HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter Nos B53/2001 and B54/2001

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND — APPELLANT

AND

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AND ORS — RESPONDENTS

Matter Nos B56/2001, B57/2001 and B58/2001

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS OF THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AND ORS — RESPONDENTS

Attorney-General (Q) v Australian Industrial Relations Commission
Minister for Employment and Workplace Relations v Australian Industrial Relations Commission
[2002] HCA 42
3 October 2002
B53 & B54/2001; B56, B57 & B58/2001

ORDER

ORDERS IN MATTER NO B53/2001:

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court dated 20 November 2000 and in its place order that:*
   (a) a writ of prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the

decision of the first respondents made on 27 November 1998 in Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998;

(b) a writ of certiorari issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998 in the Commission for the purpose of quashing the decision of the first respondents made on 27 November 1998;

(c) a writ of mandamus issue to the first respondents compelling them to hear and determine according to law the appeals C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998.

ORDERS IN MATTER NO B54/2001:

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court dated 20 November 2000 and in its place order that:*
   (a) a writ of prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 30 June 1998 in Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997;
   (b) a writ of certiorari issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 in the Commission for the purpose of quashing the decision of the first respondents made on 30 June 1998;
   (c) a writ of mandamus issue to the first respondents compelling them to hear and determine according to law the appeals C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997.

ORDERS IN MATTER NO B56/2001:

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court dated 20 November 2000 and in its place order that:*
   (a) a writ of prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 27 November 1998 in Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998;
   (b) a writ of certiorari issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998 in the Commission for the purpose of quashing the decision of the first respondents made on 27 November 1998;
   (c) a writ of mandamus issue to the first respondents compelling them to hear and determine according to law the appeals C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998.

ORDERS IN MATTER NO B57/2001:

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court dated 20 November 2000 and in its place order that:*
   (a) a writ of prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 30 June 1998 in Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997;
   (b) a writ of certiorari issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 in the Commission for the purpose of quashing the decision of the first respondents made on 30 June 1998;
   (c) a writ of mandamus issue to the first respondents compelling them to hear and determine according to law the appeals C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997.

ORDERS IN MATTER NO B58/2001:

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court dated 20 November 2000 and in its place order that:*
   (a) a writ of prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 30 June 1998 in Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997;
   (b) a writ of certiorari issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 in the Commission for the purpose of quashing the decision of the first respondents made on 30 June 1998;
   (c) a writ of mandamus issue to the first respondents compelling them to hear and determine according to law the appeals C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997.

On appeal from the Federal Court of Australia

Representation:

Matter Nos B53/2001 and B54/2001

P A Keane QC, Solicitor-General of the State of Queensland, with J S Douglas QC and S J Lee for the appellants in both matters (instructed by Crown Solicitor for the State of Queensland)

No appearance for the first respondents in both matters

R C Kenzie QC with P Ginters for the second respondent in both matters (instructed by Ryan Carlisle Thomas)

R W Gotterson QC with J E Murdoch SC for the third respondent in both matters (instructed by Australian Government Solicitor)

A K Herbert for the fourth respondent in B54/2001 (instructed by Sciacca's Lawyers and Consultants)

Matter Nos B56/2001, B57/2001 and B58/2001

R W Gotterson QC with J E Murdoch SC for the appellants in each matter (instructed by Australian Government Solicitor)

No appearance for the first respondents in each matter

R C Kenzie QC with P Ginters for the second respondent in each matter (instructed by Ryan Carlisle Thomas)

P A Keane QC, Solicitor-General of the State of Queensland, with J S Douglas QC and S J Lee for the third respondent in B56/2001 and B58/2001 (instructed by Crown Solicitor for the State of Queensland)

A K Herbert for the third respondent in B57/2001 (instructed by Sciacca's Lawyers and Consultants)

CATCHWORDS

Attorney-General (Q) v Australian Industrial Relations Commission

Minister for Employment and Workplace Relations v Australian Industrial Relations Commission

Industrial law (Cth) – Australian Industrial Relations Commission – Statutory amendment obliging Commission to cease dealing with industrial dispute if satisfied that a State award or employment agreement governs the wages and conditions of employment in issue, unless satisfied that ceasing would not be in the public interest – Effect on pending proceedings.

Statutes – Construction – Presumption that repeal or partial repeal does not affect any right acquired or accrued under earlier Act unless contrary intention appears – Whether s 8(c) of the *Acts Interpretation Act* 1901 (Cth) preserved respondent unions' rights to have pending industrial disputes arbitrated by Australian Industrial Relations Commission without regard to s 111AAA of the *Workplace Relations Act* 1996 (Cth) – Whether respondent unions had acquired or accrued a relevant "right" – Whether presumption displaced by contrary intention in repealing statute.

Words and phrases – "Accrued right".

Acts Interpretation Act 1901 (Cth), s 8.
Industrial Relations Act 1988 (Cth), ss 104(1), 111(1)(g).
Workplace Relations and Other Legislation Amendment Act 1996 (Cth), Sched 5.
Workplace Relations Act 1996 (Cth), s 111AAA.

1 GLEESON CJ. The issue in these appeals concerns the effect upon certain proceedings pending before the Australian Industrial Relations Commission ("the Commission") of an amendment to the legislation pursuant to which the Commission exercises its statutory function of settling industrial disputes.

2 The relevant facts and legislation are set out in the reasons for judgment of Gaudron, McHugh, Gummow and Hayne JJ.

3 Immediately before the amendment, the proceedings were subject to Pt VI of what was then called the *Industrial Relations Act* 1988 (Cth) ("the Act"). Division 2 of Pt VI of the Act governed the powers and procedures of the Commission for dealing with industrial disputes. It included s 104, which provided, relevantly:

> "104(1) When a conciliation proceeding before a member of the Commission in relation to an industrial dispute is completed but the industrial dispute has not been fully settled, the Commission shall proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration."

4 That was the stage the proceedings had reached. The amending provision, which was part of a more extensive scheme involving, among other things, a change to the name of the Act, took effect on 1 January 1997. It provides:

> "111AAA (1) If the Commission is satisfied that a State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees, unless the Commission is satisfied that ceasing would not be in the public interest.
>
> …
>
> (4) In this section:
>
> **cease dealing**, in relation to an industrial dispute, means:
>
> (a) to dismiss the whole or a part of a matter to which the industrial dispute relates; or
>
> (b) to refrain from further hearing or from determining the industrial dispute or part of the industrial dispute."

5 What is in contest is the effect of s 111AAA in relation to the industrial disputes the subject of the pending proceedings before the Commission.

6 When a statute changes the law, the effect of the change upon existing rights, liabilities, claims, or proceedings is determined by the meaning of the statute. The common law developed rules of statutory construction as an aid to discovering that meaning. Such rules involved presumptions; but, being rules of construction, they were subject to any contrary intention evinced with sufficient clarity in the statute[1]. When expressed in summary form, those rules distinguished between retrospective and prospective effect, and between procedural provisions, and provisions affecting rights or liabilities. However, such distinctions are not always clear-cut. The terms retrospective and prospective may often be a convenient shorthand, but in a given case it may be necessary to identify more precisely the particular application of the alteration to the law in question. And, as the present case shows, there may be rights which, in their nature, are closely bound up with procedures and remedies.

7 The *Acts Interpretation Act* 1901 (Cth) is, according to its long title, an Act for the interpretation of Acts of Parliament and for shortening their language. It shortens the language of Acts of Parliament by making it unnecessary for Parliament to enact elaborate and repetitive provisions anticipating possible uncertainties and declaring the legislative intention on those points. Naturally, the *Acts Interpretation Act* makes repeated reference to the concept, central to statutory construction, of intention. Parliament, having expressed its intention as to the way in which its enactments are to be interpreted, frames its legislation accordingly. But its general expressions of intention are subject to anything that appears in the particular legislation.

8 Acts of Parliament are drafted, and are intended to be read and understood, in the light of the *Acts Interpretation Act*. A particular Act, and the *Acts Interpretation Act*, do not compete for attention, or rank in any order of priority. They work together. The meaning of the particular Act is to be understood in the light of the interpretation legislation. The scheme of that legislation is to state general principles that apply unless a contrary intention is manifested in a particular Act.

9 Section 8 of the *Acts Interpretation Act* provides:

> "8 Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> …
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed."

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1 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 and 270 per Dixon CJ.

10 Having regard to the definition of implied repeals in s 8A, what occurred in the present case was a repeal within the meaning of s 8.

11 There was much argument about whether the parties to the industrial disputes in question had rights within the meaning of s 8(c). Let it be assumed that they had rights. Such rights flowed from the provisions of Pt VI of the Act, and Pt VI determined their nature. The key provision was s 104, which, before the amendment, obliged the Commission to proceed to deal with the industrial disputes by arbitration. The words "by arbitration" could only mean "by arbitration in accordance with this Act".

12 The amending provision, s 111AAA, was expressed in terms that attached directly to, and qualified, the claimed right. It obliges the Commission to cease dealing with certain industrial disputes. The legislative injunction, to "cease dealing" with certain kinds of dispute, assumes that the Commission is otherwise empowered and obliged to deal with them, and requires the Commission to desist. The characteristic of the disputes the subject of that injunction to the Commission is that there is a State award or agreement which, to the Commission's satisfaction, has a certain operation in relation to employees affected by the dispute. That is the discrimen by reference to which s 111AAA applies in the case of some disputes and not others. The argument for the respondents seeks to introduce an additional discrimen relating to the stage of the pending proceedings in the Commission. There is nothing in the language of the amending provision to warrant that. Section 111AAA identifies the disputes with which the Commission "must cease dealing". It does not provide that the Commission must cease dealing with some of those disputes, but not with others. It simply provides that the Commission must cease dealing with such disputes.

13 If the parties to the disputes in question in these appeals, by virtue of Pt VI of the Act and, in particular, by virtue of s 104, had a right, then there was manifested plainly a legislative intention to affect that right. The right was to have the Commission deal with the disputes by arbitration, in accordance with the Act. The legislature amended the Act, by directing the Commission to cease dealing with the disputes.

14 The purpose of the *Acts Interpretation Act* is to resolve uncertainties about legislative intention; not to create them. In the present case, the intention appears to me to be plain.

15 I would allow the appeals. I agree with the orders proposed by Gaudron, McHugh, Gummow and Hayne JJ.

16 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. These five appeals from the Full Court of the Federal Court of Australia[2] were heard together and concern the effect of certain amendments contained in Sched 5 to the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") on proceedings which then were pending in the Australian Industrial Relations Commission ("the Commission"). In each appeal, the appellant contends that the Full Court (Spender, Ryan and O'Connor JJ) erred in refusing prohibition, certiorari and mandamus to ensure, in broad terms, that proper effect be given to s 111AAA of what is now styled the *Workplace Relations Act* 1996 (Cth) ("the Workplace Relations Act"), a provision introduced by the WROLA Act. The appellants submit that, on its commencement on 1 January 1997[3], s 111AAA required the Commission to cease dealing with particular industrial disputes to which they were party, because State awards or State employment agreements governed the wages and conditions of employment in issue.

17 Section 111AAA was inserted into the *Industrial Relations Act* 1988 (Cth) ("the 1988 Act")[4] by the WROLA Act[5]. The terms of s 111AAA are as follows:

> "(1) If the Commission is satisfied that a State award[6] or State employment agreement[7] governs the wages and conditions of

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2 *Re McIntyre v Transport Workers' Union of Australia; Ex parte Attorney-General of Queensland* (2000) 105 FCR 584.

3 WROLA Act, s 2(4).

4 The 1988 Act was renamed the *Workplace Relations Act* 1996 (Cth) by Item 1 of Pt 1 of Sched 19 to the WROLA Act.

5 Item 25 of Pt 1 of Sched 5.

6 "State award" is defined in s 4(1) of the Workplace Relations Act as "an award, order, decision or determination of a State industrial authority".

7 "State employment agreement" is defined in s 4(1) of the Workplace Relations Act as "an agreement:

> (a) between an employer and one or more of the following:
>
> (i) an employee of the employer;
>
> (ii) a trade union; and

(Footnote continues on next page)

employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees, unless the Commission is satisfied that ceasing would not be in the public interest.

(2) In determining the public interest for the purposes of subsection (1), the Commission must give primary consideration to:

(a) the views of the employees referred to in subsection (1); and

(b) the views of the employer or employers of those employees.

(3) The Commission must inform itself as quickly as it can about the views referred to in subsection (2), and may inform itself in such manner as it thinks fit.

(4) In this section:

cease dealing, in relation to an industrial dispute, means:

(a) to dismiss the whole or a part of a matter to which the industrial dispute relates; or

(b) to refrain from further hearing or from determining the industrial dispute or part of the industrial dispute."

Proceedings before the Commission

18 These appeals concern two separate industrial disputes. It is convenient to refer to the first of these as "the Darwalla dispute", and to the second as "the Furnishing Industry dispute".

(b) that regulates wages and conditions of employment of one or more of the employees; and

(c) that is made under a law of a State that provides for such agreements; and

(d) that prevails over an inconsistent State award."

The Darwalla dispute

19 In September 1996, the Transport Workers' Union of Australia ("the TWU") applied for "roping-in" awards which would bind, as respondents to a federal award, particular employers in Queensland. The Queensland Chamber of Commerce and Industry ("the QCCI"), the Australian Workers' Union of Employees (Queensland) ("the AWU") and the State of Queensland sought to have these applications dismissed pursuant to par (g) of s 111(1) of the 1988 Act. That provision conferred a power on the Commission to dismiss a matter (or part thereof) or to refrain from further hearing or determining an industrial dispute (or part thereof) on grounds specified in sub-pars (i)-(v). Those asserting that the Commission should dismiss or refrain from further hearing relevant matters in the Darwalla dispute did so either on the basis that the relevant dispute was proper to be dealt with by a State arbitrator (par (ii)), or that further proceedings were not necessary or desirable in the public interest (par (iii)). Applications to the Commission for it to cease dealing with the relevant matters were subsequently brought under s 111AAA and were heard by Senior Deputy President Harrison, who delivered her decision on 5 September 1997. She dismissed all but one of the s 111(1)(g) applications and, subject to one exception, was not persuaded that she was required by s 111AAA to cease dealing with any of the matters before her. In respect of some of the disputes, the Senior Deputy President was not satisfied that a State award or State employment agreement governed the wages and conditions of employment in issue; in respect of others, she held that ceasing to deal with the industrial dispute would not be in the public interest. The Commission went on to decide that "roping-in" awards be made in respect of the employers identified in the reasons for decision[8].

