HIGH COURT OF AUSTRALIA

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

RE: THE MARITIME UNION OF AUSTRALIA & ORS — RESPONDENTS

EX PARTE CSL PACIFIC SHIPPING INC — APPLICANT/PROSECUTOR

Re The Maritime Union of Australia & Ors;
Ex parte CSL Pacific Shipping Inc
[2003] HCA 43
7 August 2003
S391/2002

ORDER

1. *Order nisi granted on 18 November 2002, as amended on 6 May 2003, discharged.*

2. *Prosecutor to pay the respondents' costs.*

Representation:

C N Jessup QC with G J Hatcher SC and C S Ward for the applicant/prosecutor (instructed by Blake Dawson Waldron)

No appearance for the first respondents

D F Jackson QC with A S Bell for the second respondents (instructed by W G McNally & Co)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with R F Crow intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

CATCHWORDS

Re The Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc

Constitutional Law (Cth) – Powers of the Parliament – Trade and commerce with other countries and among the States – Industrial relations – Application for variation of an award – Whether s 5(3), *Workplace Relations Act* 1996 (Cth) ("WRA") validly extends to employers not present in Australia – Whether s 5(3), WRA validly extends to foreign non-resident seafarers engaged outside Australia.

Industrial Law (Cth) – Application for variation of an award – Whether Australian Industrial Relations Commission had jurisdiction pursuant to s 5(3), WRA – Whether Pt VI, *Navigation Act* 1912 (Cth) impliedly repealed s 5(3), WRA – Whether s 5(3), WRA validly extends to employers not present in Australia – Whether s 5(3), WRA validly extends to foreign non-resident seafarers engaged outside Australia – Whether construction of s 5(3) to be limited through reference to rules of customary international law regarding "innocent passage" and "internal economy" of ships – Whether prosecutor validly served pursuant to Australian Industrial Relations Commission Rules 1998.

Constitution (Cth), s 51(i).
Acts Interpretation Act 1901 (Cth), s 21(1)(b).
Navigation Act 1912 (Cth), Pt VI.
Workplace Relations Act 1996 (Cth), ss 5, 111(1)(g), 113.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. On 22 January 2002, an application was lodged with the Australian Industrial Relations Commission ("the AIRC") on behalf of the Maritime Union of Australia, the Australian Institute of Marine and Power Engineers and the Australian Maritime Officers' Union. These bodies, together, comprise the second respondent in this Court. The application to the AIRC was made under s 113 of the *Workplace Relations Act* 1996 (Cth) ("the WRA"). This empowers the AIRC to vary an award. The application (which was amended on 28 February 2002) sought a variation to the Maritime Industry Seagoing Award 1999 ("the Award"). The variation would relevantly add to Sched 1 of the Award "CSL Pacific Shipping Inc, and any other person or corporation who from time to time is the employer of the crew engaged upon the ship CSL Pacific". In this Court, relief is sought under s 75(v) of the Constitution against what is said to be the erroneous assumption of jurisdiction by the AIRC.

The parties

2 The prosecutor, CSL Pacific Shipping Inc ("CSL Pacific"), is incorporated in Barbados. Together with an Australian corporation, CSL Australia Pty Ltd ("CSL Australia"), CSL Pacific is a member of a group of companies ultimately owned in whole or in part by a Canadian corporation, The CSL Group Inc ("CSL Canada").

3 As a result of changes brought about by the *ANL (Conversion into Public Company) Act* 1988 (Cth), ANL Ltd ("ANL") became a company registered under the *Companies Act* 1981 (Cth) as a public company limited by shares[1]. In May 1999, CSL Australia acquired a portion of the business of ANL involving the operation of two ships, the *CSL Pacific* (then known as the *River Torrens*) and the *CSL Yarra* (then known as the *River Yarra*). These ships worked on the Australian coast. It appears that, at the time of their sale to CSL Australia, both ships were registered under the *Shipping Registration Act* 1981 (Cth) and were licensed to operate in the Australian coasting trade pursuant to the requirements of Pt VI (ss 284-293A) of the *Navigation Act* 1912 (Cth) ("the Navigation Act"). The rates of pay and conditions of employment of the crews of the ships were regulated by the Maritime Industry Seagoing Interim Award 1998 ("the Interim Award"). That state of affairs continued after the transfer of the ships to CSL

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1 *Smith v ANL Ltd* (2000) 204 CLR 493 at 506 [25].

Australia, save that the rates of pay and conditions of employment of the Australian crew were, from 27 August 1999, regulated by the Award in place of the Interim Award.

4 On or about 14 July 2000, CSL Pacific acquired the *River Torrens* from CSL Australia. The vessel was renamed the *CSL Pacific* and was registered at Nassau in the Bahamas. At the time of the acquisition of the ship by CSL Pacific, the vessel was lying in Shanghai and had no crew. CSL Pacific arranged for the recruitment of a crew in the Ukraine. All crew members are Ukrainian citizens and they each signed ship's articles at Odessa in that country.

