HIGH COURT OF AUSTRALIA

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

AUSTRALIAN COMMUNICATION EXCHANGE LIMITED — APPELLANT

AND

DEPUTY COMMISSIONER OF TAXATION — RESPONDENT

Australian Communication Exchange Ltd v
Deputy Commissioner of Taxation
[2003] HCA 55
1 October 2003
B71/2002

ORDER

1. *Appeal allowed with costs and cross-appeal dismissed with costs.*

2. *Set aside paragraphs 1 and 2 of the orders of the Full Court of the Federal Court made on 28 November 2001 and the consent order made on 20 December 2001. In lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

G C Martin SC with L F Kelly for the appellant and cross-respondent (instructed by Corrs Chambers Westgarth)

J J Batrouney SC with M M Brennan for the respondent and cross-appellant (instructed by Australian Government Solicitor)

CATCHWORDS

Australian Communication Exchange Ltd v Deputy Commissioner of Taxation

Industrial law (Q) – Award – Superannuation – Employer's liability to pay "superannuation guarantee charge" dependent on payment of superannuation contributions in accordance with Clerical Employees Award (State) (Q) – Award requirement to contribute "3% of the employee's ordinary time earnings" – Whether employer had complied with Award – Casual employees – Meaning of "ordinary time earnings".

Appeal – Decision of appellate court – Whether disentitled to decide case on an interpretation of a contested instrument different from that contended by either party – Whether bound to decide case on arguments advanced by the parties – Whether entitled to adopt a view on the construction of an instrument different from that contended by either party.

Words and phrases: "ordinary time earnings".

Superannuation Guarantee Charge Act 1992 (Cth).
Superannuation Guarantee (Administration) Act 1992 (Cth), s 23(2).
Clerical Employees Award (State) (Q), cll 3.5, 4.2, 4.7.

1 GLEESON CJ. The issues in the case, the provisions of the relevant legislation and Award, and the facts, are set out in the reasons for judgment of Hayne J.

2 The central problem concerns the construction of those provisions of the Clerical Employees Award - State (Qld) which govern the obligations of employers to make contributions to fund superannuation benefits for casual employees. Clause 3.5(2)(a) obliges employers to contribute to an approved Fund on behalf of each eligible employee "an amount calculated at 3% of the employee's ordinary time earnings". The expression "ordinary time earnings" is defined, in cl 3.5(3)(d), to mean "the actual ordinary rate of pay the employee receives for ordinary hours of work", to include "casual rates received for ordinary hours of work", and to exclude "overtime".

3 There are three classes of employee: full-time, part-time, and casual. The matter of hours of work and overtime is dealt with by Pt 4. Clause 4.1 identifies ordinary hours of work, in a manner that refers primarily to full-time employees, in terms of an average of 38 hours per week and a spread of hours between certain times over certain days of the week. Clause 4.2, headed "Overtime", provides that work done outside or in excess of ordinary working hours is to be paid for at specified higher rates, and that such payments are to be in addition to the actual or ordinary weekly wage paid to the employee. Clauses 4.3, 4.4, and 4.5 (dealing with meal breaks, rest pauses and shiftwork) are irrelevant. Clause 4.6 deals with part-time employment. Clause 4.7 provides:

> "4.7 Casual Employment
>
> (1) *Definition* - A casual employee shall mean an employee who is engaged by the hour and who may terminate employment or be discharged at any moment without notice.
>
> (2) *Rate of Pay* - Employees shall be paid an hourly rate by dividing the weekly rate of the appropriate classification by 38 and adding a loading of 19% thereto.
>
> (3) *Hours* - All time worked outside the spread of ordinary working hours or in excess of 8 in any one day or 38 in any one week shall be paid for at overtime rates ..."

4 The problem is to relate cll 3.5(2)(a) and 3.5(3)(d) to the position of casual employees. The concepts of ordinary hours of work and ordinary rates of pay, which expressly apply to them by reason of the terms of the first and second sentences of cl 3.5(3)(d), have a meaning that can only be understood by reference to the definition provisions of Pt 4. Ordinary hours of work are dealt with primarily by reference to full-time employees, to whom they apply more naturally. But some meaning has to be given, in cl 3.5(3)(d), to the expression "actual ordinary rate of pay" in its application to casual employees, and to the expression "casual rates received for ordinary hours of work". This is necessary

in order to calculate the "ordinary time earnings" of a casual employee, by reference to which the employer's obligation to contribute is measured.

5 The question is complicated by the adoption in the Award of an elliptical method of drafting. The language of cl 3.5(3)(d) alternates between references to amounts of money and references to rates according to which such amounts are calculated. It refers to "actual ordinary rate of pay", loadings, allowances, and casual rates. However, it also refers to commission, bonuses and lump sum payments, which are amounts, not rates. Earnings, which is an amount, is said to "mean" a rate of pay. But a rate of pay can only be one integer in calculating an amount of earnings. And it is by reference to the amount of an employee's weekly earnings that an employer's liability to pay contribution is measured (cl 3.5(2)(c)).

6 As Hayne J points out, three possible constructions have been advanced. The appellant contends for (and Dowsett J at first instance in the Federal Court accepted) a narrow construction, excluding from the "ordinary time earnings" of casual employees any amounts paid in respect of hours worked outside what, for a full-time employee, would be the ordinary number and spread of hours. The respondent (cross-appellant) contends for the view that, in the case of a casual employee, the distinction between ordinary time and overtime is meaningless, and that all earnings (except those, other than overtime, specifically excluded by cl 3.5(3)(d)) are ordinary time earnings. The difficulty with that view is that we are not concerned with an abstract question about whether casual employment may involve overtime, but with a concrete problem that arises in the context of applying the language of the Award (including "casual rates received for ordinary hours of work") for the purpose of calculating the "ordinary time earnings" of casual employees. The Full Court of the Federal Court adopted an intermediate position. For the reasons given by Hayne J, I consider that the preferable construction is that adopted by the Full Court. I would add two general observations.

7 First, there is nothing unusual about a trial court, or an appellate court, adopting a view of the facts, or of the law (including the construction of a written instrument), different from the views for which the parties to litigation respectively contend. In the present case, each party contended for a particular meaning to be given to the Award. The Full Court of the Federal Court was not bound to adopt either of those meanings. It was entitled to reach its own conclusion as to what the Award meant, subject to the requirements of procedural fairness. No one suggests that those requirements have been offended. The facts are not in dispute; and it is not suggested that either party would have presented the case differently, in terms of evidence or argument, had the need to address the intermediate position adopted by the Full Court been anticipated. Having regard to their own interests, or the interests they represent, it is not surprising that the appellant contended for a narrower view than that of the Full Court, and the

respondent contended for a wider view. That means only that this Court has three possibilities to address.

8 Secondly, reference was made in argument to the purpose of the legislation in question and of the relevant provisions of the Award. It is, of course, proper to seek to give the Award a meaning which advances that purpose, so far as that can be done consistently with the text. However, it is one thing to say that the purpose of the legislation, and the Award, is to secure appropriately funded superannuation benefits for employees. That is undoubtedly so, and the social policy behind that purpose is well understood. It is another thing to say that, in order to further that purpose, when a question as to the construction of the Award arises, the Court should seek to give it a meaning that maximises the superannuation contributions payable. I accept that, for the reasons given by the Full Court, and by Hayne J, the narrow construction of the Award for which the appellant contends produces practical results that appear to limit the obligations of employers in relation to casual employees in a manner inconsistent with the demonstrable legislative and industrial purposes. On the other hand, I do not accept that those purposes can only be advanced by adopting the construction for which the respondents contend. Furthermore, that construction appears to me to involve an unacceptable disregard of the language of the instrument. The intermediate position adopted by the Full Court is that which best accommodates those purposes and the text of the Award.

9 I would dismiss both the appeal and the cross-appeal.

10 McHUGH, GUMMOW, CALLINAN AND HEYDON JJ. In order to resolve this appeal from the Full Court of the Federal Court of Australia[1], it is necessary to construe an award made by the Queensland Industrial Relations Commission under the *Industrial Relations Act* 1990 (Q). The award is the Clerical Employees Award – State (Q) ("the Award"). The necessity to construe the Award arises because the appellant employer's entitlement to be relieved from the obligations that it would otherwise have under the *Superannuation Guarantee Charge Act* 1992 (Cth) (the "Charge Act") and the *Superannuation Guarantee (Administration) Act* 1992 (Cth) (the "Administration Act") depend upon, and are ultimately to be measured by the Award.

Facts and relevant legislation

11 Before going to the most relevant sections, reference should be made to the scheme of the two Acts. Section 3 of the Charge Act provides that the Administration Act is incorporated in, and is to be read as one with the Charge Act. Section 5 of the Charge Act imposes a charge on any "superannuation guarantee shortfall" of an employer in a year. Section 6 of the Charge Act provides that the amount of the charge payable is equal to the amount of the shortfall. Section 16 of the Administration Act provides that the superannuation guarantee charge imposed on an employer's guarantee shortfall for a year is payable by the employer. Section 17 of the Administration Act provides that the employer's superannuation guarantee shortfall for a year is the total of the employer's individual superannuation guarantee shortfalls together with interest and an administration component. Section 19(2) of the Administration Act is concerned with the calculation of any shortfall. The Commissioner of Taxation has the general administration of the Act (s 43).

12 The important sections for present purposes are ss 21 and 23 of the Administration Act. Section 21 prescribes a percentage which, by reference to an employee's wages, marks out the employer's obligation to make payment of a superannuation guarantee shortfall in respect of an employee. That percentage may be reduced by the operation of s 23 if relevant conditions are met.

13 The relevant conditions are to be found in s 23(2) which provides that the charge percentage is to be reduced if in a contribution period:

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1 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426; [2001] ATC 4730.

"(a) an employer is required by an industrial award or law ... to contribute for the benefit of an employee to a superannuation fund; and

(b) the requisite contribution is a specified percentage of the employee's notional earnings base or a percentage of that base calculated in accordance with the award or law; and

(c) the employer contributes to a complying superannuation fund for the benefit of the employee in accordance with the award or law."