20 The State of Queensland, the AWU, the QCCI and certain employers obtained leave to appeal against these findings to the Full Bench of the Commission. The Commonwealth Minister for Workplace Relations and Small Business ("the Commonwealth Minister") intervened in support of the appellants. The Full Bench decided on 30 June 1998 that s 111AAA did not apply because the TWU had an "accrued right" to have the industrial disputes arbitrated by the Commission under the 1988 Act and this had been preserved by s 8 of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"). This relevantly provides:

> "Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:

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8 The employers included Darwalla Farming & Plant Pty Ltd.

…

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or

…

(e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

The Full Bench therefore concluded that the TWU was entitled to have its applications for "roping-in" awards determined without regard to s 111AAA[9].

The Furnishing Industry dispute

21 In 1989, the Federated Furnishing Trades Society, which later amalgamated with the Construction, Forestry, Mining and Energy Union ("the CFMEU"), served a log of claims on numerous employers throughout Australia, including employers in Queensland. Prolonged disputation ensued, upon which the 1988 Act operated. In 1996, the CFMEU applied to "rope-in" the Queensland employers to a federal award that had been approved by the Commission in relation to an earlier dispute. The QCCI and the Furnishing Industry Association of Australia (Q) Ltd ("the FIAAQ") applied to have the CFMEU's claim dismissed under par (g) of s 111(1) of the 1988 Act. The State of Queensland and the Commonwealth Minister for Industrial Relations, intervening, made similar applications under s 111(1)(g). The matters came on for hearing before Senior Deputy President Watson in 1996. Subsequently, in early 1997, the QCCI and the FIAAQ, together with the State of Queensland and the Commonwealth Minister for Industrial Relations, applied to have the Commission cease dealing with the dispute under s 111AAA, which had by then come into force.

22 The Senior Deputy President decided on 22 August 1997 that, by virtue of s 8 of the Interpretation Act, the CFMEU had a "right" to have the subsisting

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9 *Australian Workers' Union of Employees, Queensland v Darwalla Milling Co Pty Ltd* (1998) 83 IR 92.

s 111(1)(g) applications determined without regard to the operation of s 111AAA. Those subsisting applications were dismissed by Senior Deputy President Watson on 23 December 1997. The QCCI, the FIAAQ and the State of Queensland subsequently applied to have the pending s 111AAA applications determined. Senior Deputy President Watson referred those applications to a Full Bench of the Commission. On 27 November 1998, a differently constituted Full Bench to that which had dealt with the Darwalla dispute delivered its decision dismissing the applications under s 111AAA[10]. The Full Bench found that s 111AAA did not abrogate the CFMEU's "accrued right" to have its "roping-in" application determined under the relevant provisions of the 1988 Act. Like the Full Bench in the Darwalla dispute, the Full Bench concluded that this "right" was protected by s 8 of the Interpretation Act.

Earlier proceedings in this Court and in the Full Federal Court

23 In July 1998, the AWU applied to this Court for the issue of writs of prohibition and certiorari directed against the members of the Full Bench who had decided that s 111AAA had no relevant operation in the Darwalla dispute (Matter No B24/1998). In December 1998, the Queensland Attorney-General applied in this Court for the issue of writs of prohibition, mandamus and certiorari directed against the same members of the Full Bench, and against the Commission itself, in relation to the same findings (Matter No B58/1998). Subsequently, in May 1999, the Queensland Attorney-General instituted proceedings in this Court seeking writs of prohibition, mandamus and certiorari directed against the relevant members of the Full Bench, and against the Commission itself, in respect of the finding that s 111AAA did not apply to the Furnishing Industry dispute (Matter No B34/1999).

24 In each application, the applicants alleged that (i) the relevant decisions of the Commission in respect of s 111AAA disclosed errors of law on the face of the record, and (ii) the Commission members in each instance, by holding that s 111AAA had no relevant operation, had acted beyond jurisdiction, and had either or both failed to exercise jurisdiction and wrongly assumed jurisdiction. The applicants sought orders nisi to quash the relevant decisions of the Commission, to prohibit further effect being given to those decisions and, in

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10 *Queensland v Construction, Forestry, Mining and Energy Union* (1998) 86 IR 216. Consistently with s 36(3) of the Workplace Relations Act, two members of the Full Bench were members of the Queensland Industrial Relations Commission holding secondary offices as members of the Commission.

Matter Nos B58/1998 and B34/1999, to compel the Commission to determine the s 111AAA applications according to law.

25 The three applications were separately remitted to the Federal Court, Brisbane District Registry, by single Justices of this Court, acting under s 44 of the *Judiciary Act* 1903 (Cth)[11]. The three matters were dealt with by a Full Court of the Federal Court, which heard the matters in its original jurisdiction[12]. The Commonwealth Minister intervened in the three proceedings pursuant to s 471 of the Workplace Relations Act and was thereby taken to be a party to each of them.

26 The Full Court dismissed each of the three applications. Their Honours agreed with the Full Bench of the Commission that s 8(c) of the Interpretation Act operated to preserve the rights of the CFMEU and the TWU to have the industrial disputes to which they were parties arbitrated by the Commission. The Full Court therefore affirmed that the relevant proceedings pending before the Commission at the time s 111AAA came into force could be determined without regard to that provision. It is against this outcome that the appellants obtained special leave to appeal to this Court.

The appeals before this Court

27 The appellant in the first two appeals (Matter Nos B53/2001 and B54/2001) is the Queensland Attorney-General. The first appeal, to which the CFMEU is the second respondent, concerns the Furnishing Industry dispute. The second appeal pertains to the Darwalla dispute and the second respondent in that proceeding is the TWU. The appellant in the other three appeals (Matter Nos B56/2001, B57/2001 and B58/2001) is the Commonwealth Minister for Employment and Workplace Relations. In Matter No B56/2001, the CFMEU is the second respondent and the appeal concerns the Furnishing Industry dispute. Both Matter Nos B57/2001 and B58/2001 relate to the Darwalla dispute; the TWU is the second respondent in each. The AWU is also a respondent in Matter Nos B57/2001 and B54/2001. For convenience, the CFMEU and the TWU together will be referred to in these reasons as "the respondent unions".

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11 Matter No B58/1998 was remitted by McHugh J by order dated 3 March 1999; Matter No B24/1998 was remitted by Callinan J by order dated 18 June 1999; Matter No B34/1999 was remitted by Callinan J by order dated 13 July 1999.

12 Section 415 of the Workplace Relations Act provides for the original jurisdiction of the Federal Court to be exercised in certain matters by a Full Court.

28 The appellants seek relief in substantially the same terms as they sought initially in this Court and thereafter in the Full Court.

Part VI of the 1988 Act

29 To understand the effect of the enactment of s 111AAA and the submissions respecting the WROLA Act, it is necessary to outline the operation of the relevant provisions of the 1988 Act as they existed immediately before 1 January 1997. Although many of the features of that regime still exist under the Workplace Relations Act, it is convenient to describe the relevant provisions in the past tense.

30 Part VI (ss 88A-167) of the 1988 Act was headed "DISPUTE PREVENTION AND SETTLEMENT". Section 88A, in Div 1A of that Part, set out the objects of the Part. Division 1 (ss 89-98) of Pt VI was headed "*Functions of Commission generally*". Section 89 identified the functions of the Commission as being:

> "(a) to prevent and settle industrial disputes:
>
> (i) so far as possible, by conciliation; and
>
> (ii) where necessary, by arbitration; and
>
> (b) such other functions as are conferred on the Commission by this or any other Act."

In performing these functions, the Commission was directed by s 90 to take into account "the public interest" and, for that purpose, to have regard to (i) the objects of the Act and, in particular, the objects of Pt VI (par (a)), and (ii) the state of the national economy and the likely effects on the national economy (especially in respect of employment levels and inflation) of any award or order the Commission was proposing to make (par (b)). Section 90AA(1) provided that the Commission was to perform its functions under Pt VI "in a way that furthers the objects of this Act and, in particular, the objects of this Part". Section 90AA(2) provided that, in performing these functions, the Commission must:

> "(a) ensure, so far as it can, that the system of awards provides for secure, relevant and consistent wages and conditions of employment; and
>
> (b) have proper regard to the interests of the parties immediately concerned and of the Australian community as a whole".

31 The Commission was to encourage parties to agree on dispute resolution procedures to be included in awards (s 91) and, in considering whether to exercise its powers in relation to a dispute, was to have regard to the extent to which the parties had complied with those procedures (s 92). Section 98 exhorted the Commission to perform its functions as quickly as practicable.

32 Division 2 (ss 99-110) of Pt VI was headed "*Powers and procedures of Commission for dealing with industrial disputes*". Upon being notified of an industrial dispute under s 99, the Commission was ordinarily required to refer that dispute for conciliation (ss 100, 102, 103). It was for the Commission to determine the parties to any industrial dispute that came before it, and to determine the matters in dispute (s 101).

33 The Commission was armed by Pt VI with wide-ranging powers to deal with industrial disputes. Paragraph (g) of s 111(1), the potential application of which to the present disputes is said to have been displaced by s 111AAA, provided that the Commission "may", in relation to an industrial dispute:

> "dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute or part of the industrial dispute, if it appears:
>
> (i) that the industrial dispute or part is trivial;
>
> (ii) that the industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State arbitrator;
>
> (iii) that further proceedings are not necessary or desirable in the public interest;
>
> (iv) that a party to the industrial dispute is engaging in conduct that, in the Commission's opinion, is hindering the settlement of the industrial dispute or another industrial dispute; or
>
> (v) that a party to the industrial dispute:
>
> (A) has breached an award or order of the Commission; or
>
> (B) has contravened a direction or recommendation of the Commission to stop industrial action".

34 The exercise of the power in par (g)(iii) was subject to the qualification contained in s 111(1A). That sub-section provided that par (g)(iii) did not apply to proceedings:

> "so far as they may affect terms and conditions of employment of a particular kind that are applicable to a particular class of employees, if:
>
> (a) at any time after 7 December 1992, terms and conditions of that kind and application have been regulated by an order, award, decision or determination of a State industrial authority (whether made before, on or after that date); and
>
> (b) terms and conditions of that kind and application:
>
> (i) cannot be dealt with by a State arbitrator by compulsory arbitration (but not merely because an order, award, decision or determination of a State arbitrator cannot be changed during a particular period); and
>
> (ii) are not regulated by an employment agreement; and
>
> (iii) are not regulated by an award under this Act".

"Employment agreement" was defined in s 111(1A) as an employment agreement of a specified kind entered into under State law. "State arbitrator" was defined in s 111(4) as a State industrial authority with the power to regulate terms and conditions of employment by compulsory arbitration.

35 The discretion conferred by par (g)(ii) and par (g)(iii) was further regulated by s 111(1G). This required the Commission to give particular weight to the benefits of not disturbing State employment agreements of a specified type.

36 Section 104(1) provided an important step. It stated:

> "When a conciliation proceeding before a member of the Commission in relation to an industrial dispute is completed but the industrial dispute has not been fully settled, the Commission shall proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration."

At the time s 111AAA came into operation on 1 January 1997, the operation of s 104(1) had been engaged in the present disputes. What immediately was before

the Commission were the respective "roping-in" award applications and the attempts to have them dismissed pursuant to the power conferred by par (g) of s 111(1) of the 1988 Act.

37 Section 111AAA circumscribes the powers of the Commission by requiring the Commission to withdraw from industrial disputes in specified circumstances. At least in cases where a dispute would otherwise proceed to arbitration, the effect of s 111AAA is to qualify the direction in s 104(1) of the 1988 Act[13]. Section 111AAA narrows the circumstances in which the Commission must proceed to arbitration under s 104(1). It follows that s 111AAA brings about a "limitation of the effect" of part of the 1988 Act, or "the exclusion of the application of [the 1988 Act] or part to any person, subject-matter or circumstance". Those are the terms, respectively, of pars (b) and (c) of s 8A of the Interpretation Act[14]. That provision expansively defines the circumstances in which a statute is taken to "repeal" in whole or in part a former statute, for the purposes of s 8. It is the circumstance of that "repeal" (as defined) that engages the presumption in s 8(c) upon which the respondent unions rely.

38 Further, s 111AAA cuts across the operation of sub-par (g)(ii) of s 111(1) of the 1988 Act. It does so by imposing a mandatory requirement (subject only to the "public interest" exception) that the Commission cease dealing with a dispute if it is satisfied that a State award or State employment agreement governs the wages and conditions of employment in issue. This partially supplants the operation of sub-par (g)(ii), which confers a power on the Commission to dismiss a matter or refrain from further hearing a dispute if it appears that the dispute has been dealt with, is being dealt with, or is proper to be dealt with by a State arbitrator. That is, s 111AAA operates in circumstances that otherwise would have enlivened the exercise of the power under sub-par (g)(ii). In some cases at least, the former provision will require an

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13 Now s 104 of the Workplace Relations Act.

14 Section 8A of the Interpretation Act states:

> "A reference in section 7 or 8 to the repeal of an Act or of a part of an Act includes a reference to:
>
> (a) a repeal effected by implication;
>
> (b) the abrogation or limitation of the effect of the Act or part; and
>
> (c) the exclusion of the application of the Act or part to any person, subject-matter or circumstance."

outcome that would differ from that supported by sub-par (g)(ii) operating alone. To that extent, and in the sense spoken of in s 8A of the Interpretation Act, s 111AAA also limits the effect of sub-par (g)(ii), or excludes the application of that provision to particular persons and circumstances. The impact of s 111AAA on sub-par (g)(ii) thus also attracts the presumption in s 8(c) of the Interpretation Act.

