HIGH COURT OF AUSTRALIA

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

NICHOLAS TERRENCE FISH & ANOR APPELLANTS

AND

SOLUTION 6 HOLDINGS LIMITED & ORS RESPONDENTS

Fish v Solution 6 Holdings Limited [2006] HCA 22
18 May 2006
S206/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with S J Burchett for the appellants (instructed by Clayton Utz)

B W Walker SC with B J A Shields for the first to fourth respondents (instructed by Deacons)

Submitting appearance for the fifth respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Fish v Solution 6 Holdings Limited

Industrial law (NSW) – Industrial Relations Commission – Jurisdiction – Power given to the Commission by s 106(1) of the *Industrial Relations Act* 1996 (NSW) to declare wholly or partly void, or to vary, any contract whereby a person performs work in any industry if the contract is an unfair contract – Share purchase agreement which stipulated that the first appellant's entering an employment contract with a related company of the purchaser was a condition precedent to completion of the share purchase – Application to Commission for orders declaring share purchase agreement unfair, harsh and unconscionable, and contrary to the public interest, and orders varying the agreement – Whether the share purchase agreement was a "contract whereby a person performs work in any industry" – Whether share purchase agreement formed part of the arrangement between the parties – Relevance of changing nature of employment relationships – Relevance of availability of other remedies.

Industrial law (NSW) – Industrial Relations Commission – Writ of prohibition sought to restrain the Commission from exercising jurisdiction – Entitlement of the Commission to determine its own jurisdiction in first instance – Absence of objection to jurisdiction raised before Commission – Whether trial held by Commission in Court Session.

Prerogative writs – Prohibition – Excess of jurisdiction – Industrial Relations Commission (NSW) – Whether writ lies in the circumstances – Commission in Court Session a superior court of record of limited jurisdiction equivalent in status to the Supreme Court – Whether application for prohibition premature – Likelihood or danger of order being made in excess of jurisdiction – Relevance of privative provision purporting to exclude issue of writ – Relevance of failure of respondents to make jurisdictional objection before the Commission – Relevance of specialist subject-matter of disputes before the Commission.

Statutes – Construction – Interpretation – Remedial statute – Purposive approach to construction – Objects of statute.

Statutes – Privative clause – Industrial Relations Commission (NSW) – Whether privative provision applicable – Relevance of exclusion of the right to appeal to the Supreme Court and hence to the High Court.

Statutes – Construction – Interpretation – Composite phrase incorporating technical words – Extrinsic matters – Legislative history – Minister's second reading speech – Relevance of Parliament's purpose of successive re-enactment

in increasingly ample terms – Relevance of interpretation afforded to equivalent provisions in other jurisdictions.

Words and phrases – "any contract whereby a person performs work in any industry", "any related condition or collateral arrangement", "arrangement", "decision or purported decision", "industry".

Constitution, s 79.
Industrial Relations Act 1996 (NSW), ss 105-109A, 152, 179, 187-188.
Supreme Court Act 1970 (NSW), s 48.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ. Nisha Nominees Pty Ltd ("Nisha"), the second appellant, is controlled by Nicholas Terrence Fish, the first appellant. Nisha owned all the shares in FishTech and Partners Pty Ltd ("FishTech"), a company that carried on the business in Australia of "high technology application integration software and systems integration, network solutions and related services". In 2000, Nisha agreed to sell its shares in FishTech to Solution 6 Holdings Ltd ("Solution 6 Holdings") for a price of $19 million.

2 On completion of the agreement, Solution 6 Holdings was to pay $18.5 million to Nisha and Nisha was to subscribe for 1,897,436 shares in the capital of Solution 6 Holdings at an issue price of $9.75 per share, a total subscription amount of $18,500,001. These two sums, on account of purchase price and subscription moneys, were to be set off. The balance of the purchase price was to be paid three months after completion. (Provision was made for adjustment of the purchase price if the net assets of FishTech proved to be less than the amount disclosed in audited completion accounts, but the detail of these provisions is not relevant.)

3 Mr Fish was a party to the share purchase agreement. He guaranteed performance of Nisha's obligations. The share purchase agreement also provided that completion of the share purchase would not proceed unless (among other things) Mr Fish had "entered into an employment contract with the Buyer [Solution 6 Holdings], on terms acceptable to the Buyer".

4 In fact, on 1 March 2000, Mr Fish made an agreement with a subsidiary of Solution 6 Holdings (Solution 6 Pty Ltd) by which it was agreed he would be employed as "Executive Manager Enterprise Integration Services". The term of the employment was fixed as three years, but Mr Fish could terminate it sooner by giving 12 weeks' notice. The annual salary package was $207,000 inclusive of all benefits[1].

5 The share purchase agreement provided that Nisha must not dispose of the shares in Solution 6 Holdings it would acquire under the agreement except in

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1 The *Industrial Relations Act* 1996 (NSW) was amended by the *Industrial Relations Amendment (Unfair Contracts) Act* 2002 (NSW) with the evident intention of excluding from the reach of the unfair contract provisions of Pt 9 of Ch 2 employment agreements where the employee's remuneration exceeds $200,000. Those amendments do not apply to this proceeding.

accordance with a timetable fixed by the agreement. That permitted Nisha to sell 128,205 shares at any time after completion and further lots of up to 128,205 shares quarterly thereafter until the second anniversary of the agreement. On and after that second anniversary Nisha could sell the remainder of its shares. In addition, Nisha could sell all its shares if Mr Fish's employment with the Solution 6 Holdings Group was terminated (otherwise than for cause or by him). Separate provision was also made for Nisha disposing of shares if Solution 6 Holdings became listed on the NASDAQ Stock Market.

6 There was no provision made in the agreement for the possibility that the market value of the shares in Solution 6 Holdings, that were to be issued to Nisha at $9.75 per share, might be less than that amount at the time the share purchase agreement was to be completed. Mr Fish was later to assert that he had "repeatedly pleaded … for the inclusion of a floor price mechanism to protect against dilution of the Purchase Price".

7 When the share purchase agreement was executed, shares in Solution 6 Holdings were trading at about $13.30 per share. When the share purchase agreement was completed they were trading at about $3 per share. In November 2001, Mr Fish was made redundant and his employment by Solution 6 Pty Ltd terminated.

8 In 2002, Mr Fish and Nisha applied to the Industrial Relations Commission of New South Wales ("the Commission") seeking orders under Pt 9 (particularly, ss 105-109A) of Ch 2 of the *Industrial Relations Act* 1996 (NSW) ("the Act"). The relief sought included orders under s 106 of the Act declaring that the share purchase agreement "is, and has operated in an, unfair, harsh and unconscionable manner and contrary to the public interest", and orders varying that agreement so as, in effect, to provide to Mr Fish upon his trading the shares in Solution 6 Holdings payment of the difference between the sale price for the shares and a price of $9.75 per share.

9 A conciliation conference was held before a judge of the Commission, pursuant to s 109 of the Act, but that conciliation was unsuccessful. Those who were named as respondents to the application to the Commission (and who are the first four respondents to the appeal to this Court) then applied to the Court of Appeal of New South Wales for an order prohibiting the Commission from taking any steps to exercise its powers under s 106 of the Act in respect of the

share purchase agreement. The Court of Appeal (Spigelman CJ, Mason P and Handley JA) granted[2] the relief sought.

10 The principal question in the appeal to this Court is whether the Court of Appeal was right to hold, as it did[3], that the share purchase agreement was not a contract of a kind in respect of which the Commission could exercise the powers given to it by Pt 9 of Ch 2 of the Act. That question should be answered "yes" and the appeal to this Court dismissed with costs.

The *Industrial Relations Act* 1996

11 As its title suggests, the Act, read as a whole, is directed to regulating industrial relations. In particular, Ch 2 of the Act is concerned with the regulation of employment. It provides, in Pt 1 of Ch 2 (ss 10-28) for the making of awards, in Pt 2 (ss 28A-47) for the making of enterprise agreements, in Pt 3 (ss 48-52) for the intersection between national and State decisions concerning industrial relations, in Pt 4 (ss 53-72) for parental leave, in Pt 4B (ss 72AA-72AG) for leave for victims of crime, in Pt 5 (ss 73-82) for part-time work, in Pt 6 (ss 83-90) for unfair dismissals, in Pt 7 (ss 91-100) for protection of injured employees, in Pt 8 (ss 101-104) for protection of entitlements on transfer of business, in Pt 9 (ss 105-116) for unfair contracts and in Pt 10 (ss 117-129) for the payment of remuneration.

12 Other Chapters of the Act deal with other aspects of the regulation of industrial relations. Chapter 3 of the Act (ss 130-144) deals with industrial disputes. Chapter 4 (ss 145-208) deals with the Commission. Chapter 5 (ss 209-305) deals with industrial organisations. Chapter 6 (ss 306-355) deals with public vehicles and carriers. Chapter 7 (ss 356-403) deals with enforcement and Ch 8 (ss 404-411) contains a number of miscellaneous provisions.

The Commission

13 In addition to the functions conferred on the Commission by the Act, or any other Act or law, the Commission has the functions of setting remuneration

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2 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558.

3 (2004) 60 NSWLR 558 at 576 [59], 577 [64] per Spigelman CJ, 597 [160] per Mason P, 597 [161] per Handley JA.

and other conditions of employment, resolving industrial disputes, hearing and determining other industrial matters and inquiring into, and reporting on, any industrial or other matter referred to it by the Minister[4]. Those functions of the Commission reflect the objects of the Act which are stated, in s 3, as including "to provide a framework for the conduct of industrial relations that is fair and just".

14 The Commission consists of a President, a Vice-President, Deputy Presidents and Commissioners[5]. The President, the Vice-President and the Deputy Presidents are referred to as "Presidential Members"[6]. A presidential member of the Commission may be appointed as a member of the Commission in Court Session if that person holds, or has held, a judicial office of the Commonwealth, a State or a Territory, or is a legal practitioner of at least seven years' standing[7]. A person appointed as a member of the Commission in Court Session is referred[8] to as a "judicial member of the Commission".

15 The Commission in Court Session is established by the Act as a superior court of record[9]. For the purposes of Pt 9 of the *Constitution Act* 1902 (NSW), the Commission in Court Session is a court of equivalent status to the Supreme Court and the Land and Environment Court[10]. The Commission in Court Session is the Commission constituted only by a judicial member or members and constituted for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session by or under the Act or any other Act or law[11]. Functions of the Commission that are to be exercised only by the

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4 s 146(1).

5 s 147(1).

6 s 147(2).

7 s 149.

8 s 149(3).

9 s 152(1).

10 s 152(2).

11 s 151(1).

Commission in Court Session include proceedings under Pt 9 of Ch 2 of the Act concerning unfair contracts[12].

The unfair contract provisions

16 Division 1 of Pt 9 of Ch 2 (s 105) provides definitions of "contract" and "unfair contract" in Pt 9. Division 2 (ss 106-109A) makes provision for unfair contracts to be declared void or varied. The central provision is s 106. It provides:

> "(1) The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.
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> (2) The Commission may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.
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> (3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.
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> (4) In considering whether a contract is unfair because it is against the public interest, the matters to which the Commission is to have regard must include the effect that the contract, or a series of such contracts, has had, or may have, on any system of apprenticeship and other methods of providing a sufficient and trained labour force.
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> (5) In making an order under this section, the Commission may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Commission considers just in the circumstances of the case."

"Contract" is defined in s 105 of the Act as "any contract or arrangement, or any related condition or collateral arrangement, but does not include an industrial instrument". "Unfair contract" is defined by s 105 as a contract:

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12 s 153(1)(c).

"(a) that is unfair, harsh or unconscionable, or

(b) that is against the public interest, or

(c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or

(d) that is designed to, or does, avoid the provisions of an industrial instrument."

17 The central question in this appeal, and in the two other appeals heard at the same time[13], is whether the contract which the applicants in the Commission sought to have declared wholly or partly void, or sought to have varied, was a "contract whereby a person performs work in any industry". In this and in the other appeals, other questions arise but before identifying those other questions, it is as well to begin by identifying what, uninstructed by any of the decisions on the construction of s 106 or its legislative predecessors, is the proper approach to determining its application to particular facts and circumstances.

18 The Act is concerned with matters industrial. The power given to the Commission by s 106(1) to declare wholly or partly void or to vary certain contracts should be understood as hinged about the reference to performance of work in any industry. The first inquiry required by s 106(1) is whether a person "performs work in any industry". What may be declared wholly or partly void or varied is any "contract" whereby a person performs that work.

19 Because "contract" is given the extended definition that has been noted earlier, it must be understood as extending to any arrangement or related condition or collateral arrangement of the requisite kind, namely, a contract or arrangement whereby a person performs work in any industry. But what must be identified is the set of arrangements (leaving aside, for the moment, whether those arrangements are or may be contractual or otherwise) according to which (that is, "whereby") a person performs the relevant work[14]. What may be

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13 *Batterham v QSR Ltd* [2006] HCA 23; *Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session* [2006] HCA 24.

14 *The Oxford English Dictionary*, 2nd ed (1989), vol 20 at 214, gives, as meaning II, 2 of "whereby": "[b]y means of or by the agency of which; from which (as a source of information); *according to which*, in the matter of which, etc" (emphasis added).

declared void or varied is any part of *those* arrangements: the arrangements in accordance with which a person performs work.

20 It is to invite error to begin by identifying what contracts or arrangements are related one to another. It invites error because it suggests that it is appropriate then to ask whether *any* of that interlocking set of arrangements made provision for the performance of work in an industry, and to treat any and every aspect of the interlocking arrangements that have been identified as amenable to the powers given to the Commission under s 106. And that is the way in which much of the argument advanced on behalf of those parties who were applicants in the Commission proceeded.

The history of the unfair contract provisions of the Act

21 What is now Pt 9 of Ch 2 of the Act can be traced to the amendments made to the *Industrial Arbitration Act* 1940 (NSW) ("the 1940 Act") by the *Industrial Arbitration (Amendment) Act* 1959 (NSW). Contract labour, especially of milk vendors, bread carters and in the building trades, had emerged as a means of sidestepping, and defeating, the prescription of employment conditions by awards made in arbitration of industrial disputes. Provision was made in the 1959 legislation (in what became s 88E of the 1940 Act) deeming workers engaged in certain occupations (including milk vendors, cleaners, painters and building tradesmen) to be employees. In addition, general provision was made, by what was to become s 88F of the 1940 Act, for the Commission, or a Conciliation Committee, to:

> "make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry"

on any of a number of grounds. The grounds were expressed as being "that the contract or arrangement or any condition or collateral arrangement relating thereto" was unfair, was harsh or unconscionable, was against the public interest, provided a total remuneration less than a person performing the work would have received as an employee, or was designed to or did avoid the provisions of an award or agreement.

22 In 1965 it was pointed out[15] that there was no power, under s 88F, to order payment of money. Accordingly, a party who succeeded in proceedings brought under s 88F would either be left with no monetary remedy or would have to pursue that relief elsewhere. Accordingly, in 1966[16], s 88F was amended to allow the Commission to order payment of money in connection with any contract or arrangement declared void or varied and to award costs. In addition, by the same 1966 Act, the reference to a Conciliation Committee exercising powers under s 88F was deleted.

