HIGH COURT OF AUSTRALIA

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

PETER JAMES BATTERHAM & ANOR APPELLANTS

AND

QSR LIMITED & ANOR RESPONDENTS

Batterham v QSR Limited [2006] HCA 23
18 May 2006
S207/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

R C Kenzie QC with M J Kimber SC for the appellants (instructed by Turner Freeman)

D E Grieve QC with J M Miller for the first respondent (instructed by Pryor Tzannes & Wallis)

Submitting appearance for the second respondent

CATCHWORDS

Batterham v QSR 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 – Option to acquire shares in company pursuant to an option deed – Option deed made as part reward to option holder as promoter of company – Application to Commission for orders declaring the option deed unfair, harsh, and unconscionable and contrary to the public interest, and orders varying the deed – Whether the option deed was a contract or arrangement according to which the first appellant performed work in any industry – Relevance of the fact that the work performed pre-dated the option deed.

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.

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 specialist subject-matter of disputes before the Commission.

Statutes – Privative clause – Industrial Relations Commission (NSW) – Whether privative provision applicable – Relevance of interlocutory decision of the Commission dismissing a motion by the respondent for pre-emptive relief.

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

Statutes – Construction – Interpretation – Composite phrase incorporating technical words – Extrinsic matters – Legislative history – Relevance of Parliament's purpose of successive re-enactment in increasingly ample terms.

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".

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

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ. In November 1999, QSR Ltd ("QSR") sought to raise capital to acquire the business and property interests of 41 KFC, or Kentucky Fried Chicken, stores in New South Wales from Tricon Global Restaurants Inc, the owner of the KFC brand. QSR's directors included the first appellant (Mr Peter James Batterham), Mr Steven Gillard and Mr Anthony Veale. Messrs Batterham, Gillard and Veale were the promoters of QSR.

2 The prospectus issued by QSR for its raising capital, by a public issue of shares, disclosed that the directors of QSR (including the three promoters) had been issued options at $0.01 each, exercisable at $0.50 between 15 February 2003 and 15 March 2003, to acquire shares in the company. The exercise of options was said to be conditional upon QSR meeting predefined performance criteria for the period up to 31 December 2002. In the prospectus those criteria were said to be that the company achieved the earnings per share, and the dividends per share, that had been forecast in the prospectus (forecasts for the financial years ending 30 June 2000 and 30 June 2001) and that the company achieved earnings, before interest, taxation, depreciation and amortisation (EBITDA) of at least 18 per cent of equity subscribed plus debt for the calendar years 2000, 2001 and 2002.

3 In the case of Mr Batterham, the terms on which options were issued were recorded in a deed made between QSR and Woodglint Pty Ltd ("Woodglint") and dated 2 November 1999 (the day before QSR lodged its prospectus). The deed described the second condition for exercise of the options as achieving EBITDA in *each* of the calendar years 2000, 2001 and 2002 of 18 per cent of Average Funds Invested. The expression "Average Funds Invested" was defined in the deed, in respect of a calendar year, as "the average daily balance of Funds Invested during that calendar year".

4 Woodglint is alleged to have been trustee of a trust called the Batterham Retirement Trust. The second appellant (Maylord Equity Management Pty Ltd – "Maylord") is alleged to have replaced Woodglint as trustee of that trust in about September 2002.

5 As a director of QSR, Mr Batterham undertook various work for the company. He was involved in what was described as "the preparatory work necessary to achieve the public offering of equity" in QSR. He alleges that he established corporate systems for the use of QSR. For seven months between December 1999 and July 2000 Mr Batterham did some work for QSR in relation to its property holdings. In February 2000, he and two other directors who had been appointed after the capital raising (Mr Peter Copulos and Mr Stephen

Copulos) formed a property sub-committee of the board and were each paid for these duties.

6 By January 2000 interests associated with Peter and Stephen Copulos had significant shareholdings in QSR. By late 2001 or early 2002 they controlled the board. In April 2002, Mr Batterham resigned as a director of QSR. He contends that he was forced to resign.

7 QSR achieved EBITDA between 1 January 2000 and 31 December 2002 which, on average, exceeded 18 per cent of Average Funds Invested per annum. Its first two years were very successful; 2002 was less so. In 2002 it achieved EBITDA of 16.2 per cent. Thus, although QSR achieved an average EBITDA of 18 per cent of funds invested over the three year period from 2000 to 2002, it did not achieve EBITDA of 18 per cent in each of those three critical years.

8 Mr Batterham points to what he says is a disconformity between what was said in the prospectus about the option deed and the provision, in the option deed, that the stated level of return be achieved in *each* of the three nominated years. He has not, however, mounted any case for rectification of the option deed. Instead, he applied to the Industrial Relations Commission of New South Wales ("the Commission") under s 106 of the *Industrial Relations Act* 1996 (NSW) ("the Act") alleging that the option deed is unfair, harsh or unconscionable, or is contrary to the public interest. Mr Batterham's trust company, Maylord, was named as first applicant.

9 Mr Batterham and Maylord sought orders declaring the option deed to be unfair, harsh, unconscionable and contrary to the public interest and varying the deed. In addition, they sought orders that the contract, arrangement, condition, or collateral arrangement between Mr Batterham and QSR whereby the former performed work for QSR in an industry "including but not limited to the provision of management and administrative services to the property sub-committee of the Board" of QSR was unfair, harsh and unconscionable in that it permitted QSR to terminate the arrangement without reasonable notice or payment in lieu of reasonable notice. A further order was sought that the contract, arrangement, condition, or collateral arrangement be varied to include a term requiring 12 months' notice of termination.

10 QSR applied to the Commission for orders dismissing the proceedings for want of jurisdiction. This application was treated, in the Commission, as a "strike-out motion", and the parties argued it on the basis that the principles to be

applied were those stated by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[1] as applying to the summary determination of proceedings. Peterson J refused to dismiss the proceedings, holding[2] that QSR had "not established in the overwhelming way necessary at an interlocutory stage that the summons is beyond the reach of the jurisdiction of the Commission".

11 QSR then applied to the Court of Appeal of New South Wales for prohibition directed to the Commission, and certiorari removing the proceedings pending in the Commission into the Court of Appeal for the purpose of dismissing the proceedings. QSR also sought a declaration that s 179 of the Act (the privative clause) is invalid. By majority, the Court of Appeal (Mason P and Handley JA; Spigelman CJ dissenting) ordered[3] that the Commission be prohibited from hearing and determining the proceedings instituted in the Commission in respect of the option deed "except insofar as those proceedings may be based on a contract [or] arrangement whereby the person performed work in an industry which came into existence after the incorporation of [QSR] and before the execution of the Option Deed". Although argument was directed to the question raised about the validity of the privative clause, no order was made about that issue.

12 Mr Batterham and Maylord, by special leave, now appeal to this Court. QSR did not cross-appeal seeking some wider form of order than that made by the Court of Appeal. No question about the validity of the privative provision was argued. The appeal by Mr Batterham and Maylord was heard at the same time as the appeals in *Fish v Solution 6 Holdings Ltd*[4] and *Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session*[5].

13 The relevant provisions of the Act, and their history, are set out in the reasons given in *Fish v Solution 6 Holdings Ltd*. Those matters need not be

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1 (1964) 112 CLR 125 at 129.

2 *Maylord Equity Management Pty Ltd v QSR Ltd* [2003] NSWIRComm 366 at [39].

3 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368.

4 [2006] HCA 22.

5 [2006] HCA 24.

repeated here. As explained in *Fish v Solution 6 Holdings Ltd*[6], to decide whether the Commission had jurisdiction to make the orders which the appellants seek, it is necessary first to identify whether Mr Batterham performs (or in this case, did perform) work in any industry. (It was not argued that anything turns on the fact that Mr Batterham was no longer performing the relevant work when he applied to the Commission.) Having identified the work that Mr Batterham performed, the next inquiry is what was the contract or arrangement (and any related condition or collateral arrangement) according to which (or in fulfilment of which, or in consequence of which) that work was performed? It is only *that* contract or arrangement which the Commission may declare void or vary.

14 It not being submitted that the Court of Appeal should have made a wider form of order than it did, the particular question that arises in the appeal to this Court is whether the option deed was a contract or arrangement according to which Mr Batterham performed work in any industry.

15 In the Commission, in the Court of Appeal, and again in this Court, the appellants accepted that the option deed was not an agreement whereby Mr Batterham had performed work in an industry. Rather, their submission, both here and below, was that the option deed "constituted either part of the remuneration for work performed under a relevant contract or arrangement or was collateral to an arrangement for the performance of work".

16 The second part of that submission (that the option deed was collateral to an arrangement for the performance of work) is an argument that depended upon first identifying whether contractual stipulations (or other arrangements) can be described as related, or collateral, one to another. Then, so long as one or more of those stipulations or arrangements concerns the performance of work in an industry, the submission asserts that the Commission has jurisdiction to avoid or vary any element of the related stipulations or arrangements. For the reasons given in *Fish v Solution 6 Holdings Ltd*, that inverts the proper order of inquiry about the application of s 106. This aspect of the appellants' submissions should be rejected.