5 The *CSL Pacific* then commenced trading in North Asia. It did not work on the Australian coast until October 2001. In that month, the vessel was returned to the Australian coast and was time chartered by CSL Pacific to CSL Australia. The terms of the time charter, dated 1 October 2001, left CSL Pacific with responsibility for the navigation of the vessel and the crew and provided that it was not to be construed as a demise to CSL Australia. As a matter of internal practice within the corporate group, a time charter such as the one executed between CSL Pacific and CSL Australia may be terminated at the conclusion of any voyage at the direction of CSL Canada.

6 The *CSL Pacific* has operated on the Australian coast under spot contracts, carrying dry bulk cargoes for a number of customers on a number of voyages between ports in South Australia, Victoria, New South Wales and Queensland. This has taken place pursuant to a combination of a continuing voyage permit and single voyage permits issued under s 286 of the Navigation Act. It will be necessary to refer further to that provision later in these reasons.

7 The rates of pay and conditions of employment of the crew of the *CSL Pacific* are fixed by agreement made with the International Transport Federation and they differ from those provided for by the Award. It was in that setting that the application for variation was lodged with the AIRC on behalf of the second respondent. The Full Bench of the AIRC (comprising two Senior Deputy Presidents and a Commissioner) held[2] that there was before it an "industrial issue" within the meaning of sub-s (3)(b) of s 5 of the WRA. The members of the Full Bench together are the first respondent in this Court.

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2 *Re Maritime Industry Seagoing Award 1999* (2002) 118 IR 294.

The WRA

8 Section 5 of the WRA is a provision of central importance in this dispute. It states (s 5(1)) that "[w]ithout prejudice to its effect apart from this section", the WRA "also has effect as provided by" s 5. That effect is specified in s 5(2) as follows:

> "This Act has effect as if:
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> (a) each reference in this Act to preventing or settling industrial disputes, by conciliation or arbitration, included a reference to settling by conciliation, or hearing and determining, industrial issues; and
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> (b) each reference in this Act to an industrial dispute included a reference to an industrial issue."

Much then turns upon the use of the term "industrial issue" in place of "industrial dispute". Reference has been made to the power of variation of awards conferred on the AIRC by s 113 of the WRA. Section 113(4) states:

> "This Act applies in relation to applications, and proceedings in relation to applications, for the setting aside or variation of awards in the same manner, as far as possible, as it applies in relation to industrial disputes and proceedings in relation to industrial disputes, and for that purpose such an application shall be treated as if it were the notification of an industrial dispute."

That provision in turn must be read, in the present case, with the reference in par (b) of s 5(2) to industrial issues.

9 Section 5(3) details the content of the expression "industrial issue". It deals first with the relationship between waterside employers and waterside workers (par (a)), employers and maritime employees (par (b)), flight crew officers and employers (par (c)), and public sector employment (par (d)). Paragraphs (b) and (c) should be set out in full:

> "For the purposes of this section, the following are industrial issues:
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> ...

(b) matters pertaining to the relationship between employers and maritime employees, so far as those matters relate to trade or commerce:

(i) between Australia and a place outside Australia;

(ii) between the States; or

(iii) within a Territory, between a State and a Territory, or between 2 Territories;

(c) matters pertaining to:

(iii) the relationship between flight crew officers and flight crew officers' employers, so far as those matters relate to trade or commerce:

(A) between Australia and a place outside Australia;

(B) between the States; or

(C) within a Territory, between a State and a Territory, or between 2 Territories".

10 It is par (b) which is immediately relevant. The term "maritime employees" is, by s 4 of the WRA, given the meaning under cl 1 of Sched 1, namely "a person who is, or whose occupation is that of, a master as defined in section 6 of the [Navigation Act], a seaman as so defined or a pilot as so defined". The term "seaman" is defined in s 6 of the Navigation Act as meaning:

"a person employed or engaged in any capacity on board a ship on the business of the ship, other than:

(a) the master of the ship;

(b) a pilot; or

(c) a person temporarily employed on the ship in port".

The assumption of jurisdiction

11 On 27 September 2002, the Full Bench of the AIRC made the following finding as to its jurisdiction[3]:

> "We find that an industrial issue exists in this matter. The parties to the industrial issue are [the second respondent] and [CSL Pacific]. The subject matter of the industrial issue is whether terms and conditions of employment corresponding with some or all of the terms and conditions of employment applicable to maritime employees whose employment is covered by the [Award] should be accorded to maritime employees engaged on the ship *CSL Pacific* in respect of any class of, or all voyages to or from a port in Australia.
>
> We are satisfied that the industrial issue as found is a matter pertaining to the relationship between employers and maritime employees. The subject matter at issue reflects a claim by [the second respondent] for terms and conditions of employment to be accorded to a class of maritime employees who are not members of [the second respondent]. The subject matter at issue pertains to the relationship of the employer and the employees who are members of the organisations party to the issue. This is so because the employer's non-observance of standard minimum conditions of employment for maritime employees engaged in maritime trade and commerce within or about Australian territory causes such employees to be engaged on terms and conditions less favourable to them and less onerous on the employer than would be the case if terms and conditions under the Award were applicable."