14 It follows that an employer may satisfy its obligations under the Acts if it complies with the obligation with respect to superannuation which an Award imposes on it. But before turning to the Award in question we should state the facts upon which the parties are agreed, and which show the factual setting for its operation.

15 The appellant provided a national telephone relay service which enabled people who were deaf, or who had a hearing or speech impairment, to communicate with others. A person who wished to take advantage of the service would telephone a relay officer employed on a casual basis by the appellant. The relay officer would then act as a medium, converting text messages to voice, and vice versa.

16 The appellant, pursuant to an agreement with the Commonwealth of Australia, undertook to provide the service 24 hours a day, seven days a week. The appellant operated two call centres, one in Brisbane and one in Melbourne. (This appeal relates only to payments made to relay officers in the appellant's Brisbane centre.)

17 For the period with which this appeal is concerned, 1 June 1995 to 30 June 1998, all of the relay officers in the appellant's Brisbane call centre were employed on a casual basis under the Award.

18 The hours worked by each relay officer in a fortnight were fixed by a fortnightly roster prepared by the appellant two weeks before the relevant period of work. If the times allocated to a particular relay officer were not convenient, the officer was permitted to change shifts, or parts of shifts, with other officers. This was arranged by the employees themselves without reference to, or the need for prior approval by the appellant which would be advised of the change at some point before the commencement of the shift.

19 The respondent, the Deputy Commissioner of Taxation, issued amended assessments of the superannuation guarantee charge for the relevant period based on *all* hours worked by the appellant's employees. It is in respect of, and to challenge those arrangements that these proceedings were brought.

20 Section 42 of the Administration Act provides for objections to assessments to be dealt with in the manner set out in Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the Taxation Act"). Part IVC (ss 14ZL-14ZZS) is headed "Taxation objections, reviews and appeals". The proceeding before the Federal Court was an "appealable objection decision", in which the appellant had the burden of proving that the assessments in question were excessive (s 14ZZO) and the Court was empowered to make orders confirming or varying the disallowance of the objections (s 14ZZ, s 14ZZP).

The award

21 Clause 2.1 of the Award refers to four categories of employees: weekly, part-time, casual or as provided in cl 1.2(2).

22 Clause 4.7 provides a definition and a brief statement of some of the conditions of employment of casual employees.

> "**4.7 Casual Employment**
>
> (1) *Definition* - A casual employee shall mean an employee who is engaged by the hour and who may terminate employment or be discharged at any moment without notice.
>
> (2) *Rate of Pay* - Employees shall be paid an hourly rate by dividing the weekly rate of the appropriate classification by 38 and adding a loading of 19% thereto.
>
> (3) *Hours* - All time worked outside the spread of ordinary working hours or in excess of 8 in any one day or 38 in any one week shall be paid for at overtime rates except where the arrangement of hours are worked in accordance with clause 4.1(1)(f).
>
> Provided a minimum of 2 hours shall be paid for each engagement."

23 It can be seen that casual employees may, despite the different arrangements with respect to their pay, tenure as employees, and working times, qualify for overtime rates of pay, in addition to their hourly rate which is the ordinary rate supplemented by a loading of 19%. It is important to note that it is

time worked outside ordinary working hours, or in excess of [beyond] eight hours in any one day, or 38 hours in any one week that will attract payment of an overtime rate: that is, that an entitlement to overtime payments is related essentially to when (outside ordinary hours as defined) work is performed. Nothing received in respect of work in ordinary hours is to be regarded as an overtime payment. Everything earned for hours of work outside, or beyond those ordinary working hours, it follows, must be an overtime payment.

24 The term "ordinary hours of work" is relevantly defined as follows:

"**4.1 Hours of Work**

…

(1)(b) The ordinary hours of work prescribed herein may be worked on not more than five consecutive days in a week, Monday to Saturday inclusive, subject to the following:

(i) Except as otherwise specifically provided herein, ordinary hours may be worked between 6.30 am to 6.30 pm on Mondays to Fridays inclusive, and between 6.30 am and 12.30 pm on Saturdays. Such spread of ordinary daily working hours may be altered as to all or a section of employees provided that there is agreement between the employer and the employee or the majority of employees involved.

(ii) Ordinary hours worked by all employees, excluding casuals, on a Saturday between the hours of 6.30 am and 12.30 pm shall be paid for at the rate of time and a-quarter.

(iii) Any arrangement of hours which includes a Saturday as ordinary hours shall be subject to agreement between the employer and the majority of employees involved."

Clause 3.5 is relevantly as follows:

"**3.5 Occupational Superannuation**

(1) Application - In addition to the rates of pay prescribed by this Award, eligible employees, as defined herein, shall be entitled to Occupational Superannuation Benefits, subject to the provisions of this clause.

(2) Contributions

(a) Amount - Every employer shall contribute on behalf of each eligible employee as from 20 November 1989 an amount calculated at 3% [at the time of the making of the Award] of the employee's ordinary time earnings, into an Approved Fund as defined in this clause. Each such payment of contributions shall be rounded off to the nearest ten (10) cents.

…

(c) Minimum Level of Earnings - No employer shall be required to pay superannuation contributions on behalf of any eligible employee whether full time, part time, casual, adult or junior in respect of any week during which the employees ordinary time earnings, as defined, do not exceed 35% of the Guaranteed Minimum Wage for the Southern Division, Eastern District, as declared from time to time.

…

(3) Definitions

…

(d) 'Ordinary time earnings' shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including shift loading, skill allowances and supervisory allowances where applicable. The term includes any over-award payment as well as casual rates received for ordinary hours of work. Ordinary time earnings shall not include *overtime*, disability allowances, commission, bonuses, lump sum payments made as a consequence of the termination of employment, annual leave loading, penalty rates for public holiday work, fares and travelling allowances or any other extraneous payments of a like nature." (emphasis added)

25 Some other clauses of the Award should be set out:

"**4.1 Hours of Work**

…

(4) *Method of Payment for Ordinary Hours of Work and on Termination*

(a) Ordinary hours for all employees (excluding part time employees and casuals), shall be paid on the basis of not more than 38 per week on an averaged basis according to the work cycle, notwithstanding that in excess of 38 ordinary hours may be worked to maximise leisure time off in accordance with provision (a) of subclause (1), provision (f) of subclause (1) and provision (c) of subclause (2).

Provided that in enterprises where clerical work is incidental to the main business of the employer and the majority of employees in the main business of the employer are paid on an actual hours of work per week basis, then clerical employees may be paid on the same basis as applies to the majority of the employer's employees."

26 Further provisions are as follows:

"**4.2 Overtime**

(1) Except as hereinafter provided, all work done outside or in excess of the ordinary working hours on any day shall be paid for at the rate of time and a-half for the first 3 hours and at the rate of double time for all work so performed in excess of 3 hours on any one day. Such payments shall be in addition to the actual or ordinary weekly wage paid to each employee.

Employees called upon to work overtime on Saturday will be provided with a minimum of 2 hours work or payment therefore, provided that this paragraph shall not apply to overtime worked continuously with ordinary hours.

…

(7) Employees who work so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that they have not at least had 10 consecutive hours off duty between those times, shall, subject to

this subclause, be released after completion of such overtime until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. If on the instructions of the employer such an employee resumes or continues work without having had such 10 consecutive hours off duty, they shall be paid double rates until they are released from duty for such period and they shall then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

The provision of this subclause shall apply in the case of shift workers who rotate from one shift to another as if 8 hours were substituted for 10 hours when overtime is worked -

(a) For the purpose of changing shift rosters; or

(b) Where a shiftworker does not report for duty; or

(c) Where a shift is worked by arrangement between the employees themselves."

The case at first instance

27 The core of the reasoning of the primary judge (Dowsett J) is to be found in this passage of his Honour's judgment[2]:

"The definition of 'ordinary time earnings' clearly applies to casual employees. The reference to 'casual rates for ordinary hours of work' also indicates that a casual worker may be paid other than for 'ordinary hours of work'. This can only be as contemplated by para 4.7(3). In my view, the expression 'ordinary time earnings' in cl 3.5 includes, in the case of a casual employee, earnings received other than for time worked outside the spread of ordinary working hours as prescribed in subpara 4.1(1)(f) or in excess of 8 hours in any one day or 38 hours in any one week."

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2 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2001) 47 ATR 77 at 80 [8].

The appeal to the Full Court of the Federal Court

28 The Full Court of the Federal Court (Wilcox, Hill and Carr JJ) unanimously upheld an appeal by the respondent but the result was one neither intended nor sought by either party.

29 After discussing the entitlements of full-time employees their Honours said[3]:

> "The situation of casual employees is different. They are paid by the hour. When that hour falls within either category of overtime they are entitled to payment at a higher rate (time and a half for the first 3 hours and double time in excess of 3 hours on any one day). But it is only that increment in the rate, multiplied by the relevant number of hours, which constitutes the overtime payment for the casual employee concerned. The employee has a primary entitlement to be paid for each worked hour at the relevant hourly rate, just as full-time and part-time employees have a basic entitlement to a weekly wage. Then the casual employee has an additional entitlement to an overtime payment, brought about by enhancing the hourly rate. It is only that additional entitlement that may properly be described as an overtime payment. Only that additional entitlement is attributable to the fact that the worked hours are 'outside or in excess of' the employee's ordinary working hours.
>
> This approach achieves compatibility between the positions of full-time, part-time and casual employees. In each case the overtime payments are excluded from the definition of 'ordinary time earnings' in cl 3.5(3)(d).
>
> As we see the matter, there is nothing in the definition in cl 3.5(3)(d) which would exclude from 'ordinary time earnings' that portion of casual employees' remuneration for working in overtime periods to which they would have been entitled if they had not worked 'outside or in excess of' ordinary working hours.
>
> The opening words of the definition include the word 'means'. That may, where appropriate, be construed as 'means and includes'; it need not be an exclusive definition. The amount referred to in the first sentence of the definition is expressed in terms of a rate of pay. For casual employees their '... actual ordinary rate of pay [received] for ordinary hours of work

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3 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426 at 432 [24]-[29]; [2001] ATC 4730 at 4735.