23 The powers of the Commission were further extended in 1985[17]. Provision was made[18] for the Commission, when making an order avoiding or varying a contract or arrangement, to make an order prohibiting a party to the contract or arrangement (or a person associated with that party) "from ... entering into any specified kind of contract, arrangement or collateral arrangement whereby a person performs work in an industry" or doing acts intended to induce others to make such contracts or arrangements.

24 In 1991, the 1940 Act was repealed by the *Industrial Relations Act* 1991 (NSW). Section 275 of that Act gave the Commission power to declare certain contracts void. The contracts were identified as "any contract or arrangement or any related condition or collateral arrangement *under which* a person performs work in any industry" (emphasis added). The grounds upon which the Commission could exercise those powers were stated in the same way as they had been in s 88F. When the 1991 Act was repealed and replaced in 1996, by the Act now under consideration, the definition of unfair contract restated the relevant criteria by treating "unfair, harsh or unconscionable" as one criterion rather than "unfair" and "harsh or unconscionable" as separate criteria. This change may be noted but put to one side. Nothing was said to turn on it. Nor was any point made about the use, in the 1991 Act, of the expression "under which" rather than "whereby" as the link between the relevant contract or arrangement and a person performing work in any industry.

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15 *Agius v Arrow Freightways Pty Ltd* [1965] AR (NSW) 77.

16 *Industrial Arbitration (Further Amendment) Act* 1966 (NSW), s 5.

17 *Industrial Arbitration (Further Amendment) Act* 1985 (NSW), Sched 1.

18 s 88F(2A).

This Court's earlier decisions

25 This Court first considered questions about the operation of s 88F of the 1940 Act (as amended by the 1966 Act) in *Brown v Rezitis*[19]. That case concerned the ambit of the Commission's power under s 88F to order payment of money, and it was held that the power was not limited to making an order for payment of money by one of the parties to the relevant contract. The power was held[20] to extend to such orders as can reasonably be thought to have a real connection with the making, variation or avoidance of that contract. As Barwick CJ pointed out[21], one of the purposes of s 88F was to "deal with subterfuges, subterfuges which will take the worker out of the relationship of master and servant and therefore out of the operation of an industrial award designed, amongst other things, for the protection of workers in industry". Because there may be persons involved in the subterfuge who were not parties to the contract (but who derived benefit from its making or its execution) no narrow view was to be taken of the power to make an order for payment of money.

26 This Court next considered questions about the operation of s 88F of the 1940 Act in *Stevenson v Barham*[22]. The case concerned a share-farming agreement. In the Court of Appeal of New South Wales it had been held[23] that s 88F applied only to contracts made in "an industrial context": contracts having what had earlier been described[24] as "an industrial colour or flavour". It was this "industrial context" or "industrial colour or flavour" which was said to afford the link between the Commission's powers and the prevention of subversion of the scheme and purposes of industrial legislation.

27 On the appeal to this Court in *Stevenson v Barham*, emphasis appears to have been placed in argument upon a notion of subversion of industrial

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19 (1970) 127 CLR 157.

20 (1970) 127 CLR 157 at 165 per Barwick CJ.

21 (1970) 127 CLR 157 at 164.

22 (1977) 136 CLR 190.

23 *Barham v Stevenson* [1975] 1 NSWLR 31 at 35 per Street CJ, 41 per Hope JA.

24 *Ex parte V G Haulage Services Pty Ltd; Re The Industrial Commission of New South Wales* [1972] 2 NSWLR 81 at 87 per Jacobs JA.

regulation as marking the limit of the ambit of the Commission's powers to decide that a contract was unfair. The argument was rejected[25]. Rather, the decision in *Stevenson v Barham* was taken, in subsequent cases, as holding[26] that the relevant jurisdictional fact to be established in the Commission was that "if the contract is one which leads *directly* to a person working in any industry it has the requisite industrial character – it is a contract 'whereby a person performs work in any industry'" (emphasis added). And reference was subsequently made, not infrequently, to the remark of Barwick CJ[27] that "the language of s 88F … is intractable and must be given effect according to its width and generality".

28 The description of a contract as "one which leads *directly* to a person working in any industry" is not without its difficulty. What is meant, in this context, by "directly"? As Lord Diplock, giving the advice of the Privy Council in *Caltex Oil (Australia) Pty Ltd v Feenan*[28], pointed out, this, and other glosses on the section, must not be permitted to divert argument away from the words of the statute in an attempt to "construe" the words in which judges express their reasons for reaching a conclusion in a particular case. To divert attention in that way is wrong. And even the gloss on the word "whereby" offered in the *Caltex Case*[29] ("in consequence of which" or "in fulfilment of which"), like the gloss offered earlier in these reasons ("according to which"), must not be misunderstood as necessarily solving every difficulty that may be presented in seeking to apply the statutory language.

29 What emerges from *Stevenson v Barham* is the perception of a difficulty in reading the "intractable" language of s 88F in a way that did not give the Commission power to interfere with any and every kind of bargain. Barwick CJ, in *Stevenson v Barham*, said[30] that:

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25 (1977) 136 CLR 190 at 195 per Stephen J, 199-201 per Mason and Jacobs JJ.

26 (1977) 136 CLR 190 at 201 per Mason and Jacobs JJ.

27 (1977) 136 CLR 190 at 192.

28 [1981] 1 NSWLR 169; [1981] 1 WLR 1003.

29 [1981] 1 NSWLR 169 at 173; [1981] 1 WLR 1003 at 1008-1009.

30 (1977) 136 CLR 190 at 192.

> "[t]he legislature has apparently left it to the good sense of the … Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited".

And the reference[31], by Mason and Jacobs JJ, to a transaction which "leads directly to a person working in any industry" was evidently intended to mark a limit upon the Commission's jurisdiction.

30 But in neither *Stevenson v Barham*, nor the earlier case of *Brown v Rezitis*, was attention directed to two striking features of the legislation giving the Commission power to avoid or vary contracts. First, at the time those cases were decided, the legislation giving this jurisdiction to the Commission said nothing about who were to be the parties to proceedings. Neither those who could seek relief nor those who should be named as respondents were then specified. Only by amendments made in 1985[32] was there any specification of who may apply for an order avoiding or varying a contract alleged to be unfair. Even now there is no provision identifying who should be joined as a respondent to such an application. Secondly, both when those cases were decided, and since, the unfair contract provisions have taken their place in legislation in which there has been a comprehensive privative clause[33] restricting the circumstances in which decisions of the Commission (including decisions under the unfair contract provisions) could be challenged in proceedings which would ultimately found the jurisdiction of this Court under s 73 of the Constitution on appeal from the Supreme Court.

31 The relevant privative provision is now s 179(1). It provides that subject to what it describes as "the exercise of a right of appeal to a Full Bench of the Commission":

> "a decision or purported decision of the Commission (however constituted):
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> (a) is final, and

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31 (1977) 136 CLR 190 at 201.

32 See now s 108 of the Act.

33 1940 Act, s 84(1)(a); 1991 Act, s 366; 1996 Act, s 179.

(b) may not be appealed against, reviewed, quashed or called in question by any court or tribunal (whether on an issue of fact, law, jurisdiction or otherwise)."

Sub-sections (2) and (3) of s 179 give further emphasis to that provision. They provide:

"(2) A judgment or order that, but for this section, might be given or made in order to grant a relief or remedy (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise) may not be given or made in relation to a decision or purported decision of the Commission, however constituted.

(3) To avoid doubt, this section extends to any decision or purported decision of the Commission, including an award or order of the Commission."

Despite reference in s 179(1) to "the exercise of a right of appeal to a Full Bench of the Commission", there is no right of appeal given by the Act. An appeal to the Full Bench may be made only with the leave of the Full Bench[34] and the Full Bench is to grant leave to appeal "if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted"[35].

32 Perhaps the legislature's failure to identify who should be a respondent to proceedings brought to avoid or vary a contract can now be put to one side as a matter not bearing directly upon how the expression "any contract whereby a person performs work in any industry" should be understood. But the privative clause, and the limitations on appeal, cannot be put aside.

33 It is well established that "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words"[36]. Against that, however, must be put the "basic rule, which applies to privative clauses generally

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34 s 188(1).

35 s 188(2).

36 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

… that it is presumed that the Parliament [or, it may be interpolated, a State parliament] does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies"[37]. In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution.

34 These latter considerations weigh heavily against reading the expression "any contract whereby a person performs work in any industry" as requiring no more than the identification of one provision in a set of interlocking arrangements as touching or concerning the performance of work. So to understand s 106(1) would create a very large island of matters in which not only could there be no appeal to a Full Bench of the Commission, save by leave, the orders made by the Commission would not, or at least would not ordinarily, be susceptible to review by the Supreme Court or, ultimately, by this Court. The Supreme Court's role would be confined to granting relief ensuring the Commission's compliance with jurisdictional limits when, by hypothesis, the jurisdiction of the Commission would extend to a very wide range of agreements, the fairness or unfairness of which may have no industrial consequences.

35 The determinative question, however, remains: what does the Act provide?

A construction of the unfair contract provisions

36 The competing contentions about the construction of s 106 of the Act turned upon three intersecting elements of the provisions of that section and the definition of the term "contract" used in s 106. First, what is the significance of the reference, in the definition of "contract", in s 105, to an "arrangement"? Secondly, what is the significance of the reference, in that definition, to "any related condition or collateral arrangement"? And, thirdly, what is meant by "any contract *whereby* a person performs work in any industry"?

37 These three questions must be answered paying due regard to the breadth of the definition, given in the Act, to "industry". "Industry" is defined in s 7 of

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37 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

the Act as including "any trade, manufacture, business, project or occupation in which persons work". But recognising that this definition is very wide, the three questions identified earlier must be answered.

38 The juxtaposition of reference to "contract" and "arrangement" in the definition of "contract" requires the conclusion that the defined term includes more than obligations enforceable at law. Yet that is a conclusion that does not appear to sit easily with the Commission's powers being to avoid or vary a contract. How is an "arrangement" that is not legally binding to be avoided or varied?

39 What is meant by reference, in the definition of "contract", to "any related condition or collateral arrangement"? Why does that reference not require the identification of every contractual obligation and every non-contractual arrangement that is related one to another? Why is the whole of that interlocking web of obligations and arrangements not then subject to the Commission's powers under s 106 so long as any of those obligations or arrangements meets the criterion "whereby a person performs work in any industry"?

40 The answers to these questions are to be found in two considerations. The first is to recognise that when s 106 speaks of "any contract whereby a person performs work in any industry", the expanded meaning given to the term "contract" must be read into s 106. When that is done, it is apparent that the "contract", no matter whether it is a legally enforceable contract, an unenforceable arrangement, a related condition, or a collateral arrangement, must meet the description "whereby a person performs work in any industry".

41 The second consideration was mentioned earlier in these reasons and is not unrelated to the first. Performance of work in an industry is the hinge about which s 106 turns. It is the arrangements (contractual and non-contractual) whereby a person performs work in an industry that the Commission may avoid or vary. That is, it is the arrangements (contractual and non-contractual) according to which a person performs the work (or in consequence of which or in fulfilment of which a person performs that work) which may be avoided or varied. And although the notion of "avoiding" an arrangement that is not enforceable may be awkward, determining that some new arrangement will obtain for the future (thus "varying" the arrangement) presents no such awkward juxtaposition of ideas. Further, to focus attention upon the arrangements whereby a person performs work in an industry, no matter whether the arrangement is found in the contract the parties have made or only in some

related condition or collateral arrangement, sufficiently meets the need, identified by Barwick CJ in *Brown v Rezitis*[38], to recognise that these provisions of the Act have, as one important purpose, dealing with subterfuges which take workers outside the operation of industrial instruments intended to protect workers in an industry. At the same time, to read s 106 as hinged about performance of work in any industry and empowering the Commission to deal only with such of the arrangements between parties as can be described as a contract whereby a person performs work in any industry confines the jurisdiction of the Commission to declare a contract void or to vary it within bounds that leave intact the jurisdiction of the Supreme Court over other kinds of contractual obligations.

Does the Commission have jurisdiction in this matter?

42 The share purchase agreement made by Nisha and Mr Fish stipulated that Mr Fish's entering an employment contract with Solution 6 Holdings was a condition precedent to completion of the share purchase. (Nothing was said to turn on the fact that the employment agreement that was made was an agreement with a subsidiary of Solution 6 Holdings.) The employment agreement that was made and the share purchase agreement were therefore related and one may well be described as collateral to the other.

43 After the two agreements were made and the share purchase agreement was completed, Mr Fish performed work in an industry. But when one asks what was the "contract" whereby he performed that work, the answer does not include the share purchase agreement. Neither the share purchase agreement as a whole, nor the particular provisions of it which are now said to be or to have become unfair or against the public interest, constituted a contract, an arrangement, a related condition or a collateral arrangement whereby Mr Fish performed work in an industry. That being so, the Commission has no jurisdiction to declare the share purchase agreement or any of its particular provisions void, or to vary that agreement or any of those provisions.

44 The application to the Court of Appeal was instituted before any hearing in or decision by the Commission. That being so no question arises about the operation of the privative provisions of s 179. The Court of Appeal was right to grant the relief it did. The appeal to this Court should be dismissed with costs.

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38 (1970) 127 CLR 157 at 164.

45 On 9 December 2005, the *Industrial Relations Amendment Act* 2005 (NSW) ("the 2005 Amending Act") came into force. It amended s 106 of the Act and provided (by inserting a new cl 19B into Sched 4 of the Act) that the amended s 106 applied to "a contract made before the commencement of [the 2005 Amending Act] and to proceedings pending in the Commission at that commencement that have not been finally determined by the Commission". This Court's power and jurisdiction being confined to the making of such orders as the Court of Appeal should have made[39], the provisions made by the 2005 Amending Act do not directly arise for consideration. It may be added, however, that the Court of Appeal having rightly ordered that the Commission be prohibited from taking any steps to exercise its powers under s 106 of the Act in respect of the share purchase agreement, the proceeding in the Commission could not in that respect be described as "pending".

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39 *Judiciary Act* 1903 (Cth), s 37; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109-110 per Dixon J.

46 KIRBY J. This appeal comes from orders of the New South Wales Court of Appeal[40]. It concerns the application of the *Industrial Relations Act* 1996 (NSW) ("the IR Act") by the Industrial Relations Commission of New South Wales ("the Commission"). More specifically, it concerns the jurisdiction of the Commission, and its entitlement to determine its jurisdiction in the first instance without a pre-emptive decision on that question by the Supreme Court of the State.

