HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

JEMENA ASSET MANAGEMENT (3) PTY LTD & ORS APPELLANTS

AND

COINVEST LIMITED RESPONDENT

Jemena Asset Management (3) Pty Ltd v Coinvest Limited [2011] HCA 33
7 September 2011
M127/2010

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A J Myers QC with C B O'Grady for the appellant (instructed by Herbert Geer)

P J Hanks QC with S J Moore for the respondent (instructed by Maddocks)

S J Gageler SC, Solicitor-General of the Commonwealth with C P Young intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Jemena Asset Management (3) Pty Ltd v Coinvest Limited

Constitutional law (Cth) – Inconsistency between Commonwealth instrument and State law – Appellants employed construction workers and were bound by certain federal industrial instruments ("federal instruments") made under *Workplace Relations Act* 1996 (Cth) ("Commonwealth Act"), which contained provisions regarding long service leave – *Construction Industry Long Service Leave Act* 1997 (Vic) ("State Act") provided for scheme of portable long service leave benefits for workers in construction industry – Commonwealth Act provided for paramountcy of industrial instruments made under federal legislation over State laws, to extent of any inconsistency – Whether State Act inconsistent with Commonwealth Act as embodied in federal instruments.

Words and phrases – "alter, impair or detract from", "cover the field", "direct inconsistency", "indirect inconsistency".

Constitution, s 109.
Construction Industry Long Service Leave Act 1997 (Vic), ss 1, 3, 4, 6.
Workplace Relations Act 1996 (Cth), ss 17(1), 152(1), 170LZ(1).

1 FRENCH CJ, GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The three appellants, companies incorporated in Victoria, carry on businesses in the operation of electricity infrastructure assets. In the course of those businesses, the appellants employ persons to perform construction work, and are bound by several federal industrial instruments made under the *Workplace Relations Act* 1996 (Cth) ("the Commonwealth Act") in relation to long service leave ("the federal instruments").

2 In early October 2007, in circumstances more fully set out below, the appellants brought proceedings in the Federal Court because they feared imminent prosecution under the provisions of the *Construction Industry Long Service Leave Act* 1997 (Vic) ("the State Act") which provides for a scheme for portable long service leave benefits in the construction industry.

3 This appeal is from the judgment and orders made by a Full Court of the Federal Court (Moore, Middleton and Gordon JJ)[1] dismissing an appeal from the judgment and orders made by the primary judge (Marshall J)[2], by which answers were given to separate questions stated pursuant to O 29 r 2 of the Federal Court Rules (Cth)[3]. Those separate questions were directed to assessing whether the State Act, including the scheme established under it, is inconsistent with certain provisions of the Commonwealth Act embodied[4] in the federal instruments, and therefore invalid by reason of s 109 of the Constitution. That required consideration of the provisions for long service leave established by the federal instruments made under the Commonwealth Act and the scheme for portable long service leave benefits established under the State Act.

4 It is convenient to note the curial setting in which the separate questions arose before turning to the legislation to be considered.

5 At all relevant times the appellants were bound by the following federal instruments:

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1 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576.

2 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49.

3 The separate questions are set out in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 50-51 [3].

4 *Ex parte McLean* (1930) 43 CLR 472 at 480 per Rich J; [1930] HCA 12.

- the Power and Energy Industry Electrical, Electronic and Engineering Employees Award 1998 ("the 1998 Award"); and

- a succession of certified agreements (collectively "the certified agreements"), namely the AGL Electricity Limited Enterprise Agreement 1999 ("the 1999 Certified Agreement"), the AGL Electricity and Agility Certified Agreement (Victoria) 2002 ("the 2002 Certified Agreement"), and the AGL Electricity and Agility (Victoria) CEPU/ETU Certified Agreement 2004 ("the CEPU/ETU Agreement") and the AGL Electricity and Agility (Victoria) APESMA/ASU Certified Agreement 2004 ("the APESMA/ASU Agreement") (together "the 2004 Certified Agreements").

6 The certified agreements obliged the appellants to comply with the 1998 Award and current policies, customs and practices including the practice in respect of the granting of, and payment for, long service leave. Further, specific provision was made for long service leave in the 2004 Certified Agreements.

7 The State Act obliged the appellants to pay to the respondent "a long service leave charge in respect of every worker employed by [them] to perform construction work in the construction industry"[5].