12 The Full Bench added[4]:

> "In the practical sense, the matter at issue that pertains to the relationship between employers and maritime employees clearly relates to trade or commerce between the States. That is so because the issue is about the conditions of employment of maritime employees who on the evidence are

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3 (2002) 118 IR 294 at 320-321.

4 (2002) 118 IR 294 at 321-322.

engaged regularly in the carriage of goods by sea between Australian ports for and on behalf of Australian shippers."

13 The AIRC concluded that it was within its jurisdiction to hear and determine the industrial issue as so identified and in particular to hear and determine the application to vary the Award for that purpose.

14 Finally, the AIRC recorded its provisional determination that the parties show cause within 15 working days before a Commissioner as to why the Award should not be varied by adding CSL Pacific, as employer of the crew engaged upon the ship *CSL Pacific*, and by adding a provision to the effect that the Award "applies in or in connection with voyages and operations within Australian waters or while operating under a permit or licence granted under the [Navigation Act] or on a voyage to or from a port in Australia"[5].

The proceeding in this Court

15 On 18 November 2002, a Justice of this Court, on the application of CSL Pacific, ordered that the first respondent and the second respondent show cause before the Full Court as to why certiorari should not issue directed to the first respondent to bring into the High Court to be quashed the decision made on 27 September 2002 that the AIRC assume jurisdiction, and why prohibition should not issue directed to the first respondent prohibiting any further proceeding upon the application for variation of the Award made by the second respondent. The essential ground of the orders nisi was that, upon the proper construction and application of s 5(3)(b) of the WRA to the materials before the AIRC, the application to vary the Award did not present an industrial issue.

16 By leave of the Full Court, CSL Pacific added a further ground expressed as follows:

"Section 51(i) of the Constitution does not authorise the making of a law which regulates or operates by reference to the relationship between an employer and its employees when –

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5 (2002) 118 IR 294 at 328.

- the employer has no presence in Australia and does not engage in trade or commerce of the kind referred to in section 51(i); and

- the employees are foreign seafarers, not resident in Australia, not engaged in Australia and not members of any relevant Australian industrial organisation;

merely because the ship owned by that employer, and on which those employees work, is being used by another person to whom it has been wet chartered for the purposes of such trade or commerce, and to the extent that section 5(3)(b) of [the WRA] is such a law it is beyond legislative competence under the Constitution and invalid."

The use of the phrase "to the extent" indicates reliance by the prosecutor upon the severance or "reading down" provision made by s 15A of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"). The WRA contains in s 7A its own particular severance provision but it may be put to one side.

17 The order nisi should be discharged. What follows are our reasons for that conclusion.

The provenance of s 5(3)(b) of the WRA

18 The legislative pedigree of s 5(3)(b) of the WRA commenced with the *Navigation Act* 1952 (Cth). Section 37 thereof added Pt XA (ss 405A-405Q) to the Navigation Act. Section 405D(2) conferred upon what was then the Commonwealth Court of Conciliation and Arbitration the power to hear and determine "industrial matters" in so far as they related to "trade and commerce with other countries or among the States or in a Territory of the Commonwealth, whether or not an industrial dispute exists in relation to those matters". The phrase "industrial matters" was defined in s 405A as meaning "all matters in relation to the salaries, wages, rates of pay or other terms and conditions of service or employment of masters, pilots or seamen".

19 After changes made in 1956[6], a provision in like terms to s 405D(2) appeared as s 72(b) of the *Conciliation and Arbitration Act* 1904 (Cth). The

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6 By s 7 of the *Navigation Act* 1956 (Cth) and s 7 of the *Conciliation and Arbitration Act* 1956 (Cth).

expression "industrial matter" was defined in s 71 in terms following those of s 405A. Sections 71 and 72(b) were the subject of the decision in *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*[7]. The Court there held that s 72(b) was valid and supported by s 51(i) of the Constitution. Further, it was held that what by then had become the Commonwealth Conciliation and Arbitration Commission was empowered to deal with an industrial matter concerning the working conditions of officers at sea or in port in circumstances where they served on ships registered in London and trading between South Australia and Japan, under articles opened and signed in Hong Kong but where it was the practice of the shipping company to engage the officers in Australia.

