HIGH COURT OF AUSTRALIA

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

OLD UGC, INC & ORS APPELLANTS

AND

THE INDUSTRIAL RELATIONS COMMISSION OF
NEW SOUTH WALES IN COURT SESSION & ANOR RESPONDENTS

Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session [2006] HCA 24
18 May 2006
S209/2005

ORDER

1. *Appeal allowed.*

2. *The second respondent pay the appellants' costs of the appeal to this Court.*

3. *Set aside the orders of the Court of Appeal of New South Wales made on 21 July 2004 and in their place order that:*

   (a) *the Industrial Relations Commission of New South Wales be prohibited from hearing or determining the proceeding under s 106 of the* Industrial Relations Act *1996 (NSW), between Robert McRann as applicant and UnitedGlobalCom Inc and others as respondents, being proceeding numbered IRC 3104 of 2001 in the Industrial Relations Commission of New South Wales;*

   (b) *the second opponent, Robert McRann, pay the claimants' costs.*

On appeal from the Supreme Court of New South Wales

Representation:

G J Hatcher SC with C S Ward for the appellants (instructed by Thomson Playford)

Submitting appearance for the first respondent

J N West QC with J D Smith for the second respondent (instructed by Harmers Workplace Lawyers)

CATCHWORDS

Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session

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 – Upon termination of an employment agreement, compensation and release agreement made for the purpose of resolving any legal disputes with respect to the employment agreement – Compensation and release agreement governed by the laws of the State of Colorado – Application to Commission alleging the compensation and release agreement was unfair, harsh and unconscionable – Whether compensation and release agreement was a "contract whereby a person performs work in any industry" – Relevance of the availability of other remedies.

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.

Contract – Construction – Provision requiring parties to act in good faith.

High Court – Appeal – Appeal from New South Wales Court of Appeal – Respondent raised privative provision before the Court of Appeal but not before High Court – Whether High Court can consider privative provision in the circumstances.

Natural justice – Procedural fairness – Entitlement to trial on the merits.

Private international law – Jurisdiction – Industrial Relations Commission (NSW) – Contract in question governed by the laws of the State of Colorado – Whether the power afforded to the Commission under s 106(1) of the *Industrial Relations Act* 1996 (NSW) extends to contracts for which the proper law is other than the law of New South Wales.

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

Statutes – Privative clause – Industrial Relations Commission (NSW) – Whether privative provision applicable.

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

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

Industrial Relations Act 1996 (NSW), ss 105-109A, 152-153, 179.
Supreme Court Act 1970 (NSW), ss 25, 38, 39, 42.

1 GLEESON CJ. I would dismiss this appeal. I agree with the reasons of Gummow, Hayne, Callinan and Crennan JJ on the issue as to the territorial reach of the relevant legislation. However, on the principal issue in the case, I would uphold the reasoning of Spigelman CJ, with whom Mason P and Handley JA agreed, in the New South Wales Court of Appeal[1].

2 The matter is of some procedural and factual complexity. In his reasons for judgment Spigelman CJ accepted that the Summons filed in the Industrial Relations Commission of New South Wales ("the Commission") invoked the Commission's jurisdiction by seeking a variation, not of the relevant employment agreement, but of a later agreement. Spigelman CJ, who treated the later agreement as a variation of the employment agreement, regarded the claim for relief as misdirected in this respect but pointed out that the Court of Appeal "would not prohibit proceedings in the Commission where jurisdiction can be established by an amendment asserting that undisputed facts have a particular legal effect". It is important to keep this aspect of the case in mind when examining the reasoning by which his Honour related the facts of the case to the statutory provisions conferring jurisdiction on the Commission.

3 Section 106 of the *Industrial Relations Act* 1996 (NSW) ("the Act") empowers the Commission to make orders of certain kinds with respect to any contract whereby a person performs work in an industry if the contract is found to be unfair. The Commission may find that the contract, although not unfair at the time it was entered into, became unfair because of any variation of the contract (s 106(2)). A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time (s 106(3)). "Contract" includes "arrangement" (s 105). In this statutory context, the concept of variation of a contract or arrangement, either by the parties, or by order of the Commission, is not to be given a formal or technical meaning.

4 Mr McRann was employed, from 1995 until mid-1997, as Managing Director of the Australian affiliates of a group, headed by the first appellant, which conducted pay television operations in various countries. Mr McRann was in charge of the Australian operations. That Australian employment came to an end on 31 July 1997. Thereafter, until 31 December 1997, he was employed in Amsterdam as the Chief Operating Officer of the first appellant's Netherlands affiliate.

5 Mr McRann's Australian employment was the subject of three contractual documents. The first was a letter of 21 February 1995 by which the first appellant offered him employment with a view to his being seconded to the

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1 *Old UGC Inc v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 620.

television business of its Australian affiliates. He accepted on 3 March 1995. The "assignment" (or secondment) was to be for five years "subject to the terms of this agreement". Mr McRann was entitled to a base salary, an annual bonus and incentive compensation. (In this context, "compensation" means reward or remuneration, not recompense for harm.) That business was conducted by the Australian affiliates, later by Austar Entertainment Pty Ltd and, ultimately after a public float, by Austar United Communications Limited. The incentive compensation was related to the equity value of the Australian affiliates. In the event of Mr McRann's resignation, or the termination of his employment by the employer, he had the right to retain certain vested incentive entitlements. The incentive arrangements contemplated the possibility of options to acquire shares in the event of a public listing of an affiliate conducting the Australian business.

6 Following certain disagreements with his employer, on 2 July 1997 Mr McRann entered into two further agreements. One was called a Compensation and Release Agreement ("the CRA"). The other was called a Termination of Employment Letter Agreement. These agreements were entered into "[i]n anticipation of [Mr McRann's] transfer to Amsterdam". The CRA was said to be for the purpose of resolving all disputes between Mr McRann and the first appellant and to provide him with certain compensation and benefits in exchange for his giving up all legal rights and claims arising out of the existing agreement. Included among such benefits was a provision that, if Austar went public, Mr McRann's incentive interest would be "restructured into stock options or any comparable incentive arrangement offered to then current employees of Austar". That provision is at the centre of the present dispute between Mr McRann and the first appellant. The substantive merits of that dispute are not presently in issue. The CRA varied, and in some respects advanced, Mr McRann's incentive entitlements.

7 The Termination of Employment Letter Agreement said that, in anticipation of the transfer to Amsterdam, Mr McRann and the first appellant mutually agreed to termination of the 1995 agreement, as from 31 July 1997, that his "new assignment" would be the subject of a further agreement (which is presently irrelevant) and that Mr McRann would receive the benefits contained in the CRA.

8 Spigelman CJ said:

> "When the Employment Agreement and [the CRA] are compared ... it appears clear that the latter is, in substance, a variation of the former in view of the circumstance that Mr McRann will be leaving to join the UGC Dutch affiliate.
>
> It is of significance that under the original Employment Agreement, Mr McRann's rights extended beyond the time of the expiry of his five year term. That his rights under the later Agreement also extend beyond

the cessation of his employment with Austar, is not a distinguishing characteristic."