8 The respondent is the trustee of the Construction Industry Long Service Leave Fund ("the Fund") established by the State Act under a trust deed executed by the respondent on 1 April 1997 ("the trust deed")[6].

9 On 24 February 2006, the respondent requested the appellants to provide relevant details of their workers and to make payments pursuant to the State Act. Between May 2006 and July 2007, the respondent issued the appellants with various notices under s 10 of the State Act[7] requesting information regarding

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5 State Act, s 4(1).

6 State Act, s 3(1). The trust deed is a "subordinate instrument" as defined in the *Interpretation of Legislation Act* 1984 (Vic), s 38.

7 Section 10(1) relevantly enables the trustee to give written notice to seek information or documents from an employer which are relevant to rights and liabilities under the trust deed. Failure to comply attracts a penalty (s 10(3)).

certain of the appellants' employees between the dates 21 January 2000 and 28 February 2007 ("relevant times"). On 3 October 2007, the respondent advised the second appellant that it would commence proceedings against the second appellant in relation to its failure to comply with one of the s 10 notices.

10 The appellants contended that they were not obliged to comply with the State Act due to its inconsistency with the federal instruments made under the Commonwealth Act. Calling in aid certain provisions of the Commonwealth Act described below, and s 109 of the Constitution, the appellants contended the inconsistency rendered the State Act invalid, to the extent that it applied to them, and brought proceedings against the respondent in the Federal Court on 5 October 2007[8]. The relief sought included a declaration that the respondent had no rights, under the State Act, against the appellants in relation to their employees employed under any of the federal instruments ("relevant employees"), and an injunction restraining the respondent from exercising powers under the State Act in respect of the appellants and relevant employees.

The Commonwealth Act

11 For the purposes of s 109, an industrial award, whilst not of itself a law of the Commonwealth, has the force and effect of such a law where so provided by the machinery of a Commonwealth statute[9]. Sections 152(1) and 170LZ(1) of the Commonwealth Act prior to 27 March 2006, and s 17(1) of that Act on and after 27 March 2006, expressly provided for the paramountcy of instruments made under federal legislation. An earlier version of these provisions (s 65 of the *Conciliation and Arbitration Act* 1904 (Cth)) was recognised as evincing a statutory intention that an award made pursuant to the Act was to operate "to the exclusion of any State law."[10]

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8 At this time, the appellants were known respectively as Alinta Asset Management (3) Pty Ltd, Alinta Asset Management (4) Pty Ltd and Alinta AE Limited.

9 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 494-496, 499 per Isaacs J; [1926] HCA 6; *Ex parte McLean* (1930) 43 CLR 472 at 479 per Isaacs CJ and Starke J, 480 per Rich J, 484-485 per Dixon J; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151 at 158 per Latham CJ; [1943] HCA 41; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 548-549; [1955] HCA 44.

10 *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 648-649 per Mason, Brennan and

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12 At all material times prior to 27 March 2006, ss 152(1) and 170LZ(1) of the Commonwealth Act respectively provided that, subject to the sections, and to the extent of any inconsistency, federal awards and certified agreements prevailed over State laws and State awards (s 152(1)) and terms and conditions of employment specified in a State law, State award or State employment agreement (s 170LZ(1)). Section 170LZ(2) provided that provisions in a certified agreement which dealt with occupational health and safety, workers' compensation, apprenticeship, or any other matter prescribed by the regulations, operated "subject to the provisions of a State law that deal[t] with the matter".

13 Following the enactment of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("the Work Choices Act"), s 170LZ continued to apply to certified agreements entered into prior to the Work Choices Act reforms[11].

14 On and after 27 March 2006, and during relevant times, s 17(1) and (2) of the Commonwealth Act contained like provisions similar in effect, but not identical to, those in ss 152(1) and 170LZ(1) and (2).

15 "Award" was relevantly defined in this version of the Commonwealth Act to mean an award within the meaning of s 4(1) of the Commonwealth Act as in force immediately before the commencement of the Work Choices Act[12].

Deane JJ; [1983] HCA 28; see also *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 337; [1987] HCA 13. See, generally, *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 per Mason J; [1977] HCA 34; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628-629 [36]-[37]; [2004] HCA 19; *John Holland Pty Ltd v Victorian WorkCover Authority* (2009) 239 CLR 518 at 527-528 [21]; [2009] HCA 45.