20 Section 5 of the WRA is expressed in terms expanded from and made more precise than those of the previous provisions. The apparent looseness of the terms in which ss 71 and 72 had been expressed had occasioned difficulty, as identified by Dixon CJ in *Foster*[8]. The new s 5 first appeared in the *Industrial Relations Act* 1988 (Cth). The form taken by s 5, in particular the opening words of s 5(1), "[w]ithout prejudice to its effect apart from this section, this Act also has effect as provided by this section", reflects the form then already taken by s 6 of the *Trade Practices Act* 1974 (Cth). Of s 6, Mason J observed in *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd*[9]:

> "I now turn to s 6, which gives the Act an extended operation. To understand what the section seeks to achieve one must bear in mind that for the most part the operative sections of the Act which, according to their terms, regulate the conduct of corporations, are based upon the corporations power and the territories power. It will be recalled that in *Strickland v Rocla Concrete Pipes Ltd*[10] the Court held that the corporations power could sustain provisions regulating restrictive trade practices engaged in by corporations within the meaning of s 51(xx). Section 6(1) recognizes that the Act will in the first instance have a direct

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7 (1959) 103 CLR 256.

8 (1959) 103 CLR 256 at 276-277.

9 (1977) 136 CLR 235 at 243-244. See also *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 136-137, 151.

10 (1971) 124 CLR 468.

> operation according to its terms and at the same time provides that in addition to this operation the Act shall have a further operation in accordance with the provisions of s 6(2) and (3)."

Part VI of the Navigation Act

21 Further reference now should be made to the provisions of Pt VI of the Navigation Act. Part VI, except where otherwise expressed, applies "to all ships". Section 288(1) creates an offence by the master, owner and agent of a ship engaging in the coasting trade without a licence. Licences are for a period not exceeding three years (s 288(2)) and are issued subject to compliance on the part of the ship, its master, owner and agent "during such time as it is engaged in the coasting trade" with conditions including an obligation that seamen employed on the ship be paid wages in accordance with Pt VI of the Navigation Act. The term "coasting trade" is given a detailed definition in s 7. It is sufficient for present purposes to note the statement in s 7(1):

> "A ship shall be deemed to be engaged in the coasting trade, within the meaning of this Act, if it takes on board passengers or cargo at any port in a State, or a Territory, to be carried to, and landed or delivered at, any other port in the same State or Territory or in any other State or other such Territory".

22 As has been noted earlier in these reasons, whilst the *River Torrens* was owned by CSL Australia, and before its acquisition by CSL Pacific and renaming as the *CSL Pacific*, the vessel was licensed to operate in the coasting trade pursuant to the requirements of Pt VI of the Navigation Act.

23 The condition respecting wages stipulated under s 288 is further spelled out in s 289. Every seaman employed on a ship engaged "in any part of the coasting trade" is entitled, "for the period during which the ship is so engaged", to payment of wages "at the current rates ruling in Australia for seamen employed in that part of the coasting trade" (s 289(1)). Where the ship is engaged not only in the coasting trade but also trades to places beyond Australia, the wages to which a seaman is entitled under s 289(1) shall be paid before the departure of the ship from Australia, and the ship may be detained until the payment is made (s 289(2)). Section 291 denies the efficacy of any agreement whether made in or out of Australia to limit or prejudice the rights of any seaman under Pt VI. Further, s 292 gives the character of prima facie evidence of the rates of wages ruling in Australia, for the purposes of s 289(1), to an award

within the meaning of the WRA which is binding on or applicable to seamen employed in the coasting trade.

24 However, the nexus provided in Pt VI between award wages and engagement in the coasting trade was broken, with respect to the *CSL Pacific*, after its acquisition from CSL Australia. This was achieved by the operation of permits issued under s 286.

25 A permit under that section may be for a single voyage or may be a continuing permit (s 286(3)). Permits of both species were issued in respect of the *CSL Pacific*. Where a permit has been issued, then the prohibition otherwise imposed by s 288 upon the engagement in the coasting trade without a licence is lifted. This is effected by s 286(2) which states:

> "The carriage, by the ship named in a permit issued under this section, of passengers or cargo to or from any port, or between any ports, specified in the permit shall not be deemed engaging in the coasting trade."

26 The issue of licences is dealt with in s 286(1), which states:

> "Where it can be shown to the satisfaction of the Minister, in regard to the coasting trade with any port or between any ports in the Commonwealth or in the Territories:
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> (a) that no licensed ship is available for the service; or
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> (b) that the service as carried out by a licensed ship or ships is inadequate to the needs of such port or ports;
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> and the Minister is satisfied that it is desirable in the public interest that unlicensed ships be allowed to engage in that trade, the Minister may grant permits to unlicensed ships to do so, either unconditionally or subject to such conditions as he or she thinks fit to impose."