9 He concluded that there was a single contract of employment constituted by reading together the 1995 employment letter and the CRA. This, he said, was a contract whereby Mr McRann performed work in an industry, and was a contract with respect to which the Commission could make orders under s 106 of the Act.

10 I see no error in that analysis of the facts. If it be correct, then the case does not appear to me to give rise to a jurisdictional difficulty of the kind identified in *Fish v Solution 6 Holdings Ltd*[2] and *Batterham v QSR Ltd*[3]. Mr McRann's incentive entitlements were as much a part of the remuneration for which he worked in the Australian business of the group, headed by the first appellant, as his base salary. The circumstance that the alteration of those entitlements took place in the context of a resolution of certain disputes and a contemplated re-assignment from Australia to the Netherlands does not make the case different from, say, a consensual variation of the incentive arrangements a month after they were first entered into. The apparent jurisdictional problem arises because the Summons took the CRA as its focus of attention. Once the CRA is seen as effecting a variation of the original employment agreement and as altering the compensation (that is to say, remuneration) to which Mr McRann was entitled under that agreement, then it is the employment agreement as varied that should be the jurisdictional focus. Mr McRann performed work in an Australian industry. The employment agreement, including its terms and conditions as to compensation, was a contract whereby he performed that work.

11 The appeal should be dismissed with costs.

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2 [2006] HCA 22.

3 [2006] HCA 23.

12 GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ. In March 1995, the second respondent, Mr Robert McRann, made a written agreement with the first appellant, then called United International Holdings Inc ("UIH"), by which UIH would employ him for five years on secondment to UIH's Australian affiliate companies, CTV Pty Ltd and STV Pty Ltd. This agreement ("the employment agreement") provided for certain incentive compensation.

13 On 2 July 1997, UIH and Mr McRann agreed to terminate the employment agreement with effect from 31 July 1997. UIH, a number of its affiliates (including Austar Entertainment Pty Ltd, CTV Pty Ltd and STV Pty Ltd), and Mr McRann, made a "compensation and release agreement" ("the C & R Agreement") for the purpose, recorded in that agreement, of resolving any legal disputes with respect to the then still-existing employment agreement, and to provide Mr McRann "with the compensation and benefits" described in the C & R Agreement – compensation and benefits to which he would not otherwise be entitled. The compensation and benefits were said to be provided "in exchange for [Mr McRann] giving up any and all legal rights or claims" arising out of the employment agreement. The C & R Agreement provided that it was to be governed by the laws of the State of Colorado.

14 Under the C & R Agreement, provision was made for Austar Entertainment Pty Ltd, CTV Pty Ltd and STV Pty Ltd (together referred to as "Austar") to buy from Mr McRann, for $US387,500, 50 per cent of what the agreement called the "Incentive Interest". The Incentive Interest was an amount of money calculated as 0.50 per cent of the residual equity value of Austar. The residual equity value of Austar was to be determined by valuing the assets of Austar as 10 times the preceding 12 months' earnings of Austar, before interest, taxation, depreciation and amortisation, less net liabilities and an amount equal to shareholder debt and equity capital, plus 12 per cent compounded annual rate of return on capital. Various other provisions were made if there were to be a change of control of Austar or if Austar "goes public". The detail of those other provisions is not now important.

15 Provision had been made, in the employment agreement, for incentive compensation, also described as the "Incentive Interest", and comprising 0.75 per cent of the residual equity value of CTV Pty Ltd and STV Pty Ltd. Twenty per cent of that interest vested "at the date of hire" and the balance vested monthly over the next 48 months. The vested amount of the interest was payable upon Mr McRann's resignation and, at his option, upon termination of his employment for cause. The interest was to be calculated in a generally similar fashion to the way in which the Incentive Interest for which the C & R Agreement provided was to be calculated.

16 In April 1998, Mr McRann brought proceedings in the United States District Court for the District of Colorado alleging (among other things) that his agreement to the C & R Agreement had been procured by fraudulent misrepresentation and asking that the C & R Agreement be avoided. Those proceedings have not yet finally been determined.

17 In May 2001, Mr McRann made application to the Industrial Relations Commission of New South Wales ("the Commission") seeking relief under s 106 of the *Industrial Relations Act* 1996 (NSW) ("the Act"). He alleges that the C & R Agreement was, or had become, unfair, harsh and unconscionable. The proceedings in the Commission named the six appellants in this Court as respondents. It is convenient to refer to those parties as the "Old UGC parties".

18 The Old UGC parties applied to the Commission for orders dismissing Mr McRann's application. They alleged that the Commission lacked jurisdiction. They further contended that, as a result of what had occurred in the Colorado proceedings, Mr McRann was estopped from contending that the proceedings brought in the Commission were "concerned with more than the interpretation and enforcement" of the C & R Agreement and that, in any event, the proceedings in the Commission should be stood over pending the conclusion of the Colorado proceedings.

19 A single judicial member of the Commission (Peterson J) dismissed the application made by the Old UGC parties. The Old UGC parties sought leave to appeal to the Full Bench of the Commission. The Full Bench refused that leave, concluding[4] that the proposed appeal did not raise "matters which should lead to the grant of leave to appeal as involving matters of such importance in the public interest that leave to appeal should be granted".

20 The Old UGC parties then applied to the Court of Appeal of New South Wales for a declaration that the Commission has no jurisdiction to hear or determine the application made by Mr McRann and for prohibition or injunction restraining the Commission from proceeding further to hear the matter. The Court of Appeal (Spigelman CJ, Mason P and Handley JA) dismissed[5] that application. The Court concluded[6] that "there was a single contract of

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4 *United Globalcom Inc v McRann* [2003] NSWIRComm 318 at [15].

5 *Old UGC Inc v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 620.

6 (2004) 60 NSWLR 620 at 633 [57] per Spigelman CJ.

employment constituted by reading together the Employment Agreement and the Compensation and Release Agreement". It followed, so the Court held[7], that the parts of the C & R Agreement relied upon in the proceedings in the Commission were part of Mr McRann's contract of employment with Austar.

21 By special leave the Old UGC parties now appeal to this Court. This appeal was heard at the same time as the appeals in *Fish v Solution 6 Holdings Ltd*[8] and *Batterham v QSR Ltd*[9].

22 In the appeal to this Court the Old UGC parties made submissions about the territorial reach of the unfair contract provisions of the Act and about the consequences of the parties to the C & R Agreement stipulating that the agreement was governed by the law of Colorado. But those were submissions that treated the relevant agreement as the hinge about which the operation of s 106 of the Act turned. For the reasons given in *Fish v Solution 6 Holdings Ltd*, that is not the preferable construction of the section. Rather, the section hinges upon the performance of work in any industry and where, as here, the work said to be in question was work in an industry in New South Wales, no question arises of extraterritorial reach of the legislation.

23 Nor is there any basis for concluding, as the Old UGC parties contended, that an agreement whose proper law is not the law of New South Wales but is an agreement whereby work is performed in an industry in New South Wales is not, on the true construction of s 106, within its reach[10]. As Dixon J pointed out in *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*[11], there is a presumption that, unless a contrary intention appears, statutory provisions are understood as having no application to matters governed by foreign law. But that is a presumption about statutory construction and where, as here, the central conception upon which the relevant provisions fasten is the performance of work in an industry and the work in question was performed within the jurisdiction, no question of reading down the operation of the section according to territorial limitations arises.