17 The first part of the appellants' argument (that the option deed constituted part of the remuneration for work performed under a relevant contract or arrangement) requires more detailed examination. It will be recalled that the critical statutory phrase is "any contract whereby a person performs work". The

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6 [2006] HCA 22 at [18].

work to which the appellants point in this case was the work the promoters, and Mr Batterham in particular, performed in first negotiating, and then carrying into effect, the transaction by which QSR acquired the KFC stores. That work was said to include the work of promoting, incorporating, and raising capital for, QSR, as well as the work of negotiating the contract with the vendor, and once the purchase agreement had been completed, working as a director of QSR. The appellants submitted that it was arguable that some or all of that work was performed under an overall arrangement in which the option deed formed part of the remuneration for the work that was performed.

18 In the Court of Appeal this contention was understood as requiring identification of the parties to the arrangement and then, because the hypothesised arrangement was one for the *promotion* of the venture (and QSR in particular), as requiring consideration of whether QSR could be treated as party to, or adopting the benefit of, an arrangement that was made before it was incorporated. Handley JA (with whose reasons Mason P agreed) considered[7] that the option deed could only be within the jurisdiction of the Commission "if it formed part of some earlier, informal, arrangement of the requisite character *to which [QSR] was a party*" (emphasis added). His Honour concluded[8] that before QSR was incorporated "[i]t was not in any sense 'an actor'". Following its incorporation QSR accepted the benefit of the work that had been done before incorporation "but any contract or arrangement to this effect was not one whereby a person performed the pre-incorporation work"[9]. By contrast, Spigelman CJ considered[10] that this analysis of the matter was one which had not sufficiently been raised in argument to allow the Court of Appeal to act on it in granting relief.

19 In this Court it was not submitted that any separate question arises about whether the analysis which the majority of the Court of Appeal adopted had been sufficiently raised in argument in that Court to allow that Court to act on it. Rather, the burden of the appellants' argument was directed to two principal propositions. First, it was said that the proceedings in the Court of Appeal called into question the decision of Peterson J, contrary to the privative provisions of

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7 (2004) 208 ALR 368 at 380 [64].

8 (2004) 208 ALR 368 at 380 [66].

9 (2004) 208 ALR 368 at 380 [66].

10 (2004) 208 ALR 368 at 378-379 [51], [53].

s 179 of the Act. Secondly, it was submitted that the Court of Appeal had not only misunderstood the breadth of the appellants' case, it had made a number of particular errors in dealing with the appellants' contentions. It is convenient to defer consideration of the issues presented by the privative provisions of s 179 and to focus first upon what the appellants contended to have been the relevant contract which founded the jurisdiction of the Commission to make orders varying the option deed.

20 The appellants directed particular attention to par [74] of the reasons of Handley JA. That paragraph read:

> "Although the summons in the commission seems to rely on a contract or arrangement for the performance of work which pre-dated the formation of the company, [counsel for Mr Batterham and Maylord] did not attempt to support a case of that width. Instead he relied on a contract or arrangement which came into existence after incorporation under which the company took the benefit of the pre-incorporation work."

The appellants contended that this misunderstood the breadth of their submissions to the Court of Appeal. Given what was said by Handley JA about QSR having accepted the benefit of work done before incorporation but that any contract or arrangement to that effect was not one whereby a person performed the pre-incorporation work, it may well be doubted that the reasons, when read as a whole, betray a misunderstanding of the kind asserted. It is, however, not necessary to explore that question further. Rather, attention must be directed to the appellants' contention that they should have been permitted to seek to establish, in the proceedings in the Commission, either or both of two propositions. The first of those propositions was that, before QSR was incorporated, parties, other than QSR, had made an arrangement for the performance of work which included the incorporation of QSR and the work later done for QSR. The second was that, upon its incorporation, QSR either became a party to the arrangement or thereafter took the benefit of the arrangement. Each of these propositions fastened upon three facts. First, Mr Batterham performed work promoting the company, negotiating the purchase contract, arranging finance and then serving as a director. Second, the option deed was of benefit to Mr Batterham. Third, he obtained that benefit because he was a promoter of the venture and of QSR. But the relevant question presented by s 106 is not to be answered by doing no more than pointing to the performance of work and the obtaining of a benefit that is in some way connected to the performance of the work. Rather, for the reasons given in *Fish v Solution 6 Holdings Ltd*, the critical questions are what is the work a person

performs in an industry and what is the contract whereby the person performs that work?

21 The option deed makes no explicit reference to the performance of work (whether for or in connection with QSR or its business dealings). Nonetheless, the option deed may be seen as part of a common form of arrangement for promoting a company. And it may be seen as a benefit given in return, or as the appellants would have it, remuneration, for the work of promotion. As Professor L C B Gower, writing nearly 30 years ago[11], pointed out:

> "A promoter is not entitled to recover any remuneration for his services from the company unless there is a valid contract, enabling him to do so, between him and the company … Until the company is formed it cannot enter into a valid contract[12]. …
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> The reward may take many forms. … [One] is for the promoter to be given an option to subscribe for shares at a particular price (eg par) within a specified time. If the shares have meanwhile gone to a premium this will obviously be a most valuable right; it is a perfectly legal arrangement[13], but particulars of the option have to be given in any prospectus …"

22 For present purposes, however, there are two features of such an arrangement that are of particular importance. First, the agreement for performance of pre-incorporation work cannot be made with the company that is to be incorporated. No doubt that is why the submission now under consideration accepted that the arrangement asserted was, in the first instance, an arrangement to which QSR was not a party. Thus, when, as here, the agreement conferring a benefit on the promoter (the option deed) is made after incorporation, it is an agreement that is made as recompense for work that has already been done. But because the work has already been done, the agreement conferring the benefit cannot be described as a contract, or an arrangement,

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11 *Gower's Principles of Modern Company Law*, 4th ed (1979) at 332-334.

12 *Kelner v Baxter* (1866) LR 2 CP 174; *Natal Land Co v Pauline Colliery Syndicate* [1904] AC 120. Nor can it ratify a preliminary contract purporting to be made on its behalf. It must enter into a new contract and this ought to be under seal since the consideration rendered by the promoter will be past.

13 *Hilder v Dexter* [1902] AC 474.

whereby a person performs work in an industry. The work that was done was not done according to, or in fulfilment of, or in consequence of, that agreement. And as noted earlier the appellants have at all times accepted that the option deed was not an agreement whereby Mr Batterham performed work in an industry. The second point to be made is that the option deed was tied in no respect to the later performance of work. The grant of the options was complete upon the execution of the deed. Whether Mr Batterham thereafter did any work for, or retained any connection with, QSR was irrelevant to the grant of the options or their exercise. The work that was done after the execution of the option deed could not be said to be done according to, or in consequence of, or in fulfilment of, the option deed.

23 What then follows is that it is apparent that this method of putting the appellants' argument again depends on first relating contracts and arrangements one to another and then asking whether any of the terms or provisions of the related arrangements provide for the performance of work. And it is also apparent that the appellants' reference to the option deed as "remuneration" for work done under an arrangement first made between parties other than QSR, but to or of which QSR either later became a party or took the benefit, is a restatement of the argument that the Commission's jurisdiction extends to any and every contractual stipulation or other arrangement that can be described as related or collateral to a contract for the performance of work in an industry. By describing the option deed as "remuneration" for work done the appellants seek to connect the option deed with the performance of that work. But for the reasons given earlier, neither the work that was done before the option deed was made, nor the work that was done after it was made, was done according to, in fulfilment of, or in consequence of, that agreement. This second way in which the appellants put their argument should be rejected.

24 It is necessary then to deal with the arguments about the operation of the privative provisions of s 179 of the Act and to begin by setting out its text. Section 179, at the times relevant to this matter, provided:

> "(1) Subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law, a decision or purported decision of the Commission (however constituted):
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> (a) is final, and
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> (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).

(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."

25 Questions about the operation of the privative provisions of s 179 of the Act in this case are to be approached from some established principles. Section 179 is not to be interpreted "as meaning to set at large"[14] the court or tribunal to which it relates. Rather, because the Act limits the jurisdiction of the Commission, but also contains the privative provisions of s 179, an attempt must be made to reconcile what appear to be conflicting legislative provisions[15]. Thus the meaning and application of s 179 must be ascertained from its terms[16] set in the context of the Act as a whole.

26 Next it is important to recognise that a privative clause will have no work to do if the decision in question was a decision made according to law. The hypothesis for consideration is that the decision in question is infirm in some respect. It therefore follows that the reference in s 179 to "purported" decisions of the Commission is properly seen as inserted for more abundant caution. As was pointed out in *O'Toole v Charles David Pty Ltd*[17], in relation to the then provisions of s 60 of the *Conciliation and Arbitration Act* 1904 (Cth), an "award", on the true construction of that provision, referred to at least some purported awards[18]. Were it otherwise s 60 would have been essentially

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14 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-615; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 499-500 [56].

15 *Hickman* (1945) 70 CLR 598 at 616; *Plaintiff S157/2002* (2003) 211 CLR 476 at 500-501 [58].

16 *Plaintiff S157/2002* (2003) 211 CLR 476 at 501 [60].

17 (1991) 171 CLR 232 at 285-286.

18 See also *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 at 182.

nugatory. Reference in s 179 to "purported" decisions of the Commission makes explicit what would otherwise have been the necessary reading of the provision.

27 In the present matter, however, it is not necessary to pursue further the resolution of the tension between the limitations on the Commission's jurisdiction and the provisions of s 179. The appellants contend that QSR's application to the Court of Appeal for prohibition called in question the decision of Peterson J dismissing QSR's application for summary termination of the proceedings in the Commission. They submitted that the application for prohibition constituted, or amounted to, an attack on the reasoning and basis of the decision of Peterson J and, in that sense, called the decision into question.