47 The appellants urged this Court not to "turn back the clock"[41] on its own settled authority concerning the contested meaning and operation of the IR Act in a case of this kind. Yet that is now what a majority of this Court decides to do. With respect, the approach and decision of the majority in this appeal (which is significant for the outcome of two associated appeals, heard at the same time[42]):

- gives insufficient attention to the facts that attract the operation of the IR Act;
- fails to give effect to the broad language and large remedial purposes of the IR Act;
- ignores the consistently wide interpretation given to the analogous provisions of the IR Act (and its predecessors) by this and other courts;
- overlooks the importance of maintaining a broad approach to such provisions, given the contemporary features of employment in Australia;
- places the interpretation of the legislation out of line with that adopted with respect to other legislation, federal and State, addressed to unfair and unconscionable contracts;
- takes no, or insufficient, account of the repeated legislative endorsement and enhancement of the powers accorded to the Commission under the IR Act;

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40 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558.

41 [2005] HCATrans 917 at 6122.

42 *Batterham v QSR Ltd* [2006] HCA 23; *Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session* [2006] HCA 24.

- omits to accord proper respect to the exercise by the Commission of its jurisdiction, despite the command of Parliament generally mandating that approach; and

- does all this by the invocation of a false fear that a narrow approach to the Commission's jurisdiction is required so as to avoid the peril of decisions on "commercial" arrangements being placed outside the judgment and orders of the general courts and hence beyond the supervision of this Court in appeals brought pursuant to the Constitution[43].

48 The stated considerations bring me to a conclusion contrary to that reached by the majority of this Court and opposite to that reached by the Court of Appeal. The appeal should be allowed. The proceedings should be returned to the Commission for the regular discharge of its powers and, if jurisdiction is found after the hearing of the evidence, the provision or refusal of relief.

Insufficient attention to the facts

49 *Evidence and pre-emption*: Cases of the present kind are typically fact intensive. It is only from a full understanding of the facts, found by the court or tribunal with the responsibility to decide them, that questions of jurisdiction, discretion and relief can be safely resolved. In the present case, this desirable course was not followed. Although proceedings were commenced in the Commission in March 2002, the respondents to those proceedings, without raising any jurisdictional objection before the Commission, sought relief from the Court of Appeal in the nature of a writ of prohibition, directed to the Commission, to prevent it exercising its powers under s 106 of the IR Act with respect to a share sale agreement between the parties[44]. The apparent reason for this pre-emptive strike was an attempt to circumvent the operation of a privative provision in the IR Act[45] by which the State Parliament had strengthened its attempt[46] to forbid intrusion by the Supreme Court into "a decision or purported decision of the Commission".

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43 Constitution, s 73.

44 (2004) 60 NSWLR 558 at 562 [1]-[4]. The orders made by the Court of Appeal are set out at 596-597 [159].

45 IR Act, s 179.

46 By enhancing the privative provision contained in the former *Industrial Relations Act* 1991 (NSW) ("the 1991 Act"), s 301(1).

50 In the nature of such an interruption to the regular course of proceedings contemplated by Parliament in terms of the IR Act, an imperfect foundation is presented for a decision on a question of legal and practical importance. Moreover, as the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ ("the joint reasons") suggest, the issue for resolution is inescapably rich with facts. In law, the judicial decision may ultimately hang on a single word, "whereby"[47], over which courts have struggled in the past. But that struggle has normally been performed with the benefit of full evidence and of findings made upon that evidence.

51 In deciding whether the propounded "arrangements" are ones *whereby* a party performs work in an industry, there is no way that a correct conclusion can normally be reached except by examining closely the details of those arrangements. Necessarily, this takes the decision-maker beyond the text of any written contract. It demands a most thorough understanding of the parties' relationships.

52 In this Court the contesting respondents succeed because, in effect, they sever the employment contract from other parts of the contractual arrangements between the parties. They contend that work in an industry in New South Wales is only performed pursuant to the employment contract so that the other related arrangements are not contracts or arrangements as defined, *whereby* such work is performed. As I shall show, that interpretation involves an impermissibly narrow and artificial reading of the IR Act and is contrary to past authority and to legal principle.

53 *Evidence and parties*: Because the proceedings in the Court of Appeal depended on the brief evidence typical for a claim for a writ of prohibition, the evidence lacked the flesh and blood that a trial would have afforded. However, the parties placed before the Court of Appeal, annexed to a formal affidavit, the Contract of Employment ("the Employment Contract") and the Share Sale Agreement in issue in the case; certain emails exchanged between the parties; and extracts from an affidavit of Mr Nicholas Fish which had been earlier filed in the Commission.

54 In this Court, Mr Fish and his family trust company, Nisha Nominees Pty Ltd ("Nisha"), are the appellants. Mr Fish was employed by FishTech and Partners Pty Ltd ("FishTech") which was owned by Nisha. Solution 6 Holdings Ltd ("Solution 6 Holdings"), its subsidiary, Solution 6 Pty Ltd ("Solution 6"), Mr Neville Buch and Mr Neil Gamble are the contesting respondents. Mr Buch and Mr Gamble are respectively the Asia Pacific Managing Director and the Chief Executive Officer of Solution 6 Holdings and Solution 6. As in the Court

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47 IR Act, s 106(1). See joint reasons at [36]-[41].

of Appeal, the Commission itself submitted to the orders of this Court. It took no part in the proceedings. Consistent with authority, the only way that the Commission could express its views about the pre-emptive nature of the proceedings was through its published decisions. Those decisions have not been silent on what the Commission sees as the error of the Court of Appeal when its interventions are measured against the standard both of the privative clause in the IR Act and the past authority of this Court on the ultimate question for decision[48].

55 *The two agreements*: As the tendered documents demonstrated, there were two agreements relevant to the decision in this case. The legal question posed by the conjunction "whereby" concerns the relevant relationship between those agreements for the purposes of the relief claimed by Mr Fish and Nisha within the meaning of that word in the IR Act. The issue is whether the Share Sale Agreement is somehow placed outside the jurisdiction of the Commission.

56 As a matter of typing and presentation, the two agreements could easily have been incorporated in the one document. Had that been done, it would have been next to impossible to argue that the test of "whereby" was not satisfied by those clauses that related to the critical issue of shares. The respondents never satisfactorily answered the question why the separate engrossment of the clearly inter-related documents had the effect of depriving the Commission of jurisdiction. But I pass that point by.

57 The two agreements were each entered in early March 2000. If, therefore, this Court is looking for whether a relevant inter-relationship is established, the first criterion, that of common time, was clearly proved. The terms of the two agreements also bind them together. Thus, the Employment Contract was for a three-year fixed-term contract to commence on the date of completion of the Share Sale Agreement. Clause 5 of the Employment Contract specified that the date of commencement of the employment was the "[d]ate of completion of the ... Share Sale Agreement".

58 This intimate inter-relationship between the two agreements is also demonstrated by the detailed terms of the Share Sale Agreement. Clause 2.1(a) of the Share Sale Agreement declares, in the conditions for completion, that:

> "[c]ompletion will not proceed unless [Solution 6 Holdings] is satisfied that before or simultaneously with Completion, [Mr Fish] has been released from employment with [FishTech] and has entered into an employment contract with [Solution 6 Holdings], on terms acceptable to [Solution 6 Holdings]".

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48 See, eg, *Mitchforce Pty Ltd v Starkey (No 2)* (2003) 130 IR 378 at 436 [213]-[215], 444 [252].

59 In cl 2.2(a), it is provided that the seller, Nisha, "must use its best endeavours to satisfy the conditions for Completion set out in clause 2.1". This provision therefore binds not only Mr Fish but also his company to ensure that Mr Fish has been signed up for employment with the buyer, Solution 6 Holdings. No point was taken that the Employment Contract was with Solution 6 and not Solution 6 Holdings[49].

60 In cl 2.5 of the Share Sale Agreement, provision is made for both the buyer and seller to terminate the agreement if the conditions for completion set out in cl 2.1 are not satisfied, including the release of Mr Fish by FishTech and his entry into employment with Solution 6 Holdings.

61 In cl 3, the completion date for the sale and purchase of the shares is expressed to be "[s]ubject to clause 2". It is thus related to the provisions in cll 2.1, 2.2(a) and 2.5.

62 Clause 4 of the Share Sale Agreement concerns the purchase price of the shares. In cl 4.8(c), reference is made to the hypothesis of employment that lay at the heart of that agreement:

> "[Nisha] may Dispose of all of the [Solution 6 Holdings] Shares if at any time [Mr Fish's] employment with [Solution 6 Holdings] is terminated, unless termination results from ... [Mr Fish's] ... serious misconduct; or ... poor performance, or ... termination by [Mr Fish]."

63 The date for completion of the Share Sale Agreement is expressed in cl 6. By cl 6.1(b), an ultimate time is fixed by reference to "5 Business Days after satisfaction or waiver of the conditions precedent set out in clause 2.1". It is this clause that includes reference to the condition of the entry of Mr Fish into the Employment Contract with Solution 6 Holdings.

64 By cl 8, provision is made in relation to "competition" with "the Business". Specifically, by cl 8.1(c) it is provided, relevantly:

> "If [Mr Fish's] employment with [Solution 6 Holdings] is terminated by [Solution 6 Holdings], the restraint … will cease to apply from that date of termination, unless the termination results from ... serious misconduct; or ... poor performance, or ... termination by [Mr Fish,] in which case the restraint … will continue to apply despite termination of [Mr Fish's] employment."

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49 Joint reasons at [4].

65 By cl 8.2, Nisha and Mr Fish agree that any failure to comply with the competition provisions in cl 8.1 "would diminish the value of the Shares" and that the restrictive undertaking on his employment activities "are reasonable and necessary for the protection of the value of the Shares".

66 By cl 13 of the Share Sale Agreement, Mr Fish unconditionally guarantees the obligations of Nisha. This further affirms the close relationship between the Employment Contract and the Share Sale Agreement. It confirms that they are capable of being, in law and in effect, part of the same "arrangement".

67 This conclusion is still further reinforced by cl 14 of the Share Sale Agreement. Under cl 14.1, Mr Fish was required to:

> "use [his] best endeavours to ensure that all Employees and contractors/consultants on contract with [FishTech] remain in the employ of or contracted to [FishTech]".

68 It is tedious to examine these provisions in such detail. However, reports of cases of this kind repeatedly demonstrate that it is in the detail that the correct application of the law is to be found. Unless one is to approach a case of this kind by reference to considerations such as unstructured intuition[50] or professional hostility, the lines that have to be drawn by reference to the word "whereby" in s 106(1) of the IR Act depend on a thorough understanding of the facts. They require an appreciation of the variety of circumstances in which it was Parliament's object that the provisions for relief under the IR Act could apply.

69 So-called "commercial contracts" between business people will sometimes contemplate, and require, the performance of work in an industry. They will sometimes include provisions that affect and control the performance of work there, as that notion is broadly defined in the IR Act[51]. If such "commercial contracts" are excluded by that character from the jurisdiction of the Commission, despite being so repeatedly and intricately integrated with a written employment "contract", a lot of unscrupulous people could avoid the beneficial provisions of the IR Act[52]. This was a result clearly foreseen by the courts in past observations on such provisions.

70 *Evidence of Mr Fish*: There is still more. A document received without objection by the Court of Appeal contained an extract from an affidavit of

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50 Cf *Purvis v New South Wales* (2003) 217 CLR 92 at 103-104 [19] and fn 30.

51 See below these reasons at [81], [84].

52 Cf *Mitchforce* (2003) 130 IR 378 at 436 [212].

Mr Fish, filed in the Commission. In that affidavit, Mr Fish recounted a meeting, held on 9 January 2000, shortly before the execution of the two agreements. In that meeting Mr Fish and Mr Tyler, the then Chief Executive Officer of Solution 6 Holdings and Solution 6, took part. According to Mr Fish, Mr Tyler stated in this conversation:

> "The deal is contingent on you accepting a role with Solution 6. You will be responsible for delivering the strategy, beginning in Australia. I will deliver strategy in the US, and work with capital markets so they understand our plan."

71 Later in the same conversation, Mr Tyler is recorded as stating:

> "One of the key elements of the deal is you agreeing to the terms of an executive employment contract. It is important to Solution 6 that you are signed on to Solution 6 for a minimum period of three years. … Over the next three years I will structure a lucrative options package for you to ensure you remain incented [sic] and focused on the performance of Solution 6. You can see how such an options scheme has made me a very wealthy person."

72 Mr Fish summarised the offer that was being made to him:

> "You are sending me an executive services agreement, and the deal will not go ahead unless I agree to be employed by Solution 6 for a minimum of three years."

73 This was agreed. Mr Tyler stated that he would arrange for the head of Solution 6 Holdings's legal department to draft a Share Sale Contract and the Employment Contract to reflect what he and Mr Fish had agreed. Shortly afterwards, an email was sent by Mr Fish to his solicitor summarising his understanding of the discussions between himself and Mr Tyler. This stated:

> "100% Acquisition of FishTech at a valuation of $20,000,000.
>
> Consideration is Cash and Shares with the share price for [Solution 6 Holdings] shares being $9.75 per share.
>
> Nick Fish is to be a member of the Executive Team with a direct report to Chris Tyler".

74 Subsequently, Heads of Agreement were prepared by Mr Fish's solicitor giving effect to the arrangement so described. Without objection, this document was also received in evidence by the Court of Appeal. It outlines the intended sale of shares representing all of the issued capital of FishTech and, in the same document, refers to the Employment Contract. The reference to the Employment Contract is introduced with the following statement:

> "The Share Sale Agreement is subject to agreement on the terms of an [Employment Contract] between [Mr Fish] and [Solution 6 Holdings]".

75 It is proper to act upon this evidence[53]. It makes clear what is, in any case, plain from the terms of the two agreements. They were intimately connected. They were inter-dependent. The Heads of Agreement make this plain in a *single* document. They also make it clear how the "arrangement" came to proceed with two written agreements instead of one. This was a "package" to acquire Mr Fish and his interests for Solution 6 Holdings. It was the kind of "package" that Mr Tyler said had made him wealthy.

76 The notion that the two agreements were legally separate for the purposes of relief of the kind contained in s 106(1) of the IR Act requires an artificial severance which the documents, their purposes and the history of their making (as proved to this stage) deny. At the very least, such a conclusion was open to the Commission if the claim of the appellants had proceeded to trial and if the appellants had been afforded the right normal to a litigant in Australia. That is the right to adduce evidence and secure findings by the court or tribunal to which the law assigns the responsibility for making such decisions.

77 In the events that occurred, as explained in the background facts contained in the joint reasons[54], the Share Sale Agreement between the parties did not include a "floor price mechanism" to protect Mr Fish against dilution of the purchase price of the shares in Solution 6 Holdings. Mr Fish claims that he had repeatedly asked for the inclusion of such a provision[55]. This became the focus of the suggested unfairness of the "arrangement" made with Solution 6 Holdings, the repair of which Mr Fish sought pursuant to s 106 of the IR Act. In effect, Mr Fish sought the reinstatement of the difference in the amount received by him before he was eventually retrenched and cash offers made to him contemporaneously with the negotiations and reflected in the documents referred to. Mr Fish claimed a remedy pursuant to a comprehensive employment contract that had failed, under which he was employed on terms (not unknown in this area of discourse although rarely in sums so large) whereby employees are parted from capital assets, promised lucrative terms (including employment) but soon

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53 Because the evidence was received without objection in the Court of Appeal no question arises, for example, under the principles stated by this Court in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 concerning the admission of evidence relevant to the meaning of written contracts.