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7 (2004) 60 NSWLR 620 at 633 [58] per Spigelman CJ.

8 [2006] HCA 22.

9 [2006] HCA 23.

10 cf *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-143 per Kitto J.

11 (1934) 50 CLR 581 at 601.

24 Rather, in this appeal, as in the other two appeals heard with it, the question of the Commission's jurisdiction turns upon whether the contract which it is sought to have the Commission avoid or vary is a contract whereby a person (here, Mr McRann) performs work in any industry.

25 As noted earlier, the answer which the Court of Appeal[12] made to that question depended upon the conclusion that the C & R Agreement formed a part of "a single contract of employment constituted by reading together the Employment Agreement and the [C & R] Agreement". But to answer the question in that way was to begin the investigation of whether s 106 could be engaged by first identifying what contractual stipulations or other arrangements were to be regarded as related one to the other. For the reasons given in *Fish v Solution 6 Holdings Ltd*, that begins the inquiry at the wrong point. And while it may be accepted that the C & R Agreement varied the terms governing the relationship between Mr McRann and the Old UGC parties in connection with his employment in an industry in New South Wales it by no means follows that all the resulting stipulations and arrangements fall within the expression a "contract whereby a person performs work in any industry".

26 The stipulations which it is sought to attack in the proceedings in the Commission were agreed while Mr McRann's employment was still on foot. But, when read as a whole, it is plain that the C & R Agreement was made to resolve any and every claim he might have against the Old UGC parties in relation to not only the employment agreement that was terminated but also what was referred to as his secondment to Austar. So much is most clearly apparent from the release given by Mr McRann in the C & R Agreement. It provided:

> "Employee gives up his right to bring any legal claims against the Company of any nature and related in any way, directly or indirectly, to his employment relationship with the Company pursuant to the Existing Agreement or the termination thereof, *and his secondment to Austar*. This release in favor of the Company is intended to be interpreted in the broadest possible manner, to include all actual or potential legal claims that Employee may have against the Company in relation to the Existing Agreement *and his secondment to Austar*. For avoidance of doubt, Employee also releases all claims against the Company's officers, directors, agents and employees." (emphasis added)

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12 (2004) 60 NSWLR 620 at 633 [57].

Thus when one asks what was the agreement according to which (or in fulfilment of which, or in consequence of which) Mr McRann performed the work he did in an industry in New South Wales, the terms agreed in the C & R Agreement and upon which that employment was to be terminated do not meet the statutory criterion. The terms agreed in the C & R Agreement were not terms according to which Mr McRann performed work; they were terms according to which the parties agreed that his employment (his secondment to Austar) would be terminated. That one of the matters dealt with in the C & R Agreement was a form of deferred reward to which Mr McRann may have been entitled under the original employment agreement does not alter that conclusion. The terms agreed to in the C & R Agreement were, therefore, not terms whereby he performed work in any industry and the Court of Appeal was wrong to reach the contrary conclusion.

27 Mr McRann filed a notice of contention alleging four grounds on which he submitted that the decision of the Court of Appeal should be upheld. At the risk of undue abbreviation, the four grounds of contention can be understood as making two points: first, that the C & R Agreement took effect from the date of its execution and, secondly, that the C & R Agreement should be understood as a related condition or collateral arrangement to the original employment agreement. Both these points are sufficiently addressed and answered by what is said earlier in these reasons.

28 Mr McRann did not contend that the privative provisions of s 179 of the Act were engaged. And in any event, the procedural position in this matter is no different in any material way from that considered in *Batterham v QSR Ltd*. As in *Batterham*, there was no decision by the Commission that it has jurisdiction; there was no more than a decision that absence of jurisdiction had not so clearly been established as to warrant summary termination of the proceedings. It not being contended that s 179 precluded the grant of the relief sought by the Old UGC parties, the appeal to this Court should be allowed and the second respondent should pay the appellants' costs of the appeal to this Court.

29 The orders which the Court of Appeal should have made were:

(a) the Industrial Relations Commission of New South Wales be prohibited from hearing or determining the proceeding under s 106 of the *Industrial Relations Act* 1996 (NSW), between Robert McRann as applicant and UnitedGlobalCom Inc and others as respondents, being proceeding numbered IRC 3104 of 2001 in the Industrial Relations Commission of New South Wales;

(b) the second opponent, Robert McRann, pay the claimants' costs.

30 The orders of the Court of Appeal of New South Wales made on 21 July 2004 should be set aside. Having regard to the nature of the appeal to this Court, which is not an appeal by rehearing[13], the orders of this Court should be:

1. Appeal allowed.

2. The second respondent pay the appellants' costs of the appeal to this Court.

3. Set aside the orders of the Court of Appeal of New South Wales made on 21 July 2004 and in their place order that:

   (a) the Industrial Relations Commission of New South Wales be prohibited from hearing or determining the proceeding under s 106 of the *Industrial Relations Act* 1996 (NSW), between Robert McRann as applicant and UnitedGlobalCom Inc and others as respondents, being proceeding numbered IRC 3104 of 2001 in the Industrial Relations Commission of New South Wales;

   (b) the second opponent, Robert McRann, pay the claimants' costs.

31 Whether or to what extent Mr McRann may take any advantage from the *Industrial Relations Amendment Act* 2005 (NSW) would at least in the first instance, but subject to the supervisory jurisdiction of the Supreme Court, be a matter for the Commission in Court Session (now, since that amending legislation[14], known as the Industrial Court of New South Wales).

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

14 cl 4 of Sched 1 inserting s 151A.

32 KIRBY J. This appeal from the New South Wales Court of Appeal[15] is one of three heard, and decided, together[16]. The appeals present common issues concerning the jurisdiction and powers of the Industrial Relations Commission of New South Wales ("the Commission") to provide relief against unfair contracts. They also concern the proper relationship between the Court of Appeal, exercising the supervisory jurisdiction of the Supreme Court of New South Wales, and the Commission in Court Session[17].

Inter-related appeals

33 As will appear, this appeal raises issues identical to those decided in the companion appeals. However, there is an additional issue that must be decided. It involves an argument special to the present case because the contract in question, impugned as "unfair" within the meaning of s 105 of the IR Act, contained a clause specifying that it would be governed by the laws of the State of Colorado in the United States of America. In the Court of Appeal, it was argued, unsuccessfully, that this clause of itself deprived the Commission of jurisdiction. As will appear[18], that argument was correctly rejected.

34 In this case, alone of the present series, the Court of Appeal unanimously refused to issue relief in the nature of prohibition directed to the Commission. It upheld the jurisdiction of the Commission under s 106 of the IR Act[19]. It also rejected an application for an anti-suit injunction, in purported defence of the proceedings in the courts of Colorado, brought to restrain the proceedings in New South Wales. The Colorado courts had themselves declined to issue such an injunction. By inference, they were content to leave the resolution of any legal

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15 *Old UGC Inc v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 620.