27 No conditions were attached to any of the permits which would have achieved a result that wages had to be paid at the same rates as would have been necessary had the *CSL Pacific* been licensed for the coasting trade. It is unnecessary to consider whether the power conferred by s 286(1) would have permitted the attachment of such conditions.

The relationship between the WRA and the Navigation Act

28 The prosecutor contends that the application to vary the Award made by the second respondent assumes a construction of the WRA which is "quite at odds" with the scheme expressed in Pt VI of the Navigation Act. What was said to follow from such a proposition was not entirely clear. Even allowing for an appropriate time sequence between the enactment of the provisions in the two statutes, it would require very strong grounds to support an implication that Pt VI impliedly repealed s 5(3) of the WRA[11]. Nor is it readily apparent that, notwithstanding its plain words, s 5(3) is to be given a limited construction by reason of the terms of Pt VI of the Navigation Act. Rather, as was indicated in *Project Blue Sky Inc v Australian Broadcasting Authority*[12] with respect to provisions within the one statute, both s 5(3) of the WRA and Pt VI of the Navigation Act should be read together.

29 If that is done, the apparent difficulties which the prosecutor identifies and places at the forefront of its submissions then disappear. Were this a case where the prosecutor held a licence for the *CSL Pacific* to engage in the coasting trade under Pt VI of the Navigation Act, the Award would have the significance attached by the evidentiary provision in s 292. Where there is no such licence, and reliance is placed upon the permit system provided in s 286 for unlicensed ships, s 292 has no operation. Nevertheless, an application may be made to the AIRC founded upon s 5(3) of the WRA. That is the present case.

The case for the prosecutor

30 It will be recalled that the AIRC identified the relevant industrial issue as concerning the conditions of employment of maritime employees engaged regularly in the carriage of goods at sea between Australian ports for, or on behalf of, Australian shippers. That was an invocation in particular of par (b)(ii) of s 5(3) of the WRA with reference to industrial issues being matters pertaining to the relationship between employers and maritime employees, so far as those matters relate to trade or commerce between the States. However, the provisional determination contemplates a variation in the Award which perhaps

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11 *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35].

12 (1998) 194 CLR 355 at 381-382 [69]-[71].

goes further by the inclusion of the words not only "in or in connection with voyages and operations within Australian waters or while operating under a permit or licence granted under the [Navigation Act]" but also "on a voyage to or from a port in Australia"[13]. The latter expression may contemplate reliance upon that branch of par (b) of s 5(3) which fixes upon matters of the necessary character which relate to trade or commerce between Australia and a place outside Australia. The conclusions which follow in these reasons support the exercise of jurisdiction by the AIRC in both respects.

31 In essence, the case for the prosecutor is that the advantage it gains by the absence from the permits under Pt VI of the Navigation Act of any conditions respecting payment of wages at Australian rates is preserved from displacement by a variation to the Award made by the AIRC under its statute. In particular, the prosecutor contends, with the support of the Attorney-General of the Commonwealth on his intervention, that the extended operation given to the WRA by s 5 does not, on the proper construction of that legislation, reach far enough to permit the Award variation sought by the second respondent. The prosecutor further submits that if, contrary to its primary submission, the legislation did have a sufficient reach to permit this result, then it would be beyond the power conferred upon the Parliament by s 51(i) of the Constitution and would be read down to save its validity. However, these submissions as to lack of power do not have the support of the intervener. The Attorney-General submits that the power exists but that it has not been exercised to its full extent.

Validity

32 Section 51(i) of the Constitution confers power upon the Parliament to make laws, subject to the Constitution, for the peace, order and good government of the Commonwealth with respect to "[t]rade and commerce with other countries, and among the States".

33 Paragraph (b)(iii) of s 5(3) of the WRA speaks of matters relating to trade or commerce "within a Territory, between a State and a Territory, or between 2 Territories". It thus evinces a reliance by the legislature upon the territories power in s 122 of the Constitution. The submissions respecting validity made by the prosecutor would appear to apply to the territories power as well as to the

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13 *Re Maritime Industry Seagoing Award 1999* (2002) 118 IR 294 at 328.

commerce power. It also is implicit in the prosecutor's submissions that there is no other head of power which could support the legislation.

34 However, the variation of the Award is sought in terms which, as indicated above, would be sufficiently supported by s 5 in its foundation upon the trade and commerce power. In what follows, attention will be given, accordingly, to s 51(i) of the Constitution.

35 It is well settled that the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates and that its practical as well as legal operation must be examined to determine whether there is a sufficient connection between the law and the head of power in s 51(i)[14]. If a connection exists between the law and the relevant head of power the law will be "'with respect to' that head of power" unless the connection is "'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' that head of power"[15].

36 It is also well settled that, in the exercise of the trade and commerce power, the Parliament can validly regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States[16]. A ship journeying for reward is in commerce; those who co-operate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce[17].