54 Joint reasons at [1]-[10].

55 (2004) 60 NSWLR 558 at 565 [19].

afterwards find themselves terminated as redundant, left with neither assets nor employment.

78 On the other hand, it was argued for the contesting respondents that the Employment Contract and the Share Sale Agreement were separate agreements. They claimed that Mr Fish was seeking to rewrite the risks of the latter, which was not a contract *whereby* he performed work in any industry and did not, therefore (viewed separately), afford a foundation for any jurisdiction in the Commission to grant him relief in the circumstances.

The broad language and purpose of the IR Act

79 *The relevant legislation*: As this Court has insisted in many cases in recent years, the starting point for resolving the problem presented by the present proceedings is to be found in the provisions of the IR Act. It is not, as such, to be discovered in the large body of judicial authority that has grown around the key provisions of that Act, and its predecessors. It is easy to become lost in the forest of case law, dealing with individual instances. It is the statute that provides the bearings for the decision-maker. In the normal way, the search is for the meaning of the written law, derived from its language, read in context, assisted by available indications about its purpose[56].

80 The central provisions of the IR Act, applicable to these proceedings, are ss 105 and 106. These sections are concerned with the power of the Commission to afford relief against an unfair contract, as defined[57]. Also significant is the privative clause contained in s 179(1) of the IR Act, by which Parliament has attempted to exclude the general courts from interference in decisions, and purported decisions, of the Commission, including those concerning unfair contracts as defined[58]. As these provisions are set out in the joint reasons, I will not repeat them. Nor will I survey the general history of the introduction, amendment, re-enactment and further re-enactment of the unfair contract provisions of the IR Act and its two predecessors[59]. That history is stated elsewhere[60].

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56 Cf *Solution 6 Holdings* (2004) 60 NSWLR 558 at 588-589 [124]. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459.

57 See joint reasons at [16].

58 See joint reasons at [31].

59 Joint reasons at [21]-[24].

60 See *Walker v Industrial Court of New South Wales* (1994) 53 IR 121 at 133-135.

81 However, a number of points need to be noticed about the language of the IR Act. The reference to "work in any industry" in s 106(1) is a reference to a defined term. For the uninitiated, "industry" might conjure up images of old-style factories and bench labourers. But the definition in the IR Act could not be wider. "Industry" relevantly includes "any trade, manufacture, business, project or occupation in which persons work"[61]. Ultimately, it is enough that the person is employed in any occupation "in which persons work". Unsurprisingly, Mr Fish is such a person and Solution 6 was in such an industry.

82 The provisions of ss 105 and 106 appear in a Chapter of the IR Act headed "Employment"[62]. That generic expression is an improvement on the heading "Awards" which appeared in the Part of the *Industrial Arbitration Act* 1940 (NSW) ("the IA Act") into which s 88F (the original provision for relief against unfair contracts) was inserted[63]. The gradual adoption by Parliament of broad descriptions for Pt 9 of Ch 2 of the IR Act, in which the provision for relief appears, confirms the purpose as being to provide a separate and distinct source of jurisdiction to the Commission, but one to be exercised only by its judicial members[64].

83 In light of the provisions of ss 105 and 106 of the IR Act and this history, it would be a serious mistake to depart from the language of the IR Act and, at this late stage in the history of such provisions, to attempt to impose an extra-textual restriction on its subject matter, confining it somehow to that elsewhere and otherwise conferred in relation to more familiar "employment" disputes. Employment in Australia is changing[65]. Section 106 recognises this change. It confirms the enlargement of the jurisdiction of the Commission so that it can respond to the change.

84 Quite apart from the legislative history, various indications in s 106 itself demonstrate the purpose of Parliament to afford very wide powers to the Commission. The word "work" is deliberately broad. The reference to "any"

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61 IR Act, s 7.

62 IR Act, Ch 2.

63 IA Act, Pt VIII. In the 1991 Act, the relevant provision, s 275, appeared in Ch 3 ("Disputes, Industrial Action and Other Matters"), Pt 10 ("Void Contracts and Regulated Contracts").

64 Under the 1991 Act, s 275, the jurisdiction was conferred on the Industrial Court, created by that Act. Under the IR Act, s 153(1)(c) confines the exercise of jurisdiction under s 106 to the Commission in Court Session.

65 See below these reasons at [116]-[118].

industry gives emphasis to the breadth of the type of "work" intended. The phrase "unfair contract" invites cross-reference to s 105 where four distinct and individually broad definitions are stated of the type of contract intended. The fact that, in s 106(2), the Commission is empowered to find that a "contract", inferentially "fair" when originally made, "became an unfair contract" because of later conduct, variation of the contract or any other reason, is a further sign that Parliament contemplated a circumstance such as arose in the present case. Where two or more contractual documents exist, intended to operate by reference to each other, Parliament has explicitly required that their interaction and operation together be considered. Necessarily, by s 106(2), the later contract in a series might come to affect the ultimate characterisation of the earlier. Treating inter-connected agreements as separate and quarantined from one another is fundamentally inconsistent with the powers conferred on the Commission by the broad language of s 106.

85 Similarly, the provisions in s 106(3) for the partial avoidance of a contract, contemplating that this might be declared from some time other than the commencement of the operation of the contract, add to the legislative indication that, in a case such as the present, where the contract is in writing, its operation, and not just its written terms, must be considered in deciding whether relief should be granted under s 106.

86 In s 106(4), Parliament has clearly contemplated the existence, in a given case, of "a series of such contracts". The variety of remedies provided (including, by s 106(5), the payment of money, which was not initially available[66]), demand attention to all of the features of the relationship between the parties that might be relevant to a consideration of such broad remedies. This requires the Commission, where necessary, to look behind the *form* of the written contract or contracts and to concern itself with *substance*. The respondents did not dispute this. However, they resisted the logic to which the breadth of the language of s 106 pointed.

87 As significant as any of the foregoing provisions of the IR Act is the definition of "contract" in s 105. Once again, the amplitude of the legislative purpose is manifest. The word "contract" is defined to mean any "contract or arrangement, or any related condition or collateral arrangement ...". The word "arrangement" releases whatever legal implications might have been suggested by the use of a technical word such as "contract", if standing alone. The extension of the word "contract" to include "any *related* condition or *collateral* arrangement" makes it plain, beyond argument, that any inclination of the legal mind to view a "contract" as separate, because appearing in a separate document,

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66 The power to order the payment of money was first conferred by the *Industrial Arbitration (Further Amendment) Act* 1966 (NSW), s 5. See joint reasons at [22].

should be resisted. If, within documents, there are *related* conditions and *collateral* arrangements, they would all fall within the "contract" at which s 106 of the IR Act was targeted.

88 The purpose for this expansive definition in the IR Act is very easy to see. Were it possible, by the separate typing of an employment contract and some other contract, to avoid the jurisdiction of the Commission in cases of the present kind, the provision for relief in s 106(1) of the IR Act might just as well not exist. Clever drafters would quickly prepare separate documents. They would describe one as an "employment contract" and the other as dealing with other parts of the composite arrangement. The unfair conditions and stipulations would appear separately. The employer would then walk straight out of the Commission's jurisdiction. Anyone in doubt that this is a real risk in the current enlightened age should read *Palgo Holdings Pty Ltd v Gowans*[67]. The legislation construed in that case was quickly amended to repair the legislative gap that was found in that case[68]. However, in the present case, the New South Wales Parliament anticipated such attempts. It enacted the provisions affording relief in the broadest possible terms. It did this in order to exclude such obvious escape lines.

89 On the face of the language of the legislation, therefore, this Court should not impose on the word "whereby" a meaning contrary to the remedial purpose of s 106 as suggested by so many surrounding words and phrases. It should not adopt a meaning that would cause the section to haemorrhage. To the extent that this Court, and the Court of Appeal, prefer such an approach, having such consequences, they effectively force legislatures in Australia to adopt increasingly detailed expression of the legislative purpose[69]. Such a result would

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67 (2005) 221 CLR 249.

68 By the *Pawnbrokers and Second-hand Dealers Amendment Act* 2005 (NSW).

69 After this appeal was heard, the Parliament of New South Wales, by the *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 1, inserted sub-s (2A) into s 106 to overcome the effect of the decision of the Court of Appeal. Section 106(2A) provides:

> "A contract that is a related condition or collateral arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as:
>
> (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and
>
> (b) the performance of work is a significant purpose of the contractual arrangements made by the person."

not be in the interests of clarity in our statute law. Nor would it be harmonious with the repeated statements of this Court adopting a purposive construction of legislation that assists the written law to hit its target and not to misfire[70]. Purposive construction is a principle to be applied consistently. It is not one to be deployed selectively and ignored where judges deem its outcomes uncongenial.

90 Similar remarks may be made concerning the parliamentary purpose in enacting the enhanced privative clause[71] adopted to protect the Commission in the exercise of its jurisdiction and powers, including under s 106(1) of the IR Act. I shall deal with this consideration separately[72]. Attempts by courts, beyond cases where, for fundamental legal reasons, there is no "decision" at all[73], to circumvent the application, in State jurisdiction, of valid privative provisions, simply invite further amendments by Parliament seeking to make its purpose plain[74].

91 *Conclusion: meaning of "whereby"*: It follows that, on the face of the broad language of ss 105 and 106 of the IR Act (and especially the very broad definitions given to "contract" and "industry"), the meaning given in the joint reasons to the word "whereby" cannot be supported.

92 The approach of the majority of this Court contradicts the clear purpose of the legislation permitting and requiring the Commission, in the case of inter-related conditions and arrangements, to treat them as part of the same "contract" or "arrangement". The attempt to impose a narrower meaning on the word "whereby" conflicts with the indications to the contrary in the statutory language.

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70 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424.

71 IR Act, s 179(1).

72 See below these reasons at [132]-[148].

73 See, eg, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76].

74 The *Industrial Relations Amendment Act* 2005 (NSW) enacted further amendments to the privative provision in s 179 of the IR Act. It did so to preclude pre-emptive strikes on the Commission's jurisdiction. Section 179(2) now provides:

> "Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal."

93 Depending on the facts adduced in evidence before it, it would therefore be open to the Commission to treat the Employment Contract and the Share Sale Agreement as parts of a single "arrangement" and to subject that "arrangement", as a defined "contract", to the criteria for an "unfair contract" giving rise to consideration of the provision of relief. The Court of Appeal therefore erred in preventing the Commission from exercising its power and discretion. The majority in this Court errs in affirming that decision.

Consistency with past authority

94 *Early Commission decisions*: Even before cases of the present kind came before this Court, arising originally under s 88F of the IA Act, wise and experienced judges in the predecessor to the Commission explained why it was essential to the discharge of such jurisdiction to approach the Commission's statutory powers in a fresh way, concentrating on the particular mischief for which Parliament had provided.

95 In the first reported case that arose under s 88F of the IA Act, *Agius v Arrow Freightways Pty Ltd*[75], Beattie J, later the President of the Commission as then formed, insisted on the need to give the provisions of the section a broad reading and to avoid the attempt, ventured before him, to impose on the statutory language baggage inherited from earlier case law involving transactions with money lenders, in respect of which the text of the legislation bore superficial verbal similarities. In his reasons, Beattie J said[76] that he would not refer to such cases because it was not to be assumed that Parliament was using the chosen words as terms of art:

> "It would be a mistake in my view to complicate the administration of s 88F by reference to authorities on other statutes, and on this aspect of the matter there is a statement by Lord *Macnaghten* in one of the moneylending cases involving the construction of the phrase, 'contract is harsh and unconscionable or is otherwise such that a Court of Equity would give relief' which is apposite. In *Samuel v Newbold*[77] his Lordship said:
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> > 'What an intolerable strain would be thrown upon inferior Courts, unfamiliar with the doctrines and the practice of Courts of Equity, if they were privileged or condemned to listen to lengthy arguments and venerable precedents before deciding a question that any man

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75 [1965] AR (NSW) 77.

76 [1965] AR (NSW) 77 at 89.

77 [1906] AC 461 at 469.

> of common sense is just as capable of deciding as the most learned judge in the land, provided he is not hampered by authorities, which require no little training to discriminate and appreciate at their true value.'"

96 *Agius* was a case involving the sale by a company of a motor vehicle and the alleged goodwill of a business. The Commission did not sever the sale of the vehicle from that of the business. It found the entire contract one *whereby* a person performed work in an industry. It declared that arrangement, in its entirety, void *ab initio*, within the limited remedies available at that time[78].

97 This approach was followed by Sheldon J in *Davies v General Transport Development Pty Ltd*[79]. That distinguished judge said[80]:

> "Unlike some other sections in the [IA] Act, s 88F does not transmute contractors into employees; it takes the contract as it finds it but imperils both its continuance and its prior operation. In the result, when deciding actual cases under this section, to seek assistance from authorities on the general law of contract is an arid exercise, for if ever a law was intended to stand on its own feet it is this one.
>
> While it is hard to see how any transaction directly leading to work in an industry, and involving mutual promises, can escape a net so widely cast to attract jurisdiction, no action is warranted on a transaction not directly covered … unless it is unfair, or harsh or unconscionable. To determine this, requires no more than the common sense approach characteristic of the ordinary juryman and this cannot be communicated – indeed it may be clouded – by an analysis of decided cases even where there is some analogy in the facts. …
>
> This all shows that under s 88F the way of the transgressor is hard. He is under fire from a diversity of angles and the armour that clever drafting sometimes supplies is in this case far from impenetrable."

98 These early authorities became the standard for the then exercise by the Commission of the unique jurisdiction provided to it. It accepted that such large powers "should be exercised with proper restraint"[81]. But the amplitude of the

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78 [1965] AR (NSW) 77 at 91-92.

79 [1967] AR (NSW) 371.

80 [1967] AR (NSW) 371 at 374.

81 *Davies* [1967] AR (NSW) 371 at 374 per Sheldon J.

jurisdiction, including the power to make orders against persons who were not parties to contracts or arrangements, was clear from the statutory text. Moreover, by reference to the meaning of the word "arrangement" in other legislation, Sheppard J, in *In re Hall and Alison Clint Floral Delivery Pty Ltd*[82], accepted that an "arrangement" (a word that survived from the IA Act into s 105 of the IR Act) extended beyond contracts and agreements as ordinarily defined in law "so as to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or so as to produce a particular effect".

99 An "arrangement" might not even be enforceable at law. The word embraces "something in the nature of an understanding between two or more persons"[83]. The danger of a narrower view was recognised by all of these experienced judges. Moreover, as observed in *Hall*[84], this broad approach was endorsed by this Court in *Brown v Rezitis*[85]. That was the first case in which this Court considered the meaning and operation of such provisions.