> ...' is an hourly rate calculated by dividing the weekly rate of the appropriate classification by 38 and adding a loading of 19% thereto. In our view, the term 'ordinary time earnings for casuals' includes an amount calculated by multiplying that dollar rate by the actual number of hours worked, but does not include any overtime payment. By overtime payment we mean the incremental payment referred to ... above.
>
> Such a construction may not readily spring to mind on a first reading of cl 3.5(3)(d). However, it is consistent with the obvious purpose of that clause ie to include payments for work calculated by reference to ordinary rates of pay (including shift loading, skill allowances and supervisory allowances where applicable), but to exclude overtime and certain other payments not presently relevant.
>
> It follows that, when the respondent calculated its contribution obligation in respect of occupational superannuation for its casual employees, it should not have excluded the whole of the payments it made to them for hours worked outside or in excess of ordinary working hours; it should only have excluded such part of those payments as were true overtime payments in the sense explained above."

30 The result was that the Full Court preferred a construction of the Award whereby contributions were assessed by multiplying the rate of pay applicable for work in ordinary working hours by the number of hours worked, whereas Dowsett J had favoured the basing of contributions on amounts paid for work (if any) within ordinary hours, as the appellant submits, and the Deputy Commissioner had sought (and still seeks) to fix upon all payments made, of whatever species.

The appeal to this Court

31 In this Court neither party seeks to uphold the conclusion of the Full Court which represents, as it itself conceded, effectively a compromise of the positions adopted by them. The respondent by a cross-appeal seeks the same relief and relies on the same grounds as at first instance and in the Full Court.

32 The Court should accept the construction adopted by the primary judge, that for which the appellant contends.

33 The task of this Court is to construe, in particular, cl 3.5 which is the clause that relevantly states the obligation of the appellant, that is, to make a contribution measured by and in respect of an employee's "ordinary time earnings". Other clauses in the Award are relevant only to the extent that they

throw light on cl 3.5, or that they may define, or identify expressions used in the former.

34 The first difficulty in construing cl 3.5 of the Award is created by the attempted equation (in cl 3.5(3)(d)) between "earnings" and "[a] rate of pay" when quite obviously they are not the same, the former being the product of the multiplication of the latter by the number of hours worked.

Appellant's submissions

35 The appellant submits that the reference to "ordinary time earnings" is a reference to earnings for hours worked other than overtime hours: accordingly, whatever a casual employee earns by way of overtime is not part of "ordinary time earnings", and therefore does not provide any measure of the appellant's liability to contribute superannuation payments for that employee in respect of those overtime payments.

Respondent's submissions

36 Before going to the detail of the respondent's submissions we would make these observations. The Award is an Award for different categories of employees. Its makers were careful to define a number of different concepts: for example, ordinary hours and overtime hours, and ordinary rates of pay and overtime rates of pay. They contemplated that casual workers would be able to qualify for work in overtime (that is work performed at times beyond any of the relevant spreads of hours) and that such work would attract an additional rate of pay, well knowing that superannuation would not be payable to a fund by the appellant in respect of overtime earnings. These are matters readily to be inferred from the language of the Award and should be taken as bearing upon the clarification of any ambiguities in it. Each of "casual employee", "ordinary hours", "ordinary working hours", "ordinary time earnings", "casual rates", "overtime" and "ordinary working hours for *all* employees" must be given meaning and effect under the Award.

37 The principal submission of the respondent is that all of the provisions in cll 4.1 to 4.5 of the Award refer to full time employees only: that in particular "ordinary hours of work" in cl 4.1 ("an average of 38 per week") refer only to hours of full time employees. Several matters, the respondent submits, support this contention. Specific provision is made for the hours of part-time employees in cl 4.6(2) whilst none are specified for casual employees. This strongly suggests that the non-specific reference to hours in cl 4.1(1)(a) does not cover hours for part-time, and (by implication) casual employees. We would reject this submission. It may well be in the nature of casual employment that the hours of

work for it are not rigidly specified long in advance. In practice here, the employees apparently changed the hours when it suited them and with the appellant's concurrence. Clause 4.7(3), which is concerned with casual employees, makes it clear that it is in respect of some hours only that overtime earnings are to be paid. This follows from the words, "*all* time worked outside the spread of *ordinary* working hours ... shall be paid for at *overtime* rates ...". The clause also makes it clear that there are to be payable to casual employees both ordinary and overtime rates of pay, and that the dichotomy between them will depend essentially upon when the hours are worked.

38 Nor is it remarkable, as the respondent contends, that a casual employee who works outside the ordinary spread of hours of work might receive overtime rates, that is overtime payments only, and that accordingly the employer will not receive any relief from payment of the charge percentage under s 19 of the Administration Act. The Acts in this respect defer to the Award. It is not unreasonable to assume that its makers were aware of the effect of the former. If anomalies thereby arise, other provisions of the Award either have been designed to compensate for them, or no doubt will be. It is important to keep in mind that it is not the task of this Court, even if it were achievable, to rewrite the Award, or to venture into its crevices to try to discover whether, on its proper construction, it achieves parity between all workers.

39 It is only partly right for the respondent, and, ultimately does not assist in the resolution of the appeal, to submit that the Award does not prescribe the ordinary hours which an employer must offer, or a casual employee must work or be willing to work. What the Award does specify is the spread of hours within which an employee may work for ordinary rates of pay. The fact that no work need necessarily be performed within those hours does not alter their quality as ordinary hours, or the nature of the rates of pay, and therefore earnings that they are to attract.

40 The cross-appeal of the respondent should be dismissed.

41 We appreciate the width of the power conferred upon the Federal Court by s 14ZZP of the Taxation Act to vary the disallowance of objections to assessments. Nevertheless, we question, at least in the circumstances of this particular case, the appropriateness of the adoption by the Full Court of an approach, and a conclusion, that neither party has sought. Perhaps it is desirable in the public interest that contributions be made to an approved fund calculated in accordance with the Full Court's compromise formula. But even though that may be so, which we are inclined to doubt as the respondent as the party responsible for the administration of the Acts advanced no such proposition, this remains civil litigation between parties who have identified the issues upon which they

are joined. Even if we thought the reasoning of the Full Court correct, we would still entertain doubt whether we should uphold its conclusion, unwanted as it is by each side. We prefer to decide the case on the arguments advanced by the parties.

42 We do not however consider that the Full Court was correct in its reasoning and decision.

43 We do not accept that it is only the additional entitlement (that is, the difference between the ordinary rate of pay multiplied by the overtime hours worked and the total pay received for overtime work) that is to be regarded as "overtime" earnings within the meaning of cll 3.5, 4.2 and 4.7 of the Award. The definition in cl 3.5(3) of "ordinary time earnings" by reference to the actual ordinary rate of pay is intended to be read, and should be read, as the earnings for work done in ordinary time at the ordinary (not overtime) rate of pay. The Award itself is the result no doubt of compromises. It is not for this Court to reach a compromise of those compromises. The flexibility that casual work offers, and the desire of workers to engage in it, might well have been regarded as recompense for some other advantage forgone, either by the employee or employers or both of them. The casual "loading" of 19% might have been intended to offset all disadvantages, or may be less than it would be, but for the obligations that the appellant owes under the Acts. The framing of the definition of "ordinary hours" in the way that it was might itself have been of importance and advantage to casual employees as well as to the appellant. The Full Court saw as a desirable end, an interpretation of the Award which achieved "compatibility between the positions of full-time, part-time and casual employees"[4]. An assumption that compatibility be achieved or should be attempted between different classes of employees can provide no certain or justifiable basis for the construction of the Award. And although "means" might conceivably be construed as "includes" such a construction, in a case, as this one is, of a comprehensive definition omitting the word "includes", is, in our opinion an improbable one. It is not without significance that in adopting the construction that it did, the Full Court said that it was one that might "not readily spring to mind".

44 The correct approach is not, with respect, that adopted by the Full Court, to search cl 3.5(3)(d) of the Award to see whether there is anything in it "which would exclude from 'ordinary time earnings' that portion of casual employees'

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4 (2001) 48 ATR 426 at 432 [25]; [2001] ATC 4730 at 4735.

remuneration for working in overtime periods to which they would have been entitled if they had not worked 'outside or in excess of' ordinary working hours."[5]

45 The argument of the appellant is in our opinion correct. The conclusion of the primary judge which involved the acceptance of it is to be preferred for the reasons that we have given.

46 The appeal should be allowed and the cross-appeal dismissed, in each case with costs. Orders 1 and 2 of the orders of the Full Court made on 28 November 2001 and the consent order made on 20 December 2001 should be set aside. In place thereof it should be ordered that the appeal from the orders of Dowsett J made on 2 May 2001 be dismissed with costs.

47 The effect of these orders is to give the appellant its costs at all stages of the litigation.

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5 (2001) 48 ATR 426 at 432 [26]; [2001] ATC 4730 at 4735.

48 KIRBY J. Each of the parties to the present appeal was discontented with the solution reached by the Full Court of the Federal Court of Australia to the problem of interpretation presented by the case[6]. In its judgment the Full Court reversed the orders of the primary judge in the Federal Court[7]. He, in turn, had overruled the primary assessments.

49 In this Court, neither party sought to uphold the Full Court's interpretation. Australian Communication Exchange Limited (the appellant) asked this Court to return to the interpretation adopted by the primary judge. The Deputy Commissioner of Taxation (the respondent and cross-appellant) submitted that the Full Court had been correct to discern a flaw in the reasoning of the primary judge but had failed to follow through the logic of this conclusion. He argued that logic would result in the restoration of the respondent's amended assessments obliging the appellant to pay a superannuation guarantee charge for three financial years (1996, 1997 and 1998) in respect of portions of the wages of casual employees that the appellant had treated as outside the calculation.

50 In his reasons, Hayne J has concluded that the solution reached by the Full Court, although rejected by the parties, represented the "preferable construction" of the words determining the obligations of the appellant[8]. Gleeson CJ has agreed with this conclusion[9]. During argument, like Caesar at the Lupercal, the respondent was thrice presented the chance of embracing the Full Court's approach, which he did thrice refuse[10]. By its appeal, the appellant was equally adamant.

51 The fact that neither of the parties supported the Full Court's reasoning or conclusion is not a ground why this Court, giving effect to the requirements of the law, should not do so[11]. This Court, like the Federal Court, is a court of law.