"Accrued right"?

39 Having established that s 111AAA effects a "repeal" of parts of the 1988 Act, for the purposes of s 8 of the Interpretation Act it is necessary to ascertain whether the respondent unions have acquired or accrued a "right" of the type that s 8 preserves. Only if this inquiry is answered in the affirmative is it necessary to consider whether the prima facie preservation of that right has been displaced by a contrary intention in the repealing statute. Section 8(c) describes in general terms the nature of the "rights" which it preserves. The "right" must be one that is "acquired" or "accrued" "under [the] Act so repealed".

40 The respondent unions do not assert that they had acquired or accrued a "right" to an award. Rather, they submit that they had acquired or accrued the "right" to have their disputes arbitrated in accordance with s 104 of the 1988 Act. Describing the putative right in this manner, however, says little about its legal nature or the way in which it may be enforced. The right acquired or accrued by the respondent unions is more accurately described as a public law right to require the Commission to observe its duty to comply with the law as it exists from time to time. A right of that nature, where it exists, is a right to have a claim or application considered in accordance with the statute that governs its determination.

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd

41 Those seeking to uphold in this Court the decision of the Full Federal Court fix upon the words in s 104(1) "the Commission shall proceed". Similar terms in s 38 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act") were construed in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[15] as imposing an "imperative requirement". This Court reached that conclusion independently of the additional consideration that the old Arbitration Court was the recipient of jurisdiction

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15 (1949) 78 CLR 389 at 398.

under the 1904 Act and as a court was under a duty to exercise that jurisdiction[16]. Further, it was decided in *Ozone Theatres* that mandamus under s 75(v) of the Constitution would lie, albeit as a discretionary remedy, to compel performance of that duty. The Court rejected the submission that if[17]:

> "the Arbitration Court shall interpret the words on which its jurisdiction depends and the court in fact applies itself to that question, then, in the absence of mala fides, it discharges the duty imposed on it".

42 In the present appeals, the respondent unions submit that it follows from the application of the reasoning in *Ozone Theatres* to the 1988 Act that, as at 1 January 1997, the applicants who had moved under par (g) of s 111(1) had "accrued rights" to the discharge by the Commission of its continuing duty stemming from s 104(1).

43 It is apparent that the "right" which was "accrued" was reflective of the susceptibility of the Commission to mandamus under s 75(v) of the Constitution. But that invites attention to the nature of the particular duty placed by the 1988 Act upon the Commission. It was pointed out in *Ozone Theatres* that[18]:

> "in the case of a court or other body which is under a duty to hear and determine a matter, the tenor of the writ will require the hearing and determination of the matter, and not the decision of the matter in any particular manner".

This precept finds expression in the form of order, exemplified in *Wade v Burns*[19], which requires a determination "according to law"[20].

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16 (1949) 78 CLR 389 at 398-399.

17 By counsel for the respondent, reported (1949) 78 CLR 389 at 395.

18 (1949) 78 CLR 389 at 399.

19 (1966) 115 CLR 537 at 569. See also *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 488; *Re Coldham; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 522 at 531.

20 In some cases, it may be appropriate to frame the order so as to require the making of a particular decision: *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131 at 139, 154; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188, 203, 206.

44 Where what is involved is the exercise of judicial power, that often will require the determination of pre-existing rights or liabilities. This is illustrated by those functions which are appropriate exclusively to judicial action, including the determination of criminal guilt, actions in contract and tort, and suits to enforce trusts[21]. The term "pre-existing rights" will take its content from the state of affairs at some stage before the judicial determination, such as the accrual of a cause of action or institution of an action or application. Hence the ready accommodation here of notions of accrued rights within the sense of s 8 of the Interpretation Act.

45 Different considerations applied to the exercise of arbitral functions under the 1904 Act and the 1988 Act. The arbitrator was empowered to make a determination not of existing legal rights and liabilities, but as to the conditions to prevail in the future between the parties to the dispute; statute gave to the terms of the determination the character of legal rights and obligations. Thus, in *R v Kelly; Ex parte State of Victoria*[22], the Court said:

> "When it is said that industrial awards are of a legislative character, the point of the statement is to be found in the fact that such awards prescribe rules of conduct for the future in respect of the disputing parties and do not determine the rights and duties of those parties under the law as it already exists."

46 The requirement, enforced by mandamus, that the arbitrator hear and determine a matter according to law allowed for changes in the content of that law which founded the duty which attracted the remedy. If before the making of the award prescribing rules of conduct for the future, the law was changed to place additional restraints or conditions upon the exercise of the power to make the award, then the obligation to make a determination according to law was correspondingly modified. In this way, the content of the public duty and correlative right to its discharge was fluid rather than fixed and notions of "accrued" rights in the law as it stood at any particular stage in the arbitral processes had no place.

47 Section 111AAA(1) enjoins the Commission, with effect from 1 January 1997, to cease dealing with certain industrial disputes, if it were satisfied of the

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21 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40].

22 (1950) 81 CLR 64 at 81.

matters stated therein, unless the Commission were satisfied that to do so would not be in the public interest. Parties to industrial disputes with which the Commission was dealing, according to Pt VI of the 1988 Act, before that date had no "accrued" rights in the path of changes to Pt VI such as those effected by s 111AAA.

Esber v The Commonwealth

48 Reference was made in argument to the significance for present purposes of the reasoning and decision in *Esber v The Commonwealth*[23]. In the event, no party sought leave to re-open *Esber*.

49 The transitional provisions of the repealing statute at issue in *Esber* were held by the majority expressly to preserve the entitlement which had accrued under the previous law[24]. Their Honours said that s 129(2) of the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) "should be given the effect which its language indicates, there being nothing in the Act standing in the way of that approach". The tenor of s 111AAA, in issue on these appeals, is to the opposite effect and that, as will appear, is confirmd by other provisions of the WROLA Act.

50 Further, the "accrued right" at stake in *Esber* was concerned with the continuation of an application for review by the Administrative Appeals Tribunal and the determination of Mr Esber's entitlement to redeem his rights to further payments of compensation under the earlier legislation. As has been indicated, the "rights" said to flow from the duty imposed upon the Commission by s 104(1) of the 1988 Act were of a different nature.

Contrary intention

51 In any event, s 111AAA speaks in imperative terms with respect to proceedings pending at the commencement of its operation on 1 January 1997. Even if there had been "accrued rights" then subsisting, in the sense of s 8 of the Interpretation Act, s 111AAA itself and together with other provisions of Sched 5 to the WROLA Act evinces a contrary intention to the saving operation of s 8. We turn to explain why this is so.

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23 (1992) 174 CLR 430.

24 (1992) 174 CLR 430 at 438.

52 The operation of the presumption that accrued rights are unaffected by a repealing statute is, by s 8 of the Interpretation Act, expressly subject to the appearance of a "contrary intention". Therefore, where the provisions of a repealing statute are clearly inconsistent with the survival of accrued rights, those provisions are controlling, and any presumption erected by s 8 is displaced.

53 Although it received little attention in the Federal Court, the text of s 111AAA itself indicates a contrary intention. The expression "must cease dealing with" assumes the existence of pending proceedings. It postulates the prior continuation of those proceedings, to which the provision then attaches, requiring, in terms, that those proceedings cease. One can only "cease dealing with" a matter if one is already dealing with it. This construction, consistent with the natural meaning of the words used in s 111AAA(1), is reinforced by s 111AAA(4). That sub-section relevantly provides that the definition of "cease dealing", in relation to an industrial dispute, includes "*to refrain from further hearing* or from determining the industrial dispute or part of the industrial dispute" (emphasis added).

54 "Must cease" is a legislative command of a particular emphatic kind. Those words permit no derogation from, or qualification to, the direction conveyed. Where it applies, and subject only to the "public interest" qualification in the closing words of sub-s (1), s 111AAA requires the Commission immediately to withdraw from the industrial dispute.

55 Further, "dealing with" is an expression of considerable scope. On its face, it embraces the entire spectrum of ways in which the Commission's dispute prevention and settlement procedures may be engaged. The phrases "deal with" and "dealing with" are used repeatedly throughout Pt VI of the Workplace Relations Act to identify a broad range of activities on the part of the Commission[25]. Indeed, Div 2 of that Part[26] is headed "Powers and procedures of Commission for dealing with industrial disputes". This indicates that "dealing with" is confined neither to conciliation nor arbitration. Rather, it covers all the techniques, actions and processes by which the Commission may respond to, or become involved with, an industrial dispute to which Pt VI applies. "Dealing with" is an expression that is apt to cover every stage of the process put in motion by Div 2 of Pt VI of the 1988 Act, and the corresponding provisions of the

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25 See ss 89A(1)(a), 91, 100(2)(b), 104(1), 107(2), 108(2), 108(7), 108(8), 109(7), 110(1), 124, 135(1)(a), 136(4) and 141.

26 In both the 1988 Act and the Workplace Relations Act.

Workplace Relations Act. Indeed, a Full Bench of the Commission has held[27] that the requirement in s 111AAA to "cease dealing with the industrial dispute" extends to refraining from finding that an industrial dispute exists, a finding which ordinarily is anterior to all other steps that may be taken under Div 2.

56 The language of s 111AAA is clearly broad enough to encompass all proceedings before the Commission, whenever commenced. The respondent unions sought to introduce into the provision an unexpressed temporal limitation on its operation. That submission should be rejected.

57 The legislative context of s 111AAA confirms, rather than denies, this contrary intention to the operation of s 8. As was noted in *Re Pacific Coal Pty Ltd; Ex parte CFMEU*[28], the WROLA Act effects, in some respects at least, a contraction in the operation of the federal regime for the conciliation and arbitration of interstate industrial disputes. Schedule 5 to the WROLA Act, which contains the Item that inserts s 111AAA, is headed "Awards". It reduces, in various ways, the circumstances within which the Commission may exercise its powers. Various amendments effected by that Schedule require the Commission to defer to other bodies (including State industrial bodies) or to instruments created otherwise than pursuant to its own arbitral powers (including agreements between employers and employees at the workplace or enterprise level).

58 Part 1 of Sched 5 to the WROLA Act (Items 1-45) produces this result in a number of ways. Perhaps most fundamentally, it does so through what is described as a process of "award simplification". The effect of the relevant provisions, some of which were challenged and upheld in *Re Pacific Coal*, is that awards made by the Commission now deal with a smaller range of subjects than had previously been the case and, in general, provide only for minimum conditions of employment[29]. Awards may now deal only with the 20 subjects[30]

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27 *Australian Workers' Union of Employees, Queensland v Australian Maritime Officers Union* (1997) 75 IR 227.

28 (2000) 203 CLR 346 at 355-356 [7], 408 [193], 449 [302].

29 The provision challenged in *Re Pacific Coal* was s 3 of the WROLA Act so far as it gives effect to Items 50(1) and 51(1), (2) and (3) of Pt 2 of Sched 5.

30 These include hours of work (sub-s (2)(b)), rates of pay (sub-s (2)(c), (m), (t)), allowances (sub-s (2)(d), (e), (j), (k), (l)), superannuation (sub-s (2)(s)), and leave

(Footnote continues on next page)

set out in s 89A of the Workplace Relations Act[31]. Section 143(1B), inserted by Item 35 of Pt 1 of Sched 5, complements s 89A(1) by requiring the Commission, "if it considers it appropriate", to ensure that awards that it makes do not include "matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level".

59 There are other important respects in which Pt 1 of Sched 5 requires, or indicates, that the Commission is to have a reduced role in the settlement of industrial disputes or that the exercise of its power to arbitrate is to be subject to new impediments and qualifications. Item 10 amends s 89(a)(ii) of the 1988 Act, respecting the functions of the Commission. Section 89 had relevantly provided that the Commission's functions included the prevention and settlement of industrial disputes so far as possible, by conciliation and, "where necessary", by arbitration. The amendment omits the qualification "where necessary" and substitutes the more prescriptive clause "as a last resort and within the limits specified in this Act". Item 17 amends s 100(2) to require the President of the Commission to publish reasons for not referring an alleged industrial dispute for conciliation, before arbitration may commence in relation to that alleged dispute. Item 21 amends s 111(1)(g)(ii) in a manner that expands the circumstances in which the Commission may dismiss or refrain from further hearing a matter that has been dealt with, is being dealt with, or is proper to be dealt with under a State industrial system. It does so by replacing the reference in the 1988 Act to a dispute or part thereof being dealt with by a State "arbitrator" with the broader concept of it being dealt with by a "State industrial authority". The former term was defined as a State industrial authority with power to regulate terms and conditions of employment by compulsory arbitration[32]. The latter term is clearly broader, as it includes State persons or bodies with authority both to conciliate and to arbitrate in relation to a dispute[33].

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entitlements (sub-s (2)(e), (f), (g), (h)). Provision is also made for the Commission to arbitrate with respect to "exceptional matters" under s 89A(7).

31 Inserted by Item 11 of Pt 1 of Sched 5 to the WROLA Act. Items 1, 2, 18, 28, 31 and 32 make amendments that support the operation of s 89A.

32 See s 111(4) of the 1988 Act.

33 See s 4(1) of the Workplace Relations Act.

60 Item 22 repeals s 111(1A)[34]. This removes a restriction on the Commission's discretion in s 111(1)(g)(iii) to dismiss or to refrain from further hearing a matter on the basis that further proceedings are "not necessary or desirable in the public interest".

61 Item 34 amends s 128(1) in a manner that complements the operation of s 111AAA. Prior to the WROLA Act, s 128(1) had stated:

> "If it appears to a Full Bench that a State industrial authority is dealing or is about to deal with:
>
> (a) an industrial dispute;
>
> (b) a matter provided for in an award or an order of the Commission; or
>
> (c) a matter that is the subject of a proceeding before the Commission;
>
> the Commission may make an order restraining the State industrial authority from dealing with the industrial dispute or matter."