28 That analysis of the matter should not be accepted. Peterson J did not decide that the proceedings were, or were not, within the Commission's jurisdiction. The only decision made was that the proceedings instituted in the Commission had not been shown to be unarguably beyond jurisdiction. There is a real and radical difference between deciding that a point is arguable and deciding the point. All that Peterson J decided was the former. To hold, as the Court of Appeal did, that some, but not all, of the claims made in those proceedings were beyond jurisdiction did not question the decision of Peterson J or the reasoning that supported it. Whether the words "decision or purported decision" in s 179(1) extend to the steps in reasoning that support the outcome at which the Commission arrives in an application is a question that would require close consideration of the reconciliation between s 179 and those provisions of the Act that limit the Commission's jurisdiction. At first sight there seems no reason to give "decision or purported decision" a meaning that would encompass steps in reasoning. This, however, is not a question that needs to be resolved. It is enough to say that in this case there was no "decision or purported decision" of the Commission, "whether on an issue of fact, law, jurisdiction or otherwise", that was called in question by the proceedings in the Court of Appeal. Rather, in the light of this Court's decision in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[19], the Court of Appeal was right to grant the relief it did, and right to grant that relief when it did. As was pointed out in the *Melbourne Stevedoring Case*[20], prohibition is not a writ of course but "it is a writ which goes as of right when the prosecutor is directly affected by the course pursued by a tribunal to which the writ lies and the prosecutor shows

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19 (1953) 88 CLR 100.

20 (1953) 88 CLR 100 at 118-119.

satisfactorily that the tribunal is about to act to his detriment in excess of its authority". And again, as pointed out in the *Melbourne Stevedoring Case*[21], the privative clause shows that to defer the grant of the remedy until the Commission decides whether it has jurisdiction, if QSR is otherwise entitled to it, "may and perhaps must operate to the prejudice" of QSR. Proceedings in the Commission having taken the course they had, there was a real likelihood of an order being made in excess of the Commission's jurisdiction. And that being so, the Court of Appeal was right to grant the relief it did.

29 For these reasons the appeal to this Court should be dismissed with costs.

30 The considerations mentioned in our reasons in *Fish v Solution 6 Holdings Ltd* about the *Industrial Relations Amendment Act* 2005 (NSW) apply equally in this case to so much of the proceedings instituted in the Commission as was the subject of the Court of Appeal's order prohibiting the Commission from their further hearing and determination.

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21 (1953) 88 CLR 100 at 119.

31 KIRBY J. This is an appeal from orders of the New South Wales Court of Appeal[22]. It is one of three matters heard by this Court to be decided at the same time[23].

32 The appeals present common points. Each of the cases concerns the meaning and application of s 106 of the *Industrial Relations Act* 1996 (NSW) ("the IR Act"). Each relates to the jurisdiction and powers of the Industrial Relations Commission of New South Wales ("the Commission") under that provision. Each raises a question as to the issue by the Court of Appeal of a writ in the nature of prohibition, addressed to the Commission, in relation to the continued hearing and determination of proceedings commenced before it.

33 However, whilst the Court of Appeal accepted as applicable in the present case the principles expounded by it in *Fish*[24], decided on the same day, there were two significant differences from that case.

34 The first difference was that, unlike *Fish*, the proceedings in the present case challenging the jurisdiction of the Commission had been argued before, and decided by, a judicial member of the Commission (Peterson J)[25]. His Honour exercised the powers of the Commission in Court Session as it was then described[26]. He dismissed with costs the application for pre-emptory relief. That order contemplated that the Commission would proceed to exercise its jurisdiction and powers in this case. His Honour recognised that the conclusion expressed by him on the summons might not survive a full hearing "in the light of the evidence ultimately adduced". The ultimate conclusion, he declared, "remains open"[27].

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22 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368.

23 *Fish v Solution 6 Holdings Ltd* [2006] HCA 22; *Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session* [2006] HCA 24.

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

25 *Maylord Equity Management Pty Ltd v QSR Ltd* [2003] NSWIRComm 366.

26 The Commission in Court Session has since been re-named, once again, as the Industrial Court of New South Wales: *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 4.

27 [2003] NSWIRComm 366 at [39].

35 Secondly, in this case, unlike *Fish*, the Court of Appeal was divided. The majority reasons, supporting the order for prohibition directed to the Commission, were given by Handley JA (with whom Mason P agreed). However, Spigelman CJ dissented. He concluded that questions as to the jurisdiction of the Commission should be left to be decided within the Commission. He would have dismissed the proceedings in the Court of Appeal.

36 Spigelman CJ's reasons for reaching his conclusion were, essentially, three-fold. First, he concluded that there were certain questions, relevant to the jurisdiction of the Commission, that had not earlier been broached by either party, which should first be decided by the Commission. One was whether the conduct of a person as a promoter of a company could satisfy the concept of "work in an industry" in the context of the IR Act[28]. Secondly, he expressed doubt that the argument upon which the application for prohibition succeeded in the Court of Appeal had been the subject of submissions to that Court[29]. Thirdly, and most importantly, he was affected by the identification of the legal principles concerning s 106 of the IR Act, expressed in the reasons of Peterson J in the Commission, upon which (he thought) evidence would be necessary and eventually determinative. Such principles concerned[30] the extent to which a company, not originally a party to an "arrangement" whereby a person performed work in any industry, might later become such a party or, although not a party to the original arrangement, might yet be the subject of orders against it made under the IR Act.

37 The first and second reasons expressed by Spigelman CJ played little part in the argument before this Court. However, the third reason was critical and is decisive. Both for the proper application of the privative provision in the IR Act[31] and for the observance of the correct relationship between the Court of Appeal and the Commission, the approach adopted by Spigelman CJ was the correct one. It should be confirmed by this Court. The hearing in the Commission should proceed. To allow that to happen, this Court must uphold the appeal.

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28 (2004) 208 ALR 368 at 377-378 [41]-[44].

29 (2004) 208 ALR 368 at 378 [51].

30 Cf *Maylord Equity Management* [2003] NSWIRComm 366 at [31] cited (2004) 208 ALR 368 at 379 [54].

31 Section 179.

The facts

38 *The background facts*: The general background facts are stated in the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ ("the joint reasons")[32]. For the most part, it is sufficient to refer to the activities of the first appellant, Mr Peter Batterham, and the first respondent, QSR Limited ("QSR"). The Commission, the second respondent, submitted to the orders of this Court.

39 In late 1998, Mr Batterham discovered that Tricon Global Restaurants Inc ("Tricon"), the owner of the KFC and Pizza Hut brands in Australia, desired to sell its business and property interests in forty-one KFC stores in New South Wales and to grant the purchaser a long-term franchise agreement with the right to operate a business utilising the KFC brand name. Mr Batterham and a colleague, Mr Steven Gillard, negotiated heads of agreement with Tricon to purchase the stores. The two men then involved Mr Anthony Veale in the acquisition proposal. Mr Veale had extensive experience in property syndication.

40 The three promoters engaged lawyers and other advisers to provide advice about the suitable means to be utilised both to purchase and operate the restaurants. The promoters incurred expenses. They agreed amongst themselves to share these expenses in the event that the deal did not proceed.

41 QSR was then established as the corporate vehicle to carry the negotiations forward. The three promoters became the foundation shareholders and directors of QSR. They undertook substantial work to make the project a reality. Through QSR, they raised approximately $40 million to finance the deal.

42 *The promoters' option deed*: The promoters agreed that they should be remunerated for the work that they had undertaken before the incorporation of QSR. They were also to be remunerated for work done on behalf of QSR in bringing the deal to fruition. They were to be remunerated further for work that they would undertake for QSR on an ongoing basis as agreed prior to the issue of a prospectus on 3 November 1999. An understanding was reached amongst them whereby QSR would pay directors' fees and charges. Details of the proposed remuneration and commitments of QSR were duly published in the prospectus. Tricon insisted, and Mr Batterham agreed, that QSR could not approve the resignation, replacement or removal of any of the three promoters, except as required by law, without its prior written approval. Moreover, in so far as Mr Batterham's agreed remuneration was in the form of options in QSR, his entitlements were set out in an Option Deed. This deed was executed by Mr Batterham and QSR on 2 November 1999, the day before the prospectus was

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32 Joint reasons at [1]-[12].

issued. Mr Batterham thereafter continued to work for QSR until, in April 2002, he was allegedly forced to resign.

43 The dispute between Mr Batterham and QSR arose after interests hostile to Mr Batterham gained control of QSR and progressively marginalised him from its affairs[33]. It was at this point that a provision in the Option Deed, containing the "trigger" for the right of Mr Batterham's trust company, now Maylord Equity Management Pty Ltd ("Maylord"), to take up options of great value in QSR, became crucial to his entitlements. The provision in question concerned a "performance benchmark"[34]. The right to take up options was dependent upon the achievement by QSR of earnings (before interest, tax, depreciation and amortisation) of at least 18% on equity in the ensuing three calendar years.

44 In the event, an average return of over 18% for the three years, and well over 18% in the first two years (2000 and 2001), was achieved. However, in 2002, the return on equity was 16.2%. QSR therefore contended that the condition precedent to enliven the right to take up the options had not been met. It was this dispute that led Mr Batterham and Maylord to commence proceedings in the Commission for relief against the suggested "unfairness" of the foregoing arrangements. Mr Batterham and Maylord submitted that the Commission had jurisdiction under s 106 of the IR Act to provide relief against QSR.