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6 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426; [2001] ATC 4730.

7 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2001) 47 ATR 77. An extract from the reasons of the Full Court appears in the reasons of McHugh, Gummow, Callinan and Heydon JJ at [29] ("the joint reasons").

8 Reasons of Hayne J at [101].

9 Reasons of Gleeson CJ at [6].

10 Shakespeare, *Julius Caesar*, III, 2, 96.

11 *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 559-560.

It is not an arbitrator obliged to devise the best possible solution within parameters fixed by the parties. It does not exist merely to reach a conclusion wanted by one side of the contest[12]. It has a higher duty to the law. Sometimes, by the conduct of proceedings, a party may disentitle itself from claiming the benefits of the law[13]. Such cases apart, it is not for parties, by submissions or concessions, to deflect the Court from giving effect to the law, which has a public, not just private, quality and obligation[14]. In this respect, I fully agree with the approach of Gleeson CJ and also of Hayne J[15]. Their approach is clearly available to them. Not least is this so because the Full Court enjoyed the powers of the Federal Court under ss 14ZZ and 14ZZP of the *Taxation Administration Act* 1953 (Cth) to make orders confirming or varying the disallowance of objections.

52 Nevertheless, at least where parties are well represented, their unanimous rejection of the approach and conclusions in the decision under appeal is a reason why a court should pause before embracing the unloved conclusion for itself. In the end, it is my view that the arguments of the respondent are to be preferred. The submissions of the appellant and the "compromise" adopted by the Full Court should be rejected. Nor was the primary judge in the Federal Court correct as the majority in this Court now conclude[16]. The primary assessments should be confirmed.

The facts, legislation and award

53 The facts and history of the litigation are set out in the joint reasons[17] and the reasons of Hayne J[18]. So is a description of the applicable legislation[19] and relevant extracts from the Clerical Employees Award – State (Q) ("the Award")

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12 cf joint reasons at [41].

13 *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 at [75], [82].

14 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[144]; 194 ALR 161 at 199.

15 See especially reasons of Gleeson CJ at [7]; reasons of Hayne J at [101].

16 Joint reasons at [45].

17 Joint reasons at [15]-[20], [27]-[30].

18 Reasons of Hayne J at [94]-[97].

19 *Superannuation Guarantee (Administration) Act* 1992 (Cth); *Superannuation Guarantee Charge Act* 1992 (Cth). See joint reasons at [11]-[14]; reasons of Hayne J at [103]-[105].

made by the Queensland Industrial Relations Commission[20]. I will avoid repetition of these matters.

54 The problem of construction is surprisingly difficult. The difficulty arises from the lack of clarity in the provisions of the Award. Normally, such problems can be safely left to the industrial representatives of the parties and to the tribunal appointed to make such awards. Where the language proves so obscure and uncertain, the tribunal might be persuaded to vary the award so as to remove the difficulty.

55 However, in this case a special problem arises. The Award is given a particular status by federal law. Under s 23 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ("the Administration Act"), in respect of the superannuation fund applicable to the appellant and its employees, the charge percentage levied on the appellant was calculated by reference to a contribution made by the appellant to its superannuation fund. That contribution, in turn, was to be calculated by reference to requirements imposed on an employer, such as the appellant, "by an industrial award or a law" of a specified kind. The Award was such an "industrial award". No issue was raised as to the constitutional validity of a reference in federal legislation to an industrial award made (as here) by a State industrial tribunal, subject to change from time to time, with consequent effect on the operation of the federal law. I will assume that, in picking up the provisions of a State industrial award as they appear from time to time, as a legislative fact, the provisions of s 23 of the Administration Act are constitutionally valid.

56 Even if the constitutional problem is put to one side, the practical difficulties of incorporating by reference the requirements of a State industrial award remain. One of those difficulties is that such awards are not always drafted with the precision of language and logic of expression that one expects to find in federal legislation. Common experience teaches that the provisions of industrial awards are frequently hammered out between lay negotiators. They are typically submitted to tribunals, also often comprising lay members. Quite frequently, they are drafted in fractious and urgent circumstances. It follows that such provisions often present difficulties of construction that have to be resolved, or repaired in later disputes, by tribunals paying close attention to the purpose and spirit of the award rather than to an overly nice construction of its ambiguous language[21].

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20 (1993) 142 QGIG 153. See joint reasons at [21]-[26].

21 *Kucks v CSR Ltd* (1996) 66 IR 182; *Notification under section 130 by the Australian Workers' Union, New South Wales, of a dispute with WJ & A Seery re payment of overtime and penalty rates* [2000] NSWIRComm 62 at [38].

57 The incorporation of an award in the operation of a federal Act thus introduces a special dimension to the difficulties of construction which this case highlights. Unfortunately, in its operation in relation to the superannuation entitlements of casual employees of the appellant, the Award is unclear and ambiguous. As Hayne J has shown, there are at least three possible approaches to the meaning of the critical provisions[22].

58 This Court has no authority to fix the problem presented by the appeal by clarifying the terms of the Award, as an industrial tribunal might do, by varying its provisions. In this the joint reasons are obviously correct[23]. All that this Court can do is to identify the construction thought to be the preferable one. That preferable construction is then designated the correct, and only, legal meaning of the Award. Of course, there is a danger that the legal meaning may be different from that which the negotiating parties intended and that the tribunal making the Award believed it was making for the purpose of resolving the industrial dispute before it. That danger is mollified, to some extent, by contemporary approaches to the construction of disputed language, adopted by the courts when faced with problems such as the present.

The approach to the disputed construction

59 The primary function of a court, asked to solve a problem of the present kind, is to give meaning to the disputed language. Interpretation is a text-based activity. This means that the focus of attention is upon the legally relevant words. In the present case, those words are found in the Administration Act incorporating the Award provisions by reference (and in its companion the *Superannuation Guarantee Charge Act* 1992 (Cth) ("the Charge Act")), as well as in the Award itself. The key provision of the Administration Act refers to the requirement upon the employer bound by its provisions "to contribute for the benefit of an employee to a superannuation fund"[24]. The interface between the federal Administration Act and the State Award is only rendered significant because of the formula established by the Act, which provides for the reduction of the charge percentage to which the employer is otherwise liable by reference to the "employee's notional earnings base"[25] as determined by the requirements, relevantly, of any applicable "industrial award"[26].

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22 Reasons of Hayne J at [101].

23 Joint reasons at [38].

24 s 23(2)(a).

25 Administration Act, s 23(2)(b).

26 Administration Act, s 23(2)(a).

60 If this were a case in which the provisions of the Award were clear and unambiguous, a court would simply give its provisions effect according to their terms. This would follow from the incorporation in the federal Act of reference to the applicable industrial award and specifically the establishment of a formula to be applied in determining the obligations of the employer by reference to the employee's "notional earnings" under the Award.

61 However, where, as here, the Award is ambiguous and unclear, the plain meaning rule will not yield the solution to the problem. It is then necessary, both by the requirements of statute law[27], and by the developments of the common law[28] for regard to be had to the purpose of the legislation and, so far as it is relevant, of the Award incorporated in it by reference.

62 In his reasons, Hayne J[29] suggests that it would be wrong to approach the task of construing the Award from an assumption that its superannuation provisions were intended to benefit all classes of employees equally or to achieve a result that might be regarded as fair or desirable (as distinct from the result obliged by the language of the Award that might possibly represent an industrial compromise of which the Court was unaware). I can support these propositions so far as they go. But they do not go far because, at the close of his reasons, Hayne J invokes, in support of the interpretation that he favours, the comforting consideration that that construction "does not lead to any significant discordance between the entitlements of those who were employed by the week … and those whose employment could have been terminated at will"[30].

63 The reason why this is a comforting fact is that the Award provisions are not ordinary stand-alone clauses in an industrial instrument affecting only the parties to the Award. The provisions in issue concern superannuation entitlements. They are elements of a major shift in employee benefits that came

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27 *Acts Interpretation Act* 1901 (Cth), ss 15AA, 15AB. See also *Acts Interpretation Act* 1954 (Q), s 14A as applied by s 14(1) and Sched 1 of the *Statutory Instruments Act* 1992 (Q). By s 7 of the latter Act, an award falls within the meaning of a "statutory instrument" as it is made under an Act, namely *Industrial Relations Act* 1999 (Q), s 125.

28 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

29 Reasons of Hayne J at [115].

30 Reasons of Hayne J at [124].

about throughout Australia in the early 1990s. It was a shift stimulated and reinforced by federal legislation, including the Administration Act.

64 Any approach to the interpretation of the ambiguities and obscurities of the Award would miscarry if it failed to take this critical shift in industrial practice and federal legislative purpose into close account. Far from being irrelevant considerations (or matters relevant only so far as they can be viewed as comforting or confirmatory), the construction of the Award provisions must be undertaken in this case with a view to fulfilling the clear purposes of the relevant federal legislation, including the Administration Act. What were those purposes?

65 The passage of the Administration Act followed two major concerns of the Federal Parliament to which the Act (and cognate measures including the Charge Act) gave effect. The first was the need to reduce the dependence of wage-earners in Australia upon the age pension as the main source of their retirement income. The second was to broaden the attraction of superannuation so that it would become accessible to a wider class of non-wealthy wage earners and financially attractive to employees who had previously been disadvantaged so far as superannuation was concerned. These two objectives were interrelated. Unless superannuation could be made more universally attractive, so as to afford coverage for previously disadvantaged groups of employees, the desired shift from dependence upon government funded aged pensions would not happen.

66 In a report of a Senate Select Committee, prepared in relation to the Bill that became the Administration Act, it was pointed out that legislative measures on the part of the Federal Parliament were needed if superannuation was truly to provide "coverage for disadvantaged groups"[31]. Amongst the groups named were part-time and casual employees; female workers; employees in rural industries; and juniors, who made up a major proportion of casual workers[32]. In Australia, the numbers of "permanent casual" workers have grown enormously in recent years. What once would have been regarded as an oxymoron is now an industrial commonplace. The Administration Act must be construed in the context of these significant changes to employment practice and federal law, stimulated and sanctioned by tax implications for superannuation and tax charges for non-complying employers, aimed, in effect, at shifting a large part of post-retirement

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31 Australia, Senate Select Committee on Superannuation, *Second Report of the Senate Select Committee on Superannuation: Super Guarantee Bills*, June 1992 at 28 [5.11].