Item 34 amends s 128(1) by inserting two additional sub-paragraphs. These disable the Commission from restraining a State industrial authority from dealing with an industrial dispute in circumstances where that State industrial authority is dealing with the dispute either (i) by "facilitating the entering into of a State employment agreement", or (ii) by "approving a State employment agreement". To that extent, the power of the Commission to restrain parallel State industrial proceedings is curtailed. Further, Item 41 amends s 152 so as to provide that awards of the Commission will not ordinarily prevail over "State employment agreements".

62 Part 1 of Sched 5 to the WROLA Act therefore contains numerous provisions that require the Commission to withdraw, in specified circumstances and to varying extents, from involvement in industrial disputes and other matters arising under the Workplace Relations Act. This is consistent with the amended principal objects of the Workplace Relations Act and of Pt VI of that Act. Immediately before the commencement of the WROLA Act, the 1988 Act had relevantly provided, in s 3, that the principal object of that Act was:

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34 Item 22 also repeals sub-ss (1B) and (1C) of s 111 which were ancillary to sub-s (1A) of that section.

> "to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by:
>
> …
>
> (d) enabling the Commission to prevent and settle industrial disputes:
>
> (i) so far as possible, by conciliation; and
>
> (ii) where necessary, by arbitration".

Schedule 1 to the WROLA Act substitutes a new s 3, which relevantly provides that the principal object of the Workplace Relations Act is:

> "to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:
>
> ….
>
> (h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, *where appropriate and within specified limits*, by arbitration" (emphasis added).

Section 3(b) of the Workplace Relations Act further provides that the principal object of that Act includes "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level". Section 88A of the Workplace Relations Act, as amended by the WROLA Act[35], describes one of the objects of Pt VI of the Act in similar terms. The carrying into effect of these objects is evident in the provisions of the WROLA Act introducing the regime for certified agreements (Sched 8) and Australian workplace agreements ("AWAs") (Sched 10). Thus, as was noted in *Re Pacific Coal*, "the evident intention of [the WROLA Act] was that awards of the Commission would no longer be the principal repository (let alone the exclusive repository) of the terms and conditions of employment of individual employees"[36].

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35 Item 8 of Pt 1 of Sched 5.

36 (2000) 203 CLR 346 at 408 [193].

63 Thus the amendments in Sched 5 do not merely alter the pre-existing regime for the conciliation and arbitration of interstate industrial disputes. Many of the provisions in the Schedule have the express object of reducing the role of the Commission in relation to such disputes in deference to other bodies, instruments or techniques capable of resolving those disputes. To give provisions like s 111AAA a limited temporal operation, not expressed in the statutory text, would be to frustrate rather than further that object.

64 Moreover, the transitional provisions in Sched 5 themselves suggest that the presumption erected by s 8 of the Interpretation Act has been displaced. Part 2 (Items 46-55) of Sched 5 is headed "Transitional provisions". Much of that Part is directed to establishing a process by which existing awards were progressively to be varied throughout the "interim period"[37] to ensure that, in effect, they dealt only with the 20 matters designated by s 89A. Existing awards thereby became subject to the same limitations as new awards made after 1 January 1997.

65 Item 55 is the only provision in Pt 2 of Sched 5 that expressly provides for the continued operation of a provision repealed by that Schedule. The Item provides that:

> "The repeal of subsection 111(1A) of the Principal Act does not apply to any proceedings before the Commission that commenced before the commencement of the repeal."

This express transitional provision is properly to be regarded as exhaustive in respect of the transitional application of Sched 5 to existing proceedings. An exhaustive express transitional provision of this nature leaves no room for s 8 of the Interpretation Act to operate[38]. Indeed, Item 55 reflects a legislative assumption that the other provisions of Sched 5, including s 111AAA, will apply

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37 Defined in Item 46 of Sched 5 as "the period of 18 months beginning on the day on which section 89A of the Principal Act commences". The interim period commenced, therefore, on 1 January 1997 (WROLA Act, s 2(4)) and concluded on 30 June 1998.

38 *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 161-162; *Farbenfabriken Bayer AG v Bayer Pharma Pty Ltd* (1965) 113 CLR 520 at 526; *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 383-384; *Secretary, Department of Social Security v Kratochvil* (1994) 53 FCR 49 at 54-55.

to proceedings commenced before 1 January 1997. This legislative assumption is made particularly clear by Items 50 and 51, the effect of which is to require awards made before that date to be reviewed by the Commission to ensure that they deal only with the matters prescribed by s 89A[39].

66 Indeed, to hold that s 111AAA is inapplicable to proceedings commenced before 1 January 1997 produces practical difficulties. It is improbable that Parliament contemplated that protracted disputes would continue to be dealt with in accordance with provisions long since repealed. This is particularly apparent when the subject-matter of Pt VI of the Workplace Relations Act is borne in mind. That Part provides for the prevention and settlement of industrial disputes that may continue for many years. Findings made before 1 January 1997 respecting parties and matters in dispute can be varied by the Commission under s 101(1), without giving rise to a new dispute. Further, the effect of s 114 is that the making of one award in relation to an industrial dispute may not exhaust that dispute[40].

67 The construction of the WROLA Act for which the respondent unions contend would produce the anomalous result that s 111AAA applies only to those disputes found to exist after 1 January 1997, while those arising before that date, whatever their duration, are to be determined without regard to s 111AAA[41].

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39 See *Re Ross; Ex parte The Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399 at 418-419.

40 Section 114 states:

> "The fact that an award or order has been made for the settlement of an industrial dispute, or that an award or order made for the settlement of an industrial dispute is in force, does not prevent:
>
> (a) a further award or order being made for the settlement of the industrial dispute; or
>
> (b) an award or order being made for the settlement of a further industrial dispute between all or any of the parties to the earlier award or order, and whether or not the subject-matter of the further industrial dispute is the same (in whole or part) as the subject-matter of the earlier industrial dispute."

41 See *Re Ross; Ex parte The Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399 at 415-416.

68 The respondent unions emphasised that other Schedules to the WROLA Act apart from Sched 5 include transitional provisions with varying degrees of complexity. Some of these expressly insulate pending proceedings from the operation of new provisions. For instance, Sched 16 preserves the jurisdiction of the Industrial Relations Court in respect of certain part-heard proceedings, notwithstanding the general transfer by the WROLA Act of jurisdiction from that Court back to the Federal Court. Schedules 4 (Representation rights of organisations of employees), 6 (Termination of employment), 8 (Certified agreements) and 17 (Boycotts) deal differentially with the impact of the substantive amendments in each Schedule on matters pending before the Commission at the time the amendments came into force.

69 Contrary to the submission of the respondent unions, none of this indicates or suggests that the provisions of Sched 5 are to be construed otherwise than in accordance with their terms and in light of the objects and context of that Schedule. Indeed, the scheme of the WROLA Act is to deal separately in each Schedule with the transitional arrangements that govern the implementation of the substantive amendments in that Schedule.

Conclusion

70 The Full Court erred in holding that the respondent unions were entitled to have their respective applications determined without regard to the operation of s 111AAA.

71 Each appeal should be allowed. The orders of the Full Court of the Federal Court given on 20 November 2000 should be set aside.

72 In respect of the Darwalla dispute, a writ of prohibition should issue to the first respondents in Matter Nos B54/2001, B57/2001 and B58/2001 prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 30 June 1998 in Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997. A writ of certiorari should issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 in the Commission for the purpose of quashing the decision of the first respondents made on 30 June 1998. A writ of mandamus should issue to the first respondents compelling them to hear and determine according to law the appeals C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997.

73 In respect of the Furnishing Industry dispute, a writ of prohibition should issue to the first respondents in Matter Nos B53/2001 and B56/2001 prohibiting

them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 27 November 1998 in Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998. A writ of certiorari should issue to the first respondents to remove into this Court so far as may be necessary proceedings C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998 in the Commission for the purpose of quashing the decision of the first respondents made on 27 November 1998. A writ of mandamus should issue to the first respondents compelling them to hear and determine according to law the appeals C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998.

74 KIRBY J. Amendment and repeal of legislation are inherent features of the representative democracy established by the Constitution. Such changes have an impact upon rights and obligations expressed in the law as it previously stood. A question commonly arises as to how pre-existing rights and duties are to be accommodated to the new law. This is the question raised by the five appeals before the Court in these proceedings.

75 The primary rule for resolving such questions is that, if the new legislative requirements are valid, the decision-maker must obey and give effect to them according to their terms. When the new law is clear there is no problem. Thus, provisions in the new law may deal with transitional cases explicitly. However, it is often suggested that the new law has failed to address transitional cases, or at least to do so clearly. In such circumstances, subject to any contrary indication, both the common law[42] and statute[43] have established principles to help decision-makers reconcile any continuing effect of the repealed law with the duty of obedience to the law that has taken its place.

76 The reconciliation of the applicable rules, and the derivation of the consequences they mandate in a particular case, are often matters of doubt and uncertainty. They have resulted in divisions of opinion within this Court[44] and differences in judicial views in federal[45] and State[46] appellate courts. Such differences of approach have arisen between successive members and Full Benches of the Australian Industrial Relations Commission ("the Commission")[47], concerning the requirements of a supervening law as it affects

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42 *Surtees v Ellison* (1829) 9 B & C 750 [109 ER 278]; *Kay v Goodwin* (1830) 6 Bing 576 [130 ER 1403]. See also *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Ferrum Metal Exports Pty Ltd v Lang* (1960) 105 CLR 647 at 655-656; *Esber v The Commonwealth* (1992) 174 CLR 430 at 445 ("*Esber*").

43 *Acts Interpretation Act* 1901 (Cth), s 8. This is set out in the reasons of Gleeson CJ at [9]; reasons of Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons") at [20]; reasons of Callinan J at [154].

44 The reasoning of Kitto J in *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422 at 426-427 was reversed on appeal in *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 159-160. In *Esber* (1992) 174 CLR 430 Brennan J dissented.

45 See eg *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491.

46 *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 at 182.

47 *Re Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (1997) 73 IR 118; *National Tertiary Education Industry Union v Australian Higher Education Industrial Association* (1997) 74 IR 326; *Australian Workers'*

(Footnote continues on next page)

the powers and duties of the Commission. It now falls to this Court, in the context of the present appeals, to resolve some of the points of difference.

77 Two important but potentially conflicting principles of statutory construction are involved. The first concerns the extent to which legislation will be construed in accordance with a presumption that, in the absence of very clear language, amendments and repeals do not alter legal entitlements that accrued before the amendment or repeal in question took effect. The second concerns the duty of a court to uphold the stated command of the Parliament, expressed in valid legislation, clearly designed to achieve important legislative objectives.

The facts and earlier proceedings

78 The facts of the appeals are stated in the reasons of the Full Court of the Federal Court ("the Full Court")[48] and in the joint reasons in this Court[49]. It is unnecessary to repeat the details. Substantively, the proceedings relate to matters before the Commission for "roping-in" awards. The purpose of the awards was to bind certain employers in Queensland to the obligations of a federal award. It was the object of the respective employee organisations to bring under federal awards employment relationships that had previously been governed by State industrial law.

79 In neither of the cases has the Commission yet made an award. Applications have been made to the Commission members concerned, pursuant to a new provision whose meaning is principally in issue, that the Commission immediately cease dealing with the cases. In each case the Commission member refused that application. In consequence, appeals were brought to a Full Bench

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Union of Employees, Queensland v Australian Maritime Officers Union (1997) 75 IR 227; cf *Australian Rail, Tram and Bus Industry Union v Western Australia Government Railways Commission (Westrail)* (1997) 74 IR 119; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corp Ltd* (1998) 79 IR 31. The course of authority in the Commission is described in Jessup, "The Impact of Amendments to Federal Industrial Law upon Existing Proceedings in Industrial Tribunals", (1998) 11 *Australian Journal of Labour Law* 221 and Lee, "Is there an 'Accrued Right' to an Industrial Award?", (1999) 19 *The Queensland Lawyer* 184.

48 *Re McIntyre v Transport Workers' Union of Australia; Ex parte Attorney-General of Queensland* (2000) 105 FCR 584 ("*Re McIntyre*").

49 Joint reasons at [18]-[27].

of the Commission, which unanimously dismissed them and upheld the decisions of the Commission members[50].

80 Applications were then made to this Court for constitutional writs and other relief. The applications were remitted to the Federal Court of Australia. The Full Court of that Court unanimously dismissed them[51]. It is from that judgment of the Full Court that now, by special leave, five appeals bring the proceedings for constitutional and connected relief back to this Court. They return with the advantage of the reasoned decision of the Full Court.

81 By the time the proceedings had reached the stage that is relevant to these appeals, the *Industrial Relations Act* 1988 (Cth) ("the IR Act") had been substantially amended, renamed and replaced by the *Workplace Relations Act* 1996 (Cth) ("the Act"). It is the requirement of s 111AAA of the Act so amended, as it affects the ongoing proceedings before the Commission, that is the principal subject of these appeals.

The submissions

82 *For the appellants*: The Attorney-General of Queensland and the federal Minister for Employment and Workplace Relations[52] made common cause, supported by a Queensland State industrial union (Australian Workers' Union of Employees, Queensland) which intervened to protect its position and that of its members under State law. They contended that the respective members and Full Benches of the Commission had erred in declining to obey the instruction of s 111AAA of the Act that they "cease dealing with" the industrial disputes that were before them. It followed that the Full Court had erred in failing to so hold and in refusing relief to those applicants.

83 *For the respondents*: On the other hand, the respective federal organisations of employees, which had initiated the original proceedings in the Commission for federal awards, supported the decisions of the individual

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50 The two decisions of the Full Bench are reported as *Australian Workers' Union of Employees, (Q) v Darwalla Milling Co Pty Ltd* (1998) 83 IR 92 and *Queensland v Construction, Forestry, Mining and Energy Union* (1998) 86 IR 216. The decisions of the Full Benches are described in *Re McIntyre* (2000) 105 FCR 584 at 587-590 [3]-[16].

51 *Re McIntyre* (2000) 105 FCR 584 at 601 [47].