16 The other two are *Fish v Solution 6 Holdings Ltd* [2006] HCA 22 and *Batterham v QSR Ltd* [2006] HCA 23.

17 The Commission in Court Session was comprised at the relevant times of "a judicial member or members only for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session": see *Industrial Relations Act* 1996 (NSW), s 151(1) ("the IR Act"). By the *Industrial Relations Amendment Act* 2005 (NSW), the Court Session has been replaced by the Industrial Court of New South Wales: s 3, Sched 1, cl 4 inserting s 151A in the IR Act.

18 See below these reasons at [55]-[59].

19 (2004) 60 NSWLR 620 at 633 [58].

rights in Australian jurisdiction to the courts of this country[20]. The claim for such an injunction was not pressed in this Court. It can be ignored.

35 The Court of Appeal's decision in this case, that it should be left to the Commission to exercise its jurisdiction and to decide for itself the relief (if any) proper to that exercise, contrasts with that Court's contemporaneous decisions in *Fish*[21] and *Batterham*[22], in which writs in the nature of prohibition were issued forbidding the continuance of like proceedings in the Commission.

36 In this case, as in *Batterham*, the party objecting to the jurisdiction of the Commission did not attempt a pre-emptive strike by proceeding first to the Court of Appeal to argue its jurisdictional objection. An application objecting to jurisdiction had been made to the Commission in Court Session in *Batterham*[23], but without avail. Without tarrying to seek leave to appeal to the Full Bench of the Commission in Court Session, proceedings in *Batterham* were then taken to the Court of Appeal.

37 In the present proceedings, the objection to jurisdiction was properly raised in the Commission in Court Session. It was rejected by a single judge (Peterson J[24]). An application was then made to the Full Bench of the Commission in Court Session for leave to appeal against the adverse interlocutory order. The Full Bench refused such leave[25]. Its order, subsequently undisturbed by the Court of Appeal's disposition, required, in effect, that the proceedings take their course in the Commission in the regular way.

38 At that stage, therefore, the New South Wales and Colorado courts had both rejected attempts to prevent the claimant from having his claim heard before the Commission. He might win. He might lose. But the stakes were high

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20 (2004) 60 NSWLR 620 at 633 [61].

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

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

23 *Maylord Equity Management Pty Ltd v QSR Ltd* [2003] NSWIRComm 366: see *QSR* (2004) 208 ALR 368 at 374-375 [22].

24 *McRann v UnitedGlobalcom Inc* (2003) 124 IR 275.

25 *United Globalcom Inc v McRann* (2003) 132 IR 3. See reasons of Gummow, Hayne, Callinan and Crennan JJ ("the joint reasons") at [19].

(asserted to involve an additional employment benefit of about $10.5 million[26]). Attempts to prevent litigation from proceeding in the regular way in the ordinary venue provided by law are properly regarded as exceptional. The Court of Appeal's orders, on the face of things, gave effect to this familiar principle[27] and to other "principles of restraint"[28] applicable to such applications. The orders in this case, therefore, conform to an unexceptionable approach to claims for relief of the kind sought here.

39 Now, by special leave, a challenge has been brought to this Court against the Court of Appeal's orders. By analogy with what I have said in *Fish* and *Batterham*, the Court of Appeal was correct to reject the challenge to the jurisdiction of the Commission. The appeal fails.

The facts

40 *The importance of detailed evidence*: Cases of the present type, more than most, depend for their outcome on a thorough understanding of the evidence. If the statement of facts is abbreviated, the decision-maker risks missing elements that are central to the application of s 106 of the IR Act. The first is the inter-relationship of the impugned "contract" with "work in any industry" in New South Wales, performed by the person claiming relief. Secondly, unless the detailed facts are appreciated, the decision-maker is liable to miss the elements that are said to render the "contract" either "unfair" at the time it was entered into or subsequently unfair "because of any conduct of the parties [or] any variation of the contract"[29]. To explain my conclusions, it is therefore necessary to state the facts in some little detail.

41 *The Employment Contract*: By letter dated February 1995, Old UGC, Inc[30] ("Old UGC") employed Mr Robert McRann (the respondent) as managing

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26 *Old UGC* (2004) 60 NSWLR 620 at 626 [15].

27 See, eg, *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 447.

28 See *Solution 6 Holdings* (2004) 60 NSWLR 558 at 591 [136].

29 IR Act, s 106(2).

30 Old UGC had previously been known as UnitedGlobalCom Inc and before that as United International Holdings Inc. It was not suggested that the nomenclature affected these proceedings: see *Old UGC* (2004) 60 NSWLR 620 at 622 [1]. Reports of later proceedings indicate that there has been still further restructuring of the first appellant: see *Unitedglobalcom, Inc v Industrial Relations Commission (NSW) in Court Session* (2005) 142 IR 204 at 206 [7].

director of its Australian affiliates conducting pay television operations in Australia[31]. Old UGC is the first appellant before this Court. The other appellants are companies which were, at some stage, subject to control by, or otherwise connected with, Old UGC. The document engaging Mr McRann was titled "Employment Letter Agreement" ("the Employment Contract"). The Employment Contract commenced on 19 March 1995.

42 Mr McRann's remuneration was to include a base salary and, potentially, an annual bonus. He was also entitled to incentive compensation calculated by reference to the equity value of the first appellant's then two Australian affiliates, CTV Pty Ltd and STV Pty Ltd ("CTV and STV"). It was provided that if CTV and STV "went public" the parties were bound by a good faith agreement to the effect that the incentive compensation would be restructured into options or a comparable incentive arrangement.

43 *The termination agreements*: In 1997, Mr McRann and Old UGC entered into discussions in relation to Mr McRann working for an affiliate of Old UGC in the Netherlands. By this stage, the Australian business was conducted by Austar Entertainment Pty Ltd ("Austar Entertainment"). In consequence of these discussions, on 2 July 1997 Mr McRann entered into two further agreements with Old UGC. The first of these was a contract entitled the Compensation & Release Agreement ("the C & R Agreement"). The second was called a Termination of Employment Letter Agreement ("Termination Agreement"). The effect of these agreements was to terminate the Employment Contract on 31 July 1997.

44 The C & R Agreement provided[32] that its purpose was to resolve all legal disputes between the first appellant and Mr McRann with respect to the Employment Contract. The C & R Agreement also provided that "[i]f Austar goes public", the parties "agree in good faith" that the incentive compensation would "be restructured into stock options or any comparable incentive arrangement offered to then current employees of Austar".

45 For his part, Mr McRann gave up his right to bring any legal action and released all claims against Old UGC and its officers, directors, agents and employees. The governing law of the C & R Agreement was specified to be that of Colorado. Mr McRann acknowledged that he understood the "legally binding" character of the C & R Agreement and had been provided with an opportunity to consult a lawyer before executing it.

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31 *Old UGC* (2004) 60 NSWLR 620 at 622 [5].

32 The text of the C & R Agreement is set out in (2004) 60 NSWLR 620 at 623-625 [11].

46 The Termination Agreement anticipated Mr McRann's transfer to employment in the Netherlands and referred to the mutual agreement to terminate the Employment Contract. The Termination Agreement asserted that it and the C & R Agreement "set forth the terms and conditions of the termination of the [Employment Contract]."