32 Australia, Senate Select Committee on Superannuation, *Second Report of the Senate Select Committee on Superannuation: Super Guarantee Bills*, June 1992 at 30 [5.20]-[5.23].

income support from government pensions to personal savings (necessarily and substantially derived from employment income)[33].

67 In introducing the Bill for the Administration Act into the Parliament, the Treasurer drew particular attention to the fact that "*award* superannuation has fostered the spread of superannuation to large areas of the work force which previously had no cover"[34]. Accordingly, there was a deliberate symbiosis between award provisions (such as those in the Award) and legislation (such as the Administration Act). The reference in the one to the other is confirmatory of the intended interaction of the two. The time sequence of the adoption of the two legal instruments is also confirmatory. The Administration Act commenced operation on 1 July 1992. The Award was made in February 1993. The Award should be read as having the specific purpose of carrying into effect the objects of the Administration Act. In order to make the legislative provisions work, a statutory charge was levied on those employers who failed to contribute in accordance with the enacted formula. That formula contained reference to any applicable industrial award provisions.

68 It follows that, far from it being inappropriate to consider these contextual features, they are crucial to appreciating the way the two legal instruments were designed to work together. Given that the Award secured a specified status under the Act, it is consonant with applicable principles of statutory construction to adopt a meaning of the Award that advances the legislative purposes. Given that the Award language is ambiguous, it is not only permissible but also necessary to resolve the ambiguities by favouring the construction that fulfils the purpose of the Award in the context of the purposes of the Administration Act. Amongst those purposes was the achievement of industrial equity in the matter of superannuation for one of the "disadvantaged groups" of employees for whose particular interests the Administration Act was enacted, namely casual employees. If one construction of the Award, so incorporated, tends to protect the superannuation entitlements of casual employees and another does not, the former should be preferred and the latter rejected so far as the language of the Award permits. There is nothing heterodox in this reasoning. It is perfectly orthodox[35]. And it is also highly instructive when one gets down to the detail of the contested language of the Award.

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33 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 April 1992 at 1763 (Mr Dawkins, Treasurer).

34 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 April 1992 at 1763 (emphasis added). See also *Superannuation Test Case – September 1994* (1994) 55 IR 447.

35 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; *Kucks v CSR Ltd* (1996) 66 IR 182 at 184.

The appeal: casuals and "ordinary hours of work"

69 Read against the background of these contextual considerations, neither the Administration Act nor the Award lends support to the construction of the latter urged by the appellant.

70 So far as the Administration Act is concerned, it is clear that its purpose was to ensure that minimum employer superannuation contributions were paid in relation to *all* employees, subject only to limited exceptions[36], none of which was applicable to the present case. Casual employees were not exempted from the coverage of the Act unless, in a particular case, narrowly drawn criteria[37] (all of which were inapplicable in this case) applied. The construction of the Award urged by the appellant would have the result of minimising, and in some cases defeating, the purposes of the Administration Act to ensure access by all employees (including casuals) to employer contributions to superannuation unless the employer was expressly relieved of obligations by that Act in respect of such employees.

71 From the point of view of the Administration Act, there are a number of difficulties in the construction of "ordinary time earnings" for casual employees urged by the appellant and adopted by the primary judge. That construction led to the conclusion that, in calculating superannuation contributions for such employees, it was necessary to exclude earnings for time worked outside the spread of ordinary hours (as prescribed by cl 4.1(1)(a) and (f) of the Award) in excess of eight hours in any one day or 38 hours in any one week. As the Full Court explained and illustrated, that construction produced "strange results"[38]. It was the discordancy between those results and the way in which the Administration Act was intended to operate that led the Full Court to reject the appellant's construction of the Award and to search for a different one.

72 The "strange results" itemised in the reasons of the Full Court did not present the entire picture. Thus, the construction urged by the appellant would mean that a casual employee who, in any contribution period, only worked hours

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36 The wages must amount to $450 or more in a month; the employee must be less than 65 years old; the employee, if part-time, must be 18 years old or over; and no special exemptions in the Administration Act can apply: Administration Act, ss 27 and 28.

37 see Administration Act, ss 12(9A), 12(11), 19(4), 27, 28 and 29.

38 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426 at 431 [19]; [2001] ATC 4730 at ¶4,734.

outside the spread of hours mentioned in cl 4.1(1) of the Award, would have a "notional earnings base", for the purposes of s 23(2) of the Administration Act, of zero (that is, no notional earnings base) by reference to which the employer contribution was to be calculated. This would mean, in such a case, that s 23(2) of the Administration Act would not operate to reduce the employer's charge percentage in respect of such an employee for that contribution period. The employer would be required to pay the full charge percentage on the total salary or wages paid to that employee pursuant to s 19 of the Administration Act. Conversely, if the appellant's construction of "ordinary time earnings" were accepted and the same employees worked half an hour of "ordinary" time, as so defined, during the whole three month contribution period, the employer would be required to contribute only 6% of the wages payable for that half hour in order to reduce the charge percentage applicable to the entire three month period to zero. Such a capricious operation of the legislation, that would defeat its obvious and stated purposes (including in respect of casual employees), should not be accepted.

73 The appellant's construction not only runs into difficulties so far as the operation of the Administration Act is concerned. It does not accord with the language of the Award[39] nor with the Award's structure and purposes.

74 The superannuation provisions in the Award were clearly intended to extend to casual employees. Thus, the Award makes specific reference to employer superannuation support for full-time, part-time and *casual* employees who, after an initial qualifying period, earn more than a specified wage[40]. Given such express indications that casual employees will enjoy superannuation support entitlements under the Award, alongside full-time and part-time employees, it would be an odd, even bizarre, result of the operation of the Award for casual employees, who in any contribution period worked exclusively during hours that fell outside the spread of hours specified in cl 4.1, to be excluded from occupational superannuation support.

75 In the hard-nosed and practical setting of an Australian industrial award, providing for remuneration for employees which is increasingly viewed as including the element of superannuation support[41], an odd or bizarre reading of the award is not one that would readily be accepted. A court, approaching the

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39 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426 at 431 [21]; [2001] ATC 4730 at ¶4,734.

40 Award, cl 3.5(2)(c).

41 *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 355-356.

construction of the award would naturally favour a meaning that, so far as the language permitted, avoided unexplained exceptions from benefits and discriminatory provisions apparently inconsistent, not only with the award's broad purposes, but also with those of related federal legislation.

76 In the present appeal, when one turns to the Award's purposes, and acknowledges the coverage of full-time, part-time and casual employees alike, it becomes easier to see what "ordinary time earnings" means in the context. For a full-time or part-time employee it represents the amount calculated by the base rate that such an employee receives for the hours of work for which the employee is engaged. A casual employee, on the other hand, receiving "casual rates", is in a different category. By definition, a casual employee is not employed by reference to a given weekly interval of hours, whether full-time or part-time. On the contrary, a casual employee, as the Award itself makes clear, is "an employee who is engaged by the hour and who may terminate employment or be discharged at any moment without notice"[42].

77 It follows that the "ordinary hours of work" of an employee paid casual rates are not fixed by reference to the hours of the week. For a casual employee the "ordinary hours of work" are the hours that the casual employee actually works. This construction is compatible, in my view, with the reference in the definition of "ordinary time earnings" in cl 3.5(3)(d) of the Award to the inclusion in "ordinary time earnings" of "casual rates received for ordinary hours of work". The words of that paragraph show the imperfections of the text[43]. But such difficulties can be overcome by approaching the meaning of cl 3.5 of the Award with the purposes of the Award provisions, and the related provisions of the Administration Act, kept firmly in mind. Approached in that way the "notional earnings base" of a casual employee, established by reference to "ordinary time earnings" (as defined in cl 3.5(3)(d) of the Award) is all time earnings for all hours actually worked. No other construction does justice to the fundamental difference between the time obligations of full-time and part-time employees and the completely different time arrangements for casual employees.

78 The Full Court was therefore right to reject the submissions of the appellant. The Full Court was right to correct the conclusion of the primary judge. However, in my view the Full Court erred in adopting a construction of the Award, advanced by neither party, that fell between the respective cases for the appellant and respondent. The logic of its acknowledgment of the error of the appellant's construction of the Award and the Administration Act should have led

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42 Award, cl 4.7(1).

43 Reasons of Gleeson CJ at [5]; reasons of Hayne J at [110].

the Full Court to accept the respondent's submissions. That logic requires that the cross-appeal be allowed.

The cross-appeal: the exclusion of "overtime"

79 The obligation of the employer in accordance with the Award was to pay an amount calculated by reference to the employee's "ordinary time earnings"[44]. By the Award, these "shall not include overtime"[45]. The question in the cross-appeal is therefore how "overtime", referred to in this exclusion, is to be calculated in the case of casual employees.

80 The primary judge concluded that a casual employee's earnings received for time worked outside, or in excess of, ordinary working hours (as he defined them) were to be treated, in effect, as if they were "overtime" and therefore excluded from "ordinary time earnings" as defined in the Award. The Full Court found that under the Award there were "ordinary hours of work". Any other time worked was to be treated as "overtime", being hours of work that were not "ordinary hours of work". In the case of full-time and part-time employees, overtime payments for working "overtime hours" were received in accordance with cl 4.2 of the Award. Such payments were received in addition to the ordinary weekly wage. However, for casual employees the Full Court found that "ordinary time earnings" encompassed only a portion of the remuneration paid for all hours worked. Overtime payments were therefore to be reconstructed by reference to the incremental amount paid in addition to the portion worked during ordinary hours.

81 For a number of reasons, it is my view that the parties were correct to reject the somewhat artificial attempt of the Full Court to conceive "overtime" in the case of casual employees in the way that it did. It is crucial in this respect to note the distinction made by the Award between "overtime" and "overtime rates".