52 Formerly known as the Minister for Employment, Workplace Relations and Small Business. The name of the Minister in the title of these proceedings was changed by consent.

members of the Commission, the Full Benches of the Commission and the Full Court. They submitted that at each earlier level of decision-making the correct conclusion had been reached. They argued that s 111AAA of the Act did not oblige the Commission members to cease dealing with the part-heard industrial dispute before the Commission. On the contrary, properly construed, the Act obliged each Commission member to complete the hearings. The federal employee organisations submitted that, at that time, they had established rights which were not affected by the supervening legislation.

84 *Reasons for hesitation*: Where so many experienced decision-makers have reached unanimous opinions concerning a common issue, and have done so by purporting to apply the principles established by this Court[53], it is natural to hesitate before reaching, and giving effect to, a contrary opinion. However, in my view that is what is required by the provisions of the Act in question. The constitutional validity of the Act in all relevant respects was unchallenged[54]. It follows that the appellants were entitled to relief from the Full Court. Relief must now be provided by this Court to uphold the validly expressed will of the Parliament.

The applicable industrial legislation

85 Section 111AAA was inserted in the Act by the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") and commenced its applicable operation on 1 January 1997. The provision under which the appellants had originally sought to resist the federal award coverage that is in contest in these proceedings was s 111(1)(g) of the IR Act, now the same paragraph of the Act. The terms of ss 111(1)(g) and 111AAA are set out in the joint reasons[55].

86 From the early days of the Commonwealth Court of Conciliation and Arbitration, an extensive body of law arose governing when that Court, later the Conciliation and Arbitration Commission, should extend the application of a federal award to employers and employees previously governed by State law and when it should leave the regulation of the dispute to the applicable State

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53 Notably *Esber* (1992) 174 CLR 430. See *Re McIntyre* (2000) 105 FCR 584 at 591-593 [20]-[22].

54 cf *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346.

55 Joint reasons at [33], [17]. See also reasons of Gleeson CJ at [4] and reasons of Callinan J at [142]-[143]. Section 111(1)(g)(ii) has a very long history, it can be traced to the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), s 20.

authority[56]. The growth in the role of the federal tribunal over the intervening years, and the expansion of federal award coverage, affected the approach taken to applications to "rope-in" new respondents to federal awards and to dismiss or allow applications on the ground that the industrial dispute was "proper to be dealt with" by a State industrial authority[57]. It is fair to say that during the course of the last century, dismissals of applications for federal award coverage, although not infrequent, gradually became less common. Moves in the reverse direction, to restore parties covered by federal awards to State award coverage, were extremely rare[58].

87 In order to see s 111AAA of the Act in context, it is appropriate to make reference to other provisions of the Act, some of them of long standing and some, like s 111AAA itself, inserted by the WROLA Act. Of long standing is s 104 of the Act that relevantly provides:

> "(1) When a conciliation proceeding before a member of the Commission in relation to an industrial dispute is completed but the industrial dispute has not been fully settled, the Commission shall proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration.
>
> (2) Unless the member of the Commission who conducted the conciliation proceeding is competent, having regard to section 105, to exercise arbitration powers in relation to the industrial dispute and proposes to do so, the member shall make a report under subsection (3).
>
> (3) The member shall, for the purpose of enabling arrangements to be made for arbitration in relation to the industrial dispute, report to the relevant Presidential Member or, if the member is a Presidential Member, to the President, as to the matters in dispute, the parties and the extent to which the industrial dispute has been settled."

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56 See eg *Australian Builders' Labourers' Federation v Archer* (1913) 7 CAR 210; *Federated Hotel, Club, Restaurant, and Caterers Employees Union of Australia v Abbott* (1928) 26 CAR 489.

57 *Commonwealth Conciliation and Arbitration Act* 1947 (Cth), s 43A(d). See eg *Slaughtering, Freezing and Processing Works (Meat Industry) Interim Award, 1962* (1968) 123 CAR 714.

58 See eg *Musicians Award* (1960) 94 CAR 511.

88 Amongst the new provisions of the Act, inserted with s 111AAA by the WROLA Act, is s 88A ("Objects of Part"). That section appears at the opening of Pt VI ("Dispute prevention and settlement"). The stated objects of that Part are, relevantly, to ensure that:

> "(c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and
>
> (d) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that:
>
> (i) encourages the making of agreements between employers and employees at the workplace or enterprise level".

89 By s 88B of the Act the Parliament provides for the "[p]erformance of [the] Commission's functions under this Part". In particular, that section includes the following:

> "(1) The Commission must perform its functions under this Part in a way that furthers the objects of the Act and, in particular, the objects of this Part."

90 By s 89A, also inserted by the WROLA Act, a radical change was introduced in the matters comprising the "[s]cope of industrial disputes" with which the Commission could normally make award provisions. The WROLA Act contained detailed transitional provisions set out in the Schedules to that Act. The only provision to make reference to proceedings already commenced in the Commission before the WROLA Act amendments came into operation, is Item 55 of Sched 5. It reads:

> "The repeal of subsection 111(1A) of the Principal Act does not apply to any proceedings before the Commission that commenced before the commencement of the repeal."

91 As it stood in the IR Act, s 111(1A) addressed itself specifically to s 111(1)(g)(iii). It provided that that subparagraph did not apply to proceedings so far as they might affect terms and conditions of employment of particular kinds[59]. In this way the provision of Sched 5 to the WROLA Act gave express attention to the operation of s 111(1)(g)(iii) in respect of "proceedings before the Commission", that is, part-heard proceedings.

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59 Section 111(1A) had been inserted by the *Industrial Relations Legislation Amendment Act (No 2)* 1992 (Cth), s 5(b) and commenced operation on 21 January 1993.

92 Several of the other schedules to the WROLA Act (and there were 20 in all) contained transitional provisions affecting the changes introduced by that particular schedule. Those in Sched 16 represented the most elaborate of the transitional provisions. That schedule was concerned with incomplete court proceedings instituted before the commencement of the repealing legislation. Schedule 16 was concerned to transfer to the Federal Court the jurisdiction originally conferred by the IR Act on the Industrial Relations Court. Part 3 of Sched 16 distinguished between proceedings merely commenced prior to the commencement of the WROLA Act and proceedings in which the Industrial Relations Court had, by that time, begun a substantive hearing. In respect of cases in the latter class, in proceedings before the Industrial Relations Court, the transitional provisions expressly preserved the jurisdiction of that Court as if the repealing Act had not been enacted[60]. Other proceedings, although they had been commenced in the Industrial Relations Court, were to be transferred to the Federal Court as if commenced in the latter court under the Act as amended[61].

93 Less elaborate but still detailed transitional provisions are found in other schedules[62]. They contain explicit references to proceedings already begun in the Commission before the commencement of the repealing provisions of the WROLA Act.

The applicable interpretation statute

94 In addition to the foregoing provisions of the applicable industrial laws, it is appropriate to note the other statutory provisions that were invoked by the employee organisations to support the construction that they urged upon this Court. They relied on the provisions of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), s 8, set out in the joint reasons[63].

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60 WROLA Act, Sched 16, Pt 3, Div 3, Item 69; cf *Re Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (1997) 73 IR 118 at 127.

61 WROLA Act, Sched 16, Pt 3, Div 2, Item 64.

62 Schedule 4 concerning Commission proceedings under s 118A of the IR Act: WROLA Act, Sched 4, Pt 2, Items 11-13; Sched 6 concerning applications under s 170EA of the IR Act lodged before the commencement of the Act: WROLA Act, Sched 6, Pt 2, Item 17; Sched 8 "Ongoing matters": WROLA Act, Sched 8, Pt 2, Items 23(6), (7) and Sched 17 "Boycotts": WROLA Act, Sched 17, Pt 3, Items 30 and 37.

63 Joint reasons at [20]. See also reasons of Gleeson CJ at [9] and reasons of Callinan J at [154].

95 For the purposes of the Interpretation Act, it was not contested that the WROLA Act was properly to be classified as repealing legislation in its effect upon the IR Act. I am prepared to accept that this is a correct classification of the WROLA Act. But for the interposition of whatever requirements s 111AAA of the Act is found to contain, the Commission, by s 104 of the IR Act (now the same section of the Act), was obliged in the circumstances of the affected cases to proceed to deal with the dispute by arbitration[64].

96 The crucial question before the Commission, and ultimately before the Federal Court, was therefore whether the enactment of s 111AAA, read in the foregoing context of industrial legislation and of the Interpretation Act, altered that position. Did s 111AAA require the Commission to "cease dealing with" the industrial dispute, unless the precondition for doing so was considered and the Commission was relevantly satisfied? Or was the Commission obliged to see the part-heard hearings through to their lawful conclusion, unaffected by the supervening amendments?

The decision of the Full Court

97 The Full Court approached the issues from the point of view of whether s 8(c) of the Interpretation Act applied to sustain any rights already accrued in the proceedings before the Commission. By inference, from its citation of a passage in the decision of the Full Bench of the Commission in one of the proceedings[65], the Full Court endorsed the rejection of the proposition that s 111AAA of the Act evinced a legislative purpose that its command "should apply to all proceedings, both in the future and extant at the time it came into operation"[66]. However, this rejection was not elaborated or fully reasoned. It was simply stated. The Full Court endorsed what it said were earlier opinions of differently constituted Full Benches of the Commission, rejecting the proposition[67]. Such rejection was also

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64 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 399-400; 72 ALR 1 at 12-14; cf *Re Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (1997) 73 IR 118 at 125.

65 *Re McIntyre* (2000) 105 FCR 584 at 590 [15] citing *Queensland v Construction, Forestry, Mining and Energy Union* (1998) 86 IR 216 at 228.

66 (1998) 86 IR 216 at 228.

67 Such as *Re Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (1997) 73 IR 118 at 126-130; cf *Australian Rail, Tram and Bus Industry Union v Western Australia Government Railways Commission (Westrail)* (1997) 74 IR 119 at 136.

explained in the context of the application of the Interpretation Act. The relevant passage, from a Full Bench decision, reproduced in the Full Court's reasons, concludes[68]:

> "We concur, with respect, with the view expressed in both cases that the terms of s 111AAA do not evince an intention that it should operate to abrogate rights which would otherwise be preserved by s 8(c) [of the Interpretation Act]".

98 From this conclusion, the remainder of the Full Court's reasons was addressed to the operation of s 8 of the Interpretation Act. This is made clear by the fact that the reasoning is presented under two headings, namely "Was there an accrued right before s 111AAA came into force?"[69] and "Did a contrary intention appear from the implied partial repeal of s 104?"[70]. The first aspect of this analysis is addressed to the reference in s 8(c) of the Interpretation Act to the effect of repeal on any "right … acquired accrued or incurred under any Act so repealed". There is a similar reference to "any such right" in s 8(e). The second involves a reference to the opening words of s 8 of the Interpretation Act, by which its operative provisions apply "unless the contrary intention appears".

99 In addressing the first of the questions posed for itself, the Full Court began its analysis with the observations of the Privy Council in *Director of Public Works v Ho Po Sang*[71]. However, much of the remaining examination of the question involved scrutiny of the decision of this Court in *Esber v The Commonwealth*[72] and some of the subsequent State[73] and Federal Court[74] decisions that had applied *Esber*.

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68 *Queensland v Construction, Forestry, Mining and Energy Union* (1998) 86 IR 216 at 228 cited in *Re McIntyre* (2000) 105 FCR 584 at 590 at [16].

69 *Re McIntyre* (2000) 105 FCR 584 at 590 [17].

70 *Re McIntyre* (2000) 105 FCR 584 at 601 [45].

71 [1961] AC 901 at 922 cited in *Re McIntyre* (2000) 105 FCR 584 at 591 [18].

72 (1992) 174 CLR 430 cited in *Re McIntyre* (2000) 105 FCR 584 at 591-593 [19]-[23].

73 *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 at 169 cited in *Re McIntyre* (2000) 105 FCR 584 at 593-594 [24]-[25].

74 *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491; *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583 at 589; see *Re McIntyre* (2000) 105 FCR 584 at 594-597 [27]-[32].

100 In responding to the question that it had first posed for itself, the issue that clearly concerned the Full Court (rightly as it turned out) was whether the jurisdiction and power that had been given to the Commission by the IR Act to make an award was one that fell within the classification of a "right [that] might fairly be called inchoate or contingent"[75]. Or, whether it was no more than a privilege to set in train the procedure that would determine "whether [the party asserting an accrued right] shall be given a right which he did not have when the procedure was set in motion"[76]. If, properly analysed, the "right" to have the Commission conclude the part-heard hearings was nothing more than an entitlement of the second kind, the consequence would be that there was no right that had accrued or been acquired under the repealed provisions of the IR Act, to which sub-ss 8(c) or (e) of the Interpretation Act could have application.

101 The Full Court considered that this problem of classification was effectively resolved by the way in which the majority in this Court in *Esber* had determined the character of the "inchoate or contingent" or "conditional" entitlement in issue in that case. The Full Court reasoned that its conclusion on that point was reinforced by what this Court had separately said concerning the prima facie entitlement of a person who had invoked the jurisdiction of the Commission to have that application "properly and fully heard and determined"[77].

102 The Full Court eventually concluded that the amendments introduced by the WROLA Act, including s 111AAA of that Act, were not merely procedural in operation but substantive; that they therefore attracted the "ordinary presumption against retrospective operation"[78]; and that this, together with the enforceable obligation of the Commission to hear and determine the applications before it, was enough to attract the operation of s 8(c) of the Interpretation Act. The Full Court therefore answered its first question thus[79]:

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75 *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552; cf *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422 at 427.

76 *Director of Public Works v Ho Po Sang* [1961] AC 901 at 922.

77 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 400; 72 ALR 1 at 14 referring to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 398-399.

78 *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 at 615; *Rodway v The Queen* (1990) 169 CLR 515 at 518 cited in *Re McIntyre* (2000) 105 FCR 584 at 600 [41].

79 *Re McIntyre* (2000) 105 FCR 584 at 601 [44].