47 *The suggested element of unfairness*: In his proceedings in the Commission, Mr McRann asserted that the C & R Agreement became "unfair" because of the failure of the appellants to restructure his incentive compensation into options by reason of the float of CTV and STV by way of the listing of Austar United Pty Ltd ("Austar United") on the Australian Stock Exchange in July 1999.

48 In his proceedings in the Commission, Mr McRann relied heavily on cl 6 of Chapter II of the C & R Agreement. By that clause, provision was made "[i]f Austar goes public". In his initiating document he recited events leading to the dispute between the parties[33]. When Austar United was floated, Mr McRann's successor as managing director of CTV and STV, Mr John Porter, was granted options of approximately 4.8 million shares in Austar United at a strike price of $1.80 per share. This was consequent on a restructuring of his incentive compensation.

49 Mr McRann claimed that, if the same arrangement had applied to his own incentive compensation, he would have held options over some 2.4 million shares in Austar United. He would have been in a position to exercise those options. He claimed that he would have done so around June 2000 at a time when Austar United's shares were trading at approximately $6.10 per share. This would have resulted in a profit to Mr McRann of $4.30 per option or approximately $10.5 million in total.

50 There would be obvious difficulties in securing orders for the legal enforcement of the promises contained in the C & R Agreement. The enforcement in the general courts of law in Australia of "good faith" promises in contractual stipulations is still comparatively undeveloped[34]. However, if

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33 See *Old UGC* (2004) 60 NSWLR 620 at 627 [18].

34 See, eg, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 27-28; cf at 42. The more recent cases and opinions are collected in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 191-193 and *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 695-696 [393]-[394]. See also Thomas, "Good Faith in Contract: A Non-Sceptical Commentary", (2005) 11 *New Zealand Business Law Quarterly* 391.

Mr McRann could bring the promises, which certainly concerned his successive employment arrangements with the affiliates of Old UGC, into the jurisdiction of the Commission, its large powers to make orders in respect of qualifying employment "contracts" and "arrangements" could better serve his purposes. Hence, the present proceedings.

51 Because the Court of Appeal refused to grant the relief sought by the appellants, it was left to the Commission in Court Session to decide the contest about the claim brought by Mr McRann, including any continuing contest as to the Commission's jurisdiction and powers. Unquestionably, the Commission has jurisdiction and power for that purpose. Indeed, it is the first duty of judicial and quasi-judicial bodies, when a question of their jurisdiction and powers is raised, to satisfy themselves as to such jurisdiction and as to their power to afford the relief claimed[35].

52 *Pre-emptive relief and merits*: The appellants complained that there was no merit in the suggestion of unfairness to Mr McRann in the foregoing "contracts" and "arrangements". However, at this stage, neither the Court of Appeal nor this Court is concerned with the merits of Mr McRann's claim. Such questions are normally, and best, determined after a trial in which a party has the opportunity to adduce evidence and argument and appellate courts have the advantage of findings, conclusions and reasons of judges designated by law with the power to decide the contest[36]. To secure termination of the proceedings at this stage, an obligation lies on the appellants to exclude any reasonable possibility that Mr McRann could establish "unfairness" of the impugned "contracts" of the kind for which s 106 of the IR Act provides relief. It is not an insubstantial obligation given that it puts a party out of court, depriving it of the normal rights of a party in this country to a trial on the merits in the court or tribunal that enjoys jurisdiction in such a trial. For this Court, as for the Court of Appeal, the issue for decision is thus a technical and legal one. It is whether "on the facts no basis could exist for exercising the power"[37]. Merits belong elsewhere. By law, they belong to the Commission.

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35 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 495; *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 656-657 [68].

36 Cf *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 392-393.

37 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118.

53 Three grounds were argued before this Court by the appellants to sustain their contention. Those grounds present the main issues for decision.

The issues

54 The issues in this appeal are as follows:

(1) *The proper law issue*: Whether the provisions in s 105 of the IR Act referring to a "contract" and an "unfair contract", and the powers of the Commission to make orders under s 106 in relation to such "contracts", are to be read so as to exclude from "contracts" so defined, contracts the proper law of which is other than the law of New South Wales.

(2) *The premature intervention issue*: Whether, having regard to the privative provisions of s 179 of the IR Act and the general legal principles governing restraint in the grant of supervisory orders before the trial and resolution of contested matters of jurisdiction by a superior court of record, this Court should intervene to provide a writ in the nature of prohibition at this stage, where the Court of Appeal has declined to do so.

(3) *The qualifying contract issue*: Whether, if it remains lawful and proper at this stage for this Court to concern itself with the merits of the attack on the jurisdiction of the Commission, a conclusion should be reached that no arguable basis exists, in the evidence placed before the Commission, for the claim that the C & R Agreement impugned by Mr McRann is a "contract or arrangement" attracting the jurisdiction of the Commission under s 106 of the IR Act.

The decision on the proper law issue was correct

55 *The Court of Appeal's decision*: The Court of Appeal rejected the submission that the nomination of the proper law of the impugned contract as that of Colorado placed that contract outside the jurisdiction of the Commission to grant relief under s 106 in respect of it[38]. I agree with the joint reasons that this conclusion was correct and that the argument to the contrary should be rejected[39].

56 It would be astonishing if the opposite were the case, given the remedial purposes of s 106 of the IR Act. A contrary rule would leave the statutory

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38 *Old UGC* (2004) 60 NSWLR 620 at 630 [40].

39 Joint reasons at [23].

provisions open, in many cases, to easy evasion by the simple nomination of a governing law other than that of New South Wales. In many cases, in the new economy, such a device could not be easily impugned[40]. From the earliest days of the consideration of the predecessors to s 106, both in the Commission itself[41] and in this Court[42], judges have resisted the notion that, by "clever drafting"[43] or otherwise, the legislation could be rendered ineffective by such verbal devices. It is unlikely in the extreme that evasion of this kind would have been contemplated by the New South Wales Parliament. This is an obvious reason why the common law rule of construction, limiting legislation addressed to contracts as normally applicable only to those whose proper law is that of the jurisdiction[44], does not apply in the case of s 106 of the IR Act.

57 There are clear indications in ss 105 and 106 that Parliament did not import such a rule of construction in the present case. Indeed, the legislation shows that it did not[45]. It expanded the application of s 106 to an "arrangement" – a notion that includes agreements, such as the C & R Agreement in this case, containing provisions not necessarily enforceable in a court of law. As Spigelman CJ tartly observed[46]:

"There is no rule of private international law applicable to 'arrangements'."

58 Further, as his Honour pointed out, the focus of s 106 is upon employment "arrangements", not only "contracts" in the conventional sense. The section is a provision enacted (indeed re-enacted and reinforced) to achieve social purposes that the Parliament of New South Wales has deemed important. The section is

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

41 *Davies v General Transport Development Pty Ltd* [1967] AR (NSW) 371 at 374 per Sheldon J.

42 *Brown v Rezitis* (1970) 127 CLR 157 at 164.

43 *Davies* [1967] AR (NSW) 371 at 374; cf *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 280-284 [95]-[111].

44 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601.

45 (2004) 60 NSWLR 620 at 630 [35]-[38].