100 *The High Court and Privy Council*: In *Brown*[86], which followed orders made by the Commission under s 88F of the IA Act, this Court found an excess of jurisdiction in respect of some parts of the moneys which the Commission had ordered to be paid under s 88F. However, the importance of the case, for present purposes, lies in the recognition by this Court of the ample character of the jurisdiction and powers of the Commission and the statements made as to the approach that should be taken by the general courts in the exercise of their supervisory jurisdiction.

101 In his reasons, Barwick CJ (with the concurrence of McTiernan, Windeyer and Owen JJ) observed[87]:

> "It must be borne in mind that one of the purposes of the section is to deal with subterfuges, subterfuges which will take the worker out of the relationship of master and servant and therefore out of the operation of an

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82 [1971] AR (NSW) 56 at 63-64 citing *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 at 573.

83 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7; [1958] AC 450 at 465 (PC).

84 [1971] AR (NSW) 56 at 62.

85 (1970) 127 CLR 157.

86 (1970) 127 CLR 157.

87 (1970) 127 CLR 157 at 164.

> industrial award designed, amongst other things, for the protection of workers in industry. There may be persons involved in the subterfuge who are not parties to the contract or arrangement but who are in reality the actors deriving benefit from the making or the execution of the contract or arrangement."

102 It was this reality that justified provision of relief that might be directed to persons other than parties to the contract or arrangement. This Court acknowledged that the Commission's jurisdiction was very wide. The limitation on the orders that could be made was fixed only by "the lack of conceivable connexion of the order … with the avoided contract"[88].

103 In his reasons, Menzies J took an equally expansive view[89]:

> "The section is clearly intended to confer a comprehensive power upon the Commission to go to the substance of an arrangement made for a person to perform work in an industry – and to do so in disregard of the legal dress in which the arrangement has been clothed …
>
> I do not doubt that the Commission has a wide discretion in determining not only what money should be paid but by whom it should be paid. It is not for a Court, from which a writ of prohibition or certiorari is sought in relation to an order of the Commission, to exercise for itself the discretion given by the statute to the Commission [but] only when it is satisfied that the payment which has been ordered is one outside the power conferred upon the Commission by the section."

104 A similarly broad view was taken by the majority of this Court in *Stevenson v Barham*[90]. That was a case where the owner of land entered into a share-farming agreement with a dairy farmer to work the land. The latter was to supply cattle, labour and some machinery. The owner was to supply milking machines and other plant. The profits were to be shared. The Commission was asked to declare the contract void under s 88F. By majority[91], this Court held that the application was within the Commission's jurisdiction. It rejected the argument that because of its multiple stipulations, the share-farming agreement was not itself one *whereby* the farmer performed work in an industry.

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88 (1970) 127 CLR 157 at 168.

89 (1970) 127 CLR 157 at 169-171.

90 (1977) 136 CLR 190.

91 Barwick CJ, Mason and Jacobs JJ; Stephen and Aickin JJ dissenting.

105 The rejected contention in *Stevenson* (wherein lay the seeds of the present respondents' argument) found favour in this Court with Stephen J[92] and Aickin J[93]. However, it was rejected by the majority of the Court. In his reasons, Barwick CJ, in language reflecting the approach of Sheldon J in *Davies*[94], said[95]:

> "Notwithstanding the wide language of s 88F, I have found difficulty in becoming convinced that it was within the contemplation of the legislature that agreements for business ventures, of which the present may be a specimen, freely entered into by parties in equal bargaining positions, should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void. However, I have come to the conclusion that the language of s 88F of the [IA] Act is intractable and must be given effect according to its width and generality. The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited."

106 In *Stevenson*, Barwick CJ also agreed in the joint reasons of Mason and Jacobs JJ. In those reasons[96], their Honours gave effect to reasons that had been written by Jacobs JA in *Ex parte V G Haulage Services Pty Ltd; Re The Industrial Commission of New South Wales*[97], when he was a member of the Court of Appeal of New South Wales. The reasons in that case had laid emphasis on the variety and non-homogeneous terms of the five grounds on which the Commission could vary or avoid contractual arrangements[98] and the fact that those grounds, as expressed, were not limited to cases that threatened general industrial standards[99]. Moreover, they endorsed the statement of

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92 (1977) 136 CLR 190 at 196.

93 (1977) 136 CLR 190 at 212.

94 See above these reasons at [97].

95 (1977) 136 CLR 190 at 192.

96 (1977) 136 CLR 190 at 200.

97 [1972] 2 NSWLR 81 at 87-88.

98 Referred to by Barwick CJ in *Brown* (1970) 127 CLR 157 at 164.

99 [1972] 2 NSWLR 81 at 87-88 citing *Davies* [1967] AR (NSW) 371 at 373 per Sheldon J.

Jacobs JA in *V G Haulage*[100] that the impugned transaction must "directly lead to work in the industry". It was by this route that this Court in *Stevenson*[101] borrowed the adverb "directly" from the reasons of Sheldon J in *Davies*. It brought that word into the judicial discourse in an attempt to explain what was meant by the concept of "whereby", read in a context where all of the verbal indications pointed in the direction of an extremely ample notion of a connection envisaged between an impugned "contract" or "arrangement" and work in an industry. Since *Stevenson*, the word "directly" has been repeatedly applied by New South Wales courts[102].

107 In the course of these proceedings, the correctness of the word "directly" to convey the meaning expressed by the word "whereby" has been doubted. I agree with the joint reasons[103] about the difficulty of introducing this notion into the text. The safer course is to return to the statutory expression itself, read in its context. That context does not support the interposition of the restrictive notion of "directly". To the contrary, the context points to the sufficiency of direct *or indirect* connection between the impugned "contract" or "arrangement" and the work in any industry of the person who impugns it. The Privy Council was right in *Caltex Oil (Australia) Pty Ltd v Feenan*[104] to warn against glossing a remedial measure of this kind.

108 The Privy Council's decision in *Caltex* is useful because it followed *Stevenson* in this Court where the debate as to the operation of the word "whereby" had been exposed by the differing opinions of the majority and the minority. *Caltex* concerned a licence agreement between an oil company and licensees for the operation of a service station in which the licensees would perform work. The oil company appealed to the Privy Council from a refusal of the New South Wales Court of Appeal to declare void, for want of jurisdiction, relief ordered in the Commission, based on s 88F of the IA Act. The oil company contended that the licence was not a contract "whereby" the licensees performed work.

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100 [1972] 2 NSWLR 81 at 88.

101 (1977) 136 CLR 190 at 201. See also *Gosper v Sawyer* (1985) 160 CLR 548 at 560, 568.

102 See, eg, *Williams v Matthews* [1978] 1 NSWLR 78 at 80-81; *Production Spray Painting & Panel Beating Pty Ltd v Newnham* (1991) 27 NSWLR 644 at 647-648, 657.

103 Joint reasons at [28].

104 [1981] 1 NSWLR 169 at 173; [1981] 1 WLR 1003 at 1008.

109 Their Lordships in *Caltex* rejected this argument. They concluded that the word "whereby", in the context of such a "contract" or "arrangement", bore "its ordinary meaning of 'in consequence of which' or 'in fulfilment of which'". They declared that "[e]ither meaning is sufficient to bring the [contract] within the description of contracts to which s 88F applies"[105]. In testing this proposition, the Privy Council looked to the benefit obtained by the oil company from the contract, in addition to the licence fee and rental of goodwill. That benefit included "an assured and profitable outlet for their products without incurring the expense of paying wages to employees for doing what, under the [contract], the [licensees] had bound themselves to do instead"[106]. That was enough for their Lordships to attract the provisions of the IA Act.

110 None of the foregoing cases (or the approaches they endorse) has ever been questioned in this Court. Indeed, there was no attempt in the present case to cast doubt upon them or to suggest that the broad approach adopted in the past, both by this Court and the Privy Council, was wrong or in need of re-expression and qualification. To the extent that re-expression is suggested by revisiting the authorities, it favours Mr Fish by the deletion (suggested by the Privy Council in *Caltex*) of the non-statutory gloss of "directly".

111 *Conclusion: application of authority*: If the practical test expressed by the Privy Council in *Caltex* is applied in the present case, the work that Mr Fish bound himself to do for Solution 6 Holdings and Solution 6 was for the benefit obtained by those companies in the integrated operation of the Employment Contract and the Share Sale Agreement. Had the arrangement of the licensees with the oil company in *Caltex* involved separate written contracts for the "investment" in the rent and use of equipment in the service station and the "employment" performed at the petrol bowsers, it is unthinkable that the Privy Council would have dissected the two and held the former outside the remedies available in the then Commission because it was not a contract "whereby" the licensees performed work in any industry.

112 The consistent approach of past authority at the highest levels applicable to these cases should be maintained. It follows that the Court of Appeal erred in its understanding of decisional authority. It was distracted from the reality of the "arrangement" between the parties in this case, found in the interaction of the two integrated contractual documents. Despite its protests to the contrary, the Court of Appeal permitted form to swamp substance. As this Court and the earliest cases in the Commission correctly recognised, such an approach is forbidden by the language of the statute and the purpose of the powers granted to afford relief

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105 [1981] 1 NSWLR 169 at 173; [1981] 1 WLR 1003 at 1009.

106 [1981] 1 NSWLR 169 at 174; [1981] 1 WLR 1003 at 1009.

in such cases. The statutory text has remained, as Barwick CJ described it, "intractable".

113 Latter-day attempts to gloss the statute by resuscitating the approach to the word "whereby", rejected in *Stevenson* and *Caltex*, should not now succeed. This Court should not turn back the clock. The new attempt to restrict the statutory language[107] should be repelled. It is unwarranted by the parliamentary text. It is incompatible with this Court's authority, which was not questioned. Moreover, it presents the very mischief of evasion and subterfuge recognised by this Court in 1970 in *Brown*[108]. Relevantly, nothing has changed in the governing law.

Contemporary employment and ancillary contracts

114 *A new consideration*: When s 88F of the IA Act was introduced in 1959[109], it appeared amongst a series of special provisions dealing with such particular matters as bread delivery, hairdressing and milk vending contracts and taxi-cab, motor omnibus, private hire car and like contracts[110]. However, the more general language of s 88F was quickly applied to a wider variety of cases. There was no common element. The cases ranged from the sale of a transport business[111] to the sale of a ladies' boutique[112]. They extended to contracts with entertainers[113].

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107 Such as the requirement that s 106 of the IR Act "extends only to such aspects of a contract as *closely relate to* the performance of work in an industry": see (2004) 60 NSWLR 558 at 580 [83] (emphasis added).

108 (1970) 127 CLR 157 at 164.

109 By the *Industrial Arbitration (Amendment) Act* 1959 (NSW), s 8(b).

110 IA Act, s 88E(1), enacted *Industrial Arbitration (Amendment) Act* 1959 (NSW), s 8(b).

111 *Harris v Hammon (No 2)* (1995) 59 IR 232.

112 *Production Spray Painting* (1991) 27 NSWLR 644.

113 *In re Becker and Harry M Miller Attractions Pty Ltd (No 2)* [1972] AR (NSW) 298.

115 The provisions of s 88F, and its successors, are unique to New South Wales[114]. A more limited jurisdiction exists in Queensland[115]. A still narrower jurisdiction has been enacted by the Federal Parliament, introducing an unfair contracts regime into federal law, but applicable only to certain independent contractors[116].

116 *The new economy*: Since the passage of the progenitors to s 106(1) of the IR Act, two important developments have occurred. They combine to make it undesirable, as a matter of legal policy, for this Court to adopt a narrower view about the jurisdiction of the Commission than was expressed in *Brown*, *Stevenson* and *Caltex*.

117 These considerations relate to features of what has been called the "new economy"[117]. Professor McCallum has pointed out that such features include the increasing number of cases involving employment and quasi-employment where part of the service expected must take place in "offshore situations"[118]. Whereas the old economy in Australia was substantially localised in nature (primary industry, manufacturing, mining and agriculture and government services), since 1980 a new economy has emerged involving offshore employment. This has resulted in closer integration of Australian employment contracts and arrangements with the global labour and capital markets. It has presented issues of jurisdiction, conflicts of laws and differing expectations that were not common features of earlier Australian employment arrangements.

118 As well, the general shift away from award-based regulation of employment conditions has encouraged statutory and extra-statutory enterprise agreements that necessitate consideration of legal rights quite different from those presented by traditional employment concerns. If industrial tribunals, such as the Commission, are to remain relevant to the changing character of employment, it may be expected that they will have to alter the focus of their attention from awards to agreements. This may sometimes extend to agreements outside an industrial instrument. Contracts that fall within the definition of an

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114 McCallum, "Conflicts of Laws and Labour Law in the New Economy", (2003) 16 *Australian Journal of Labour Law* 50 at 55-56.

115 *Industrial Relations Act* 1999 (Q), s 276.

116 *Workplace Relations Act* 1996 (Cth), ss 832-834.

117 McCallum, "Conflicts of Laws and Labour Law in the New Economy", (2003) 16 *Australian Journal of Labour Law* 50.

118 McCallum, "Conflicts of Laws and Labour Law in the New Economy", (2003) 16 *Australian Journal of Labour Law* 50 at 66.

"industrial instrument" lie outside a "contract" to which s 106 of the IR Act applies[119]. But the "contract or arrangement, or any related condition or collateral arrangement", such as Mr Fish relied on in this case, was not an "industrial instrument". It was therefore typical of the kind of "contract" found in the "new economy" for which the provision of industrial protection and scrutiny by the Commission is far from surprising.

119 *Adhering to authority*: In these circumstances, far from becoming of less relevance to contemporary industrial regulation, a provision such as s 106(1) of the IR Act is likely to become of much greater relevance. The jurisdiction under that provision (and its predecessors) has expanded over time with changing of employment practices. The two features that I have mentioned are reasons for this Court to adhere to the broad interpretation of the jurisdiction and powers of the Commission that it has adopted in the past. They afford reasons to resist the attempt to find artificial limitations in the word "whereby", in order to impose a new and hitherto rejected constraint that will deny people in contemporary employment relationships the facility of review of those relationships and of the varied conditions and arrangements related or collateral to them.

Consistency with other remedies

120 *Current similar remedies*: The existence of other remedies cannot control or limit the jurisdiction of the Commission under a provision such as s 106(1) of the IR Act[120]. If, by reference to the existence of other remedies, Handley JA meant to suggest otherwise, I would respectfully disagree with him[121].

121 *Distinguishing other remedies*: Nothing in the other remedies for what might be called "unjust contracts" casts any doubt on the construction of the IR Act urged for Mr Fish. As to the *Contracts Review Act* 1980 (NSW), it is made clear in that Act that its provisions do not limit or restrict the operation "of any other law providing for relief against unjust contracts"[122]. Moreover, no cause of action under the *Contracts Review Act* is available to Mr Fish. Pursuant to s 6(2) of that Act, relief may not be granted in relation to a contract entered into "in the course of or for the purpose of a trade, business or profession" carried out, or proposed to be carried out, by an applicant for relief. The *Contracts Review Act* does not apply to a contract of service, to the extent that it includes provisions in

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119 IR Act, s 105, definition of "contract".