> "In our view, both the administrative decision considered in *Esber*, and the decision which the Commission was required to make in the present case (after a finding of a dispute) whether to make an award, involved the exercise of a discretion. Accordingly, it cannot be said that a contingent or inchoate right of the kind protected by s 8(c) of the *Acts Interpretation Act* must be one which crystallises only after a finding of pre-existing facts and which does not depend at all on an exercise of discretion by the decision-maker."

103 As to the second question, concerning whether the Act manifested a relevant "contrary intention", the Full Court was affected by what it saw as the omission of the Parliament to provide expressly for transitional cases that were part-heard before the Commission[80]. It concluded[81]:

> "[P]arts of the amending legislation in which s 111AAA is to be found provide for the legislation to have immediate effect and other parts, by way of savings provisions, preserve the effect of the previously existing legislation which is otherwise repealed. The absence of any express reference to the effect of the pre-existing legislation on accrued rights, far from indicating a contrary intention, strongly suggests that the effect of the new legislation on accrued rights is to be governed by general interpretative provisions like s 8(c) of the *Acts Interpretation Act*."

Arguments to support the Full Court's approach

104 *Viewing the legislation in context*: Even if (as I shall show) the approach of the Full Court to the task before it was flawed, reasons can be collected to sustain the same conclusion. Given the unanimity of opinion in the Full Benches of the Commission and the Full Court, it would be surprising if it were otherwise. In order to focus attention clearly on the correct construction, it is useful first to collect the contrary arguments.

105 Starting with the imperative command of s 111AAA of the Act, it is essential to read that provision in context. Relevantly, the context includes not only the transitional provisions included in the WROLA Act but also the general statement of the approach of the Parliament to the impact of supervening repeals contained in s 8 of the Interpretation Act. Viewed in this light, s 111AAA of the Act must be given a meaning derived from the body of federal statutory law of which the crucial section is but one part.

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80 *Gerrard v Mayne Nickless Ltd* (1996) 135 ALR 494 at 514 cited in *Re McIntyre* (2000) 105 FCR 584 at 601 [46].

81 *Re McIntyre* (2000) 105 FCR 584 at 601 [45].

106 *Absence of express transitional provisions*: Secondly, so far as the transitional provisions are concerned, it was obviously open to the Parliament, by express language, to put beyond contention its purpose to apply the command of s 111AAA(1) to all part-heard proceedings before the Commission. Had it done so, perhaps in an express transitional provision included in Sched 5, Pt 2 to the WROLA Act, the doubts and uncertainties that have engaged so many proceedings before the Commission[82] would have been avoided.

107 This argument can be advanced in two ways. By having omitted to spell out the application of s 111AAA to part-heard cases before the Commission, the Parliament implicitly indicated (so it was argued) that it did not intend such a drastic result. Instead, it was content to rely upon the ordinary principles of general legislation and the common law as to the effect of supervening legislation. Alternatively, because in the transitional provisions designed to achieve the effective demise of the Industrial Relations Court, highly specific measures were enacted, the absence of like provisions for cases part-heard before the Commission gave rise to an inference (so it was argued) that a legislative decision had been made to preserve those proceedings as they stood at the time when the new legislation came into force. This approach would leave the impact of the suggested implied repeal by s 111AAA of the Commission's obligation in s 104 of the Act to the operation of general legal principle. Such a principle was that in sub-ss 8(c) or (e) of the Interpretation Act, or like principles of the common law, stating that obligations already accrued are unaffected by repealing statutes unless the contrary is clearly evinced.

108 *Protection of accrued rights*: Thirdly, it may be accepted that, in the past, as a matter of legal principle or policy, this Court has rejected a narrow view of the survival of accrued rights in the context of repealing legislation. Thus it has insisted that, except in statutes "which affect mere matters of procedure"[83], there is a presumption against retrospectivity of the operation of a repealing law that would affect an existing right or obligation. The presumption operates unless the language of the statute expressly or by necessary implication requires such a construction. Clearly, this is a beneficial and just principle. It is protective of accrued entitlements and obligations derived from statute. In some cases, such accrued entitlements and obligations might themselves give rise to constitutional protections, inapplicable in the present proceedings but affording another reason

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82 Described in Jessup, "The Impact of Amendments to Federal Industrial Law upon Existing Proceedings in Industrial Tribunals", (1998) 11 *Australian Journal of Labour Law* 221 and Lee, "Is there an 'Accrued Right' to an Industrial Award?", (1999) 19 *The Queensland Lawyer* 184.

83 *Rodway v The Queen* (1990) 169 CLR 515 at 518.

to maintain a strong presumption against retrospective operation of laws having effect on substantive rights[84]. If the Parliament wishes to achieve such a consequence, then the general tendency demonstrated in several decisions of this Court obliges it to require the lawmakers to make their will known in an unmistakable way. I am sympathetic to this tendency. It is compatible with the treatment given by this Court to analogous questions[85].

109 *Reconciling the new legislative command*: Fourthly, the instruction in s 111AAA of the Act is also to be read harmoniously with the indication in s 104 of the Act, so far as the two requirements of the Act are capable of both being obeyed. The employee organisations submitted that the two provisions were compatible. Thus, s 104 was to be construed as a requirement that the Commission should proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration, meaning arbitration carried out in accordance with the Act as it stood at the time when the preconditions stated in s 104(1) were fulfilled. These contemplated no more than that conciliation proceedings before a member of the Commission in relation to an industrial dispute are completed but the industrial dispute has not been fully settled. Because those preconditions were fulfilled in the present cases, the literal application of s 104(1) demanded that the Commission complete the arbitrations before it. In the light of that obligation, s 111AAA was to be read prospectively. It applied only to cases where the accrued entitlement to arbitration, as contemplated by s 104(1), had not already enlivened the duty there stated.

110 *The suggested authority of Esber*: Fifthly, the employee organisations invoked *Esber*, as the Full Court did. The division of opinion in *Esber*, between the reasons of the majority and the dissenting reasons of Brennan J, reflected many of the issues argued in these appeals. As Brennan J's reasons demonstrate, there were strong arguments in *Esber* for construing the legislation in question as extinguishing the suggested right to redeem weekly payments of workers'

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84 cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297. See also the views of the minority in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [86], 400-401 [168]-[170], 445-446 [289]-[290]; cf 359-360 [29], 417 [221], 450 [304].

85 Such as the rule that, in the absence of clear language to the contrary, courts will ordinarily construe legislation so as to preserve basic rights and not to diminish them: *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396; *Malvaso v The Queen* (1989) 168 CLR 227 at 233; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414 [28]; cf *Ackroyd v Whitehouse (Director of National Parks & Wildlife Service)* (1985) 2 NSWLR 239 at 246-247; *Booker v SRA of NSW [No 2]* (1993) 31 NSWLR 402 at 410.

compensation benefits. In the absence of a determination by the delegate of the Commissioner prior to the supervening legislation that repealed the right to redemption, that right could certainly not be described as a transaction past and closed[86]. It was not a transaction "already completed" under the repealed law[87]. It was not even a case where the only issue awaiting determination was the quantification of the lump sum to be paid[88]. Yet the majority of this Court concluded that the worker's entitlement to continue the proceeding to review the delegate's decision carried with it the right to have his claim to redeem his entitlements decided in accordance with the former statutory provisions.

111 Had *Esber* been decided otherwise, the employee organisations' arguments in these appeals would have been much more difficult. But, just as in *Esber* further steps remained to be taken to decide whether the worker might redeem his entitlements and, if so, in what sum, so it was submitted in the present case that the outstanding determination of whether a federal award should be made by the Commission, and if so in what terms, was analogous. It was the same kind of "conditional", "inchoate" or "incomplete" entitlement that remained to be determined in *Esber* in accordance with the Act as it stood prior to the repeal. This followed, in part, because on the face of that Act, the Parliament had not made its contrary intention clear. But, in part, it was also reinforced by the operation of s 8 of the Interpretation Act that afforded the legislative context in which the WROLA Act was enacted.

The correct approach: construing the new law

112 *Commencing with the legislative test*: Whilst the foregoing represents an arguable case for upholding the judgment of the Full Court in these proceedings, in my view the preferable construction of the applicable legislation produces the contrary conclusion. With respect, the Full Court approached the problem before it in an incorrect way. The correct starting point for the analysis of the question presented to that Court was to discover the meaning of s 111AAA of the Act, derived from its language, understood from its context and given effect to achieve the apparent legislative purpose.

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86 *Surtees v Ellison* (1829) 9 B & C 750 at 752 [109 ER 278 at 279] cited in *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

87 *Butcher v Henderson* (1868) LR 3 QB 335 at 338 cited in *Maxwell v Murphy* (1957) 96 CLR 261 at 267. See also *Esber* (1992) 174 CLR 430 at 445 per Brennan J (diss).

88 *Esber* (1992) 174 CLR 430 at 448 per Brennan J (diss) citing *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552-553.

113 In numerous recent decisions, this Court has identified a tendency of those engaged in the task of statutory construction to look first to a number of external sources for guidance rather than to start with an analysis of the legislative provisions in question[89]. It may be hoped that repeated instruction will correct this widespread tendency and re-focus attention, in a problem such as the present, upon the crucial language of the relevant provisions before other aids to construction are considered.

114 To adopt the correct approach is not to return in statutory construction (or the interpretation of contracts and other legal instruments[90]) to the bad old days of narrow textualism. Apart from anything else, in the case of federal legislation, statutory provisions now require that regard be had to a wider frame of reference[91]. But it does involve starting the legal task at the correct point, namely, with the construction of the text applicable to the case. Doing this is logical. It is also more efficient and more likely to yield correct outcomes. In the present proceedings, this means starting with an analysis of s 111AAA of the Act rather than (as the Full Benches of the Commission and the Full Court have done and as the employee organisations urged on this Court) with the Interpretation Act, s 8 and its common law analogues.

115 When one turns to s 111AAA of the Act, the language of the section sustains the submission that the legislative instruction to the Commission means what it says, that it must "cease dealing with the industrial dispute". It applies to any "dealing" with such an "industrial dispute" before the Commission, once s 111AAA of the Act came into force. It was not restricted to a prospective operation on "industrial disputes" arising, notified or found *after* the new section came into force – that is not what s 111AAA says or meant. Several features in

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89 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; 182 ALR 321 at 339; *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1561 [54]; 183 ALR 380 at 392-393; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1630 [249]; 184 ALR 113 at 180; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 449 [70]; 186 ALR 289 at 307; *Conway v The Queen* (2002) 76 ALJR 358 at 371 [65]-[66]; 186 ALR 328 at 345-346; *Western Australia v Ward* (2002) 191 ALR 1 at 11-12 [2], 16 [16], 19 [25], 164 [588]; *Wilson v Anderson* [2002] HCA 29 at [47], [137], [144]-[146].

90 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 449 [71]; 186 ALR 289 at 307-308.

91 eg *Acts Interpretation Act* 1901 (Cth), ss 15AA and 15AB.

the language of the section and of other amendments introduced by the WROLA Act demand this construction.

116 *Internal evidence of legislative purpose*: Sub-section 111AAA(1) is apt, in its language, to apply immediately to a part-heard proceeding before the Commission. There is no internal evidence in the section to the contrary. Any such qualification must be supplied externally, by the imposition of a presumption protective of already established rights. But when the language of s 111AAA is scrutinised more closely, it repels such a presumption.

117 The reference in s 111AAA to the satisfaction of the Commission that a State award or State employment agreement governs the wages and conditions concerned, is applicable in a case to which s 111(1)(g)(ii) of the Act would be relevant. Thus, one of the grounds for dismissing or refraining from further hearing or from determining the industrial dispute, stated in the immediately preceding section of the Act, enlivens the requirement of s 111AAA, stated in comparable language. The wording of the two provisions is relevantly the same. Both provisions refer to dealing with the industrial dispute. Section 111AAA, read as a consecutive provision of the same Act, reinforces and elaborates the restraint envisaged by s 111(1)(g)(ii). It does so as a clear matter of legislative policy. Accordingly, the natural meaning of the two provisions, read together, is that s 111AAA has an immediate application to elaborate and reinforce the power expressed in s 111(1)(g)(ii).

118 Section 111AAA(1) permits an exception where the Commission is satisfied that ceasing to deal with the industrial dispute "would not be in the public interest". That consideration is itself highly instructive. Under the Act, an industrial dispute might last months or years, especially if there were variations to the original application[92]. This fact suggests that the "public interest" referred to in s 111AAA(1) is that applicable at the time that the Commission's determination under s 111AAA is enlivened. The "public interest" at some later time could be quite different. The Parliament has also grafted onto s 111(1)(g)(iii) of the Act an obligation and an exception that refers to the "public interest". Accordingly, both aspects of s 111AAA anticipate immediate engagement. It is not unreasonable to infer that the "public interest" to which the Parliament made reference was to be given immediate consideration. This conclusion is strengthened by the obligation imposed upon the Commission by s 111AAA(3) to ascertain the views of employees and employers, as contemplated by s 111AAA(2), "as quickly as it can".

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92 cf *Re Ross; Ex parte Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399 at 415-416 [55], 417-418 [63] ("*Re Ross*").

119 *Other provisions of the Act*: Other provisions introduced by the WROLA Act confirm that s 111AAA was to operate immediately. On its face, the WROLA Act introduced new and important government policies in a field of legislation self-evidently of high political and social importance. The IR Act was changed to reflect a newly elected government's industrial policies. Relevantly, those policies were stated by s 88A of the amended Act in respect of awards. They represented a shift towards conciliation, enterprise bargaining, workplace agreement and State regulation in the place of inter-State industry-wide bargaining, comprehensive awards and federal arbitration.

120 The WROLA Act introduced measures in addition to s 111AAA that required or permitted federal authorities to defer to State Acts and to industrial instruments made under State law[93]. It appears most unlikely that the Parliament, which had acknowledged the appropriateness of State law and State industrial regulation in these ways should, at the same time, provide effectively for bifurcation of proceedings before the Commission by reference to the immaterial circumstance as to whether the original dispute was lodged before or after 1 January 1997.

121 On its face, s 111AAA of the Act represents a legislative injunction to cease dealing with any industrial dispute with the prescribed attributes, in circumstances where the likely outcome might be to override a State regulation unless considerations of the public interest lead the Commission to the conclusion that the operation and integrity of State regulation in respect of affected employees should be overridden[94].