37 It may be added that, with respect to the commerce clause in the United States Constitution, the Supreme Court settled the law to the same effect a

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14 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; cf at 515 [89].

15 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369. See *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J.

16 *Australian Steamships Limited v Malcolm* (1914) 19 CLR 298 at 329-330; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 138, 152.

17 cf the argument of Sir Garfield Barwick QC in *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 264.

century ago. The Supreme Court said in *Patterson v Bark Eudora*[18] of a federal law protecting the payment of the wages of seamen[19]:

> "We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation, and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels."

As is apparent from these authorities, the commerce power is attracted by the engagement of the employees in interstate and overseas trade. The Attorney-General correctly stressed in his submissions that it is not to the point that the party responsible for payment of the wages of those employees and owning the ship in question is not itself also plying that ship for commercial reward.

38 However, the prosecutor contends that s 51(i) does not support a law in the terms of s 5(3) of the WRA where particular circumstances apply. The first of these circumstances is a variation of those just considered with reference to the Attorney-General's submission. It treats the "presence" in Australia of the employer providing the wages to the persons who are part of the complement of the ship as essential, and the want of that "presence" as decisive. The second of these circumstances is that the employees were not engaged in Australia, do not reside here and are not members of any Australian industrial organisation. Thirdly, the prosecutor also emphasises that s 5 of the WRA is concerned with the extension of the power reposed by that statute in the AIRC. In that regard, the prosecutor relies upon a statement by Windeyer J in *Foster*. His Honour said[20]:

> "Prima facie Commonwealth statutes ought not to be so construed as authorizing any subordinate law-making body to deal with matters which have no real and substantial connexion with Australia or to make any rules

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18 190 US 169 (1903). See also *Strathearn Steamship Co Ltd v Dillon* 252 US 348 at 355-356 (1920); *Benz v Compania Naviera Hidalgo* 353 US 138 at 142 (1957); *McCulloch v Sociedad Nacional* 372 US 10 at 17 (1963).

19 190 US 169 at 179 (1903).

20 (1959) 103 CLR 256 at 311.

except such as can be directly or indirectly enforced by the authority of Australian courts."

39 There is no substance in the first and second matters relied upon by the prosecutor. They deny the settled authority that, where a connection exists between the law in question and the head of power which is not insubstantial, tenuous or distant, that connection is not displaced by the lack of some further or additional connection[21]. The same is true of the reliance upon the phrase "real and substantial connexion" as it appears in the passage in the judgment of Windeyer J in *Foster*. However it may have appeared soon after the changes made in 1956 to the industrial relations legislation, there is now no specific requirement of a particular added degree of connection to a head of power where the law in question authorises the exercise of legislative authority by a non-judicial body such as the AIRC. It may be added that, in *Foster*, no other member of the Court used terms akin to those used by Windeyer J.

40 The submissions with respect to invalidity and reading down of s 5(3) fail. There remains the submission by the prosecutor that, notwithstanding the reach of the terms in which it is expressed, s 5(3) should be given a construction placing the assumption of jurisdiction by the AIRC in this case beyond its reach.

Construction

41 The prosecutor submits that s 5(3) should be read with the unexpressed limitations that it not apply to industrial matters in which (a) the employer has no "presence" in Australia and (b) the employees are foreign non-residents who are not members of any relevant Australian industrial organisation. In this way, the prosecutor re-introduces as matters of construction the arguments upon validity.

42 The prosecutor prayed in aid s 21(1)(b) of the Interpretation Act. That was said, if applied to s 5(3) of the WRA, to produce a construction which would be consistent with the reading advocated by the prosecutor. Section 21(1)(b) provides:

"In any Act, unless the contrary intention appears:

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21 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492-493 [16]-[17] and the authorities there cited; cf at 515 [89].

...

(b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth."

43 The point which the prosecutor seeks to make good may be examined by reference to the provision of the Jones Act[22] construed by the Supreme Court of the United States in cases including *Lauritzen v Larsen*[23] and *Hellenic Lines v Rhoditis*[24]. That statute conferred rights upon "[a]ny seaman who shall suffer personal injury in the course of his employment". In *Lauritzen*, Jackson J, delivering the opinion of the Court, said of this provision[25]:

> "It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation – a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording."

The Supreme Court decisions upon the Jones Act are concerned with the reading of territorial limitations into the statute, with contrasting outcomes upon differing facts. To such legislation, if enacted in Australia, s 21(1)(b) of the Interpretation Act would have a readily apparent application. But the terms of s 5(3) of the WRA are not at large. Rather, they identify, in par (b) thereof, trade and commerce between the States, between Australia and a place outside Australia, and within and between Territories and between a State and a Territory. Section 21(1)(b) has no relevant operation upon s 5(3) of the WRA.

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22 46 USC §688.

23 345 US 571 (1953).

24 398 US 306 (1970).