46 (2004) 60 NSWLR 620 at 630 [35].

not to be whittled down by the imposition upon it of a common law rule of construction that would frustrate its operation and undermine its effectiveness.

59 *Conclusion: New South Wales law applied*: I therefore agree that this Court should reject the appellants' submission that, because the C & R Agreement specified the law of Colorado as its proper law, s 106 of the IR Act could not attach and that, for that reason, the Commission had no jurisdiction. The Court of Appeal made no error in so concluding.

Intervention at this stage is premature

60 *Grounds of prematurity*: As demonstrated in the concurrent decisions in *Fish*[47] and *Batterham*[48], there are two legal bases, separate but mutually reinforcing, that indicate that the issue by this Court of a writ in the nature of prohibition to the Commission in Court Session would be premature, inappropriate and unlawful. The bases are to be found in the privative provisions of s 179 of the IR Act and also in the principle of restraint that governs the issue of legal process, prerogative in nature, to a court or tribunal before that body has had the opportunity finally to determine its own jurisdiction.

61 As pointed out in the other decisions[49], the Commission in Court Session was at the relevant time, by force of the IR Act[50], established in New South Wales as a superior court of record and as a court of a status equivalent to the Supreme Court of New South Wales, of which the Court of Appeal is part[51]. The *Constitution Act* 1902 (NSW) was amended to recognise that status. It provides constitutional protection to the judicial members of the Commission in Court Session[52].

62 Proceedings invoking relief for which s 106 of the IR Act provides were assigned by that Act to the Commission in Court Session[53]. That is where these

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47 [2006] HCA 22 at [132]-[148].

48 [2006] HCA 23 at [54]-[83].

49 *Fish* [2006] HCA 22 at [134]; *Batterham* [2006] HCA 23 at [70].

50 IR Act, s 152.

51 *Supreme Court Act* 1970 (NSW), ss 25, 38, 39 and 42.

52 See *Constitution Act* 1902 (NSW), Pt 9 as amended by IR Act, s 152(2), Sched 5, cl 5.2.

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

proceedings have hitherto been heard. It is where, by order of the Court of Appeal, they stood remitted. It is thus for the Commission in Court Session, at first instance and, if leave is granted after the trial, for the Full Bench of the Commission, to determine finally questions of jurisdiction and to do so on the basis of the evidence and argument considered at first instance in the regular way. The right and duty of the Commission to decide contested issues of jurisdiction was not disputed. Yet now, before such a final determination within the Commission, the appellants ask this Court to intervene and to issue the writ that will terminate the proceedings.

63 *The proper approach*: Section 179 of the IR Act expresses the exclusive character of the jurisdiction of the Commission in matters assigned to it by law. In the terms applicable at the time of the Court of Appeal's orders, the section provided, relevantly[54]:

> "179 Finality of decisions
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> (1) … [A] decision or purported decision of the Commission …
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> (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 ..."

64 Here, therefore, were successive "decisions" of the Commission, made by judicial members, in a part of the Commission accorded a status equivalent to the State Supreme Court, repeatedly rejecting the appellants' submission that on no arguable basis could the Commission enjoy jurisdiction over the proceedings brought to it.

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54 Section 179 was amended after this appeal was heard: see *Industrial Relations Amendment Act* 2005 (NSW), s 3, Sched 1, cl 5.

65 Neither Peterson J[55] nor the Full Bench purported to determine the issue of jurisdiction finally[56]. Each was dealing with the matter on an interlocutory basis at a preliminary stage. Each was engaged in proceedings in the nature of a "strike out" application for want of an arguable case. It was that objection to jurisdiction that was rejected. All that the Commission decided was that the matter should proceed to trial. Were this Court to intervene now, that trial would not be held. The judicial body assigned by Parliament with the responsibility (at least in the first instance) to decide questions as to its jurisdiction would never then make a final determination. Instead, the decision would be made by this Court alone, necessarily on abbreviated evidence. This would deprive Mr McRann of the opportunity that normally belongs to any litigant in an Australian court or tribunal to advance his claim, to call evidence and make submissions, to secure considered findings on contested points in the normal way and to appeal against the orders if dissatisfied with them.

66 The foregoing are not only statutory rights envisaged in this case by the IR Act. They are basic or fundamental rights[57]. A party that has invoked the jurisdiction of the lawful court or tribunal should not be deprived of such rights by an abbreviated trial on limited evidence. Certainly, that should not happen except in a "very clear" case that demands such an outcome[58]. Especially where the law involved is novel and is in a state of development and exposition, special care must be exhibited in affording such pre-emptory relief[59].

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55 (2003) 124 IR 275.

56 (2003) 132 IR 3.

57 International Covenant on Civil and Political Rights done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Art 14(1). Article 14(1) applies to a "suit at law" and thus to non-criminal proceedings: see General Comment 13 of the United Nations Human Rights Committee noted in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 390 [14.03].

58 Cf *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J: "the power ... is not to be used in cases of doubt or difficulty or where the pleading raises a debatable question of law".

59 *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694 per Sir Thomas Bingham MR; cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 565-566 [138]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 796 [228]-[229]; 214 ALR 92 at 149.

67 *The parties' arguments*: It is true[60] that, in this Court, Mr McRann did not explicitly rely on s 179 of the IR Act. This was doubtless because, in the many issues of the three related appeals, the prosecution of the privative provision point could safely be left by him to Mr Batterham and to Mr Fish. In their cases the Court of Appeal had issued prohibition. The offence to s 179 was therefore presented in sharp relief. No such writ, contrary to s 179, attracted a like complaint in Mr McRann's case. The failure to press the common point in Mr McRann's case cannot deprive that point of any force that it enjoys as a matter of law.

68 In any event, by its terms, s 179 is addressed to courts, not, as such, to parties. It is courts and tribunals, ultimately, that are commanded not to "call in question" (nor to entertain an "appeal" against nor to "review or quash") any decision or purported decision of the Commission. The broad meaning given to the expression "call in question" makes it clear that the grant of relief in the nature of prohibition to the Commission by this Court would "call in question" decisions of the Commission made in these proceedings[61]. Those decisions rejected pre-emptory relief. They insisted on the determination of the issue of jurisdiction following a trial when relevant evidence would be adduced by which such decision could be accurately and fairly made. To decide that pre-emptory relief is nonetheless now available, and should be granted, calls in question (and effectively reverses as if on an appeal) the contrary conclusion of the Commission in Court Session, both at first instance and before the Full Bench. This is in clear contravention of s 179 of the IR Act.

69 It was not suggested that, because of the federal character of this Court, the command in s 179 of the IR Act was not "picked up" and applied in the exercise of federal and constitutional jurisdiction[62]. In *Batterham*, a contest to the constitutional validity of s 179 was advanced. However, it was abandoned in the Court of Appeal and not renewed[63]. So long as s 179 is a valid law, it must be obeyed. It must be given effect by every court in the land, and that includes this Court[64].

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60 See joint reasons at [28].

61 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 93; *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 at 370 (PC).

62 *Judiciary Act* 1903 (Cth), s 79.

63 *QSR* (2004) 208 ALR 368 at 369 [3].