122 So far as the transitional provisions of the WROLA Act are concerned, there is a ready explanation for the absence of detailed transitional clauses addressed to proceedings before the Commission. It is an explanation that distinguishes the perceived need to provide such detail, as was done in Item 55 of Sched 5 to the WROLA Act that dealt with a matter of substantive law. If, on its face, s 111AAA was addressed to the Commission's relevant satisfaction at any stage of proceedings being dealt with by it, there was no need for extensive transitional provisions in that regard. Sub-section (1) of s 111AAA itself, without more, addressed all such transitional cases. It did so according to its own terms. Within those terms, it contemplated what was to be done immediately. It afforded an exception which itself was to be considered and disposed of quickly. For all other transitional cases, and for all new cases, the legislative instruction was clear and emphatic. The Commission "must cease dealing with the industrial dispute".

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93 These included ss 3(c), 152(2), (3), 170HA, 170HB and 170LZ of the Act.

94 cf *Re Ross* (2001) 108 FCR 399 at 416-419 [56]-[67].

123 *A defining point?* One further consideration helps to confirm this conclusion. That is the difficulty that would otherwise obtain in defining, by reference to the Act, the point at which s 111AAA would attach to part-heard proceedings before the Commission and when it would be rendered inapplicable by reason of the existence of an accrued right[95].

124 For the employee organisations it was submitted that the finding by the Commission of the existence of an industrial dispute, as contemplated by the Act[96], was such a defining point. However, fixing that point, as distinct from others, has an element of arbitrariness about it. And it does not have an adequate textual foundation in s 111AAA of the Act. The section is addressed, in general terms, to the conduct of the Commission. The phrase used, "dealing with the industrial dispute", is deliberately broad in its scope. To give effect to its apparent policy, it applies according to those terms at any stage of the Commission's "dealing". There is no principled basis for distinguishing dealing with the dispute *before* or *after* findings about the parties to the dispute or the matters in dispute, which findings in any case could be varied or revoked[97]. It follows that the unmistakable inference is that the object of the WROLA Act amendments was that they should take effect as quickly as possible, according to their terms, and applied to all industrial disputes.

125 *Enactment of important policy*: Industrial law represents a sensitive area of law-making. Newly-elected governments not infrequently seek prompt legislative endorsement of their policies. Such legislative changes often lie at the heart of the political and social controversies which the representative democracy established by the Constitution is designed to settle. So long as the legislation is constitutionally valid, it is no part of the function of a court to frustrate the changes of policy enacted by the Parliament. On the contrary, if the changes appear as the very object of the legislation, courts and other decision-makers should give effect to them.

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95 cf *Re Ross* (2000) 108 FCR 399 at 417-418 [63].

96 The Act, s 161(1) contemplates that the Commission shall determine whether an "alleged" industrial dispute is an "industrial dispute"; cf discussion in *Australian Workers' Union of Employees, (Q) v Australian Maritime Officers Union* (1997) 75 IR 227 at 239-240.

97 As in the Act, s 102(1); cf *Australian Workers' Union of Employees, (Q) v Australian Maritime Officers Union* (1997) 75 IR 227; Lee, "Is there an 'Accrued Right' to an Industrial Award?", (1999) 19 *The Queensland Lawyer* 184 at 185.

126 Consistently with this view of the Act, the Commission was obliged to cease dealing with a dispute in accordance with the previous law, out of respect for an evident policy reflected in the WROLA Act amendments, namely to curtail or reduce the jurisdiction and powers of the Commission in specified ways. Relevantly, this extended to intrusions by new federal awards into areas hitherto governed by State awards or State regulated employment agreements. In the context of such clearly stated governmental policy, carried into effect by the provisions introduced by the WROLA Act, there was no room for the operation of s 8 of the Interpretation Act. The meaning and operation of that provision was not reached in the circumstances of these proceedings.

127 *Esber is distinguishable*: To the submission that the foregoing approach to the meaning of s 111AAA of the Act is inconsistent with that taken by this Court in *Esber*, I would point out, on the contrary, that the joint reasons in *Esber* first addressed themselves to the construction of the legislation there in question[98]. The *ratio decidendi* of the majority reasons in *Esber* rests on the construction that their Honours favoured concerning Mr Esber's entitlement to redemption under the transitional provisions that were there applicable. That their Honours' construction of those provisions was the true foundation of their decision is put beyond doubt by what their reasons say. Having completed their analysis of the meaning of the applicable provisions, the majority state[99]:

> "This conclusion is enough to dispose of the appeal in favour of the appellant. But the alternative ground [that the entitlement to redemption was preserved by s 8 of the Interpretation Act] was fully argued and should be dealt with … [I]t lends strong support for the construction of [the Act] already reached."

128 There is, accordingly, no doubt that the remarks of this Court in *Esber*, as to the operation of s 8 of the Interpretation Act, were *obiter dicta*. They were unnecessary to the result reached by the majority. In effect, the majority in *Esber* joined issue with Brennan J, in dissent, concerning the construction of the amending legislation. Accordingly, as a matter of binding authority, that is the limited point for which *Esber* stands. As a matter of law, there is nothing in *Esber* that obliges the conclusion of the present proceedings as favoured by the Full Court. On the contrary, the reasoning of all members of this Court in *Esber* began in the correct place, namely, with the construction of the contested statutory provisions[100].

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98 *Esber* (1992) 174 CLR 430 at 436-438.

99 *Esber* (1992) 174 CLR 430 at 438.

100 cf *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 457 [113]; 186 ALR 289 at 319.

129 The Full Court and the Full Benches of the Commission erred by proceeding directly to the suggested application of the Interpretation Act. The question raised by that Act is, and can only ever be, a subsidiary one. The primary task of a person obliged to construe a statutory provision is to start with the statute in question. More often than not that approach will yield the correct understanding of the applicable legislative command and obviate the need for resort to subsidiary aids to construction.

The interpretation statute was unavailing

130 *The precondition required*: As in *Esber*, the foregoing analysis is sufficient to dispose of these appeals. However, because the operation of the Interpretation Act was fully argued I will, as their Honours did in *Esber*, add some observations about s 8 in the present context.

131 In a sense, s 8 of the Interpretation Act constitutes the reverse side of the coin of statutory construction. Its provisions apply "unless the contrary intention appears"[101]. That phrase reinforces the duty first to attempt to elucidate the meaning and effect of the supervening legislation. Until that attempt is made, the existence or absence of a contrary intention cannot be stated with any certainty.

132 Because of the way in which the Full Court approached the task presented by these proceedings, it consigned the question of contrary intention to a virtual postscript to its reasons[102]. Yet in truth, the determination of such intention was the essential gateway to the application of s 8. Had the Full Court examined the text of s 111AAA, read with surrounding provisions (particularly those inserted with that section by the WROLA Act), and given proper weight to the significant policy alterations to the Act worked by the WROLA Act amendments, the treatment of contrary intention would have had to have been more elaborate. It would have followed the analysis with which these reasons began. This would have led to the conclusion that, read in context, s 111AAA indeed evinced the contrary intention and thus excluded the operation of s 8 of the Interpretation Act[103].

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101 This phrase also appears in the English legislation: *Interpretation Act* 1889 (UK), s 38(1), and in some of the Australian states: *Interpretation of Legislation Act* 1984 (Vic), s 14(1); *Acts Interpretation Act* 1915 (SA), s 16(1); *Interpretation Act* 1984 (WA), s 37(1); *Acts Interpretation Act* 1931 (Tas), s 16(1);

102 *Re McIntyre* (2000) 105 FCR 584 at 601 [45]-[46]. See also *Re Ross* (2001) 108 FCR 399 at 415 [54], 418 [64]-[66].

103 *Pfeiffer v Stevens* (2001) 76 ALJR 269 at 288 [124], cf 272 [20]; 185 ALR 183 at 210, cf 187.

133 Once the conclusion is reached that s 111AAA constitutes a valid parliamentary command to the Commission in respect of all proceedings before it, the requisite contrary intention is manifest. The assertion of surviving rights that would contradict the primary instructions of the Parliament cannot prevail.

134 *Arbitration and legal "rights"*: Even if (contrary to this view) the precondition to the application of s 8 of the Interpretation Act could be overcome, there would remain a further question. This is whether, within s 8, the entitlement (to use a neutral word) to continue proceedings to conclusion under a previous statutory regime is a right of the kind mentioned in sub-ss 8(c) or (e). The Full Benches of the Commission in the proceedings thought that such an entitlement was a right of this character. In their conclusion, the Full Benches departed from the reasoning of an earlier Full Bench[104] that had come to a contrary conclusion. The Full Court, in turn, endorsed the approaches of the later Full Benches.

135 There are certain similarities between the suggested right found to exist in *Esber* and that upheld by the Full Court in the present proceedings. In each case, the right said to exist was incomplete or provisional. In each case, it was necessary to proceed to a tribunal to have a decision made whether or not to grant the right and if so in what terms. In each case, the exercise of previously unexercised statutory discretions remained to be performed, notwithstanding the supervening repeal of legislation pursuant to which such discretions were formerly provided.

136 However, it is possible to distinguish *Esber* from these proceedings on fairly obvious grounds[105]. Mr Esber had an uncontested statutory entitlement to weekly compensation payments. This afforded him the foundation of a legal right for a fairly simple determination of entitlement to a redemption sum and calculation of its amount. In none of the present proceedings was the task of the Commission so simple. Even if, an industrial dispute having been found, it might be anticipated that a federal award would be made or extended as sought by the employee organisations, that decision still had to be reached by the Commission. Once reached, the content of the applicable award remained to be determined. Moreover, in the face of a radical alteration of the jurisdiction and powers of the Commission effected by the WROLA Act, designed to limit the

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104 *Re Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (1997) 73 IR 118.

105 cf *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583 at 590; *Hicks v Aboriginal Legal Service of Western Australia (Inc)* (2001) 108 FCR 589 at 601 [61].

subject matter of federal awards and the function of the Commission and to include a public interest consideration, the consequence of the respondents' argument would be completely the opposite. The Commission would have to continue its award-making functions under the IR Act without the consideration of the public interest otherwise mandated by s 111AAA, where the wages and conditions of employment of particular employees had hitherto been governed by State awards or State employment agreements. It is impossible to reconcile this prospect with the Act, read as a whole after the WROLA Act amendments came into effect.

137 Because of the primary conclusion as to the correct meaning and operation of s 111AAA of the Act, it is strictly unnecessary for me to decide whether, had s 8 of the Interpretation Act applied, the entitlement of the employee organisations before the Commission represented rights or privileges of the kind contemplated. Likewise, it is unnecessary to respond to the suggestion that this Court should reconsider the *obiter* remarks of the majority in *Esber* and review them, taking into account the persuasive dissenting opinion of Brennan J. That dissent endorsed and applied the reasoning of the Privy Council in *Director of Public Works v Ho Po Sang*[106]. According to their Lordships in that case there is "a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given"[107]. I would accept that dichotomy.

138 Whatever might be said of the entitlement to have an application for redemption of workers' compensation benefits considered and decided as in *Esber*, the making of a comprehensive industrial award applicable to new parties plainly involves a much more complex decision. The making of such an award is a decision of the second kind described above[108]. It is therefore not such a right as would attract s 8 of the Interpretation Act.

139 Thus, even if the construction of s 111AAA of the Act were favourable to the employee organisations and even if no contrary intention were evinced by that provision (premises that I reject) there would still have been no occasion to apply s 8 of the Interpretation Act to these proceedings. The entitlement to have the Commission make an award was not a right of the kind to which that section refers. This was so because making such an award went beyond the carrying into effect of rights of the parties accrued before the repeal of the law. It would have

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106 [1961] AC 901. See *Robertson v City of Nunawading* [1973] VR 819 at 825-826 and *Esber* (1992) 174 CLR 430 at 447 per Brennan J (diss).

107 *Director of Public Works v Ho Po Sang* [1961] AC 901 at 922.

108 cf *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 361.

involved no more than the continuation of procedures to decide whether there should be *new* rights and, if so, what those *new* rights should be[109].

140 The point of distinction is not, as such, one addressed to the constitutional character of the Commission as a tribunal rather than a Ch III court. The distinction lies in the nature of the entitlement said to be preserved notwithstanding the passage of the repealing legislation.

Conclusion and orders

141 It follows that the Full Court erred in declining constitutional and other relief directed to the respective Full Benches of the Commission. I therefore agree in the orders proposed in the joint reasons.

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109 *Director of Public Works v Ho Po Sang* [1961] AC 901 at 922 cited in *Esber* (1992) 174 CLR 430 at 447 per Brennan J (diss).

142 CALLINAN J. The Transport Workers' Union of Australia (the "TWU") applied to the Australian Industrial Relations Commission (the "Commission"), before 1 January 1997, for orders which would have had the effect of binding, as respondents to a federal award, a number of employers in Queensland. Applications were subsequently made by or on behalf of some of the employers, supported by the State of Queensland, for relief pursuant to s 111(1)(g) of the *Industrial Relations Act* 1988 (Cth) (the "IR Act") which provided as follows:

> "111(1) Subject to this Act, the Commission may, in relation to an industrial dispute:
>
> …
>
> (g) dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute or part of the industrial dispute, if it appears:
>
> (i) that the industrial dispute or part is trivial;
>
> (ii) that the industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State arbitrator;
>
> (iii) that further proceedings are not necessary or desirable in the public interest;
>
> (iv) that a party to the industrial dispute is engaging in conduct that, in the Commission's opinion, is hindering the settlement of the industrial dispute or another industrial dispute; or
>
> (v) that a party to the industrial dispute:
>
> (A) has breached an award or order of the Commission; or
>
> (B) has contravened a direction or recommendation of the Commission to stop industrial action …"

143 The *Workplace Relations Act* 1996 (Cth) (the "WR Act"), was enacted in 1996. By an amending Act[110], there was inserted in that Act, a new s 111AAA, to come into operation on 1 January 1997. It provides as follows:

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110 *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), Item 25 of Pt 1 of Sched 5 (the "WROLA Act").