11 Commonwealth Act on and after 27 March 2006, Sched 7, pt 2, div 1, cl 2(1)(g).

12 See the definitions of "award" and "pre-reform award" contained in s 4(1) of the Commonwealth Act on and after 27 March 2006, and Work Choices Act, Sched 4, pt 2, div 2, item 4 (which relevantly replaced pre-existing awards with instruments in identical terms designated "pre-reform awards").

16 Upon the repeal of the Commonwealth Act by the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) ("the Fair Work Act"), awards and certified agreements in operation immediately before the date of the Commonwealth Act's repeal continued in existence as "transitional instruments"[13]. These transitional instruments remain subject to the same "instrument interaction rules" and "State and Territory interaction rules"[14] as in force immediately before the date of repeal[15]. However, no issue arises in this appeal in respect of the Fair Work Act.

The federal instruments

17 The 1998 Award and the certified agreements impose obligations on employers bound by them to grant, and pay for, long service leave in relation to their qualifying employees, and govern the circumstances in which such entitlements will accrue.

The 1998 Award

18 In the words of the Full Court below, "the 1998 Award deals with all the ordinary aspects of long service leave entitlements which might arise in the industrial relationship between employee and employer."[16] Clause 24 prescribes, among other things, an entitlement to long service leave calculated and paid at a particular rate[17], requirements for accruing and taking leave[18], and mechanisms

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13 Fair Work Act, Sched 3, pt 2, item 2.

14 Respectively, Commonwealth laws governing priority between instruments of the kind that become transitional instruments, and Commonwealth laws governing priority between State and Territory laws and such instruments: Fair Work Act, Sched 3, pt 2, items 5(2) and 5A(2).

15 Fair Work Act, Sched 3, pt 2, items 5(1) and 5A(1).

16 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 578 [8].

17 Clause 24.2.

18 Clause 24.3-24.4.

for making payments in lieu of leave in the event of termination of employment[19].

The certified agreements

19 The certified agreements oblige affected employers to comply with the 1998 Award and current policies, customs and practices[20], including the practice in respect of the granting of, and payment for, long service leave. The 2004 Certified Agreements contain "guide" provisions[21] governing the accrual, calculation and payment of long service leave[22].

The State Act

20 The State Act's purpose is:

> "to repeal the *Construction Industry Long Service Leave Act* 1983 [(Vic)] and provide for the scheme established by that Act to be administered in accordance with a trust deed by a company incorporated under the Corporations Law"[23].

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19 Clause 24.5.

20 1999 Certified Agreement, cl 4; 2002 Certified Agreement, cl 4; 2004 Certified Agreements, cl 5.

21 The heading to Attachment D (Leave Entitlements) of the CEPU/ETU Agreement, and to Attachment C (Leave Entitlements) of the APESMA/ASU Agreement, reads: "The following leave provisions are a guide only and are to be read in conjunction with the Parent Awards" – which include the 1998 Award.

22 CEPU/ETU Agreement, Attachment D, cl 3.d; APESMA/ASU Agreement, Attachment C, cl 3.

23 State Act, s 1. The predecessor legislation, the *Construction Industry Long Service Leave Act* 1983 (Vic) ("the 1983 Act"), provided for long service leave for persons in the construction industry. Entitlements were dealt with by the board of a statutory fund. Payments described as "a long service leave charge" were made to the Board by employers in respect of each worker performing building, electrical or metal trade work. See Pts I, V and VI. Section 46A allowed the responsible Minister to make a reciprocal arrangement with a Minister of another State or of a

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21 In essence, the State Act requires employers bound by it to contribute to the abovementioned Fund so as to provide portable long service leave benefits for workers in the construction industry. Reciprocal arrangements with the relevant Minister of another State or of a Territory are possible[24].

22 As mentioned above, s 4(1) of the State Act provides that an employer "must pay to [the respondent][25] a long service leave charge in respect of every worker employed by the employer to perform construction work in the construction industry." Section 4(2) provides that the date for payment of the charge, the period for which it is payable, the amount of the charge and the method of calculating the charge "are as determined from time to time by the trustee in accordance with the trust deed"[26]. The charge imposed in respect of a worker may not exceed 3% of the worker's ordinary pay[27].

23 Section 6 of the State Act provides:

> "(1) Every worker is entitled to long service leave, and to be paid benefits out of the [F]und, in respect of continuous service in the construction industry[28].