64 Constitution, ss 106, 107 and 108.

70 *The principle of restraint*: Apart from the provisions of s 179 of the IR Act, and assuming that the attempts to construe its unloved commands virtually to vanishing point succeed, there remains the normal principle of restraint applicable to these proceedings.

71 That principle is explained in the companion cases, both in the Court of Appeal[65] and in this Court[66]. I will not repeat what is said there. It is sufficient to remember that, in the proper exercise of this Court's function in disposing of a constitutional appeal, the issue of a writ in the nature of prohibition to a superior court of record, equivalent in status to the Supreme Court of a State, is a step normally conserved (in the rare cases where it is available) until after a regular trial and, at the least, the final determination of contested questions of jurisdiction by the body to which that function is committed by law. In the present case, that body is the Commission in Court Session.

72 *Conclusion: restraint applies*: It follows that the court in which was reposed the relevant power and duty to make a final determination on the issue of its jurisdiction, in the first instance, was the Commission in Court Session. It was not the Court of Appeal. And it is not this Court. The Commission in Court Session had not, at the stage of the challenges in the Court of Appeal and in this Court, made such a final decision. At the least, as a court of error, this Court should limit any intervention that it finds lawful and appropriate to the correction of the orders of the Court of Appeal so that the residual issues in these proceedings, concerning the privative provision, the principle of restraint, discretion and comity as between courts of equal status, are decided by the Court of Appeal.

73 For this Court to provide for a writ in the nature of prohibition to the Commission in Court Session is premature, contrary to settled principle and inconsistent with s 179 of the IR Act. Whilst the 2005 amendments to s 179 of the Act, which came into force after the hearing of this appeal, may not govern these proceedings[67], they surely illustrate once again the strengthened resolve of the Parliament of New South Wales to protect the Commission in Court Session (now the Industrial Court[68]) from the inappropriate, and especially the premature, intervention of the Court of Appeal (and, by analogy, of this Court). So long as

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65 *Solution 6 Holdings* (2004) 60 NSWLR 558 at 591 [136].

66 *Fish* [2006] HCA 22 at [141]-[142]; *Batterham* [2006] HCA 23 at [69]-[83].

67 *Fish* [2006] HCA 22 at [45] per Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ.

68 See above these reasons at [32] fn 17.

such statutory interventions are constitutionally valid, courts including this Court must give them effect.

A relevant "contract" exists for relief under s 106

74 *The requirement of "whereby"*: Assuming that the foregoing impediments to intervention in the proceedings before the Commission are not conclusive, the issue arises as to whether it can be said that on no possible basis could the facts of this case attract the exercise of the jurisdiction and powers conferred on the Commission in Court Session under s 106 of the IR Act.

75 Such a conclusion could only be reached if this Court were to take the view of the jurisdiction and powers of the Commission under s 106 that a "related condition or collateral arrangement", within s 105 of the IR Act, must itself be one *whereby* a person performs work in any industry. For the reasons that I have explained in *Fish*[69] and *Batterham*[70], that approach to the meaning of the Act is contrary to the statutory language. It undermines the repeatedly re-enacted legislative purpose. It is inconsistent with the authority of this Court[71]. And it involves the very attitude to the Act and its beneficial provisions that has led to privative provisions to repel the intervention of the general courts in the work of industrial tribunals, now increasingly concerned not with awards but with employment arrangements of a broad and varied kind.

76 In the present case, Mr McRann relied on the argument that the C & R Agreement, the primary subject of his application to the Commission, was a modification of his pre-existing contract of employment. In his evidence, even presented in its present abbreviated form, such a way of presenting the case in the Commission was clearly open to Mr McRann[72]. It is plain, from the language and purpose of ss 105 and 106 of the IR Act, that Parliament did not contemplate an approach to the meaning of a "contract" and of an "unfair contract", in respect of which relief might be granted under s 106, that expelled from consideration the operation of subsequent amendments and variations to a "contract" earlier made.

77 The structure of the two sections of the IR Act, whereby successive definitions of "contract" and "unfair contract" are afforded in s 105 and those words are then used in s 106, makes it clear that reading the words in a narrow

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69 [2006] HCA 22 at [79]-[93].

70 [2006] HCA 23 at [84]-[99].

71 Most especially in *Stevenson v Barham* (1977) 136 CLR 190 at 192, 201-202.

72 Reasons of Gleeson CJ at [10].

and strictly sequential and separated manner is impermissible. The fact that, in this context, "contract" includes an "arrangement" and extends to "any related condition or collateral arrangement" (whenever the word "contract" is used in s 106) makes this clear. It is equally obvious from s 105 that "contract", so defined, informs the meaning of that word appearing in the next defined phrase "unfair contract". The point is put beyond doubt by s 106 where, in sub-s (2), it is provided:

> "The Commission may find that it was an unfair contract at the time it was entered into or that it *subsequently became* an unfair contract because of any conduct of the parties, *any variation of the contract* or any other reason." (emphasis added)

78 Where, therefore, in the present case, either because it amounted to "conduct of the parties" or a "variation of" the Employment Contract or for "any other reason", the C & R Agreement had an effect of terminating Mr McRann's Employment Contract on conditions that rendered that contract "an unfair contract", s 106(1) is arguably attracted. It follows that, at a minimum, Mr McRann is entitled to a trial in which he can advance that proposition[73]. This conclusion follows without reliance on the additional argument available to Mr McRann that, as contemplated by the C & R Agreement, at least for a short interval in July 1997, he continued to perform work in an industry directly under the application of the Employment Contract and the C & R Agreement[74].

79 The Court of Appeal found that, during Mr McRann's employment, the terms and conditions of that employment were eventually subject to three agreements. These were the Employment Contract, the C & R Agreement and the Termination Agreement. The effect of the Termination Agreement was to bring the earlier employment of Mr McRann to a close and to replace the employment with a new agreement (the C & R Agreement). In consideration of Mr McRann's entering into the C & R Agreement, he was to be provided with benefits and compensation in exchange for cancellation of the benefits to which he was otherwise entitled under the original Employment Contract. This is why Spigelman CJ correctly treated the C & R Agreement as, in substance, a "variation" of the Employment Contract[75]. As an arguable variation of that contract, it was open to Mr McRann to contend that it thereby rendered the

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73 *Old UGC* (2004) 60 NSWLR 620 at 632 [51].

74 *Old UGC* (2004) 60 NSWLR 620 at 631 [45]; cf at 623 [10]. In a notice of contention in this Court, Mr McRann asserted that the C & R Agreement came into effect, according to its terms, upon execution by Mr McRann on 2 July 1997. He continued to perform work under the Employment Contract until 31 July 1997.

75 *Old UGC* (2004) 60 NSWLR 620 at 633 [55].

original Employment Contract an "unfair contract". There is absolutely no doubt that Mr McRann performed work pursuant to ("whereby") the Employment Contract in an industry in New South Wales and (if that be required) "directly" so[76].