45 *The parties' arguments*: For Mr Batterham and Maylord it was argued that, although the Option Deed did not *per se* constitute a contract within s 106, it either represented part of the remuneration for work performed under a relevant contract or arrangement or was collateral to an arrangement whereby work was to be performed in an industry. Moreover, QSR had secured the benefit of Mr Batterham's work prior to, and after, its formation and had sought to take unfair advantage of a provision in the Option Deed which related directly to his remuneration for such work.

46 QSR, on the other hand, portrayed the work performed, and the benefits under the Option Deed, as separate from the earlier contract or arrangement. QSR suggested that Mr Batterham's employment had been terminated by agreement and that complaints about the Option Deed were no more than arguments about a business deal that had proved disappointing in the circumstances.

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33 (2004) 208 ALR 368 at 373 [17].

34 (2004) 208 ALR 368 at 371 [12].

The application to the Commission

47 *The objection to jurisdiction*: QSR did not delay in contesting the jurisdiction of the Commission. No sooner had the initiating documents been filed for Mr Batterham and Maylord but QSR lodged a notice of motion for pre-emptory relief against the proceedings. Both in the Commission, and later in the Court of Appeal, QSR indicated that it was content to accept as true the facts stated in Mr Batterham's originating process and verifying affidavit.

48 Mr Batterham resisted QSR's objection to the jurisdiction of the Commission. He argued that the unwritten contract of employment and the Option Deed amounted together to an "arrangement" whereby work was performed in an industry in New South Wales, including the promotion and establishment of the KFC acquisition and the subsequent work performed, once the deal was agreed, as a director of QSR and otherwise. Mr Batterham also submitted that the remuneration for his work under the "contract or arrangement" was the grant of options to Maylord, together with the payment of directors' fees and the issue of shares. In the alternative, he argued that the grant of options, as part of his remuneration, was a "collateral arrangement or a condition" related to the "arrangement" for the performance by him of work. He contended that the "arrangement" in question included the incorporation of QSR as the vehicle to obtain the benefit of the acquisition of the KFC stores and that, upon such incorporation, QSR became a party to that "arrangement", took advantage of it and was thus susceptible to orders of the Commission directed to it, addressed specifically to the provisions of the Option Deed complained of as "unfair".

49 QSR advanced many arguments to contest the jurisdiction of the Commission[35]. In particular, QSR disputed any unfairness of the "contract or arrangement" relied upon; distinguished the work performed by Mr Batterham as a promoter of the "deal" before formation of QSR and as a director thereafter; divided the alleged "work" into these two distinct phases; and contended that the Option Deed referred, and referred only, to the earlier phase as promoter and thus could not, before QSR was formed, result in any legal liability in that company in respect of which relief could be thereafter given under s 106 of the IR Act.

50 *Rejection by the Commission*: In his reasons for dismissing the application for pre-emptory relief, Peterson J referred to decisional authority both as to the ambit of s 106 (and its predecessors) and as to the approach to be applied to such an interlocutory claim for relief terminating the proceedings[36]. In

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35 See (2004) 208 ALR 368 at 376-377 [34]-[40].

36 [2003] NSWIRComm 366 at [5]-[6] referring to *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129 per Barwick CJ; *Nagle (t/a W D and J L Nagle & Sons) v Tilburg* (1993) 51 IR 8 at 10-12.

the course of his reasons, Peterson J referred to some observations of my own in the Court of Appeal of New South Wales, to which I adhere[37]:

> "[A preliminary hearing is] sensible ... where a party has a substantial threshold argument which, if it succeeds, will knock out the claim and save the costs and inconvenience that attend a protracted hearing of proceedings on the merits. But, as with any threshold relief of this kind, it must be conserved to a clear case where it is plain that the invocation of the jurisdiction impugned is wholly misconceived or, upon analysis, lacks an arguable legal foundation. Necessarily, refusal of relief at the threshold will not finally determine that jurisdiction exists for any order which the Commission might make between the parties. This is because, to secure relief, the claimants must demonstrate that no order could be made which would be within jurisdiction. This burden … is a heavy one".

51 Applying the foregoing authorities, as the parties had invited him to do, Peterson J rejected the challenge to jurisdiction at that stage. He set the matter down for trial.

52 *Invocation of the Court of Appeal*: It was then that QSR invoked the supervisory jurisdiction of the Supreme Court and secured from the majority of the Court of Appeal the order in the nature of a writ of prohibition, directed to the Commission, that is now in contest in the appeal to this Court.

The issues

53 The appeal raises two procedural issues, and one substantive issue. They are as follows:

(1) *The privative clause issue*: Did the Court of Appeal err, the jurisdiction and powers of the Commission having been invoked, in calling into question a decision of the Commission on a matter within the Commission's jurisdiction? Did doing this constitute a breach of, or failure to comply with, s 179 of the IR Act so that, on that ground, it was legally erroneous?

(2) *The comity and restraint issue*: Whatever the strict requirements of s 179 of the IR Act, did the Court of Appeal err in its approach to the entitlement of the Commission in Court Session to determine its own jurisdiction and, having regard to the applicable principles of restraint, did

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37 [2003] NSWIRComm 366 at [6] citing *Nagle* (1993) 51 IR 8 at 10-11 applying *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 446-447.

it err in affording relief when it did, before the Commission had heard and finally determined the application before it?

(3) *The substantive rights issue*: Assuming that there is no impediment to the Court of Appeal's orders on either of the foregoing grounds, did the Court of Appeal err in providing the relief it did, having regard to whether the case before the Commission was reasonably arguable? Was that case clear in fact and in law to the degree that warranted intervention by the Court of Appeal in advance of a concluded hearing and decision of the Commission about its jurisdiction and powers?

The privative provision of s 179 was applicable

54 *The terms of s 179*: From the creation of an industrial jurisdiction in New South Wales, the State Parliament has provided, in successively more stringent terms, privative provisions designed to limit (it could not entirely prevent[38]) the provision of prerogative relief (or relief of that nature) addressed by the Supreme Court of the State to the industrial tribunal. The history of such provisions is helpfully collected by Spigelman CJ in his reasons in the *Fish* case[39]. That history is mentioned in *Fish* in this Court[40].

55 Whereas the form of the privative provision contained in s 301(1) of the *Industrial Relations Act* 1991 (NSW) ("the 1991 Act") afforded finality to decisions of the then Industrial Court, the section expressly preserved the operation of s 48 of the *Supreme Court Act* 1970 (NSW)[41]. When, by the IR Act, in 1996, the Industrial Court was abolished and a Commission reinstated, this limited reservation of the powers of the Supreme Court was removed. At the relevant time, s 179 provided[42]:

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38 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 131 per Griffith CJ; *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-617; *Church of Scientology v Woodward* (1982) 154 CLR 25 at 55-56; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 484 [10]-[11], 499-501 [54]-[60].

39 *Solution 6 Holdings* (2004) 60 NSWLR 558 at 583-584 [101].

40 [2006] HCA 22 at [136].

41 See 1991 Act, s 301(3).

42 Section 179 was amended after the orders of the Court of Appeal were made in the present case by the *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 5: see *Fish* [2006] HCA 22 at [45] per Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ and my own reasons at [90] fn 74. I am content to assume that the

(Footnote continues on next page)

"179 Finality of decisions

(1) Subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law, a decision or purported decision of the Commission (however constituted):

(a) is final, and

(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).

(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."

56 *The validity of s 179*: In the proceedings before the Court of Appeal in the present case, QSR originally contended that s 179 was invalid, as beyond the legislative powers of the New South Wales Parliament. Notices in respect of a constitutional issue were duly given[43]. The State Attorney-General intervened before the Court of Appeal to support the constitutional validity of the section. In the result, QSR did not press its constitutional objection. The Court of Appeal did not rule on it. The point was not revived in this Court. It can be ignored in deciding this appeal.

57 *The breadth of s 179*: The extremely broad ambit of s 179 is apparent from its terms. It is concerned to protect not only a "decision" but also a "purported decision" of the Commission. It is not confined to the Commission in its then judicial manifestation (the Court Session). It is addressed to the Commission "however constituted". The prohibition is not only against "appeal". It extends to the review of such "decisions" of the Commission. But it also

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amendments do not affect the disposition of the appeal. The contrary conclusion is unnecessary to the outcome that I favour.

43 (2004) 208 ALR 368 at 369 [3].

extends to calling any such decisions "in question". It goes further to forbid the making of a judgment or orders in the nature of prohibition, *certiorari*, *mandamus*, injunction, declaration or otherwise, which might, but for the section, have been made or given, relevantly by the Court of Appeal. The section extends to any order of the Commission. It thus extends to the decision of Peterson J in the present case, exercising the jurisdiction of the Court Session. Specifically, it applies to his Honour's order dismissing QSR's interlocutory objection to the jurisdiction of the Commission. Manifestly, decisions and purported decisions on "jurisdiction" are within s 179(1)(b).

58 Whilst, under s 48 of the *Supreme Court Act*, actions in the Supreme Court seeking orders to prohibit a "specified tribunal" from proceeding in any matter before it are assigned to the Court of Appeal, and whilst "the Industrial Relations Commission or a member of that Commission" are included in the "specified tribunals" so affected[44], this provision is no more than an intra-mural identification of venue. It is not a grant of jurisdiction or power to the Supreme Court, inconsistent with s 179 of the IR Act.