Territory, responsible for the administration of a corresponding law of that State or Territory.

24 State Act, s 18.

25 See definition of "trustee" contained in s 3(1) of the State Act: "CoINVEST Limited ACN 078 004 985 or any new trustee appointed under, and in accordance with, the trust deed."

26 See definition of "trust deed" contained in s 3(1) of the State Act.

27 State Act, s 4(3).

28 Section 40(1) of the 1983 Act, governing entitlements, was expressed differently:

> "Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous service in the construction industry (whether before or after the commencement of this section)."

(2) Every working sub-contractor who has paid long service leave charges is entitled to be paid benefits out of the [F]und in respect of continuous service in the construction industry.

(3) The amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed."

24 Employers are under obligations to register with the respondent in accordance with the trust deed or they are prohibited from employing workers in the construction industry for over five days in any month[29], and must keep records and send the respondent information relating to their employed construction workers[30]. Disputes concerning the operation of the State Act and the scheme dealt with by the trust deed are deemed to have been referred to arbitration in accordance with the Commercial Arbitration Act 1984 (Vic)[31].

The State Act scheme

25 The respondent is required to exercise powers under the trust deed in accordance with the State Act[32]. The respondent has made rules relating to the Fund "established under the trust deed"[33] ("the Fund rules") which are to be construed as part of the trust deed[34]. The Fund rules have been amended by the respondent from time to time pursuant to its rule-making power in cl 5.1 of the trust deed. The relevant rules are those in existence as at 29 August 2006.

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29 State Act, s 8.

30 State Act, s 9.

31 State Act, s 12.

32 Clause 6.2.2 of the trust deed.

33 See definition of "fund" contained in s 3(1) of the State Act.

34 Clauses 5.1 and 5.3 of the trust deed. Clause 5.3 of the trust deed provides that the provisions of the trust deed prevail over the Fund rules to the extent of any inconsistency.

Words and expressions used in the State Act have the same respective meanings as they have in the Fund rules[35].

Relevant Fund rules

26 *Entitlement to long service leave benefits.* Rule 27.1 provides that "[e]very Worker[36] is entitled to a Long Service Leave Benefit in respect of Continuous Service[37] performing Construction Work[38] for an Employer[39]". "Long Service Leave Benefit" is defined in r 1.1 as "an entitlement paid out of the Fund, in accordance with these Rules". "Long Service Leave" is defined as "long service leave which a Worker is entitled to under these Rules by virtue of the [State] Act". Rules 27.2 and 27.3 prescribe a method for calculating the amount of the entitlement due to each Worker depending on the length of his or her period of continuous service and the relevant date of assessment. Rule 27.4 obliges the respondent to pay from the Fund to the Worker "forthwith upon receipt of a request in writing from the Worker the Long Service Leave Benefit to which he is entitled."

27 *Payment of a long service leave charge.* Rule 11.1 requires every Employer, in respect of every Worker employed to perform Construction Work during each Prescribed Period[40], to pay a Long Service Leave Charge to the respondent for the work performed by those Workers during that period. "Long

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35 State Act, s 3(2).

36 A person who "is ordinarily resident in Victoria" and "performs work under a contract of employment"; this includes "a foreman, sub-foreman and an Apprentice": r 1.1 of the Fund rules.

37 As defined, relevantly, in r 21: r 1.1 of the Fund rules.

38 As defined in r 1.1 of the Fund rules.

39 Including, relevantly, a person (other than the Crown in right of the Commonwealth or the State of Victoria, or any Commonwealth or Victorian public statutory body) who employs Workers under a contract of employment: r 1.1 of the Fund rules.

40 Any period of two months determined by the respondent: r 11.11 of the Fund rules.

Service Leave Charge" is defined in r 1.1 as a "contribution paid into the Fund by any Employer … in accordance with these Rules". Rule 11.2(a) authorises the respondent's Directors to fix the amount of the Long Service Leave Charge per Worker by special resolution, in default of which the method of assessment set out in rr 11.2(b) and 11.3 applies. Rules 11.4-11.5 stipulate the method of calculating this charge for persons who have engaged in more than one kind of Construction Work during any Prescribed Period.