"**111AAA Commission to cease dealing with industrial dispute in certain circumstances**

(1) If the Commission is satisfied that a State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees, unless the Commission is satisfied that ceasing would not be in the public interest.

(2) In determining the public interest for the purposes of subsection (1), the Commission must give primary consideration to:

(a) the views of the employees referred to in subsection (1); and

(b) the views of the employer or employers of those employees.

(3) The Commission must inform itself as quickly as it can about the views referred to in subsection (2), and may inform itself in such manner as it thinks fit.

(4) In this section:

cease dealing, in relation to an industrial dispute, means:

(a) to dismiss the whole or a part of a matter to which the industrial dispute relates; or

(b) to refrain from further hearing or from determining the industrial dispute or part of the industrial dispute."

144 It is sufficient to say, in relation to the industrial proceedings initiated by the TWU, that by the time that s 111AAA of the WR Act came into operation, although the parties had, in one instance, been informed by the Commission that an order as sought by the TWU would be made, because of appeals and other matters, there had been no final determination of the proceedings, albeit that full argument may have been presented and a decision reserved. The other proceedings, although well advanced, had not reached that stage.

145 The relevant facts are fully stated in the report[111] of the decision of the Full Court and the judgments of other members of this Court. The facts to which

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111 *Re McIntyre v Transport Workers' Union of Australia; Ex parte Attorney-General of Queensland* (2000) 105 FCR 584.

I have referred, are, however, sufficient to throw up the questions to which these appeals give rise. They are:

(1) whether a party to an industrial dispute pending in the Commission as at 1 January 1997 has an accrued right, under s 8(c) of the *Acts Interpretation Act* 1901 (Cth) or the common law presumption against retrospectivity, to have that industrial dispute arbitrated in accordance with the provisions of the IR Act without regard to the operation of s 111AAA of the WR Act; and,

(2) whether the WR Act evinces an intention that s 111AAA should apply in relation to industrial disputes arising before 1 January 1997, the date of commencement of s 111AAA.

146 The Full Court of the Federal Court (Spender, Ryan and O'Connor JJ), dismissed applications by the appellants (made originally to, and then remitted by this Court), for prerogative relief pursuant to s 75(v) of the Constitution which, if granted, would have had the effect of requiring the Commission to give effect to s 111AAA of the WR Act in the industrial proceedings instituted before its enactment.

147 The Full Court held that once a person has been found to be a party to an industrial dispute, as had occurred here, that person has a right, within the meaning of s 8(c) of the *Acts Interpretation Act*, to have the dispute arbitrated by the Commission notwithstanding the enactment of s 111AAA of the WR Act.

148 In the reasons of the Full Court the right identified was variously described as a right to have the arbitral jurisdiction exercised, a right to have the disputes arbitrated, or a right to have a decision made whether or not to make an award. The Full Court went so far as to say that s 8(c) extends to a right which still "requires creating" at the time when it is said to have accrued or been acquired[112].

The appeal to this Court

149 Both the State of Queensland and the Commonwealth have appealed against the decision of the Full Court.

150 Three matters, all of them notorious, should be noted at the outset. Industrial proceedings in the Commission often take many years to resolve. Even when an award is made, or an Industrial Agreement ratified, it may, years

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112 *Re McIntyre* (2000) 105 FCR 584 at 596 [30], 597-598 [35]-[36], 599 [40] and 601 [44].

afterwards, be the subject of an application for amendment, and possibly amendment in substantial respects. The second matter is that, on any date, including 1 January 1997, there would have been many proceedings pending in the Commission. The third matter is that the Commission, in framing awards and making orders, has regard to contemporary, rather than past events, as is the case in conventional litigation, in which, as a general rule, all elements of the cause of action must be complete when the proceedings are commenced. That this important distinction exists, appears, for example, from s 90 of both the IR Act and the WR Act which obliges the Commission, in the performance of its functions, to take into account the public interest, having regard, among other things, to the state of the national economy, and to the effect upon it of any award, or order it considers, or proposes to make.

151 The significance of these matters is this. The reach of s 111AAA would be significantly curtailed, having regard to the multiplicity and extraordinary duration of pending proceedings, if s 111AAA has the temporal operation that the Full Court held it to have. Secondly, the presence of an identical s 90 in both Acts serves to emphasize that, to carry out its statutory functions, the Commission may have regard to, indeed may be obliged to have regard to, contemporary events: that it would be open to a party to seek to rely upon changes in relevant circumstances, at least up to the moment of the making of any order or award. The proceedings are not closed and finalised until the order or award is finally made.

152 The first matter to be noticed about s 111AAA of the WR Act is that, to attract its operation, there must be an "industrial dispute". That condition is satisfied here. The second matter is the presence of the mandatory words, "must cease dealing with the industrial dispute". A reader, reading those words naturally, would have no reason to read them other than as applying to any and all disputes. There is no obvious reason why, for example, the expression should be read as if it were in this form: "must *sometimes* cease dealing", or "must cease dealing with *future* industrial disputes", or, "must cease dealing with industrial disputes *except pending* industrial disputes". Furthermore, the words "cease dealing" are important. For them to have work to do, there must be a proceeding in being to which they can apply.

153 The Construction, Forestry, Mining and Energy Union (the "CFMEU") seeks to argue against the natural construction of s 111AAA on these bases. First, it submits that it had an accrued substantive right pursuant to s 104 of the IR Act which provided as follows:

> **"Arbitration**
>
> 104(1) When a conciliation proceeding before a member of the Commission in relation to an industrial dispute is completed but the industrial dispute has not been fully settled, the Commission shall

proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration.

(2) Unless the member of the Commission who conducted the conciliation proceeding is competent, having regard to section 105, to exercise arbitration powers in relation to the industrial dispute and proposes to do so, the member shall make a report under subsection (3).

(3) The member shall, for the purpose of enabling arrangements to be made for arbitration in relation to the industrial dispute, report to the relevant Presidential Member or, if the member is a Presidential Member, to the President, as to the matters in dispute, the parties and the extent to which the industrial dispute has been settled.

(4) The member shall not disclose anything said or done in the conciliation proceeding in relation to matters in dispute that remain unsettled.

(5) In an arbitration proceeding under this Act, unless all the parties agree, evidence shall not be given, or statements made, that would disclose anything said or done in a conciliation proceeding under this Act (whether before a member of the Commission or at a conference arranged by a member of the Commission) in relation to matters in dispute that remain unsettled."

154 Secondly, the CFMEU relies on the common law presumption against the imputation to the legislature of an intention to interfere retrospectively with rights which have already accrued. It submitted that no narrow view of a right should be taken: if it were otherwise, the essential justice of the principle would be eroded. The same process of reasoning, it submitted, applies to the rights (of which this is said to be one) to which s 8(c) of the *Acts Interpretation Act* refers:

"8 Effect of repeal

Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:

…

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed …

…

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

155 In support of its first submission the CFMEU referred to *Mathieson v Burton*[113] in which Windeyer J said that in assessing whether a party has a right which is acquired within the meaning of a statutory equivalent to s 8(c) of the *Acts Interpretation Act*, the court is "not engaged in an exercise in analytical jurisprudence, or with the classification, expressed in terms of correlatives and opposites, that delights and attracts both disciples and critics of Hohfeld."

156 The CFMEU contends that its right arising out of s 104(1) of the IR Act, has been recognized to be an accrued right by the decision of this Court in *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[114]. That case does not however do more than relevantly hold that parties are entitled to have proceedings before a tribunal decided according to law. It does not relieve a tribunal, or any court called upon to determine the questions arising, from the performance of the task of first ascertaining the law to which effect has to be given. In this matter the appellants on the other hand, made a submission, which I would uphold, that the CFMEU has no right to have its proceedings determined according to what *was* the law. Its right, such as it was, remained, although, the content of it may have changed: it was a right to have its proceedings determined according to the changed law. Indeed, what *Ozone Theatres* does is to highlight a fundamental difference between ordinary curial proceedings, and those of the kind instituted here, involving the creation of new rights and obligations, and in which the tribunal looks to events before, and contemporaneous with the moment before the pronouncement of an order or an award[115].

157 The CFMEU, as did the Full Court of the Federal Court, placed reliance upon *Esber v The Commonwealth*[116] in which this Court (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) held that s 8(c) of the *Acts Interpretation Act* should be applied. But, *Esber* too is distinguishable from this case. In *Esber*, the applicant had a right to have his claim determined in his favour, if the delegate of the Minister had wrongly refused his claim, on the basis of events, it should be emphasised, which had all occurred before the application for the review of the applicant's decision. The applicant there had fulfilled all of the requirements of

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113 (1971) 124 CLR 1 at 12.

114 (1949) 78 CLR 389.

115 *Ozone Theatres* (1949) 78 CLR 389 at 398.

116 (1992) 174 CLR 430.

the amended legislation for the acquisition of the right, even though the right to enforce it had not yet been established in the pending proceedings. That is a right of the kind which the CFMEU here would only have, had the Commission made a final determination of which the CFMEU could take advantage.

158 In the Full Court the argument that s 111AAA did manifest a contrary intention within the meaning of the opening words of s 8 of the *Acts Interpretation Act* was dealt with in this way[117]:

> "Mr Herbert contended in the alternative that the Act which inserted s 111AAA manifested a contrary intention within the meaning of the prefatory words of s 8 of the *Acts Interpretation Act* which displaced the presumption erected by s 8(c) of that Act. However, we consider that a cogent answer to that contention is afforded by the submission of Mr Haylen QC for the union respondents that parts of the amending legislation in which s 111AAA is to be found provide for the legislation to have immediate effect and other parts, by way of savings provisions, preserve the effect of the previously existing legislation which is otherwise repealed. The absence of any express reference to the effect of the pre-existing legislation on accrued rights, far from indicating a contrary intention, strongly suggests that the effect of the new legislation on accrued rights is to be governed by general interpretative provisions like s 8(c) of the *Acts Interpretation Act*."

159 In my opinion, the absence of express reference in s 111AAA to the effect of the pre-existing legislation in the WR Act, does not avail the CFMEU. There is good reason why s 111AAA does not make any express reference to previous legislation and its effects. It is that s 111AAA does, by reason of the presence of the expressions in it to which I have earlier referred, manifest a clear, contrary intention that it is to operate on pending proceedings. As to the presence of express transitional provisions elsewhere in the WR Act, it is sufficient to point out that it made many major changes to the pre-existing law, including the establishment of a greatly altered regime for the resolution of industrial disputes[118], which, for their efficient operation required a different and specific form of transitional provision, whilst s 111AAA, because of its intended immediate operation, did not. One example of the former will suffice. Section 89A of the WR Act provides a restricted statutory catalogue of "allowable award matters". It is easy to see why the legislature would enact transitional provisions in respect of these, that is, in order to enable the Commission to ascertain exactly

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117 *Re McIntyre* (2000) 105 FCR 584 at 601 [45].

118 Schedule 16 of the WROLA Act is concerned with the transition of the jurisdiction exercised by the Industrial Relations Court to the Federal Court.

what an award might contain. Accordingly, the transitional provisions contained in Sched 5, Pt 2, Item 49 of the WROLA Act provided a mechanism that allowed parties to an award to apply to the Commission for a variation of the award. In such circumstances the Commission was empowered, during "[an] interim period" to vary the award so that it would deal with, and include only allowable award matters[119].

160 The fact that the relief sought by the CFMEU was mandamus, and that the remedy requires a party to act or proceed according to law does not advance the CFMEU's case. The remedy, which may even have its origins as far back as the early years of the Norman conquest of England[120], issues to ensure good and lawful government: the performance of a public duty in accordance with the law. That the law will generally be tender to those who have instituted proceedings on the basis of its state at the time of their commencement, and that special statutory protection of rights is almost universal in common law jurisdictions, cannot absolve this Court from the responsibility of ascertaining and applying the law, even retrospectively if a clear legislative intent in that regard, can, as here be discerned.

161 It is unnecessary therefore to give any further consideration to the *Acts Interpretation Act*. A contrary intention is sufficiently manifested.

162 For these reasons I would allow the appeals and would make orders as follows:

Matter Nos B54/2001, B57/2001 and B58/2001:

(a) the appeal be allowed;
(b) the judgment of the Federal Court of Australia (Full Court) given on 20 November 2000 be set aside;
(c) a Writ of Prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 30 June 1998 in Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997;
(d) a Writ of Certiorari issue to the first respondents to remove into this Honourable Court so far as may be necessary Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 in the Commission for the purpose of quashing the decision of the first

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119 See also Sched 5 Pt 2 Item 46 of the WROLA Act.

120 See Van Caenegem, "The old executive writ" in *Royal Writs in England from the Conquest to Glanvill*, Selden Society, (1959), vol 77 at 177 et seq.

respondents given and made at Sydney in the State of New South Wales on 30 June 1998;

(e) a Writ of Mandamus issue to the first respondents compelling them to hear and determine according to law Matters C No 40827 of 1997, C No 40829 of 1997 and C No 40830 of 1997 insofar as they relate to s 111AAA of the *Workplace Relations Act* 1996 (Cth).

Matter Nos B53/2001 and B56/2001:

(a) the appeal be allowed;

(b) the judgment of the Federal Court of Australia (Full Court) given on 20 November 2000 be set aside;

(c) a Writ of Prohibition issue to the first respondents prohibiting them from acting upon, giving effect to, further proceeding upon or enforcing the decision of the first respondents made on 27 November 1998 in Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998;

(d) a Writ of Certiorari issue to the first respondents to remove into this Honourable Court so far as may be necessary Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998 in the Commission for the purpose of quashing the decision of the first respondents given and made at Sydney in the State of New South Wales on 27 November 1998;

(e) a Writ of Mandamus issue to the first respondents compelling them to hear and determine according to law Matters C No 31982 of 1998, C No 32162 of 1998 and C No 32163 of 1998 insofar as they relate to s 111AAA of the *Workplace Relations Act* 1996 (Cth).