25 345 US 571 at 576-577 (1953).

44 Two other principal grounds are relied upon by the prosecutor in construing s 5(3). The first is the need to avoid a construction of s 5(3) which places it "at odds" with Pt VI of the Navigation Act. There is, as explained above, no force in that ground.

45 The second may be identified by reference to the authorities cited by Taylor J in *Meyer Heine Pty Ltd v China Navigation Co Ltd*[26] for the proposition that the Parliament, in enacting the WRA, is not readily to be taken as intending to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or State. The sovereign authority involved here, the prosecutor submits, is that of the Bahamas, the law of the flag of the *CSL Pacific*. In particular, the prosecutor emphasises the need to displace only by clear and express terms what are said to be the rules of customary international law preserving to the law of the flag the regulation of the "internal economy" of ships, and protecting the right of "innocent passage".

"Innocent passage"

46 It is convenient to commence with consideration of the right of "innocent passage". In that regard, the prosecutor referred in particular to Arts 17, 18 and 19 of the United Nations Convention on the Law of the Sea ("the LOS Convention"). This was adopted on 10 December 1982 by the Third United Nations Conference on the Law of the Sea but it entered into force generally and for Australia only on 16 November 1994[27]. That was well after the enactment of s 5(3) of the WRA.

47 There is room for dispute as to when the right of "innocent passage" came to be regarded as forming part of customary international law and as to the content of the doctrine[28]. Article 18 of the LOS Convention defines "passage" in this regard as meaning:

"navigation through the territorial sea for the purpose of:

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26 (1966) 115 CLR 10 at 31.

27 *Australian Treaty Series*, (1994), No 31.

28 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 55 [58].

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility".

Of par (b), Professor O'Connell observed[29]:

> "The inclusion of passage to and from ports in internal waters is intended to reflect the supposition that there are rules of international law reflecting freedom of access to ports, and that the coastal State would not be free to deny ships transit rights for the purpose of access."

Of the LOS Convention, it has been said[30] that it:

> "involved a delicate compromise on the issues that carefully balanced the rights of coastal states with the maritime powers. The emerging view is that the provisions of the LOS Convention relating to navigation are either customary international law, the best evidence of international practice, or, at the very least, the foundation upon which customary international law will develop."

48 The result is that the provisions of Art 18 provide a somewhat uncertain basis on which to identify in any specific sense the comity of nations referred to in *Meyer Heine*. However, there is no interference by or pursuant to s 5(3) of the WRA with the navigation of the *CSL Pacific* through the territorial sea for the purpose of proceeding to or from Australian waters and calling at Australian ports.

Internal economy

49 The prosecutor referred to the well-known passage in the 1887 decision of the Supreme Court of the United States in *Wildenhus's Case*[31]. That Court, after

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29 *The International Law of the Sea*, vol 1, (1982) at 269.

30 Schoenbaum, *Admiralty and Maritime Law*, 3rd ed (2001), vol 1, §2-22.

31 120 US 1 (1887).

referring to the general proposition that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes[32], continued[33]:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

50 However, that statement falls short of a rigid formulation of a normative requirement of customary international law. English writers recently put the position as follows[34]:

> "By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships. But since ships are more or less self-contained units, having not only a comprehensive body of laws – that of the flag State – applicable to them while in foreign ports, but also a system for the enforcement of those flag State laws through the powers of the captain and the authority of the local consul, coastal States commonly enforce their laws only in cases where their interests are engaged. Matters relating solely to the 'internal economy' of the ship tend in practice to be left to the authorities of the flag State."

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32 120 US 1 at 11 (1887).

33 120 US 1 at 12 (1887).

34 Churchill and Lowe, *The law of the sea*, 3rd ed (1999) at 65-66 (footnote omitted).

51 In the Reporters' Notes to §512 of the *Restatement of the Law of the Foreign Relations Law of the United States*[35], it is said:

> "A coastal state can condition the entry of foreign ships into its ports on compliance with specified laws and regulations. The jurisdiction to prescribe may extend even to some matters relating to the internal affairs of the ship."

There then is a citation of *Patterson v Bark Eudora*[36].

52 The question thus becomes whether the interests of the coastal State are engaged such as to attract the operation of its legislation upon a particular subject to the visiting ship. An example of legislation of that nature is provided by Pt VI of the Navigation Act. That, as has been indicated, applies to all ships (s 284) and requires licensing to engage in the coasting trade. Moreover, the licensing system carries requirements, discussed earlier in these reasons, respecting the payment of wages. The licensing requirements of Pt VI do not apply to the *CSL Pacific* by reason of the operation of the permit system. However, the terms of s 5(3) of the WRA, in particular par (b), found the exercise of jurisdiction by the AIRC in matters engaging the interstate and territories and overseas commerce power. Whether, and the extent to which, an award or variation of an award is to affect the "internal economy" of ships such as the *CSL Pacific* is a matter entrusted for consideration by the AIRC.