82 The concept of "overtime" in cl 4.2 of the Award coincides with the concept of "overtime" in common parlance. There it constitutes a reference to work performed beyond ordinary hours that, incidentally, attracts a special (greater) rate of pay, typically time and a half or double time. However, the whole point of casual employment is to distinguish it from this normal aspect of weekly employment (whether full-time or part-time). Except to the extent that the Award makes special and particular provisions for overtime for casual employees, they would usually fall outside the normal provision for overtime hours at overtime rates. With respect, the reasoning of the Full Court failed to

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44 Award, cl 3.5(3)(d).

45 Award, cl 3.5(3)(d).

give effect to the distinction earlier drawn in rejecting the appellant's primary argument, that is, the distinction between working overtime hours and working ordinary hours of work.

83 Under the Award, overtime hours and ordinary hours of work are discrete in point of time. Overtime payments for employees paid by reference to set hours of work are made by reference to the working of hours that are truly characterised as overtime hours. Casual employees, by way of contrast, are paid for working ordinary hours of work. Casual employees receive an hourly rate, loaded for the incidents of casual employment. The only overtime *rates* that casual employees receive are those specifically provided in cl 4.7 of the Award. Such rates are paid for time worked outside the spread of ordinary working hours in excess of eight in any one day or 38 in any one week. No part of the other times that a casual employee works can properly be characterised as overtime.

84 In so far as specific reference is made in cl 3.5(3)(d) to "casual rates received for ordinary hours of work", it is important to note that the word "rates" appears in the plural. Such "rates" may include casual loadings and additional rates akin to penalty rates. The parties were agreed that casual loadings are generally considered as compensation to employees for the burdens associated with working on a casual basis. Those burdens are not necessarily – and often not at all – related to work considerations involving hours of work. Such rates pre-existed Award provisions affording access to occupational superannuation. They were not intended to encompass compensation for any reduced access to such new benefits.

85 When regard is had to cl 4.2 of the Award it is clear that "overtime" is defined as a measure of "work done" in hours that are worked outside, or in excess of, the ordinary working hours of the employee. Payment for working overtime is calculated at specified rates. Such rates are to be received in addition to the actual or ordinary weekly wage paid to the employee. Therefore, overtime is work done in hours which are worked in addition to work done in "ordinary hours". The concept of "overtime" as hours worked in addition to ordinary hours worked is long established in this field of discourse[46]. A casual employee does not therefore work "overtime" simply because that employee does not work hours in addition to ordinary hours of work. Nor does a casual employee receive payments for "overtime" in addition to an actual or ordinary weekly wage. In so far as cl 4.7 of the Award identifies certain rights to overtime *rates* in the case of

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46 *Municipal Officers' Association of Australia v Council of Shire of Maroochy* unreported, Federal Court of Australia, 20 August 1981 at 7-12 per Evatt J; *Workers Rehabilitation & Compensation Corporation v Harle* (1994) 61 SASR 507 at 510, 514, 519; *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* (2002) 116 FCR 338 at 344-345 [27]-[29].

casual employees, it makes a specific and limited provision. It does not incorporate casual employees for this purpose within cl 4.2 of the Award. The definition in that clause, making reference to work performed in addition to actual or ordinary hours, distinguishes the case of a casual employee who, by definition, works according to a different time principle.

86 It follows that the respondent's submission is correct in saying that the concept of "overtime" in ordinary time earnings should be construed in a manner consistent with the concept of "overtime" as defined in cl 4.2 of the Award. This means overtime for hours worked "outside or in excess of the ordinary working hours on any day" resulting in payments "in addition to the actual or ordinary weekly wage paid to each employee". Those expressions are simply inapplicable, indeed they are nonsensical, in the case of a casual employee. There is nothing in the Award to suggest that overtime in "ordinary time earnings" has a meaning different from that in cl 4.2 confined to the case of casual employees. Instead, as a member of one of a list of extraneous payments referred to in cl 3.5(3)(d), the definition there appearing supports the proposition that the payments of "overtime" are payments in addition to payments of casual rates for ordinary hours worked.

87 The solution proposed by the Full Court presents difficulties of its own, especially when the Award is viewed in its industrial context. In that context, the provision of penalty *rates* for work done in hours considered "overtime" is the subject of frequent conflict, negotiation and settlement in the form of industrial awards and certified agreements[47]. To describe all time worked outside, or in excess of, the spread of "ordinary hours" as "overtime" for all employees, and to treat each and every payment made to such employees for work performed within those hours as payments for "overtime", is to adopt a construction that overlooks industrial realities. It also ignores the structure of the Award in which particular provision is made for "casual employment" in cl 4.7 and in respect of "overtime *rates*" in cl 4.7(3).

88 This reasoning confirms that "overtime", when appearing in the definition of "ordinary time earnings" in cl 3.5(3)(d) of the Award, is confined to payments made to compensate an employee who works outside, or in excess of, ordinary working hours as they are prescribed for such an employee. Because it is of the essence of the work of a casual employee that no such "ordinary hours" are prescribed, no amounts paid to them can properly be described as "overtime" for the purposes of *that* definition.

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47 eg *XL Parcel Express Pty Ltd v Transport Workers' Union of Australia* (1996) 151 QGIG 2079 at 2082.

89 I concede that the approach to the meaning of the Award that I favour involves some difficulties and that the Award is less than clear. But the other two approaches canvassed in the appeal also present difficulties, as I have shown. In the end, I prefer the approach urged by the respondent on the basis that that construction involves a more realistic interpretation of the Award when read in its industrial setting. It is one that is available in the language of the Award.

90 Additionally, the respondent's construction facilitates the achievement of the expressed and implied objectives of the Administration Act, so far as that Act incorporated this and other industrial awards by reference. The appellant's construction tends to frustrate the achievement of that Act's objective. The Full Court's interpretation only achieves it in part. However, it does so at the cost of adopting what in my view is an unrealistic and artificial interpretation. The respondent's interpretation comes closest to achieving the presumed object of negotiating the provisions of "occupational superannuation" in the Award, designed to tie the Award to the then recently enacted federal superannuation legislation, which included the Administration Act.

Orders

91 The appeal should be dismissed with costs. The cross-appeal should be allowed with costs. The judgment of the Full Court of the Federal Court of Australia should be set aside. In place of that judgment, it should be ordered that the appeal to that Court be allowed with costs; the orders of the primary judge be set aside; and in their place it be ordered that the appellant's appeal to the Federal Court from the decision of the respondent made on 10 May 2000 be dismissed with costs.

92 HAYNE J. The *Superannuation Guarantee (Administration) Act* 1992 (Cth) ("the Administration Act") and its related Act, the *Superannuation Guarantee Charge Act* 1992 (Cth) ("the Charge Act") were intended, so the Treasurer said in the Second Reading Speech for the Bill for the Administration Act[48], to encourage employers to provide a minimum level of superannuation support for employees. Employers who provide less than the minimum level of superannuation support are liable for a superannuation guarantee charge which is used, after deduction of administration costs, to meet the superannuation contribution entitlements of employees[49]. The Commissioner of Taxation has the general administration of the Administration Act[50].

93 Section 16 of the Administration Act provided that "superannuation guarantee charge" is to be paid on "an employer's superannuation guarantee shortfall for a year". In working out whether an employer has a superannuation guarantee shortfall, account is taken of what contributions the employer has made for the benefit of employees to defined benefit superannuation schemes[51] and to other superannuation funds[52]. In particular, if an employer is required by an industrial award to contribute for the benefit of an employee to a superannuation fund, and if two further conditions are met (first, that the requisite contribution is a specified percentage of what the Administration Act calls "the employee's notional earnings base" and, secondly, that the employer contributes to a complying superannuation fund for the benefit of the employee in accordance with the award) the charge percentage for the employer is reduced[53].

94 This appeal and the respondent's cross-appeal concern the operation of these provisions of the Administration Act. The appellant employed casual employees whose employment was governed by the Clerical Employees Award – State (Q) ("the Award"). The determinative question in the proceedings is whether the appellant made contributions to a complying superannuation fund for the benefit of those employees in accordance with the Award.

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48 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 April 1992 at 1764.

49 *Superannuation Guarantee (Administration) Act* 1992 (Cth), Pt 6, ss 46-58, Pt 8, ss 63-71.

50 s 43.

51 s 22.

52 s 23.

53 s 23(2).

The assessments to superannuation guarantee charge and the proceedings below

95 The appellant provided a national telephone relay service enabling those who have a hearing or speech impairment to communicate with others. A person using the service used a teletypewriter, modem and telephone to send text messages to a Relay Officer. The Relay Officer read the text messages to the intended recipient of the message and conveyed, in text, the recipient's responses to the person using the service. The appellant provided this service 24 hours a day, seven days a week. It operated two call centres, one in Brisbane and one in Melbourne.

96 The Commissioner assessed the appellant to a superannuation guarantee charge for the years ending 30 June 1996, 30 June 1997 and 30 June 1998 in respect of some of the wages the appellant had paid to persons it employed as Relay Officers in its Brisbane call centre. The assessments now in question were amended assessments issued on 12 January 2000. Nothing was said to turn on the fact that they were amended assessments. For the years in question, all the Relay Officers in the appellant's Brisbane call centre were employed as casuals. Their employment was regulated by the Award.

97 The appellant objected to the amended assessments. The respondent wholly disallowed the objections. The appellant appealed to the Federal Court of Australia. The primary judge (Dowsett J) ordered[54] that the respondent's decision disallowing the objection be varied by allowing the objection in full. From this decision the respondent appealed to the Full Court. That Court (Wilcox, Hill and Carr JJ) allowed the appeal[55] and set aside the orders of Dowsett J. The Full Court did not, however, accept that the amended assessments which the respondent had issued were based on a correct construction of the Award. Rather, the Full Court concluded that the proper construction of the Award "provide[d] a result that lies between the positions contended for by the parties"[56]. Accordingly, the Full Court ordered that the decision to disallow the objections be varied to allow so much of the objections as would result in an assessment being made in accordance with the reasons of the Full Court. It is from these orders that, by special leave, the appellant appeals, and the respondent cross-appeals.

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54 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2001) 47 ATR 77.

55 *Deputy Commissioner of Taxation v Australian Communication Exchange Ltd* (2001) 48 ATR 426; [2001] ATC 4730.