28 *Reimbursement of employers.* Rule 40.3 entitles an Employer to reimbursement from the Fund where (a) a person is given Long Service Leave or payment in lieu thereof to which he or she is entitled otherwise than under the Fund rules, and (b) the Employer giving the leave or making the payment has paid the prescribed Long Service Leave Charges for the relevant period of employment. It also needs to be noted that r 50.2 provides for refunds of overpaid benefits and r 23.10 ensures that there are no double claims; no worker may recover a long service leave benefit under the Fund in circumstances where the amount has already been received from a source other than under the State Act.

29 *Payments in and out of the Fund.* Under r 6.1, the only payments to be made into the Fund are the Long Service Leave Charges paid to the respondent under the Rules and in accordance with the State Act; proceeds of investment of the Fund; and any other money paid into the Fund under the Fund rules. Monies to be paid out of the Fund under r 6.2 are the Long Service Leave Benefits provided for under the Fund rules; Fund administration costs; and other payments which the respondent reasonably believes should be paid from the Fund or which are authorised by the Fund rules.

Reasoning in the courts below

30 It was common ground throughout the proceedings that the inconsistency alleged by the appellants was said to arise between the State Act and the applicable provisions of the Commonwealth Act, as embodied in the federal instruments[41], and the separate questions were framed accordingly.

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41 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 55-56 [27], citing *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 648-649. See also *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 582 [31]-[32].

31 The primary judge's answer to each of the separate questions concerning the existence of any inconsistency was "No"[42] reflecting his views that the scheme under the State Act did not alter, impair or detract from the operation of the federal instruments[43] or enter the field intended to be covered by them[44]. In particular, his Honour considered that nothing in the federal instruments indicated that they were intended to cover the subject matter of the State Act scheme, namely "portable long service leave in the construction industry funded by way of a charge … and paid out of a fund."[45]

32 On the question of whether the State Act scheme altered, impaired or detracted from the operation of the federal instruments (and, therefore, the Commonwealth Act[46]), the Full Court of the Federal Court found that the duty imposed on particular employers under the State Act scheme did not conflict with that imposed by the federal instruments, nor did the former regime deny or vary any right, power or privilege conferred by the latter[47]. Their Honours agreed with the primary judge that the State Act and the federal instruments "co-exist in harmony such that each of them may be considered supplementary to or cumulative upon the other"[48].

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42 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 59 [44]. It was unnecessary to answer other separate questions concerning the extent of any inconsistency.

43 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 57-58 [39].

44 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 58-59 [43].

45 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR 49 at 58 [42].

46 *Compass Group (Australia) Pty Ltd v Bartram* (2007) 239 ALR 262 at 266 [22], citing *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 643, 648; cited by the Full Court in *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 582 [32].

47 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 583 [37].

48 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 583 [38], quoting from *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2009) 182 IR

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33 The Full Court of the Federal Court also agreed with the primary judge that the Fund rules "fundamentally provide[d] for the entitlement to be paid monies out of the [F]und, and not the entitlement for actual long service leave or payment in lieu."[49] This, in turn, determined the ambit of the entitlement to long service leave under s 6(1) of the State Act by virtue of the interpretative rule contained in s 3(2)[50]. In the Full Court's view, the primary entitlement afforded under the Fund rules could be characterised as a Long Service Leave Benefit, defined in r 1.1 as an entitlement to be paid out of the Fund in accordance with the Fund rules[51]. Although the amount of this entitlement was expressed in certain circumstances as a period of leave – for example, the entitlement to 13 weeks' leave "on Ordinary Pay" under r 27.2(a) – nevertheless the respondent's only obligation under the Fund rules was to make payments from the Fund upon receipt of a request for a long service leave benefit[52].

34 The Attorney-General of the Commonwealth intervened in this appeal pursuant to s 78A of the *Judiciary Act* 1903 (Cth) in support of the respondent, asserting the lack of inconsistency.

35 For the reasons which follow, the respondent's submissions on the validity of the State Act must be accepted and the appeal should be dismissed.

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49 at 58 [40]. The expression "supplementary to or cumulative upon" can be traced to *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J referring to the operation of a Commonwealth law within the setting of other laws.

49 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 580 [21].

50 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 580 [17].

51 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 580 [22].

52 *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576 at 580-581 [24]-[25].