59 The broadest prohibition in s 179(1)(b) is that forbidding a court from calling in question any "decision or purported decision" of the Commission. The breadth of such language has been noted many times. Like terms appeared in s 29(3)(a) of the *Industrial Relations Act* 1967 of Malaysia, ousting the jurisdiction of the Malaysian High Court to issue writs of *certiorari* to the Industrial Court of that country. Such provisions have a long history in the relations between industrial tribunals and the general courts. They are common throughout the Commonwealth of Nations. In *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*, dealing with s 29(3)(a) of the *Industrial Relations Act* 1967 (Malaysia), Lord Fraser of Tullybelton, delivering the judgment of the Privy Council, observed[45]:

> "[T]he final words 'quashed or called in question in any court of law' seem to their Lordships to be clearly directed to certiorari. 'Quashed' is the word ordinarily used to describe the result of an order of certiorari, and it is not commonly used in connection with other forms of procedure (except in the quite different sense of quashing a sentence after conviction on a criminal charge). If 'quashed' were for some reason not enough, the expression 'called in question in any court of law' is in their Lordships' opinion amply wide enough to include certiorari procedure. Accordingly they are of opinion that paragraph (a) does oust certiorari at least to some extent."

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44 *Supreme Court Act* 1970 (NSW), s 48(1)(a)(ii).

45 [1981] AC 363 at 370.

60 In the present proceedings, the relief claimed in, and granted by, the Court of Appeal was a writ in the nature of the writ of prohibition. However, the point concerning the phrase "called in question" remains good. The IR Act deliberately uses wide language. Against the background of this history in New South Wales law and like laws in other countries, the interdiction is designed to discourage any interfering inclination on the part of a general appellate court. To the extent that the provision is valid, and cannot be confined by legitimate techniques of statutory construction, it is the duty of courts to give it effect. There will lie outside such prohibitions cases involving fundamental affronts to jurisdiction, such that what has occurred does not answer to the statutory expression "decision or purported decision" or "award or order"[46]. However, the present is not such a case.

61 *Section 179 is attracted*: Because of the procedures followed in this case, s 179 of the IR Act was enlivened. In the Court of Appeal, Handley JA accepted that Peterson J had given a "decision" of the Commission within the terms of s 179(1)[47]. That was a correct holding. I would reject submissions to the contrary, on the alleged grounds that Peterson J's decision was not a "decision" within s 179(1) because it was procedural in nature and merely a decision to defer a "decision". In this, I agree in the reasons given by Heydon J[48].

62 Being a "decision", Peterson J's "order" was liable, once made, to an application to a Full Bench of the Commission in Court Session for leave to appeal. Instead of taking that course, which was the regular one contemplated by the IR Act[49], QSR invoked the suggested powers of the Court of Appeal. But those powers lie outside the system of industrial tribunals, specifically the Commission. On the face of things, at least, this involved proceeding to the Court of Appeal to "call in question" the decision of the Commission given by Peterson J.

63 The essential issue raised, and argued, before the Court of Appeal was relevantly the same as that before Peterson J. So much is disclosed by a comparison of that Court's reasons with those of Peterson J. If this is so, the challenge in the Court of Appeal was effectively an attempt to exercise a right of "appeal" contrary to the line of appeal expressly provided by Parliament. If it did

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46 Cf *Plaintiff S157/2002* (2003) 211 CLR 476 at 513-514 [103]-[104] with particular reference to the Constitution, s 75(v). In this conclusion I disagree with the opinion of Heydon J at [108].

47 (2004) 208 ALR 368 at 383 [85].

48 Reasons of Heydon J at [107].

49 IR Act, s 179(1).

not literally seek "review" of the decision of Peterson J, as such, it certainly called that decision "in question". It did so by challenging it on the core conclusion to which it gave effect. This was that, on the facts common at this stage to the proceeding both in the Commission and the Court of Appeal, a reasonably arguable case of jurisdiction in the Commission had been shown. Peterson J decided that it had. The majority of the Court of Appeal decided that it had not. By going over the same ground and reaching their contrary conclusion, the majority in the Court of Appeal "called in question" Peterson J's "decision" and "order".

64 If any new points were raised in the Court of Appeal, the scheme of the IR Act, contemplated by the terms of s 179(1), is that any such points should be advanced on appeal, by leave, to the Full Bench of the Commission in Court Session, not to the Court of Appeal.

65 *An erroneous intervention*: In his reasons, Handley JA[50], for the majority, concluded that no barrier to the intervention of the Court of Appeal was presented by s 179 of the IR Act. The joint reasons in this Court appear to endorse his Honour's approach[51]. I disagree.

66 Handley JA advanced two reasons as to why s 179 did not apply. Neither of these is convincing:

(1) The first suggested reason was that the decision of the Commission was interlocutory and thus did not create any *res judicata* or issue estoppel[52]. There is nothing in s 179 that draws any such distinction. Decisions and purported decisions, as well as awards and orders, referred to in the section, may be interlocutory as well as final. The section still applies. The suggested gloss, exempting interlocutory decisions and orders, would be perverse and confusing, given the uncertainty that can sometimes arise over such classifications. There is no reason for this Court to lend support to such a modification of the statute.

It was then suggested that the fact that the Court of Appeal "after fuller argument" concluded that the Commission's jurisdiction did not extend to any relevant contract or arrangement would not "call in question" the interlocutory decision[53]. However, the place for "fuller argument",

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50 (2004) 208 ALR 368 at 383 [87].

51 Joint reasons at [27]-[28].

52 (2004) 208 ALR 368 at 383 [87].

53 (2004) 208 ALR 368 at 383 [87].

contemplated by s 179 (in its language, history and purpose), was not the Court of Appeal. It was either in the Commission when it conducted the hearing, or in the Full Bench of the Commission in Court Session, as the IR Act provides[54]. The very mischief addressed by s 179 is the conduct of "fuller argument" in a court of general jurisdiction, separate from the industrial tribunal which Parliament has entrusted with jurisdiction under s 106 of the IR Act, including decisions as to whether it has jurisdiction in the particular case or not. In so far as Handley JA's reasoning contained a suggestion that the Court of Appeal's position was effectively no different from that of the Commission at a final hearing, that suggestion was incorrect. In a final hearing of the proceeding in the Commission all the evidence that the parties considered relevant would be tendered; the admissibility of that evidence would be decided by the judicial member of the Commission hearing the case; and findings and rulings would be made by that judicial member, who could also make orders to give effect to such conclusions. In the event, the Court of Appeal was obliged to reach *its* decision on materials more abbreviated than those available in a final hearing before the Commission. That is a procedure which, even when legally permissible, is reserved to very clear cases. By reaching a different conclusion on the jurisdiction question, the Court of Appeal did not suggest any identified error on the part of Peterson J. It simply substituted its own opinion on the same substantive issues, using effectively identical material and reaching its conclusion in a like pre-emptory process. The only suggested advantage of the Court of Appeal was "fuller argument". However, that does not authorise circumvention of s 179(1) of the IR Act and the legislative policy that it expresses.

(2) Secondly, Handley JA appeared to consider that the course adopted by the majority was sustained by this Court's approach in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[55]. Although the joint reasons in this Court endorse that conclusion[56], in my view it is erroneous[57].

Melbourne Stevedoring involved a challenge to an inquiry held by a delegate of the Stevedoring Industry Board, otherwise than as authorised by its legislation, to consider the fitness of an employer to be registered under federal law. Instead, the Board imposed a sanction on an employer

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54 IR Act, ss 188, 190A, 191.

55 (1953) 88 CLR 100 at 118.

56 Joint reasons at [28].

57 Cf reasons of Heydon J at [109].

> to enforce a policy of the Board. This was a completely erroneous conception of the Board's jurisdiction and powers. The error was fundamental to the exercise of the power and pervasive in the case.
>
> There was no similar fundamental error in the perception by Peterson J of the jurisdiction of the Commission based on the Option Deed. Even if there were, it was not for the Court of Appeal to call into question here his Honour's decision that the jurisdiction of the Commission sufficiently existed. And even if, in some way, the Court of Appeal was authorised to ignore and bypass the decision of Peterson J in the Commission, the supposed error of classifying the deed for the purposes of s 106 of the IR Act was not of the character of the error described in *Melbourne Stevedoring*.
>
> It is essential to the concept of jurisdictional error (sometimes supported in federal matters as inherent in the nature and purpose of the writs afforded by the Constitution[58]) that tribunals afforded jurisdiction by Parliament must be respected by the courts. They must normally be allowed to determine, at least in the first instance, whether they have jurisdiction and, whilst acting within it, to exercise that jurisdiction without external judicial interference. The restraints that ordinarily operate in federal jurisdiction are reinforced in a case of the present kind by the privative provisions of s 179 of the IR Act.

67 *Conclusion: breach of s 179*: It follows that the relief ordered by the Court of Appeal, and the reasons of the Court explaining that relief on the basis of the lack of jurisdiction in the Tribunal, necessarily "called in question" the "decision" of Peterson J that jurisdiction arguably existed. Such relief foreclosed the enacted line of appeal within the Commission. It involved the intrusion of the Court of Appeal into the regular exercise by the Commission of its own powers. Such interference was forbidden by s 179 of the IR Act. So long as they are constitutionally valid, the provisions of that section must be given effect by the courts. In the end, no argument of constitutional invalidity was pressed.