120 *Walker v Industrial Court of New South Wales* (1994) 53 IR 121 at 134.

121 (2004) 60 NSWLR 558 at 598 [170]-[171].

122 *Contracts Review Act* 1980 (NSW), s 22.

conformity with an award[123]. This provision, and the "ancillary relief"[124] that may be afforded under the *Contracts Review Act*, suggest a consistency of treatment of "unfair contracts", but by a process initiated in different jurisdictions, having regard to the "employment" character of the "contract" impugned.

122 So far as the *Fair Trading Act* 1987 (NSW) is concerned, whilst a remedy for misleading or deceptive conduct in trade or commerce might have been available to Mr Fish under that Act[125] (or equivalent provisions of the *Trade Practices Act* 1974 (Cth)), the remedy for "unconscionable" conduct under such provisions is limited to "consumers"[126]. Moreover, the requirements of unconscionability are narrower than the broader concept of "unfair contracts" contained in s 106 of the IR Act[127]. It is worth observing that, if the *Fair Trading Act* applied to the present case, the remedies available under that Act extend to "an order declaring the whole or any part of a contract … *or of a collateral arrangement relating to such a contract*, to be void" and "an order varying such a contract *or arrangement*"[128]. To this extent, there is consistency in the broad approach adopted by Parliament.

123 It is not uncommon for a party to enjoy alternative legal rights. It is then left to that party to select the rights most applicable and to pursue them in the jurisdiction relevant for that purpose. Given the close evidentiary integration of the Employment Contract and the Share Sale Agreement in the present case, it is unsurprising, in the light of past authority, that Mr Fish and Nisha chose the Commission. In doing so, they invoked a statutory jurisdiction which, in common with other laws, addresses unjust, unconscionable, unfair or harsh contracts and affords remedies extending to relief from related conditions, arrangements, understandings and collateral contracts. Measured against analogous federal and State laws[129], the scope of s 106 of the IR Act is not surprising. Least of all is it so given the mischief at which it is targeted.

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123 *Contracts Review Act* 1980 (NSW), s 21(1).

124 *Contracts Review Act* 1980 (NSW), s 8, Sched 1.

125 *Fair Trading Act* 1987 (NSW), s 42.

126 *Fair Trading Act* 1987 (NSW), s 43: see the definition of "consumer" in s 5.

127 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

128 *Fair Trading Act* 1987 (NSW), s 72(5) (emphasis added).

129 See above these reasons at [115].

Endorsement of the Commission's powers

124 Since s 88F of the IA Act was enacted some forty-seven years ago, Parliament, far from deleting the provision or reducing its scope, has enacted several enhancements[130]. The same can be said of the language in which the privative provision has been expressed[131].

125 In elucidating the meaning of legislation, it is relevant for a court to have regard both to its legal and historical context[132]. It used to be said that courts would infer from later amendment or re-enactment of statutory provisions that Parliament had accepted the construction placed on such provisions by the courts[133]. Such assumptions are now commonly treated as legal fictions. The assumption of close parliamentary scrutiny of all judicial decisions would stretch the legal imagination too far.

126 On the other hand, the persistence of the remedial and privative provisions in the IR Act and its predecessors (indeed the strengthening of the legislation in later provisions) suggests that, in this field at least, some attention has been paid by the State Parliament to some of the decisions of the courts. If it had been the purpose of Parliament to cut back in horror the broad jurisdiction for relief against unfair contracts provided to the Commission, as declared by the courts, one might have expected to see this in at least one of the two most recent major revisions of the IR Act. Particularly is this so, because each of the later revisions, in 1991 and 1996, were the products of widespread reform adopted by State governments of differing political persuasion, giving effect to differing policies in the politically sensitive area of employment regulation.

127 Had it been an objective of the New South Wales Parliament to limit or redefine and restrict the Commission's jurisdiction and powers or, in this regard, to submit the Commission to a more active supervision by the general courts, it

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130 1991 Act, s 275; IR Act, s 106.

131 IA Act, s 84(1); 1991 Act, s 301(1); IR Act, s 179.

132 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 280 [11].

133 *Dun v Dun* (1959) 100 CLR 361 at 373; [1959] AC 272 at 292 (PC); *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106; *The Royal Court Derby Porcelain Co Ltd v Russell* [1949] 2 KB 417 at 429 per Denning LJ; cf *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

would be reasonable to expect that such amendments would have been adopted or at least presented to Parliament. On the contrary, succeeding Parliaments enacted a steady enhancement of the jurisdiction and powers of the Commission and its predecessors. They endorsed an enlargement of the privative provision, designed to protect such decisions, and the rights of litigants, from disturbance by the general courts of the State.

128 The Minister's Second Reading Speech to the 1996 Bill that became the IR Act made express reference to the decision of the Court of Appeal in *Walker v Industrial Court of New South Wales*[134]. The Minister affirmed the purpose of the government "to give legislative direction broadly consistent with the comments about the scope of the section made [in that case] … to [the] effect [of] the intended broad sweep of the [Commission's] jurisdiction"[135]. In the Court of Appeal in *Walker*[136], I referred to the repeated emphasis placed by this Court, and by the Court of Appeal, on the "very wide discretion conferred by s 88F [of the IA Act]". By reference to *Stevenson*[137], I said that "[t]here is no warrant for confining this very large power, or for narrowing the circumstances of its exercise, except as the statute provides"[138].

129 The Minister, in supporting the provisions that are now under this Court's scrutiny, made it clear to Parliament that no retreat from the broad jurisdiction and ample remedies was envisaged. The Explanatory Note to the 1996 Bill makes plain the purpose to "continue[] the existing ... jurisdiction"[139]. The objects of the IR Act, set out in s 3, are not confined to "industrial relations" traditionally conceived. That expression would, in any case, have a very wide application, having regard to the IR Act's definition of "industry". The jurisdiction and powers extend to "regulation of employment" and the wider objective of "workplace reform and … relations"[140].

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134 (1994) 53 IR 121.

135 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 1995 at 3850 by the Hon J W Shaw.

136 (1994) 53 IR 121 at 135.

137 (1977) 136 CLR 190 at 195, 199, 201.

138 (1994) 53 IR 121 at 135.

139 Explanatory Note to the Industrial Relations Bill 1996 at 6.

140 IR Act, s 3.

130 *Conclusion from history*: The conclusion to be derived from the history of the legislation, its repeated re-enactment in increasingly ample terms, and the parallel enlargement of the privative clause, is that the New South Wales Parliament was pleased with its handiwork.

131 It might offend some legal purists to see "commercial arrangements" whereby a person performs work in any industry decided by the specialist Commission, according to criteria broadly expressed and armed with considerable powers to afford final relief. However, Australia's constitutional federal arrangements permit legislative experimentation[141]. Indeed, this is supposed to be one of the advantages of the federal system of government. Provisions akin to s 88F of the IA Act have already sprung up in federal law and the law of another State[142]. No question as to the constitutional validity of the present legislation has been raised. The legislative history suggests a duty of the courts to give effect to s 106(1), according to the "broad sweep" of its language. It does not support the attempt of the Court of Appeal, or now the majority of this Court, to introduce belated restrictions by burdening the word "whereby" with a meaning hitherto rejected.

Prohibition: privative provision and respect for the Commission

132 *The appellants' submission*: The appellants accepted that, in certain very limited circumstances, the Court of Appeal, as part of the Supreme Court of New South Wales, has jurisdiction to make an order addressed to the Commission in the nature of prohibition[143]. They also accepted that, for the purposes of the then applicable provisions of the privative clause in the IR Act[144], the Commission had not, at the time of the pre-emptive application to the Court of Appeal, made any "decision or purported decision".

133 A number of provisions of the IR Act were called to notice to support a submission that the Court of Appeal should have refrained from making the order for prohibition that it did.

134 *The relevant legislation*: Jurisdiction under Pt 9 of Ch 2 ("Unfair contracts") of the IR Act is exercisable only by the Commission in Court

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141 Cf *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152 [3].

142 See above these reasons at [115].

143 *Supreme Court Act* 1970 (NSW), s 69.

144 IR Act, s 179.

Session[145]. By s 152(1), the Commission in Court Session "is established ... as a superior court of record". By s 152(2), Pt 9 of the *Constitution Act* 1902 (NSW) is altered to provide that "the Commission in Court Session is a court of equivalent status to the Supreme Court and the Land and Environment Court". By s 175 of the IR Act, it is then provided:

> "The Commission may, for the purpose of exercising its functions in connection with a matter before it, determine any question concerning the interpretation, application or operation of any relevant law or instrument (including the industrial relations legislation and any industrial instrument)."

135 In addition to the express power afforded to the Commission to interpret the IR Act under which it is constituted (and hence to decide whether it has jurisdiction under that Act in proceedings commenced before it), it is inherent in the fact that it is a superior court of record that it has the jurisdiction and power to determine the existence of facts upon which its jurisdiction depends[146].

136 *Error of the Court of Appeal*: The Court of Appeal held that the statutory scheme for the immunity of "decisions" of the Commission was irrelevant, except to support the availability of a writ in the nature of prohibition[147]. The Court of Appeal came to this conclusion substantially by tracing the history of the successive privative provisions in the industrial relations legislation of New South Wales from the *Industrial Arbitration Act* 1901 (NSW)[148] through variations[149] up to the provisions enacted in the 1991 Act[150] and in the IR Act[151].

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145 IR Act, s 153(1)(c).

146 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 374, 389; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 648; *DMW v CGW* (1982) 151 CLR 491 at 509-510; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215-216, 223; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375, 386-387.

147 (2004) 60 NSWLR 558 at 593 [140], 595 [145]. See reasons of Heydon J at [173]-[174].

148 Section 32: see (2004) 60 NSWLR 558 at 583 [101].

149 *Industrial Disputes Act* 1908 (NSW), s 52; *Industrial Arbitration Act* 1912 (NSW), s 58(1); IA Act, s 84(1).

150 Section 301.

151 Section 179.

An important difference between the last two such provisions was that, whereas s 301(3) of the 1991 Act preserved the operation of s 48 of the *Supreme Court Act* 1970 (NSW)[152], no such special provision, whether for the Commission or for the Commission in Court Session in particular, survived into s 179 of the IR Act.

137 This notwithstanding, the Court of Appeal found a gap in the expression of s 179(3) of the IR Act, with its reference to the extension of the section "to any decision or purported decision of the Commission"[153]. On this basis, giving that expression a strict construction, the Court of Appeal found that it did not apply where, as in this case, no "decision or purported decision" of the Commission had been made[154].

138 Self-evidently, this interpretation placed a premium on the pre-emption of any "decision" by the Commission that would enliven s 179 of the IR Act. This interpretation, if correct, would encourage the course of events that has happened in the present case. This involved the filing of the parties' process and the complete failure of the respondents, or any of them, to raise an objection to the jurisdiction of the Commission before the Court Session itself, inferentially for fear that this might give rise to a "decision" activating the privative clause.

139 Prohibition, certainly where it is sought against a superior court, should not be granted until after that court has first had the opportunity to determine whether or not it has jurisdiction[155]. It was this principle that led to a consistent earlier line of authority in the New South Wales Court of Appeal holding, correctly in my view, that relief in the nature of prohibition would be refused unless the jurisdictional objection had first been advanced and determined before the Commission[156].

140 The Court of Appeal in the present case regarded that authority as having somehow been over-ridden by the inclusion in s 179 of the IR Act of an extension of the privative clause to "purported decisions"[157]. In the face of that

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152 Referring to the issue of proceedings in the nature of the prerogative writs, relevantly to the Industrial Relations Commission or a member of that Commission: see *Supreme Court Act* 1970 (NSW), s 48(1)(a)(ii) and (2)(c).

153 See reasons of Heydon J at [174].

154 (2004) 60 NSWLR 558 at 589 [125], 600-601 [183].

155 *Ross-Jones* (1984) 156 CLR 185 at 216, 219, 222-223.

156 See, eg, *Ultra Tune (Aust) Pty Ltd v Swann* (1983) 8 IR 122; *Maltais v Industrial Commission (NSW)* (1986) 14 IR 367.

157 (2004) 60 NSWLR 558 at 592 [138].

extension, instead of drawing the inference that Parliament wished to *expand* the immunity of the Commission from supervisory orders, it inferred that such orders might be issued, so long as the applicant for them moved with pre-emptive speed. In this way the terms of the amended provisions of s 179 were stood on their head to *contract* the jurisdiction and powers of the Commission. Given the history, this was a surprising outcome indeed.

141 *Conclusion: erroneous intervention*: The Court of Appeal's circumvention of s 179 was wrong in principle. It amounted to a thinly veiled frustration of the will of the State Parliament. The Commission should first have had the opportunity of discharging the jurisdiction and powers entrusted to it by Parliament[158]. That jurisdiction clearly included the determination of whether or not the Commission had jurisdiction. The discretionary nature of the grant of a writ in the nature of prohibition[159] should have persuaded the Court of Appeal to refuse such a writ where the consequence of issuing it was to interrupt the process of the Commission and cut across the object of the privative provision in the IR Act.

142 Many considerations support this view, quite apart from the language of s 179 of the IR Act and its history. It is scarcely seemly to have a superior court (then the Commission in Court Session), enjoying the same statutory status as the Supreme Court, prohibited by the Supreme Court from even deciding its own jurisdiction. Least of all is this satisfactory in a case where, as here (and typically), the decision has to be made by the Supreme Court on abbreviated materials and without giving the other superior court the opportunity first to come to its own conclusion. The objection to pre-emption of this kind is not only to its lack of seemliness and comity. It is also wrong in principle. It portrays a want of proper respect to a superior court created by an Australian Parliament acting within its powers[160]. If courts do not accord such respect to each other, they can scarcely complain when outsiders follow suit.

143 Underpinning the reasoning leading to the course followed by the Court of Appeal (and now by the majority in this Court) is a belief that, whatever Parliament has enacted and said in respect of the status of the Commission in Court Session, its judges do not in reality have sufficient experience to decide contested questions about "commercial contracts"[161]. This is not a completely

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158 See reasons of Heydon J at [162].

159 Cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 101-106 [43]-[52], 136-137 [146]-[148], 144 [172].

160 See reasons of Heydon J at [177].

161 See, esp, (2004) 60 NSWLR 558 at 595 [151]. See reasons of Heydon J at [178].

novel concern. In reverse, general courts have sometimes confessed to the embarrassment they felt in deciding issues relevant to traditional industrial disputes with which industrial tribunals are more familiar[162].

144 However, where Parliament has enacted, re-enacted, expanded and confirmed the broad stand-alone jurisdiction committed to the Commission, now found in s 106 of the IR Act, it is not, in my view, lawful for a supervisory court to prevent that body from determining the existence or absence of its own jurisdiction. Least of all may this happen where the body is, in law, a superior court and where the decision has to be made on imperfect materials and in advance of a trial. The result of what has occurred is that the specialist body, afforded jurisdiction by a statute, the validity of which is unchallenged, is denied the chance to determine whether or not that jurisdiction attaches. Moreover, the language in which the powers of the Commission are cast calls forth the wisdom and experience of judges versed in employment and industrial questions including as those questions now manifest themselves.