Applicable principles

36 The paramountcy[53] of the Parliament of the Commonwealth under the Constitution resolves any conflict between Commonwealth and State law as set out in covering cl 5 and s 109 of the Constitution:

> "5 This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State …
>
> 109 When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

37 Quick and Garran describe s 109 as "practically a corollary"[54] of ss 106, 107 and 108 of the Constitution which deal respectively with the saving of State Constitutions, powers of State Parliaments and State laws, all of which are made subject to the Constitution. In the context of the law-making powers of the State and Commonwealth Parliaments under their respective Constitutions, s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth.

38 The expressions "a law of the State" and "a law of the Commonwealth" in s 109 are sufficiently general for s 109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also, as mentioned, an industrial order or award[55], or other legislative instrument or regulation[56], made under a statute.

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53 *Ex parte McLean* (1930) 43 CLR 472 at 485 per Dixon J.

54 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 939.

55 See note 9 above.

56 *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 576, 591-594, 598; [1954] HCA 29. See also *Co-operative Committee on Japanese Canadians v Attorney-General of Canada* [1947] AC 87 at 106. Cf *Commonwealth v Colonial*

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39 Applicable principles have been reiterated in the joint reasons of the whole Court in *Dickson v The Queen*[57]:

> "The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth* [('the *Kakariki Case*')][58] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[59] as follows:
>
> > 'In *Victoria v The Commonwealth*[60], Dixon J stated two propositions which are presently material. The first was: "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid." The second, which followed immediately in the same passage, was: "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent." …'

Combing, Spinning and Weaving Co Ltd (1922) 31 CLR 421 at 431 per Knox CJ and Gavan Duffy J; [1922] HCA 62 (dealing, inter alia, with the expression "the laws of the Commonwealth" in covering cl 5 of the Constitution).

57 (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30.

58 (1937) 58 CLR 618 at 630; [1937] HCA 82.

59 (1999) 197 CLR 61 at 76 [28]; [1999] HCA 12.

60 (1937) 58 CLR 618 at 630.

> The first proposition is often associated with the description 'direct inconsistency'[61], and the second with the expressions 'covering the field'[62] and 'indirect inconsistency'."

40 The expression "cover the field" means "cover the subject matter", which was the description used and explained by Dixon J in *Ex parte McLean*[63]. From the outset the aspect of inconsistency associated with the expression "covering the field" has not been free from criticism[64]. There can be little doubt that indirect inconsistency involves "more subtle … contrariety"[65] than any "textual"[66] or "direct collision"[67] between the provisions of a Commonwealth law and a State law.

41 The crucial notions of "altering", "impairing" or "detracting from" the operation of a law of the Commonwealth have in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the

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61 See, for example, *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151 at 159 per Latham CJ and 161 per Starke J. See also *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258; [1968] HCA 2; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 78; *Dickson* (2010) 241 CLR 491 at 504 [22].

62 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489, 491, 499 per Isaacs J; *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 108-109 per Latham CJ; [1948] HCA 13.

63 (1930) 43 CLR 472 at 483-486.

64 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 147 per Evatt J; [1932] HCA 40; *Kakariki Case* (1937) 58 CLR 618 at 633-634 per Evatt J.

65 *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406 per Stephen J; [1977] HCA 51.

66 *Miller v Miller* (1978) 141 CLR 269 at 275 per Barwick CJ; [1978] HCA 44.

67 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258 per Barwick CJ.

Commonwealth law. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial[68].

42 Although the utility of accepted tests of inconsistency, based on recognising different aspects of inconsistency for the purposes of s 109, is well established as Mason J observed in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[69], it is not surprising that different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109. All tests of inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a "real conflict"[70] exists between a Commonwealth law and a State law.

43 The appellants' case incorporated the language of the two propositions of Dixon J set out above and involved asserting the existence of both direct and indirect inconsistency between the Commonwealth Act as embodied in the federal instruments and the State Act[71].

44 With concurrent federal and State powers, the question of inconsistency does not involve the limits of constitutional powers under the respective Constitutions, but rather the operation of both Acts. As explained by Dixon J in *Wenn v Attorney-General (Vic)*[72]:

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68 See *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643, 651; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27].

69 (1980) 142 CLR 237 at 260; [1980] HCA 8.

70 See, for example, *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553.

71 The test of direct inconsistency adverted to in *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 286, 289, 299; [1910] HCA 8 (the "impossibility of simultaneous obedience test") was not relied upon. See also, subsequently, *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 398; [1994] HCA 17 and *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27].

72 (1948) 77 CLR 84 at 120, 122.