68 It follows that the correct approach was the one taken by Spigelman CJ. It was to leave the jurisdictional issue to be decided in the Commission[59]. Cases of the kind presented by Mr Batterham and Maylord are typically highly fact-specific. In the face of the privative provisions of s 179, it would be very rare indeed that the Court of Appeal would be entitled to issue process in the nature of prohibition to the Commission. This was not such a case.

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58 Constitution, s 75(v).

59 (2004) 208 ALR 368 at 379 [55].

Principles of comity and restraint deny intervention

69 *Applicable comity and restraint*: Apart from s 179 of the IR Act, there are additional, and reinforcing, principles that argue, on discretionary grounds, against the intervention decided by the majority of the Court of Appeal, now confirmed by the majority in this Court.

70 It is important to start the consideration of this issue with a reminder that proceedings for orders under s 106 of the IR Act were assigned to the Commission in Court Session[60]. By s 152 of the IR Act, specific provision was made by the Parliament of New South Wales concerning the status of that body:

> "152 Commission in Court Session superior court of record
>
> (1) The Commission in Court Session is established by this Act as a superior court of record.
>
> (2) For the purposes of Part 9 of the *Constitution Act 1902*, the Commission in Court Session is a court of equivalent status to the Supreme Court and the Land and Environment Court, and is of higher status than the courts referred to in section 52(2)(b) and (c) of that Act."

71 In furtherance of s 152 of the IR Act, the New South Wales Parliament amended the *Constitution Act* 1902 of the State[61], to extend Pt 9 to members of the Commission in Court Session. This provision ensured that the appointment of all judges of the former Industrial Court, created by the 1991 Act but abolished by the IR Act, would become members of the Commission in Court Session[62].

72 The members of the Commission in Court Session, all of whom were, by rank and designation, State judges, enjoyed the same status as judges of the Supreme Court. More importantly, the Commission in Court Session was established as a constitutional institution of New South Wales and, by law, enjoyed a status equivalent to that of the Supreme Court. It did not have the history of the Supreme Court, travelling back as that Court does to the early days of the colony. Nor was it mentioned in the federal Constitution, as the Supreme

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

61 IR Act, Sched 5.

62 IR Act, Sched 4, Pt 4.

Court of the State is[63]. But the Commission in Court Session had its own extended lineage, dating back to the *Industrial Arbitration Act* 1901 (NSW). In the provision by the Court of Appeal of writs, prerogative in nature, directed to the Commission (at least in respect of proceedings in Court Session) the design of the institutions of the State, lawfully enacted by the Parliament of the State, demanded an approach that involved comity as between both courts and restraint in any intrusion of one upon the other. The terms of s 179 represented no more than a traditional mechanism (albeit expressed in unusually emphatic terms) reflecting the expectations of this parity of statutory status.

73 Comity as between judicial institutions of equivalent status is not merely a formula for courtesy. It has an institutional purpose. Writing of judicial comity in *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs*[64], French J observed, in words that I would endorse:

> "The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges."

74 To similar effect are the words of Brennan J in this Court in *Attorney-General (Cth) v Finch [No 2]*[65]. And as McHugh J suggested in *Re Tyler; Ex parte Foley*[66], uniformity and regularity in the making of judicial decisions is a matter of great importance to the administration of the law. Absent such an approach, confidence in the administration of justice might dissolve or be impaired. The feeling that, where Parliament has provided a venue for the determination of the unusual and expansive jurisdiction afforded by s 106 of the IR Act, the jurisdiction, once invoked, will be allowed to take its ordinary course, is an understandable one. The notion that those with deep pockets can contest the jurisdiction and then, despite the privative clause, secure intervention by the Court of Appeal or this Court, is one liable to be disturbing to informed observers[67].

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63 Constitution, s 73(ii).

64 [2003] FCA 757 at [76] (appeal dismissed (2004) 138 FCR 475).

65 (1984) 155 CLR 107 at 120-121.

66 (1994) 181 CLR 18 at 39.

67 The extent of the determination of the Parliament of New South Wales to discourage and repel such interventions can be seen in the still more emphatic language of s 179 of the IR Act following the amendments introduced by the *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 5.

75 The foregoing conclusion is especially applicable where the outcome of the intervention is to deprive a person of the right normal to a litigant in this country, even when unprotected by a provision such as s 179 of the IR Act, namely to be entitled to present all of the facts of an arguable claim and to secure a decision on that claim by a qualified and independent court or tribunal with the jurisdiction and powers to apply the law to the facts and to provide reasons for its outcome[68]. A litigant would be entitled to feel especially disturbed where, as here, a challenge to jurisdiction has been rejected by the body designated by Parliament as having the exclusive jurisdiction and power to decide such a claim.

76 Against the long history in Australia and elsewhere of statutory limits on the intrusion of the general courts into the jurisdiction and power of industrial tribunals, and the suspicion that such intrusion has sometimes favoured commercial interests over claimants before industrial tribunals, the intervention by the Court of Appeal merely adds to legitimate feelings of resentment[69]. The rule of law relies on obedience to the law by courts and tribunals and the attention of those bodies, as the law provides, to the justice of the individual case.

77 *Industrial v commercial arrangements*: In the present proceedings, as in *Fish*[70], I infer that part of the willingness of the Court of Appeal to circumvent the provisions of s 179 of the IR Act, and to provide relief in advance of a final hearing, findings and orders of the Commission as determined on the merits, derives from a belief that "commercial contracts", of the kind illustrated by the Option Deed, ought not properly to be before a specialised tribunal, the colour and flavour of whose jurisdiction is normally "industrial" in the traditional sense[71].

78 To the extent that any such attitude affected the approach to the present and like cases, it must, in my opinion, be eradicated. It is incompatible with the status of the Commission in Court Session (now once again the Industrial Court) and of its judges. It is inconsistent with the wide definition of "industry" and the

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68 See *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 565-566 [138] applying *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694 per Sir Thomas Bingham MR.

69 Judicial comity in this context is an antithesis of judicial chauvinism: see *Hicks* [2003] FCA 757 at [76] per French J quoted above at [73].

70 [2006] HCA 22 at [143]; cf *Mitchforce Pty Ltd v Starkey (No 2)* (2003) 130 IR 378 at 436 [212]-[213].

71 See, eg, *Mitchforce* (2003) 130 IR 378 at 386 [22].

large powers over "unfair contracts" provided by the IR Act[72]. It is not consonant with the language and purpose of s 179 of that Act. It destabilises the affected institutions[73].

79 Moreover, the separation of the Option Deed and other arrangements, evidenced in the present case, is not compatible with legislation addressed, as s 106 of the IR Act is, to relief against contemporary unfair employment contracts. Such contracts are bound, increasingly, to involve agreements that, for taxation or other purposes, include collateral, supplementary, later and related conditions and "arrangements". The IR Act recognises this in its terms[74]. So does the past authority of this Court[75]. The Court of Appeal should have done likewise.

80 The imposition of an artificial exclusion of "commercial contracts", for whatever reason, is impermissible as a matter of legal construction. It is an invitation to the very kind of contractual subterfuge against which this Court earlier, and correctly, set its face.

81 *The correct approach*: The Court of Appeal has sometimes adopted the correct approach to the foregoing questions. However, the majority decision did not do so in this case. The approach of Spigelman CJ correctly reflects, and gives effect to, the applicable principle of restraint that, quite apart from s 179 of the IR Act, should govern the issue of orders in the nature of prohibition to the Commission in Court Session[76]. Such restraint used to be the approach of the Court of Appeal in such matters[77]. It was so even before the enactment of s 179,

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72 IR Act, s 7 (definition of "industry"), ss 105, 106.

73 Cf *Mitchforce* (2003) 130 IR 378 at 436 [212]-[213].

74 IR Act, s 105 in reference to the definition of "contract" which means "any contract or arrangement, or any related condition or collateral arrangement, but does not include an industrial instrument". See also s 106(2) referring to "variation of the contract"; s 106(3) referring to variation "from some other time"; s 106(4) referring to a "series of contracts"; and s 106(5) referring to wide powers to make orders for the payment of money, including against non-parties.

75 *Brown v Rezitis* (1970) 127 CLR 157 at 164; *Stevenson v Barham* (1977) 136 CLR 190 at 192.

76 (2004) 208 ALR 368 at 379 [55]. See also the references to the "principle of restraint" and to relevant cases in *Solution 6 Holdings* (2004) 60 NSWLR 558 at 591-595 [136]-[145].

77 See, eg, *Maltais v Industrial Commission (NSW)* (1986) 14 IR 367 at 368.

the expansion of its terms and the development of a culture of pre-emptive review[78].

82 The proper approach is that expressed by Giles JA in the Court of Appeal in a more recent case in the present series. In *Alliance Motor Auctions Pty Ltd v Industrial Relations Commission (NSW)*[79], Giles JA, giving the principal reasons of the Court of Appeal for refusing prohibition to the Commission for want of jurisdiction to hear and determine a claim under s 106 of the IR Act, said[80]:

> "It does not seem to me that that would be an appropriate course to adopt. First, it is not the function of this Court to supervise the parsing of proceedings in the Commission into aspects within the jurisdiction of the Commission and aspects not within its jurisdiction, a task which in any event could not readily be undertaken … Secondly, because the proceedings in the Commission must begin with a finding of what the contract was, and if it be found that the contract was as asserted by the claimants there is ready opportunity for the fullest exercise of jurisdiction. It therefore does not seem to me that the task can be carried out at all, because it cannot be said that there are aspects of any significance which are clearly outside the Commission's jurisdiction. Thirdly, and most important, I repeat that I do not accept that the Commission will not recognise, if the position so arises, that there is some particular aspect of the proceedings before it which exceeds its jurisdiction, and act accordingly."