56 (2001) 48 ATR 426 at 433 [31]; [2001] ATC 4730 at 4736.

The parties' contentions

98 Three different views of the appellant's obligations under the Award require consideration. The appellant submitted that the primary judge construed the Award correctly. It submitted that the Award required it to make superannuation contributions, for Relay Officers at its Brisbane call centre, calculated as a percentage of the amount paid to them for the work they did during the ordinary working hours fixed by the Award. It submitted that no superannuation contribution was to be paid on amounts paid for work done outside those hours. (Work done outside ordinary working hours was paid at a higher rate than work done within those hours.)

99 The second view of the Award is the construction which underpinned the Full Court's conclusion. It held that the Award obliged the appellant to pay a greater superannuation contribution than the appellant had contended, and the primary judge had held, was required. The Full Court concluded that superannuation contributions were to be calculated as a percentage of an amount derived by multiplying the number of hours a Relay Officer actually worked by the rate of pay which that employee would have received for working during ordinary working hours.

100 In this Court, the respondent submitted that both the primary judge and the Full Court had erred in construing the Award. The respondent submitted, as it had in the courts below, that the Award required the appellant to make superannuation contributions calculated as a percentage of *all* amounts paid to the Relay Officers, no matter whether the work was done in or outside ordinary working hours. Accordingly, the respondent cross-appeals against the Full Court's orders.

101 It will be necessary, therefore, to consider these three different constructions of the Award obligation to make superannuation contributions:

(i) contributions were to be based on amounts paid for work within ordinary hours (the appellant's construction);

(ii) contributions were to be based on amounts calculated by multiplying the rate of pay applicable for work in ordinary working hours by the number of hours worked (the Full Court's conclusion); and

(iii) contributions were to be based on all payments made to Relay Officers (the respondent's construction).

These reasons will seek to demonstrate that the conclusion reached by the Full Court gives effect to the preferable construction of the Award.

102 Before considering the competing constructions of the Award, it is as well to make more detailed reference to some provisions of the Administration Act and of the Award.

The Administration Act

103 The Administration Act provided that the amount of an employer's superannuation guarantee shortfall was to be calculated as a percentage of the total salary or wages paid by the employer to the relevant employee during the period in question[57]. The percentage to be applied was to be ascertained according to s 20 or s 21 of the Administration Act, as reduced in respect of the employer by s 22 or s 23. Section 20 applied to those who were employers for the whole of the 1991-1992 year; s 21 applied to those who were not an employer for the whole of that year. The appellant was not an employer for the whole of 1991-1992 and s 21 therefore applied to it. Each of ss 20 and 21 made different provisions for the percentage to be applied according to whether the employer's payroll did, or did not, exceed a specified sum. As mentioned earlier, s 22 provided for the reduction of the percentage thus identified by s 20 or s 21 where an employer contributed to a defined benefit superannuation scheme; s 23 provided for reduction where the employer contributed to a superannuation fund other than a defined benefit scheme.

104 Section 23 was engaged in this case. The contributions which the appellant made for the benefit of its Relay Officers were made to a complying superannuation fund which was not a defined benefit scheme. Section 23 required reduction of the percentage fixed by s 20 or s 21 (here s 21) by reference to "the amount of the percentage figure that expresses the contribution to the fund ... as a proportion of the total amount of the employee's notional earnings base"[58]. An employee's "notional earnings base" was defined in a number of provisions. For present purposes, it is enough to notice only s 14(2) which provided, in effect, that the notional earnings base, for employees such as the appellant's Relay Officers, was the earnings by reference to which the employer's contribution was to be calculated under the applicable award. (Section 23 also provided for adjustments according to whether the employee was employed under the relevant award or law for only part of the period in question, but it is not necessary to notice the way in which those aspects of the provision were expressed or worked.)

105 At the risk of oversimplifying statutory provisions expressed with much elaboration, it follows that if an employer was bound by an award to contribute to

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57 ss 18 and 19.

58 s 23(2).

a superannuation fund an amount calculated as (say) 3 per cent of the gross earnings of an employee, and the employer made the contributions that were required by the award, the charge percentage to be applied to that employer would be the figure specified in s 20 or s 21 (as the case required) minus three. But that reduction could be made under s 23(2) only if the employer contributed to a fund "in accordance with the award or law". It is, therefore, necessary to refer to some provisions of the Award, including not only those which governed the appellant's obligations to make superannuation contributions on behalf of employees, but also some others which regulated employment under the Award.

The Award

106 The Award (cl 2.1(1)) required an employer "[a]t the point of engagement of each employee" to "specify whether the engagement is on a weekly, part-time or casual basis". By cl 4.7(1) a casual employee was defined as "an employee who is engaged by the hour and who may terminate employment or be discharged at any moment without notice". They were to be paid "an hourly rate by dividing the weekly rate of the appropriate classification by 38 and adding a loading of 19% thereto" (cl 4.7(2)). For full-time employees the Award provided rates of pay expressed as an identified sum per week. Provision was made for some allowances (cl 3.6) and for such things as higher duties payments (cl 3.7). For part-time employees, the Award provided that they should be paid an hourly rate by dividing the weekly rate of the appropriate classification by 38 (cl 4.6(3)) but that, subject to agreement to the contrary by the employer and a specified union official, a part-time employee was to be employed for not less than 15.2, and not more than 32, "ordinary hours per week" (cl 4.6(1)). Employees, other than casual employees, were entitled to annual leave, certain statutory holidays and sick leave (Pt 5).

107 The Award provided (cl 3.5(1)) that, in addition to the rates of pay it prescribed, "eligible employees ... shall be entitled to Occupational Superannuation Benefits, subject to the provisions of this clause". An eligible employee was defined as "any employee who has been employed by the employer during 5 consecutive weeks and who has worked a minimum of 50 hours during that period" (cl 3.5(3)(b)). The definition went on to provide that, after completion of that qualifying period, superannuation contributions were to be made in accordance with cl 3.5(2) "effective from the commencement of that qualifying period".

108 Clause 3.5(2) of the Award dealt with the subject of employers' superannuation contributions, and it did so under seven headings: Amount, Regular Payment, Minimum Level of Earnings, Absences from Work, Other Contributions, Cessation of Contributions and No Other Deductions. It is as well to set out the full text of two of those provisions – those dealing with Amount and Minimum Level of Earnings. Clause 3.5(2) provided:

> "(a) Amount – Every employer shall contribute on behalf of each eligible employee as from 20 November 1989 an amount calculated at 3% of the employee's ordinary time earnings, into an Approved Fund as defined in this clause. Each such payment of contributions shall be rounded off to the nearest ten (10) cents.
>
> ...
>
> (c) Minimum Level of Earnings – No employer shall be required to pay superannuation contributions on behalf of any eligible employee whether full time, part time, casual, adult or junior in respect of any week during which the employee's ordinary time earnings, as defined, do not exceed 35% of the Guaranteed Minimum Wage for the Southern Division, Eastern District, as declared from time to time."

Two features of those provisions should be noticed. First, on its face, cl 3.5(2)(a) required that the amount of which it spoke was to be calculated by taking 3 per cent of "the employee's ordinary time earnings". It therefore assumed that the employee's "ordinary time earnings" was an amount of money. Secondly, cl 3.5(2)(c) assumed that an employer may be required to pay superannuation contributions on behalf of casual employees, but only in respect of a week during which the employee's "ordinary time earnings" exceeded a certain amount. (The qualification sheds no light on what is meant by "ordinary time earnings". It simply sets a threshold which must be passed before superannuation contributions must be made for a casual employee. It does not say how the threshold is calculated.)

109 "Ordinary time earnings" was defined in the Award (cl 3.5(3)(d)) as:

> "the actual ordinary rate of pay the employee receives for ordinary hours of work including shift loading, skill allowances and supervisory allowances where applicable. The term includes any over-award payment as well as casual rates received for ordinary hours of work. Ordinary time earnings shall not include overtime, disability allowances, commission, bonuses, lump sum payments made as a consequence of the termination of employment, annual leave loading, penalty rates for public holiday work, fares and travelling time allowances or any other extraneous payments of a like nature."

Three features of this definition should be noted. First, it spoke of the "*rate* of pay the employee *receives*" for ordinary hours of work. Secondly, it expressly *included* within its meaning "casual rates received for ordinary hours of work". Thirdly, it expressly *excluded* from its meaning overtime and penalty rates for public holiday work.

110 The references in that definition to *rates* of pay are awkward. As pointed out earlier, the expression "ordinary time earnings" was used in the provision which required an employer to make superannuation contributions in a context which assumed that "ordinary time earnings" was an *amount* of money, not a *rate* of pay. The definition of "ordinary time earnings" spoke of the actual ordinary rate "the employee *receives*" and of "casual rates *received*". Those references to receiving a rate invite attention to payments made, rather than figures used in calculating how much should be paid. But what the definition may be thought to assume, rather than state, is that the amount received was to be computed by reference to not only a rate of pay (expressed as money per unit of time) but also the relevant number of units of time that had been worked. The definition did not state expressly that account was to be taken of the number of units of time worked. It said that "ordinary time earnings" was the actual ordinary rate of pay the employee received *for ordinary hours of work*. But the words "for ordinary hours of work" can be understood as doing no more than describing the rate of pay that was to be taken into account.

111 The ordinary hours of work were prescribed by the Award. They were to be an average of 38 hours per week (cl 4.1(1)(a)) to be worked on not more than five consecutive days in a week, Monday to Saturday inclusive (cl 4.1(1)(b)). Subject to some qualifications and exceptions not now relevant, these hours were to be worked between 6.30 am and 6.30 pm from Monday to Friday and between 6.30 am and 12.30 pm on Saturday (cl 4.1(1)(b)(i)). Subject to agreement to the contrary by employer and employees, ordinary working hours were not to exceed eight on any day and in no case could exceed 10 (cl 4.1(1)(f)).

112 The Award also provided for overtime payments. It required that "all work done outside or in excess of the ordinary working hours on any day" was to be paid at time and a half for the first three hours and at double time thereafter (cl 4.2(1)). It was said that "[s]uch payments shall be in addition to the actual or ordinary weekly wage paid to each employee" (cl 4.2(1)). All work done on Sundays was to be paid at "double time in addition to the ordinary weekly wage paid to each employee" (cl 4.2(2)). Ordinary hours worked by employees, other than casuals, on a Saturday between 6.30 am and 12.30 pm were to be paid at time and a quarter (cl 4.1(1)(b)(ii)).