145 The suggestion (if that is what lies behind this exceptional approach) that "commercial contracts" fall to be decided by reference to "commercial law" may be the very reason why this jurisdiction has been confirmed in the Commission and why the privative clause has been enacted, and repeatedly reinforced[163]. Perhaps Parliament was determined, in the words of Sheldon J in *Davies*[164], to make sure that the "armour" of "clever drafting" proved penetrable. On the face of things, Parliament has concluded that this is more likely to happen in the Commission than in the general courts. Obedience under the Constitution to a valid law of the State Parliament suggests that the Court of Appeal should have observed the principle of restraint to which it referred but to which it gave no effect[165]. So should this Court[166].

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162 See, eg, Lord Scarman's remarks in *Express Newspapers Ltd v McShane* [1980] AC 672 at 694 noted Murphy and Rawlings, "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980", (1981) 44 *Modern Law Review* 617 at 628.

163 Cf reasons of Heydon J at [179].

164 See above these reasons at [97].

165 (2004) 60 NSWLR 558 at 591-592 [136] and cases there cited.

166 See *Metropolitan Water Sewerage and Drainage Board v The Judges of the Industrial Commission of New South Wales* [1981] AR (NSW) 305 at 310 per Moffitt P, cited with approval by Heydon J at [171].

146 I would be the first to defend the Court of Appeal in the provision of a writ in the nature of prohibition against fundamental error on the part of the Commission that led it to exceed or neglect its jurisdiction, and this notwithstanding s 179 of the IR Act[167]. The statutory inclusion of reference to a "purported decision" could not protect from supervisory orders of the highest court of the State action by the Commission that did not reach the fundamental requirements contemplated by Parliament in protecting "decisions" and also "purported decisions". The rule of law, which is an acknowledged implication of the Australian Constitution, imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that basal standard.

147 This said, at least in State jurisdiction, valid privative provisions, such as s 179 of the IR Act, must be given effect[168]. What happened in the present case, to achieve the supposed advantages of pre-emption, was irregular. It was contrary to principle and unwarranted in law. As a result, Mr Fish and Nisha have been deprived, without proper cause, of the entitlement which the IR Act conferred on them, certainly in the first instance, to have the Commission decide whether it enjoyed the jurisdiction and power to determine the matter brought to the Commission in Court Session for its decision.

148 The Court of Appeal erred in depriving Mr Fish and Nisha of that entitlement. In particular, it erred in assuming that the Commission, if it proceeded to a decision, would make an erroneous determination of that legal question. At least as a matter of discretion, therefore, the Court of Appeal should have denied the writ of prohibition. The figleaf of urgency propounded to protect the utility of pre-emption did not cover the serious departure from legal principle involved in preventing the Commission in Court Session from performing a basic function of its jurisdiction and powers. It did not condone frustrating Mr Fish and Nisha from securing the exercise of legal rights accorded to them by the State Parliament acting within constitutional powers that have not been disputed.

The false fear over constitutional appeals

149 *An irrelevant consideration*: In the joint reasons, it is suggested that a ground supporting the interpretation of "whereby" in s 106 of the IR Act favoured in those reasons, is that to decide otherwise would have the consequence of placing the decision in the present and like cases finally in the Commission and thus outside the "jurisdiction of the Supreme Court of that State

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167 *Plaintiff S157/2002* (2003) 211 CLR 476 at 506 [76].

168 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 634.

over matters of a kind ordinarily dealt with by the State Supreme Courts"[169]. On this footing, the exclusion of a right of appeal to this Court under s 73 of the Constitution is postulated as a reason for supporting a narrow reading of the privative clause in the IR Act and the restricted meaning of s 106.

150 Whilst I accept that constitutional consequences are proper matters to take into account in deciding contested questions about the common law[170] and legislation[171], such considerations are irrelevant to the present appeal.

151 *Inapplicability of the concern*: The Parliament of New South Wales has, in any case, in the *Industrial Relations Amendment Act* 2005 (NSW), now rendered this argument redundant. That Act has made it even clearer (if that were possible) that s 179 applies to pre-emptive challenges to jurisdiction[172]. As the possibility of appeal to the Supreme Court in a case such as the present has long since been excluded, the consideration of the desirability of an appeal from that Court under the Constitution does not assist the respondents. Assuming, therefore, the validity of the amending legislation, artificial constructions of the statutory language are not called for. Instead, other remedies should be examined. There are no insurmountable barriers to such remedies if the parliamentary will is there.

152 In my view s 73 of the Constitution does not treat the "appeals" identified in that section as an exclusive list of the "appeals" that may be brought to this Court. There is probably no more lamentable illustration of the misuse of the *expressio unius* rule than this. It is not warranted by the language of s 73. Nor is it justified by this Court's past practice. If the New South Wales Parliament wished to provide for appeals to this Court from what is now the Industrial Court of New South Wales it could lawfully do so.

153 As I pointed out in *Ruhani v Director of Police*[173], there have been many exceptions over the years by which "appeals" to this Court have been permitted and decided, although not brought from any of the "courts" expressly mentioned in s 73. The most important exception concerns appeals from the Supreme

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169 Joint reasons at [33].

170 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562; *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

171 See, eg, *Chief Executive Officer of Customs v El Hajje* (2005) 79 ALJR 1289 at 1301-1303 [59]-[70]; 218 ALR 457 at 473-476.

172 See above these reasons at [90] fn 74.

173 (2005) 79 ALJR 1431 at 1463 [173]; 219 ALR 199 at 240.

Courts of the Australian Territories. Unless, derivatively, such courts are "federal courts" (a view that has been denied, at least when those courts were exercising the judicial power of the Territory concerned[174]), Territory courts could not fall within the categories expressly stated in s 73[175]. Either s 73 contains an exhaustive list or it does not. So long as Territory appeals continue to come to this Court (or to any other federal court within Ch III) they deny the postulate of exhaustiveness[176].

154 The recent confirmation of this Court's jurisdiction and power to determine what are described, and are in truth, "appeals" from the Supreme Court of Nauru[177] is another illustration that legislation may, if so desired, afford a new facility of appeals from State courts that did not exist at the time of Federation.

155 Recently, it was held that the former Commission in Court Session (now the Industrial Court[178]) was a "court of a State" to which a matter might be remitted by this Court, pursuant to s 44 of the *Judiciary Act* 1903 (Cth)[179]. The difficulties of providing a link to this Court have been overstated. But narrow decisions in the general courts, such as the present, tend to confirm the opinions of legislators that severance from the general courts is necessary. This is so to forestall the efforts of those courts to frustrate the parliamentary will in legal innovations such as ss 105 and 106 of the IR Act. It used to be said that the Privy Council's jurisdiction in s 74 of the Constitution was entrenched by the British authorities to preserve that Court's jurisdiction and powers to protect British commercial interests from the decisions of Australian judges[180]. It has not previously been said that Australian commercial interests must be protected from

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174 *Northern Territory v GPAO* (1999) 196 CLR 553 at 615-616 [168], 616-617 [170].

175 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 438, 440, cf at 446; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598, 604, 609, 614, 619, 625.

176 *Ruhani* (2005) 79 ALJR 1431 at 1465 [189]; 219 ALR 199 at 244.

177 In *Ruhani* (2005) 79 ALJR 1431; 219 ALR 199.

178 *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 4.

179 *Veta Ltd v Evans* [2003] HCATrans 252 at 1384-1465 per McHugh J.

180 Brennan, "The Privy Council and the Constitution", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) 312 at 313 citing de Garis, "The Colonial Office and the Commonwealth Constitution Bill", in Martin (ed), *Essays in Australian Federation*, (1969) 94 at 105; La Nauze, *The Making of the Australian Constitution*, (1972) at 261.

the decisions of Australian judges in superior courts with a status equivalent to that of the State Supreme Court.

156 *Conclusion: an immaterial factor*: The invocation of a danger of cases falling outside an appeal to this Court is ultimately immaterial to the interpretation of the IR Act. If such an appeal is desired, there would be legislative power, in the Federal and State Parliaments, acting together, to provide for it[181]. If it is not desired, subject to constitutional elaborations not explored in this case, the exclusion of an appeal might be achieved by clear State legislation. In this respect, the language of the present Act is clear.

Conclusion and orders

157 It follows that the Court of Appeal erred in issuing the order prohibiting the Commission "from taking any steps to further exercise, or purport to exercise, its power under s 106" of the IR Act with respect to the proceedings brought to the Commission by Mr Fish and Nisha and in ordering Mr Fish and Nisha to pay the costs of the Solution 6 Holdings interests.

158 Such orders frustrated a decision upon the detailed facts essential to the proper conclusion about jurisdiction; ignored the broad language and purpose of s 106 of the IR Act; were inconsistent with the past authority of this Court and the Privy Council on like provisions; overlooked the operation of the IR Act in the current employment context; were out of harmony with the approach suggested by similar legislation; denied respect to the Commission to decide its own jurisdiction in the first instance; and took into consideration immaterial matters, instead of observing the valid and applicable privative provision re-enacted and strengthened by the New South Wales Parliament.

159 To give effect to this conclusion, this Court should allow the appeal and set aside the orders of the Court of Appeal of the Supreme Court of New South Wales. In place of those orders, this Court should order that the first to fourth respondents' summons in the Court of Appeal be dismissed. Those respondents should pay the appellants' costs both in this Court and in the Court of Appeal. The proceedings should be remitted to the Industrial Court of New South Wales for trial.

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181 It could require that *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 be over-ruled and the interpretation upheld in *Gould v Brown* (1998) 193 CLR 346 restored.

160 HEYDON J. The Court of Appeal is part of the Supreme Court of New South Wales. The Industrial Relations Commission of New South Wales in Court Session is a court of equivalent status to the Supreme Court[182]. In this case the Court of Appeal exercised its discretion in favour of granting prohibition against the Commission from taking any steps in the proceedings[183]. It did so at a time when the Commission had not considered whether it had jurisdiction under s 106 of the *Industrial Relations Act* 1996 (NSW) ("the 1996 Act"), and when there was no real likelihood or danger that when it did consider that question it would act beyond jurisdiction. Was it right to do so?

The Court of Appeal's reasoning

161 It held that it was for three main reasons. First, it was entitled to grant prohibition where the defect in the Commission's jurisdiction was "patent", "clear" or "plain". Secondly, any principle restraining the grant of prohibition expressed in cases before 1996 had been weakened by s 179 of the 1996 Act. Thirdly, the Commission was not a true "specialist tribunal" of a kind to which a court with supervisory jurisdiction should defer.

Prohibition: a principle and an exception

162 *One principle.* In general, prohibition should not issue against a court or tribunal unless and until it has had an opportunity to consider its jurisdiction and has erroneously decided to exercise that jurisdiction[184]. That is particularly so where the court or tribunal is "a superior court of record" like the Federal Court of Australia[185], having almost exclusive original jurisdiction arising under

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182 Section 152(2) of the *Industrial Relations Act* 1996 (NSW) provides that for the purposes of Pt 9 of the *Constitution Act* 1902 (NSW) "the Commission in Court Session is a court of equivalent status to the Supreme Court". The power of the Supreme Court to grant judicial review is often exercised by a single judge. However, s 48(2)(c) of the *Supreme Court Act* 1970 (NSW) assigns proceedings for prohibition against the Commission to the Court of Appeal.

183 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558. The background circumstances are set out in other judgments.

184 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 219 per Brennan J, 222-223 per Deane J.

185 *Federal Court of Australia Act* 1976 (Cth), s 5(2).

specialised statutes like the *Trade Practices Act* 1974 (Cth), which raise complex issues of fact and law[186].

163 The role of the Commission in relation to s 106 of the 1996 Act is similar to the role of the Federal Court in relation to Pt IV of the *Trade Practices Act*. It too is established as "a superior court of record": s 152(1) of the 1996 Act. It too deals with specialised matters of legal and factual complexity. Its jurisdiction is totally exclusive. It too has a power – and a duty – to determine any question (including jurisdictional questions) concerning the interpretation, application or operation of any relevant law: s 175 of the 1996 Act.

164 *An exception.* One exception to the general principle just stated exists where the prosecutor has shown "a real likelihood or danger" of an order being made in excess of jurisdiction[187]. The Court of Appeal said that it was not necessary to rely on that exception in this case[188]. Indeed, no attempt to demonstrate the relevant likelihood or danger has been made. Hence, it is not necessary to decide whether that exception could ever justify the grant of prohibition by the Court of Appeal against the Commission, a superior court of equivalent status to the Supreme Court.

Patent, clear or plain defects

165 *The Court of Appeal's reasoning.* The first basis for the Court of Appeal's decision was that the summary of facts in the Amended Summons revealed that the Commission's lack of jurisdiction was "patent, plain or clear". The defect could be seen without examining any evidence. It could not be cured by evidence[189].

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186 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 127 per Mason J.

187 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119 per Dixon CJ, Williams, Webb and Fullagar JJ.

188 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [157] per Spigelman CJ (Mason P and Handley JA concurring).

189 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [152] and [154]-[158] per Spigelman CJ (Mason P and Handley JA concurring).

166 *The authorities relied on.* In relation to "patent" defects the Court of Appeal relied[190] on a statement by Brennan J[191] that prohibition issued as of course if the absence of jurisdiction was apparent – "patent" – on the face of the proceedings. However, Brennan J was speaking of, and cited cases dealing with, bodies not equivalent to courts created by statute as superior courts of record[192]. Cases about inferior courts are not relevant to whether a patent absence of jurisdiction in a superior court will attract prohibition from another superior court of equivalent status before the first court has decided the question of jurisdiction for itself.

167 In relation to "plain" defects the Court of Appeal relied[193] on a statement of Mason J[194]:

> "[I]t is desirable that the Federal Court should be permitted to exercise its jurisdiction without interference by this Court by way of grant of prohibition except in those instances where the matter in question *plainly* gives rise to an absence or excess of jurisdiction."

However, Mason J was speaking of intervention by the High Court in proceedings before the Federal Court. These are not courts of equivalent status like the Court of Appeal and the Commission.

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190 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [154]-[155] per Spigelman CJ (Mason P and Handley JA concurring).

191 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 218.

192 *Mayor of London v Cox* (1867) LR 2 HL 239 at 281 (Lord Mayor's Court); *Farquharson v Morgan* [1894] 1 QB 552 at 557 per Lopes LJ (County Court); *Yirrell v Yirrell* (1939) 62 CLR 287 at 297, 304, 306 and 310 (Children's Court); *Master Retailers Association of New South Wales v Shop Assistants Union of New South Wales* (1904) 2 CLR 94 at 98 (Arbitration Court described as "inferior Court").

193 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [154] per Spigelman CJ (Mason P and Handley JA concurring).

194 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 127 (emphasis added).

168 In relation to "clear" defects, the Court of Appeal relied[195] on a statement by Murphy J that while a writ may be issued by the High Court against the Federal Court before the Federal Court has concluded that it has jurisdiction, this should "usually be done only in a *clear* case"[196]. But Murphy J added:

> "... and even then a writ should not in general issue unless there is some reason to apprehend that the Federal Court will decide the question wrongly in circumstances where the party seeking the writ may be prejudiced."