83 The approach by Giles JA is the legally correct approach to applications of the present kind. Spigelman CJ was right to adopt it in these proceedings. The majority of the Court of Appeal erred in deciding to intervene. Following Peterson J's decision and order, the Court of Appeal should have responded to the present case in the way expressed by Giles JA in *Alliance Motor Auctions* and for the same reasons. This Court makes a serious error in taking, and endorsing, the opposite approach.

The substantive arguments for prohibition fail

84 *The residual question*: Assuming, however, that the foregoing impediments of s 179 of the IR Act and the principles of institutional comity could be lawfully circumvented, should the appeal to this Court nonetheless be

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78 *Ballam v Higgins* (1986) 17 IR 131; cf *Mitchforce* (2003) 130 IR 378 at 436 [213] per Boland J.

79 (2005) 146 IR 99.

80 (2005) 146 IR 99 at 104 [23].

dismissed because any appeal by QSR to the Full Bench of the Commission in Court Session was ultimately *bound* to succeed?

85 The joint reasons in this Court find no error in the approach of the majority of the Court of Appeal to the claim brought by Mr Batterham and Maylord[81]. In part, the approach of the joint reasons rests on the applicability to claims for relief under s 106 of the IR Act of the law governing the liability of corporations, once formed, for the performance by promoters of their agreed pre-incorporation functions[82]. The joint reasons are also influenced by the form of the Option Deed with QSR and the view that any work done by Mr Batterham, after the execution of that deed, could not be said to be done according to the deed and hence that the deed was not a contract "whereby" work was performed in an industry[83].

86 Much of the reasoning that leads to these conclusions is similar to that expressed in the joint reasons in *Fish*[84]. I adhere to the views that I expressed in that appeal. The approach taken in the joint reasons has many flaws, as explained in *Fish*. Above all, it amounts to a narrowing of the application of the deliberately broad language of s 106 for reasons that I regard as unpersuasive and contrary to Parliament's purpose and a turning away from the past authority of this Court. I will not repeat what I said in *Fish*. I incorporate it by reference.

87 Even if, however, a narrower view were taken of the meaning and application of s 106 of the IR Act than that formerly adopted with respect to like statutory language by this Court and by the Privy Council[85], basic questions would remain as to whether, in the facts of the present case, the Court of Appeal was correct to apply such narrower test and to reach the conclusion that the claim of Mr Batterham and Maylord to enlist the jurisdiction of the Commission, is not reasonably arguable so far as it related to the Option Deed. Only such a firm conclusion would have warranted the provision of the relief granted to QSR in terms of the Court of Appeal's order.

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81 Joint reasons at [20]-[23].

82 Joint reasons at [22].

83 Joint reasons at [23].

84 [2006] HCA 22 at [36]-[43].

85 In *Caltex Oil (Australia) Pty Ltd v Feenan* [1981] 1 NSWLR 169 at 173; [1981] 1 WLR 1003 at 1009, the Privy Council said that the word "whereby", in the context of a contract or arrangement, "bears its ordinary meaning of 'in consequence of which' or 'in fulfilment of which'".

88 There are several reasons why the majority in the Court of Appeal were wrong to find that it was not reasonably arguable that the Commission enjoyed the jurisdiction to determine the claims for relief brought by Mr Batterham and Maylord. Their finding involved a misunderstanding of the nature of the claim brought. It entailed legal errors in analysis. And it resulted in an order which, at the very least, was premature and therefore inappropriate. I will explain these errors in turn.

89 *Misunderstanding of the claim*: So far as the misunderstanding of the claim brought by Mr Batterham and Maylord is concerned, the reasons of the majority in the Court of Appeal suggest a belief on Handley JA's part that the claim was narrower than in fact it was[86]. Contrary to Handley JA's description of the claim, Mr Batterham and Maylord were clearly attempting to support a case relying on an "arrangement" for the performance of work pre-dating the formation of QSR. So much appears in the submission of counsel, recorded elsewhere in the reasons of Handley JA[87]. Moreover, Mr Batterham and Maylord were also advancing the case that the "arrangement" involved QSR taking the benefit not only of pre-incorporation work but also post-incorporation work in an industry. This fact had been noticed by Peterson J in his reasons[88], in turn actually extracted in Handley JA's reasons[89].

90 It is against this background, of the misunderstanding of the ambit of the claim advanced by Mr Batterham and Maylord, that the majority in the Court of Appeal proceeded to a misapplication of the word "whereby" in s 106(1) of the IR Act. They suggested that it was essential that there be a temporal operation obliging any "contract or arrangement" relied on to pre-date the relevant work before any order could be made under the section against QSR[90]. With all respect, this suggestion involves an incorrect application of the IR Act.

91 Mr Batterham and Maylord argued that the Option Deed was "collateral" to the "arrangement" for the performance of work. This argument was disposed of by the majority in the Court of Appeal on the mistaken basis that the case as to what constituted the "arrangement" was somehow circumscribed or confined by the date of QSR's incorporation[91]. Because of these mistakes, the majority in the

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86 (2004) 208 ALR 368 at 381 [74].

87 (2004) 208 ALR 368 at 381 [72].

88 [2003] NSWIRComm 366 at [25].

89 (2004) 208 ALR 368 at 381 [70].

90 (2004) 208 ALR 368 at 382 [75].

91 (2004) 208 ALR 368 at 382 [77].

Court of Appeal deprived Mr Batterham and Maylord of the opportunity, by their evidence, to establish the existence of an "arrangement" within the IR Act, which included the incorporation of QSR and which, although an "arrangement" made *before* incorporation, continued to exist *after* such incorporation.

92 *Legal errors in the analysis*: The fundamental flaw in the foregoing reasoning is that it departs from past elaborations of an "arrangement" where that word is used in s 105 of the IR Act and its predecessors. "Arrangement" has repeatedly been given a broad meaning, when appearing in statutes designed (as the IR Act here is) to cast a wide net of operation[92]. Against the deliberate use in the IR Act of a word that may conventionally apply to conduct having no legal consequences, the approach of the Court of Appeal was seriously constricted. When the relationship between entitlements under the Option Deed and both the pre- and post-incorporation work of Mr Batterham is kept in mind, it is strongly arguable that this was precisely the kind of "arrangement" to which ss 105 and 106 of the IR Act were addressed. To impose a strict temporal sequence, as favoured by the majority in the Court of Appeal, is contrary to the statutory language. It is also contrary to the purpose of the facility afforded by these provisions, being to permit the Commission to look in a sensible way at *any* related and collateral "arrangements"[93]. The strict temporal sequence is now endorsed by the joint reasons in this Court. That conclusion constricts the capacity of s 106 to afford remedies against unfair employment contracts as the broad language adopted by Parliament intended. It inflicts a needless wound on the IR Act's remedial provisions.

93 To the present time, the case law of this Court and of the Privy Council concerning the meaning of the word "whereby" in the context of provisions such as s 106 of the IR Act (in relation to a "contract" or "arrangement") consistently holds that the claimant must show that work in any industry is performed "in consequence of" or "in fulfilment of" the "contract" or "arrangement". The use of the word "arrangement" in the legislation gives emphasis to the contemplation of two features. The first is that the "arrangement" might not be a contract in the legal sense. Indeed, it might be an agreement or set of actions that would have no legal consequences at all[94]. Secondly, the word "arrangement" contemplates

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92 (2004) 208 ALR 368 at 378 [47]; *Jaques v Federal Commissioner of Taxation* (1924) 34 CLR 328 at 359; *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 at 573; *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 8-9; [1958] AC 450 at 465-466 (PC); *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 359-360 [75].

93 *Fish* [2006] HCA 22 at [84]-[88].

94 *Fish* [2006] HCA 22 at [87].

something more fluid and uncertain than a "contract" enforceable at law[95]. It envisages the integration of related conditions and collateral terms, including some agreed at a time later than the formal contract, but which must be taken into account if the "arrangement" is to be understood in its entirety[96]. Attempts to impose upon such statutory language rigidities, formalities and a strict time sequence are not only inconsistent with the words chosen. They are incompatible with the achievement of the purposes of the novel remedies provided in the IR Act.

94 There is yet a further legal error in this approach. The Commission has been given power to make orders against *parties to the proceedings* who may not have been parties to the *contracts or arrangements* whereby work was performed. This has obviously been done to permit orders to be made against persons and corporations that have benefited from the work performed under such contracts or arrangements, although not ultimately *parties* to them. Such a facility was essential to respond to the dangers inherent in "clever" legal drafting. The ambit of the power was explained in *Brown v Rezitis*[97]. It is conditioned only on the requirement that the order must be made "in connection with" a contract or arrangement. There is no other jurisdictional precondition[98]. "Connection" is not limited to legally enforceable contractual connection. It is a basic error to so suppose.

95 It follows that Handley JA was in error in introducing a temporal requirement as a precondition to recovery in respect of the "pre-incorporation work" relying on the conjunction "whereby" to carry that burden. There is no such temporal requirement in the IR Act. In fact, the Act distinguishes between the existence of the "contract" or "arrangement" whereby a person performs work and the provision of relief. By the settled authority of this Court, that relief can be granted, in terms of the legislation, against *non-parties* to the contract or arrangement. It can be granted in an "arrangement" where no legal obligation whatever existed.