Superannuation contributions for Relay Officers

113 Relay Officers, employed by the appellant as casual employees, who worked outside ordinary working hours, were paid at rates calculated in accordance with the overtime provisions of the Award. Thus, if a Relay Officer worked on a Sunday, he or she was paid at double the rate payable for work the employee did between 6.30 am and 6.30 pm from Monday to Friday. The appellant had made superannuation contributions for its Relay Officers only in respect of hours which those employees worked which were not hours paid at overtime rates. The respondent assessed the appellant to a superannuation

guarantee charge on the basis that the Award had required the appellant to make superannuation contributions calculated as a percentage of all earnings of the Relay Officers, regardless of whether those earnings included amounts paid at rates prescribed by the overtime provisions of the Award.

114 The primary judge concluded that the appellant had complied with the Award. As I have noted earlier, the Full Court adopted an intermediate position. It considered that the Award required the appellant to make superannuation contributions calculated as a percentage of an amount derived by multiplying the rate at which the employee was entitled to be paid for work within ordinary working hours by the number of hours that employee actually worked, regardless of whether some or all of those hours fell outside the ordinary hours prescribed by the Award. The Full Court said that only the increment in the rate paid for work outside normal working hours was an overtime payment[59]. This increment did not attract superannuation contributions. The Full Court said that the construction which it adopted "achieve[d] compatibility between the positions of full-time, part-time and casual employees"[60]. In the Full Court's view[61] there was "nothing in the definition in cl 3.5(3)(d) which would exclude from 'ordinary time earnings' that portion of casual employees' remuneration for working in overtime periods to which they would have been entitled if they had not worked 'outside or in excess of' ordinary working hours".

Construing the Award

115 It may readily be accepted that, as the appellant submitted, in construing an industrial award, it is necessary to recognise that the award will have been made in settlement of an industrial dispute and will reflect compromises that have been reached to effect that settlement. The Award in this case is, then, not to be construed as having created obligations intended to be wholly for the protection or benefit of employers, or of employees or of the organisations which represent them[62]. Further, if, for any reason, particular provisions of an award are thought not to achieve a desired or desirable end, it is open to a party to the award to seek its amendment. It would, therefore, be wrong to approach the task of construing this Award from an assumption that its superannuation provisions were intended to benefit all classes of employees or to benefit all classes of employees equally. It would also be wrong to strain the words of the Award to

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59 (2001) 48 ATR 426 at 432 [24]; [2001] ATC 4730 at 4735.

60 (2001) 48 ATR 426 at 432 [25]; [2001] ATC 4730 at 4735.

61 (2001) 48 ATR 426 at 432 [26]; [2001] ATC 4730 at 4735.

62 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 426 per Brennan CJ, Dawson and Toohey JJ.

achieve some result that might be considered fair or desirable according to some a priori standard of fairness or proper employment practice. To do that would ignore the very real significance which should be attached to the fact that the terms of an award will usually reflect compromise. Nonetheless, the Award must be given a construction that not only accords with the language which the parties or the relevant industrial tribunal have used to express the rights and obligations of the parties, but also gives sensible work for them to do.

116 The central provisions to be construed are cl 3.5(2)(a), which prescribed the amount of the superannuation contribution, and cl 3.5(3)(d), which defined "ordinary time earnings". No doubt they must be construed in the light provided by the overtime provisions of the Award but I do not consider that the question presented in this matter is to be expressed as what *hours* worked by a Relay Officer were ordinary hours as distinct from overtime. Ordinary hours of work were defined by the Award. The references to "casual rates received for ordinary hours of work" (cl 3.5(3)(d)) and to "ordinary hours worked by all employees, *excluding casuals*, on a Saturday" (cl 4.1(1)(b)(ii)) make plain that the expression "ordinary hours of work" was intended to operate in relation to casuals. To ask what hours worked by a Relay Officer were ordinary hours, or to ask what were the ordinary hours of work of a casual employee, distracts attention from the central provisions. The question which those provisions present is: what multiplier was to be applied to the actual ordinary rate of pay (or, in the case of a casual employee, to the casual rates received) for ordinary hours of work, to arrive at the amount on which the appellant's superannuation contributions were to be calculated under the Award? Was it a multiplier which was the number of hours that the Relay Officer worked, or was it only the number of hours that the Relay Officer worked during ordinary working hours? Of those two constructions, I prefer the former.

117 The respondent's contention that the Award required the appellant to make superannuation contributions on *all* sums paid to Relay Officers, regardless of whether the earnings included amounts paid at overtime rates should be rejected. The respondent's contention, which lay at the heart of its cross-appeal, depended upon the proposition that every hour a Relay Officer worked, as a casual employee, was for that Relay Officer an ordinary hour of work. Perhaps that might be so if the expression "ordinary hours of work" were not defined in the Award. But once account is taken of that definition when construing the expression "casual rates received for ordinary hours of work" in the definition of "ordinary time earnings", the respondent's contention must be rejected. The reference to *rates* of pay combined with "for ordinary hours of work" requires the conclusion that the rate in question was the rate which was to be paid to the employee concerned for work done during the periods defined as "ordinary hours of work" in the Award. It was that rate which was to be used in calculating "ordinary time earnings", not the several different rates derived from that basic rate and used, for example, in calculating the payments to be made for work

outside normal working hours. It follows that the respondent's cross-appeal should be dismissed.

118 The Award obliged the employer to make superannuation contributions calculated as 3 per cent of a casual employee's ordinary rate of pay multiplied by the number of hours actually worked by that employee. There are several reasons for preferring this construction of the Award.

119 First, and perhaps most significantly, casual employees were what the Award referred to as "eligible employees ... entitled to Occupational Superannuation Benefits" if they were employed during five consecutive weeks and worked a minimum of 50 hours during that period. Even if all of the 50 hours that a particular casual employee worked had been worked outside normal working hours, that employee was entitled to Occupational Superannuation Benefits. No doubt that entitlement was, as cl 3.5(1) said, "subject to the provisions" of that clause. But stating the qualification by reference to hours worked, rather than *ordinary* hours worked suggests, and suggests strongly, that what was seen as important, in the case of a casual employee, was *how much* work had been done, not *when* it was done.

120 Secondly, the tension in the definition of "ordinary time earnings" between the references to a rate of pay ("the actual ordinary rate of pay" and "casual rates") and the evident intention to prescribe an amount of money as distinct from a rate, is not resolved by fastening upon the expression "for ordinary hours of work" when used in the definition. In particular, the references to "for ordinary hours of work" ("the ... rate ... the employee receives for ordinary hours of work" and "casual rates received for ordinary hours of work") are to be understood as serving only to identify what was the relevant rate to be considered. The phrase "for ordinary hours of work" is not to be understood as identifying the periods which were to be taken into account when converting the rate to an amount.

121 To understand that phrase as identifying the periods which were to be taken into account in calculating the amount of ordinary time earnings would treat the words "actual ordinary rate" (in the phrase "the actual ordinary rate of pay") as adding nothing to the definition. It would read the definition as if it said "[o]rdinary time earnings shall mean the *pay* the employee receives for ordinary hours of work". No doubt, it might be said, that to construe the definition in this way would do no more than resolve the tension earlier identified in a different way from the resolution I propose. It would treat "rate of pay" as synonymous with "pay". It is a construction which, having regard to the several considerations to which reference is made in these reasons, I would not adopt.

122 Thirdly, although it might be said that the increased amount which any employee, whether full-time, part-time or casual, was to receive for working outside normal working hours was intended to be full compensation for that

work, that contention assumes the answer to the question now being considered. Whether superannuation contributions were to be made in respect of hours worked outside normal working hours is not answered by asserting that overtime was full recompense for that work.

123 Fourthly, the express exclusion of overtime from the definition of "ordinary time earnings" is consistent with construing the Award in the way I prefer. That exclusion would not be necessary if the only hours to be taken into account in computing "ordinary time earnings" were the ordinary hours of work which the employee performed. Nor would it have been necessary to say that the term "ordinary time earnings" included "casual rates received for ordinary hours of work" if, contrary to the conclusion I have reached, the expression "for ordinary hours of work", in the phrase "the actual ordinary rate of pay the employee receives for ordinary hours of work", was used to define the number and types of hours that were to be taken into account in calculating "ordinary time earnings".

124 Finally, reading the Award in the way I have described means that the amount of superannuation contributions to be made in respect of casual employees did not depend upon whether the employee worked in or outside normal working hours. For the reasons given earlier, it is neither necessary nor helpful to decide whether that achieves "compatibility" with full-time and part-time employees if "compatibility" is intended to invoke notions of fairness or equality between classes of employees. It is, however, right to say that the construction I prefer does not lead to any significant discordance between the entitlements of those who were employed by the week (whether as full-time or part-time employees) and those whose employment could have been terminated at will. Perhaps more significantly, however, it is a construction which is consistent with those provisions of the Award that said that overtime payments were "in addition to the actual or ordinary weekly wage paid to each employee" and it reflects the differences between the terms on which casual employees were engaged and their pay calculated.

125 By the Award, both full-time and part-time employees were to be engaged by the week. The ordinary working hours of full-time employees were fixed by the Award and, in the case of part-time employees by agreement with the employer. The weekly amount to be paid to full-time and part-time employees could, therefore, be determined before they undertook their work in any particular week. For part-time employees the calculation of an hourly rate of pay was an intermediate step in that calculation but it was no more than that. Casual employees, by contrast, were engaged by the hour. The amount which each would receive for a week's work depended entirely upon the number of hours they actually worked. The employer's superannuation contributions for full-time and part-time employees could, therefore, sensibly be fixed by reference to their weekly rates of pay. There is no discordancy with that arrangement to hold that,

for casual employees, the determining elements of the calculation were their ordinary rates of pay and the number of hours actually worked.

126 Both the appeal and the cross-appeal should be dismissed. There should be no order as to the costs of the proceedings in this Court.