80 The only argument that suggests a conclusion adverse to Mr McRann would be one by which the Commission was obliged to isolate each of the foregoing "contracts", ignoring the effects of any "variation" of an earlier "contract" and judging whether sequentially, and in each case in isolation, the posited "contract" and each variation of the "contract" answered to the description "whereby a person performs work in any industry". There is nothing in ss 105 and 106 that would justify the imposition of such an artificial construction on the sections. There is plain language that argues to the contrary. So does the large remedial purpose of the sections. Such an interpretation would be contrary to the express contemplation of the subsequent variations of a relevant "contract", as envisaged by s 106(2). It would also be contrary to the entitlement of the Commission, having before it *any* "contract" whereby a person performs work in any industry, to decide whether "because of any conduct of the parties" or for "any other reason", as distinct from a variation, the *original* (qualifying) contract "subsequently *became* ... unfair"[77].

81 *Conclusion: an arguable case*: It follows from this analysis that I agree with Peterson J in the Commission in Court Session, with Wright, Walton and Boland JJ in the Full Bench of the Commission, with Spigelman CJ, Mason P and Handley JA in the Court of Appeal and with the Chief Justice in this Court[78] that, on the facts shown in the evidence adduced in the Commission, Mr McRann demonstrated a sufficiently arguable case to attract the jurisdiction of the Commission. The proceedings should go forward to a final decision in the Commission, reached in the regular way. That means on the basis of evidence and argument at trial, not in an abbreviated hearing in the Supreme Court or, still worse, in an appeal before this Court, necessarily decided on condensed materials.

82 The course that I favour would ensure that the final decision on the Commission's jurisdiction and powers would be made where Parliament contemplated: in the Commission. Moreover, it would be made after a trial. And it would not be made where Parliament appears specifically to have

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76 *Stevenson v Barham* (1977) 136 CLR 190 at 201; cf *Solution 6 Holdings* (2004) 60 NSWLR 558 at 570-572 [26]-[35]; *Fish* [2006] HCA 22 at [28], [107].

77 IR Act, s 106(2) (emphasis added).

78 Reasons of Gleeson CJ at [10].

forbidden: in the general courts exercising exceptional and deliberately limited supervisory jurisdiction. Least of all would it be made in this nation's ultimate court.

83 Having arrived at the foregoing conclusion, reached within the four walls of the reasoning of the Court of Appeal, it is unnecessary for me, in order to propose my own orders, to determine other questions reserved by Mr McRann in his notice of contention filed in this Court.

84 Those questions included suggestions that the Court of Appeal should have found the C & R Agreement to be a "related condition" or "collateral arrangement" of the Employment Contract within the definition of "contract" in s 105 of the IR Act; that it should have found that the three separate agreements constituted a single "arrangement" as that word is used in the definition of "contract" in s 105; and that the reliance expressed in the Court of Appeal on its decision in Mr Fish's case[79] was wrong. It is unnecessary to repeat what I said in *Fish*. The Court of Appeal erred in that case. But it did not err in this.

Orders

85 The appellants' arguments fail. As the Court of Appeal decided, the claim should be returned to the Commission in Court Session, now the Industrial Court. The appeal to this Court should be dismissed with costs.

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79 (2004) 60 NSWLR 620 at 632 [50] citing *Solution 6 Holdings* (2004) 60 NSWLR 558 at 575-576 [54]-[58].

86 HEYDON J. The appeal should be dismissed with costs. The background circumstances and the legislation are set out in other judgments.

Section 179

87 *Peterson J's hearing.* On 24 April 2003, the Industrial Relations Commission of New South Wales in Court Session (Peterson J) dismissed notices of motion filed by the appellants. The notices of motion sought summary dismissal of the proceedings on various grounds, one of which was that the Commission lacked jurisdiction because the relevant agreement fell outside s 106 of the *Industrial Relations Act* 1996 (NSW). Peterson J held that to succeed on the notices of motion the appellants had to "establish, with certainty, that the summons for relief cannot succeed."[80] He held that the appellants "have failed at this interlocutory stage to demonstrate that the [agreement] is necessarily outside the scope of the relief available under s 106."[81] All the other grounds failed, and he dismissed the notices of motion.

88 *The Full Bench hearing.* The Full Bench of the Commission (Wright, Walton and Boland JJ) refused leave to appeal[82]. It found no material errors of law or principle or fact. It held that it could not be said that the material conclusions of Peterson J were not open.

89 *The Court of Appeal.* The appellants sought an order in the nature of a writ of prohibition in the Court of Appeal. The Court of Appeal (Spigelman CJ, Mason P and Handley JA) drew attention to s 179 of the Act, and recorded two arguments advanced by the appellants. The first was that[83]:

> "s 179 should be read down so that it does not preclude relief in relation to an exorbitant assumption of jurisdiction by the Commission, which [they] submitted was demonstrated in this case. The contract or arrangement in the proceedings before the Commission is not, it was said, in any sense an agreement under which work is done and accordingly is not protected by s 179."

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80 *McRann v UnitedGlobalcom Inc* (2003) 124 IR 275 at 277 [7].

81 *McRann v UnitedGlobalcom Inc* (2003) 124 IR 275 at 287 [47].

82 *United Globalcom Inc v McRann* (2003) 132 IR 3.

83 *Old UGC Inc v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 620 at 628 [24] per Spigelman CJ (Mason P and Handley JA concurring).

The second was that[84]:

> "the judgment of Peterson J in the proceedings in the Commission, from which leave to appeal was refused by the Full Bench of the Commission, was not a 'decision' within the meaning of s 179."

The Court of Appeal did not find it necessary to deal with these arguments.

90 *The first argument.* The first argument is fallacious. Section 179 does not draw any distinction between exorbitant assumptions of jurisdiction and other assumptions of jurisdiction. Indeed, s 179(3) points positively against the existence of any such distinction.

91 *The second argument.* The second argument is also fallacious. Peterson J made a decision that the appellants had not demonstrated that the proceedings in the Commission were necessarily outside its jurisdiction. That was one reason why he made another decision: to dismiss the appellants' notices of motion for summary dismissal. What he did can be characterised as involving a third decision: to permit the proceedings to go to trial.

92 *Other possible arguments.* In *Batterham v QSR Ltd*[85] other arguments for the non-application of s 179 were considered. They failed for the reasons given by me in that case[86].

93 *Procedural difficulties.* Since this appeal was heard at the same time as the appeals in *Fish v Solution 6 Holdings Ltd* and *Batterham v QSR Ltd*, the legal representatives of the second respondent in this appeal read and heard arguments advanced on the possible application of s 179. Despite this, the second respondent did not rely on s 179 in his notice of contention in this Court, or in his written or oral submissions. However, I would agree with Kirby J that the application of s 179 is a matter for a court to consider, even if the party in whose interest it is to raise the point does not do so[87]. Notwithstanding this, if the application of s 179 had been a crucial factor in the appellants' appeal being dismissed, it would be necessary to seek further submissions from the parties in relation to it. Since the appellants' appeal will not be dismissed, however, there is no need to take this course.

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84 *Old UGC Inc v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 620 at 628 [25] per Spigelman CJ (Mason P and Handley JA concurring).

85 [2006] HCA 23.

86 [2006] HCA 23 at [107]-[111].

87 See at [67].

Other issues

94 In view of the conclusion that s 179 applies, the other issues debated by the parties do not arise.