96 This is why, in his reasons rejecting the challenge to the jurisdiction of the Commission, Peterson J correctly said[99]:

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95 *Fish* [2006] HCA 22 at [87].

96 *Fish* [2006] HCA 22 at [84], [87].

97 (1970) 127 CLR 157 at 163.

98 *Hoffman v Industrial Commission (NSW)* (1990) 33 IR 139 at 142.

99 [2003] NSWIRComm 366 at [31].

> "While it is apparently true that (at least some of) this work was performed before QSR came into existence, I am not persuaded at this stage that QSR could not have become a party to the arrangement and accepted some burden thereunder or, alternatively could not be made a party to the proceedings, even if not a party to the arrangement, if it may be shown that QSR took the, or some, benefit under it."

97 This was the essential consideration that also led Spigelman CJ to conclude that Mr Batterham and Maylord should have their day in court, with the determination of their claim made by the Commission in the normal manner.

98 *Conclusion: premature intervention*: Against the background of the misunderstanding of the claim brought by Mr Batterham and Maylord and the misapplication of the applicable law, as long accepted, stated by this Court and reinforced by re-enactment in terms of ss 105 and 106 of the IR Act[100], it could not be said that Mr Batterham and Maylord had no reasonable prospect of persuading the Commission to find the existence of an *arrangement*, as described, and to find that it was one, viewed globally, *whereby* Mr Batterham performed work in an industry, as defined. Nor could it be said that there was no real prospect of the making of orders against QSR, to the extent that it was shown that the "arrangement" proved was, *or became*, an unfair contract which justified avoidance or variation, with the payment of money as the justice of the circumstances of the case warranted[101].

99 The termination of the hearing in the Commission, based on the contention that the Option Deed was not part of the overall "arrangement" with QSR, was erroneous. On this ground too, the appeal must be allowed. The narrow approach to the IR Act adopted by the Court of Appeal, and now endorsed by the majority of this Court, will simply reaffirm the view of those who enacted ss 105 and 106 of the IR Act. It will confirm a belief that the general courts are hostile to the Commission and the remedial provisions of the IR Act and that the jurisdiction and powers of the Commission must be still further protected to ensure that the purposes of those sections are achieved and achieved in the Commission[102].

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100 *Fish* [2006] HCA 22 at [124]-[131].

101 IR Act, ss 105, 106(5).

102 As occurred after the hearing and orders of the Court of Appeal in this case: *Industrial Relations Amendment Act* 2005 (NSW).

Orders

100 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of those orders, the application to the Court of Appeal should be dismissed with costs.

101 HEYDON J. The appeal should be allowed, the orders of the Court of Appeal should be set aside, and in lieu of those orders, the application to the Court of Appeal should be dismissed. The first respondent should pay the appellants' costs in both this Court and the Court of Appeal.

102 The relevant legislation and background circumstances are set out in other judgments.

Section 179

103 The reason why the appeal should be allowed is that s 179 of the *Industrial Relations Act* 1996 (NSW) operated to prevent the Court of Appeal making an order prohibiting the Industrial Relations Commission of New South Wales from continuing to hear the proceedings instituted by the appellants' summons.

104 The following arguments for the proposition that s 179 does not apply need to be considered.

105 *No decision.* The first respondent filed a notice of motion in the Industrial Relations Commission of New South Wales seeking dismissal of the appellants' summons "for want of jurisdiction". It agreed[103] with the appellants that the relevant legal principles to be applied were those stated by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[104]. Peterson J dismissed the notice of motion because he considered that the first respondent had "not established in the overwhelming way necessary at an interlocutory stage that the summons is beyond the reach of the jurisdiction of the Commission." He also said: "Whether that remains so in the light of the evidence ultimately adduced remains open."[105] He therefore dismissed the notice of motion with costs.

106 The Court of Appeal held that while Peterson J did not decide that the Commission had jurisdiction, he did make a decision when he dismissed the first respondent's notice of motion for summary dismissal[106]. The majority judgment in this Court states that Peterson J made a decision that the proceedings instituted

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103 *Maylord Equity Management Pty Ltd v QSR Ltd* [2003] NSWIRComm 366 at [5].

104 (1964) 112 CLR 125 at 129.

105 *Maylord Equity Management Pty Ltd v QSR Ltd* [2003] NSWIRComm 366 at [39].

106 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368 at 383 [85] per Handley JA (Mason P concurring).

in the Commission had not been shown to be unarguably beyond jurisdiction[107]. Contrary to its position in the Court of Appeal, where the first respondent more than once described Peterson J as having made a "decision", in this Court, without relying on a notice of contention, the first respondent challenged the proposition that Peterson J had made a decision. The basis of the challenge was that to defer a decision is not to make a decision. However, it is possible to make particular decisions in the course of concluding that another decision should be deferred. That is what Peterson J did. Each of the conclusions that Peterson J made a decision is correct. Indeed, as the Court of Appeal recognised, he made another decision as well – that the proceedings should go to trial[108]. That decision was called into question by the Court of Appeal's decision that they should not go to trial.

107 *Procedural decisions outside s 179?* The first respondent also submitted that even if Peterson J had made a decision, it was outside s 179 because it was merely procedural, and s 179 is directed to decisions on matters of substance. There is nothing in s 179(1) and (2) to suggest that a procedural decision is of necessity outside those sub-sections, and that is a conclusion supported by s 179(3)[109]. In any event, the rejection of a notice of motion seeking summary dismissal on the ground of want of jurisdiction was not, in this case, merely procedural. It rested on matters of substance.

108 *The Melbourne Stevedoring Case.* The majority in this Court[110], and apparently the majority in the Court of Appeal[111], considered that the reasoning in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[112] prevents s 179 from being applicable. Kirby J has accepted a submission of the appellants distinguishing that case on the ground that the delegate there made a "fundamental error" as to jurisdiction, while any error by

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107 At [28].

108 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368 at 383 [87] per Handley JA (Mason P concurring).

109 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at 588 [122] per Spigelman CJ (Mason P and Handley JA concurring).

110 At [28].

111 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368 at 383-384 [89] per Handley JA (Mason P concurring).

112 (1953) 88 CLR 100 at 118-119.

Peterson J was not fundamental[113]. However, nothing in the language of s 179(1) and (2) supports a distinction between fundamental and other errors, and s 179(3) points against it.

109 The case is, however, distinguishable on another ground: s 179 is much wider than the privative provision in the *Melbourne Stevedoring Case* (s 52 of the *Stevedoring Industry Act* 1949 (Cth)). Section 52 protected an "order" and a "direction", but nothing else. Section 179 protects "a decision or purported decision", and here Peterson J made a decision. On the basis of the first respondent's summons the Court of Appeal made an order that the Industrial Relations Commission be prohibited from hearing and determining certain aspects of the proceedings. That order could only be made by reviewing or calling into question Peterson J's decision that the first respondent had not established to the appropriate standard that the appellants' summons in the Industrial Relations Commission was outside its jurisdiction. The Court of Appeal did call the decision into question by directly challenging the correctness of the reasoning leading to that conclusion and the orders Peterson J made as a result of reaching it. And Peterson J's interlocutory decision that the case should go to trial was called into question by the Court of Appeal's decision that the case should not proceed further.

110 *Absence of res judicata and issue estoppel.* The majority of the Court of Appeal drew attention to the fact that Peterson J dismissed the notice of motion because the first respondent had failed to discharge the heavy burden created by *General Steel Industries Inc v Commissioner for Railways (NSW)*[114]. The majority continued[115]:

> "An interlocutory decision of this kind does not pre-judge the final decision or create any res judicata or issue estoppel. A final decision in the commission that it lacked jurisdiction in whole or in part would not call in question the interlocutory decision that the case should go to trial. The position is no different here. The fact that this court, after fuller argument, might conclude that the commission's jurisdiction does not extend to any contract or arrangement which pre-dated the incorporation of the [first respondent] would not call into question the interlocutory decision of Peterson J."

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113 At [66].

114 (1964) 112 CLR 125.

115 *QSR Ltd v Industrial Relations Commission of New South Wales* (2004) 208 ALR 368 at 383 [87] per Handley JA (Mason P concurring).

111 The first two sentences are correct. But it is not correct to say that the Industrial Relations Commission, after a trial, reaching a conclusion that there was no jurisdiction, was in the same position as the Court of Appeal, before a trial, granting prohibition against the proceedings on the ground that there was no jurisdiction. The materials before the Court of Appeal were a little fuller, but not significantly fuller, than those before Peterson J; at a trial in the Industrial Relations Commission it is possible, and even likely, as Peterson J acknowledged, that they would have been more extensive. Whether or not the argument before the Court of Appeal was fuller than it was before Peterson J is unclear. It does seem that more cases were cited in argument in the Court of Appeal. Before oral argument took place in front of Peterson J, the parties each filed written submissions. After oral argument, they filed further written submissions. There is nothing to suggest that Peterson J restricted either written or oral argument in any way. But whether or not argument was fuller in the Court of Appeal than before Peterson J, the Court of Appeal's order did "call in question the interlocutory decision that the case should go to trial" because in substance it reversed it. Hence, s 179 applied.

Other issues

112 In view of the conclusion that s 179 applied, it is not necessary to deal with the other issues debated.