The Commission may vary or revoke an order under this Part on application by:
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> …
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> (b) any employee, or representative of any employee, to whom the order relates (whether or not named or described in the order)."

23 (2000) 74 ALJR 1348 at 1354 [17]; 174 ALR 585 at 591.

24 (2000) 74 ALJR 1348 at 1354 [17]; 174 ALR 585 at 591.

25 (2000) 74 ALJR 1348 at 1354 [17]; 174 ALR 585 at 591.

wrong to reach this conclusion, then that was an error *within* jurisdiction[26]. Furthermore, "[t]he writ of mandamus is not a writ of right nor is it issued as of course"[27]. It is a discretionary remedy, and one of the established factors which tends against the grant of the remedy is "unwarrantable delay"[28]. Given the delay in this case, I doubt that I would have granted an order nisi even if the time limits in O 55 do not apply to the AIRC and the applicant had an arguable case. Moreover, unless mandamus was granted in this case, certiorari could not go.

Costs

25 Section 347 of the Act provides:

> "(1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.
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> (2) In subsection (1):
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> ***costs*** includes all legal and professional costs and disbursements and expenses of witnesses."

On the current authorities[29], s 347 operates to prevent the Court from ordering costs against the present applicant, unless the proceedings were instituted "vexatiously or without reasonable cause". In *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]*[30], this Court said that "[t]he test for determining whether a proceeding is in a matter arising under the Act for the purposes of s 347(1) is whether the right or the duty that is sought to be enforced

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26 (2000) 74 ALJR 1348 at 1356 [32]; 174 ALR 585 at 595.

27 *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

28 *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

29 See eg *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 93-94; *Re Jarman; Ex parte Cook [No 2]* (1996) 70 ALJR 550 at 553-554; 136 ALR 233 at 238; *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654.

30 (1997) 189 CLR 654.

owes its existence to a provision of the Act"[31]. The right or duty that the applicant sought to enforce in these proceedings owes its existence to s 45 of the Act. Section 347(1) therefore arguably applies, although it is perhaps arguable that the case does not arise under the Act but is an application pursuant to the Rules of this Court for an extension of time.

26 However, the Commonwealth, after referring to *Re Polites; Ex parte Hoyts Corporation Pty Ltd*[32], accepted in its written submissions that "costs should only be awarded on the basis that the proceedings have been instituted without reasonable cause". On that basis, the Commonwealth submitted that costs should be awarded against the applicant because he had no reasonable basis to bring the proceedings. In support of this submission, the Commonwealth said that "the applicant knew, as a consequence of the legal advice he received, that the arguments which he brings in the substantive matter are *unlikely to succeed*" (emphasis added). The Commonwealth appears to concede that the applicant had some chance of success (albeit minor).

27 Certainly the fact that an application fails does not mean that it was commenced without reasonable cause[33]. Although I am of the view that the application for an order nisi is so weak that it should not be remitted to the Federal Court, in my view the Court should not award costs to the Commonwealth. The applicant has sworn that he obtained legal advice that he had an arguable case. That claim was not challenged by the Commonwealth. Furthermore, the advice was given, and the notice of motion filed, before this Court's decision in *Coal and Allied*[34]. In those circumstances, I am not prepared to make a costs order in favour of the Commonwealth.

28 After the hearing, the applicant sent a letter to the Court and the Commonwealth referring me to *Re McJannet* and asking that, in the event that his application should be dismissed, he should have liberty to apply in respect of costs. There is, however, no point in giving him liberty to apply. No costs order is made against him. And it is clear that there is no basis whatever for a costs order in his favour.

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31 (1997) 189 CLR 654 at 656.

32 (1991) 173 CLR 78.

33 *The Queen v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 473 per Gibbs J.

34 (2000) 74 ALJR 1348; 174 ALR 585.

Orders

29 As noted above, I have not had to consider the applicant's submission that the time limits in the High Court Rules do not apply to an application for constitutional relief against the AIRC. In those circumstances, the appropriate orders are as follows:

1. The notice of motion is dismissed.
2. No order as to costs.