53 In that regard, s 111(1)(g) of the WRA is important. This applies to the present application before the AIRC for variation by dint of s 113(4). The text of that latter provision is set out earlier in these reasons. Paragraph (g)(iii) empowers the AIRC to dismiss an application in whole or in part, or to refrain from further hearing or determining the industrial issue, if it appears to the AIRC that further proceedings would not be "desirable in the public interest". Considerations respecting the significance of the "internal economy" rule on the one hand and the economic interests of Australia on the other will be for consideration in due course by the AIRC. The "internal economy" rule does not

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35 3d, vol 2, Ch 2, (1987).

36 190 US 169 (1903).

require, as a matter of construction, the reading of s 5(3) of the WRA in such a fashion as to preclude entry by the AIRC upon consideration of the subject.

54 The suggested canons of construction upon which the prosecutor relies do not warrant any conclusion that the determination by the AIRC on 27 September 2002 was made in excess of jurisdiction.

Service

55 In *John Pfeiffer Pty Ltd v Rogerson*[37], it was said in the joint judgment of five members of the Court:

> "Federal, State and Territory courts have jurisdiction in personal actions if the defendant is served with the court's originating process within the territorial bounds of the court's jurisdiction[38]. Those courts will also take jurisdiction in certain other circumstances prescribed by rules of court or by the *Service and Execution of Process Act* 1992 (Cth). In this 'long arm' jurisdiction a plaintiff must show some connection between the claim and the jurisdiction in which the claim is made."

56 The prosecutor emphasises its situation outside Australia and relies upon the proposition in the first sentence set out above as specifying the effective foundation of the jurisdiction of the AIRC in the present matter. Before the Full Bench, the prosecutor appeared by its solicitor. However, the appearance was expressed to be "conditional" and not to be taken as an admission or concession by the prosecutor that the AIRC had jurisdiction to entertain and hear the application to vary the Award[39].

57 The evidence indicates that, earlier, on 28 March 2002, CSL Pacific had received at its office in Barbados a letter from the solicitors for the second respondent. This enclosed a copy of the application filed on 22 January 2002, as amended on 28 February 2002.

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37 (2000) 203 CLR 503 at 517 [13]; see also at 548-549 [116].

38 *Laurie v Carroll* (1958) 98 CLR 310; *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565.

39 (2002) 118 IR 294 at 296.

58 The Full Bench of the AIRC said with respect to the objection as to service outside the jurisdiction taken by the prosecutor[40]:

> "Jurisdiction under the [WRA] is not dependent or conditioned upon formal or actual service of process. Rather, jurisdiction arises from an objectively established state of affairs between participants in employment and industrial relationships. That is not to deny that the exercise of jurisdiction may be precluded where procedural fairness is not accorded for reasons that include a failure to adequately notify or serve process."

That statement of the position should be accepted as correct.

59 The AIRC was not concerned with the exercise of judicial power where, as identified in *Pfeiffer*, the assertion of jurisdiction in personal actions depends upon the legal service of the initiating process. Rather, its powers are of a legislative rather than judicial nature, being concerned with the prescription of rules of conduct for the future in respect of the disputing parties.

60 The only question that arises is whether the Australian Industrial Relations Commission Rules 1998 stipulate for service of documents only within Australia. Rule 72 specifies various methods of effecting service of documents. They include posting the documents by registered post to the secretary at the registered office of a body corporate (r 72(2)(d)(ii)). The term "registered office" is defined in r 72(3) as meaning, in relation to a body corporate, the principal office or place of business of the body corporate. In the present case, there was literal compliance with r 72. In any event, further provision is made by r 73. This provides that the AIRC may make an order for substituted or other service of notice by letter or other specified means "for the purpose of bringing the document to the notice of the person to be served".

61 On 25 January 2002, a Commissioner ordered service upon CSL Pacific to be effected by sending sealed copies of the relevant documents, including the notification of hearing, by post to the office in Sydney of CSL Australia and there is no dispute that this was done. It is unnecessary to determine whether the service provided for in r 72 is limited to service within the Commonwealth. This

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40 (2002) 118 IR 294 at 327.

is because r 73 was availed of in this case. Its general terms are apt to encompass an order for service within the jurisdiction in substitution for service outside the jurisdiction by the party in question.

62 The controlling consideration is that identified by the Full Bench, namely, whether in a particular case, there has been a denial of procedural fairness by a failure adequately to notify or serve process. A denial of procedural fairness may attract a remedy in this Court for excess of jurisdiction[41]. As has been indicated, no such issue arises in the present case.

Conclusions

63 The order nisi should be discharged. There should also be a costs order against the prosecutor[42].

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41 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

42 *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654 at 657.