The Court of Appeal also relied on a statement by Mahoney JA[197]. After saying that the Court of Appeal normally required final determination of the matter in the Commission before it could consider granting prerogative relief, he continued:

> "I do not mean by this that the court will or should require such a body to proceed with a final determination of the matter where, at an earlier stage, it is *clear* that there is jurisdictional error or a denial of natural justice."

However, he was speaking not of prohibition in particular, but of prerogative relief in general. That is, in his view the Court of Appeal should only intervene after the actual excess of jurisdiction had taken place, although it could do so before proceedings in the Commission had come to an end. When he said "it is clear that there is jurisdictional error", he did not mean "it is clear, before the Commission considers the matter, that any exercise of jurisdiction will be erroneous."

169 Another authority relied on[198] was *R v Gray; Ex parte Marsh*[199]. There, Brennan J said:

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195 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [154] per Spigelman CJ (Mason P and Handley JA concurring).

196 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 238 (emphasis added).

197 *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 at 519 (emphasis added).

198 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 596 [155] per Spigelman CJ (Mason P and Handley JA concurring).

199 (1985) 157 CLR 351 at 381-382.

> "A defect in jurisdiction appearing on the face of the application does not require evidence to establish it nor can evidence cure it. The defect in jurisdiction being apparent, prohibition may be granted to restrain an intended exercise of jurisdiction."

But this observation, supported by authority relating to inferior courts[200], and made in a case in which the High Court granted prohibition against the Federal Court, must be read subject to the qualifications which Brennan J stipulated in the earlier case of *R v Ross-Jones; Ex parte Green*[201]:

> "It is premature and unnecessary to invoke the jurisdiction of this Court to issue prohibition to a superior federal court on a ground which that court has not considered or been called on to consider even though an absence of jurisdiction appears on the face of the proceedings before it.
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> ... [I]t would be an extraordinary case where it is proper to invoke this Court's jurisdiction to issue prohibition directed to a superior federal court where that court had neither determined the issue on which its substantive jurisdiction depends nor appeared likely to exceed the true constitutional limits of its jurisdiction."

Neither condition, if applicable, was satisfied here.

170 *Evaluation.* In analysing the statements relied on, it is necessary to distinguish between the different contexts in which prohibition may lie. As the Court of Appeal said[202]:

> "Authorities on s 75(v) of the Constitution must be treated with care as that jurisdiction is not co-extensive with the common law supervisory jurisdiction of a superior court."

Some of these different contexts may be listed as follows:

(a) where a superior court seeks to control an inferior court;

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200 *Farquharson v Morgan* [1894] 1 QB 552 at 563 (County Court).

201 (1984) 156 CLR 185 at 219-220.

202 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 589 [129] per Spigelman CJ (Mason P and Handley JA concurring).

(b) where the High Court is asked to order prohibition pursuant to s 75(v) of the Constitution against an officer of the Commonwealth in a case involving a constitutional point;

(c) where the High Court is asked to order prohibition pursuant to s 75(v) of the Constitution against an officer of the Commonwealth in a case not involving a constitutional point;

(d) where the High Court is asked to order prohibition against a superior federal court of record, such as the Federal Court of Australia or the Family Court of Australia, in a case where the prosecutor has a right of appeal and no constitutional question is involved[203];

(e) where the Court of Appeal, a superior court of record, is asked to order prohibition against the Commission, another superior court of record of equivalent status, in litigation involving a specialised subject-matter.

171 Statements in cases dealing with one of these categories are not necessarily applicable in another. In particular, statements in cases dealing with any of the first four categories are not necessarily relevant to the fifth. There a traditional principle of restraint applied at least until 1996. It was put thus by Moffitt P[204]:

> "[I]t should only be in special circumstances and hence in rare cases that, in exercise of [the Court of Appeal's] discretion, it will be prepared, particularly against objection, to grant prerogative relief against the exercise of jurisdiction by the Industrial Commission before the exercise or professed exercise of jurisdiction has been exhausted in the Commission."

It has been said that among the "special circumstances" are urgency or manifest practicality[205]. The first to fourth respondents did not point to anything in the pre-1996 authorities about this traditional principle of restraint which suggested that in cases where the applicant for prohibition is the respondent before the Commission, one of the special circumstances exists where no more can be

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203 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375 per Mason J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 105-106 [50] per Gaudron and Gummow JJ.

204 *Metropolitan Water Sewerage and Drainage Board v The Judges of the Industrial Commission of New South Wales* [1981] AR (NSW) 305 at 310.

205 *Ballam v Higgins* (1986) 17 IR 131 at 132 per Kirby P.

shown than that the want of jurisdiction is patent, plain or clear even before the Commission begins to examine the question of its own jurisdiction[206].

172 The question is whether that aspect of the traditional principle applied in this case. The Court of Appeal said that it did not apply for two reasons. One depended on s 179. The other denied the Commission's specialist character in this case.

The role of s 179

173 *The Court of Appeal's reasoning.* There is no challenge to the Court of Appeal's holding that the Commission had not made a "decision" or "purported decision" so as to attract the direct operation of s 179[207]. However, the Court of Appeal saw another significance in s 179: that it narrowed Moffitt P's traditional "principle of restraint"[208]:

> "Although this Court must still be slow to intervene before a superior court like the Commission has had an opportunity to determine its own jurisdiction, the principle of restraint can no longer operate as it did before s 179 was enacted, at least with respect to matters that are not of an industrial character."

The appellants expressed difficulty in understanding why this was so. In any event, they submitted that it was an error of principle to treat s 179 as a factor favouring the grant of prohibition rather than pointing against it.

174 The reasoning must be understood before it can be criticised. It was as follows:

(a) A line of pre-1996 authority held that the precursors to s 179 gave protection from judicial review only to "decisions" or "determinations",

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206 McHugh JA, in an interlocutory ex tempore judgment, left open the question of prohibition being granted to a stranger where the jurisdictional facts are not in dispute: *Ballam v Higgins* (1986) 17 IR 131 at 133. The first to fourth respondents here are, of course, not strangers to the proceedings in the Commission.

207 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 589 [125] per Spigelman CJ (Mason P and Handley JA concurring).

208 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 595 [145] per Spigelman CJ (Mason P and Handley JA concurring).

but not to decisions in excess of jurisdiction, for these were not true "decisions" and could therefore be challenged[209].

(b) Before the introduction of s 179 in 1996, it was unnecessary for the Court of Appeal to grant prerogative relief before the Commission had exceeded its jurisdiction, because it was open to the Court of Appeal to grant prerogative relief after the Commission had completed its task and the Full Bench had determined any appeal[210].

(c) Indeed, a reason for refusing relief before jurisdictional error took place was that restraint in that respect rendered the Court's supervisory jurisdiction more efficacious[211].

(d) But after 1996, because s 179 applied to "purported decisions", it prevented the Court of Appeal from granting prerogative relief after the completion of the Commission and Full Bench proceedings in which jurisdictional errors had been made[212]. That made it more important to avoid the risk of them being made by granting prohibition at the very start of the proceedings, before the Commission reached any "decision" or "purported decision" at all. That in turn meant that there should be less restraint in ordering prohibition than before 1996.

(e) Hence, "the existence of a privative provision" – s 179 – "constitutes a reason for *not* refraining from the exercise of a supervisory jurisdiction"[213] by prohibition.

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209 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 584 [102] per Spigelman CJ (Mason P and Handley JA concurring).

210 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 592 [138] per Spigelman CJ, 600 [182] per Handley JA (Mason P concurring).

211 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 584 [103] and 593-595 [142]-[143] per Spigelman CJ (Mason P and Handley JA concurring).

212 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 592 [138] per Spigelman CJ, 600 [183] per Handley JA (Mason P concurring).

213 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 593 [140] per Spigelman CJ (Mason P and Handley JA concurring).

175 *Evaluation.* This reasoning contends that s 179 abolished to some extent the principles stated in the pre-1996 case law – in particular, relevantly to the present case, the principle that the Court of Appeal would not grant prohibition against the Commission examining the question of its jurisdiction even where it was clear that it lacked jurisdiction. The reasoning may have some force if it is assumed that the legislation is indifferent to whether judicial review of jurisdictional errors on the part of the Commission takes place. The difficulty is that the assumption is unsound. The 1996 Act is highly restrictive of judicial review. That is a key element in its scheme. Section 179 excludes all judicial review of any "decision" or "purported decision" to which it applies (apart from whatever is left open by the principles associated with *R v Hickman; Ex parte Fox and Clinton*[214]). Sections 187 and 188 provide that the only appeal from a decision of the Commission lies to a Full Bench of the Commission with leave. These provisions exclude the Court of Appeal from the role of correcting jurisdictional errors, along with all other errors which the Commission may make in particular proceedings.

176 The first to fourth respondents complained that, since most jurisdictional challenges are deferred until the trial, if there were restraint in granting prohibition before a ruling by the Commission, s 179 will make review very difficult once the Commission erroneously rejects a challenge. Respondents as a class may see this as harsh, but it is inherent in the legislative scheme. The legislative language gives no reason to suppose that although the legislative scheme reduces, almost to nil, the scope of judicial review for jurisdictional error after an error occurs, it increases the scope for review before an error occurs.

177 The self-denial repeatedly shown by the Court of Appeal in refusing to uphold challenges to the Commission's jurisdiction before proceedings there had finished is important background to s 179. It would be curious, against that background, to construe s 179 as widening capacity to challenge the Commission's jurisdiction in the Court of Appeal before the Commission had been asked to rule on that matter. Where the legislation has committed to the Commission the determination of questions about its own jurisdiction, there would be a lack of harmony in the legal regime if a court of equivalent status permitted itself readily to prevent the Commission from even beginning to fulfil its duty to decide on questions of jurisdiction. Hence, it cannot be said that the existence of s 179 is a reason to conclude that that restraint on the Court of Appeal's discretion to grant relief against jurisdictional error has been loosened. Rather, s 179 reinforces its continued existence.

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214 (1945) 70 CLR 598 at 615 per Dixon J.

The Commission as a specialist tribunal

178 *The Court of Appeal's reasoning.* The Court of Appeal's third reason for granting prohibition was as follows. Section 106 created an unconfined discretion not involving the clarity of a legal standard. It was difficult for lawyers to advise on. It was therefore difficult to settle disputes about it. The economic welfare of the community would be advanced if commercial parties were told early that relief under s 106 was not available on jurisdictional grounds. The Court of Appeal should therefore not refrain from exercising its jurisdiction to order prohibition unless there was a reason for doing so. No reason could be found in the contention that the Commission was a "specialist tribunal" whose expertise should be respected by a court with a supervisory jurisdiction: the members of the Commission had only limited experience of commerce or commercial law, a fact which would be relevant in commercial disputes like the present[215].

179 *Evaluation.* Comparing the experience of members of the Commission in commerce and commercial law with that of members of the Court of Appeal would be as invidious as comparing their respective experience in industrial matters and industrial law. Fortunately, it is not necessary to embark on those enterprises. The real issue is not which court has what experience, or which court ought to deal with what particular types of issue, but which court the legislation sets up as the court to deal with s 106 questions. Questions of whether s 106 relief ought to be granted can arise in entirely non-commercial contexts, but they can also arise if there is a commercial dimension to arrangements, related conditions and collateral arrangements whereby a person performs work in an industry. Similarly, questions about whether there is jurisdiction to grant s 106 relief can arise in mixed industrial/commercial contexts. The effect of the legislation is that the questions which s 106 poses – not only about remedy, but also about jurisdiction – have been committed by the legislature to the Commission rather than to the Supreme Court. The fact that a particular s 106 controversy is more "commercial" and less "industrial" than others is not a reason to depart from earlier Court of Appeal authority on its discretion to grant prohibition.

Conclusion

180 The majority reasons for judgment refer to two presumptions. One is that a legislature does not cut down the jurisdiction of the courts save to the extent that the legislation expressly so provides or necessarily implies. The other is that

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215 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 595 [145] and [147]-[151] per Spigelman CJ (Mason P and Handley JA concurring).

a State Parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution[216]. These presumptions are plainly rebutted by the 1996 Act. One effect of the legislative scheme is that since the legislature has entrusted the Commission with the duty of deciding whether it has jurisdiction, it should be allowed to fulfil that trust. Another is that while the Commission may err in deciding jurisdictional questions, only very limited challenges to those errors are possible[217]. Observers may not like s 106. Observers may not approve of legislation which creates an island within which the Commission is immune from having its decisions on jurisdiction reviewed by the Supreme Court and examined on appeal from that Court by this Court. Observers may think that the Supreme Court would handle some of the tasks which s 106 creates better than the Commission. The fact is that the legislation has committed those tasks to a particular court – the Commission. It is a court of equivalent status to the Supreme Court. The jurisdiction of the Court of Appeal to intervene against jurisdictional errors after they have been made has, since 1996, been very narrow. There is no reason to suppose that restrictions stated by the Court of Appeal in the pre-1996 cases on granting prohibition so as to preclude jurisdictional errors being made in the future have been liberalised or made subject to new exceptions. Thus, even where the answer to the question "Is there jurisdiction?" seems clear, the question remains one which the legislature has entrusted to the Commission. It remains one which the Commission must be permitted to examine for itself without any greater interference by the Court of Appeal than that permitted by Moffitt P's principle of restraint.

181 Under that principle, there will be "special circumstances" in which the Court of Appeal may grant prohibition against the Commission, before that Court even begins to carry out its duty to determine whether proceedings before it are within jurisdiction. But there are no special circumstances here.

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216 At [33].

217 As Pring J said, "there should not be that prolonged course of litigation which so often irritates and ruins litigants" in courts other than the Commission: *Bank of New South Wales v United Bank Officers' Association and The Court of Industrial Arbitration* (1921) 21 SR (NSW) 593 at 614, approved in *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 95 per Stephen, Mason, Aickin, Wilson and Brennan JJ.

An unargued issue

182 It was assumed in argument that the relevant fact on which the Commission's jurisdiction depended was whether there was a contract whereby a person performs work in an industry. That is, it was assumed that, in the words of Glass JA: "[T]he legislature intended that jurisdiction should be dependent upon the actual existence of such a contract as opposed to the Commission's determination or opinion that such a contract existed."[218] Glass JA thought that the correctness of this assumption was "at least arguable" in relation to the precursor to s 106 which was then in force. However, since the matter was not argued in the present appeal, nothing need be said about it.

Other issues

183 It is unnecessary to deal with the other issues debated.

Orders

184 The appeal should be allowed; the orders of the Court of Appeal should be set aside; and in lieu thereof there should be an order that the summons in the Court of Appeal be dismissed. The first to fourth respondents should pay the appellants' costs in both this Court and the Court of Appeal.

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218 *Metropolitan Water Sewerage and Drainage Board v The Judges of the Industrial Commission of New South Wales* [1981] AR (NSW) 305 at 308.

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