> "There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. …
>
> [W]hile s 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute."

45 Similarly, in *Western Australia v The Commonwealth* (*Native Title Act Case*)[73] it was recognised that the extent of any inconsistency "depends on the text and operation of the respective laws." A proper understanding of the policy and purpose of the State Act underpins the task of construing it and identifying its operation[74].

46 Because it was accepted by all parties that the 1998 Award covered employee entitlements and correlative employer obligations in respect of the grant of, and payment for, long service leave, the respondent conceded by reference to *Wenn*, that if, and to the extent that, the State Act scheme dealt with the grant of long service leave it would operate inconsistently with the federal instruments.

Does the State Act undermine the federal instruments?

47 The federal instruments made detailed provision for the grant of, and payment for, long service leave. The appellants contended that the State Act and scheme were directly inconsistent with the relevant provisions of the Commonwealth Act embodied in the federal instruments, because obligations

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73 (1995) 183 CLR 373 at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47.

74 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

imposed by the State Act were additional to, hence greater[75] than, the obligations imposed under the federal instruments.

48 Reliance was placed upon the Minister's Second Reading Speech[76] in respect of the Construction Industry Long Service Leave Bill which emphasised that the State Act was replacing the *Construction Industry Long Service Leave Act* 1983 (Vic) in circumstances where the earlier Act described long service leave entitlements differently[77]. Reliance was also placed on the references to "long service leave" in s 6(1) of the State Act, in an obsolete Fund rule[78] and in a number of the current Fund rules. It was asserted that, in its terms, s 6(1) provides for both an employee's entitlement to long service leave and a separate entitlement to be paid a long service leave benefit out of the Fund. These considerations were relied on to show that the State Act undermined the operation of the federal instruments insofar as the latter dealt with long service leave.

49 The respondent submitted that the State and Commonwealth laws are different because the former provides for workers to access the Fund, supported by long service leave charges levied on employers, and does not purport to create or modify the industrial relationship between employee and employer and entitlements and obligations in respect of long service leave under the federal instruments. It was contended that a power to amend the Fund rules[79] cannot impair the operation of the federal instruments unless and until the rules are amended so as to bring about such an impairment.

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75 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 257, 258, 259 and 271; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27]; *Dickson* (2010) 241 CLR 491 at 504 [22].

76 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1997 at 823-824.

77 See note 23 above.

78 Rule 35.1 of the original Fund rules, deleted by a deed poll executed by the respondent on 2 December 1997.

79 See s 6(3) of the State Act. Clause 5.2 of the trust deed followed s 6(3).

50 As this Court has stated many times, statements of legislative intention made by a Minister do not overcome the need to consider the text of a statute to ascertain its meaning[80].

51 A reading of the whole of the State Act, the trust deed and the Fund rules shows that despite references to "long service leave" in s 6(1) of the State Act and in some of the current Fund rules the operation of the State Act is limited to the provision of a long service leave benefit which can apply in circumstances where a worker may work with different employers during continuous service in the construction industry. Those references to "long service leave" are adjectival in respect of the "benefit" provided under the State Act and do not encompass the distinguishable obligations of an employer and the entitlements of an employee in respect of the grant of, and payment for, long service leave by an employer, although they unavoidably allude to long service leave in dealing with the "long service leave benefit" which is the subject matter of the State Act.

52 An employee's entitlement to a long service leave benefit under the State Act can only be in the form of payment from the Fund (for example, see rr 27.1 and 29.1 of the Fund rules) paid out in accordance with the Fund rules (for example, see rr 1.1 and 27.1). There is no provision for the grant of any long service leave, a subject which is covered by the federal instruments. Importantly, the State Act scheme contemplates that long service leave, as between an employer and an employee, may be paid under the federal instruments. When that occurs employers are entitled to be reimbursed (r 40.3) and a correlative reduction in the worker's entitlements under the State Act would also follow (r 23.10).

53 The State Act, and the scheme under it, for the provision of portable long service leave benefits in the construction industry, do not undermine an employer's obligations under the federal instruments to grant, and pay for, long service leave or an employee's correlative entitlement to receive such leave.

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80 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23; see also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

Are the federal instruments exhaustive?

54 The appellants also alleged indirect inconsistency by submitting that the field covered exhaustively by the federal instruments is the appellants' obligations in respect of long service leave accrued in whole or in part through service with the appellants and the entitlements of employees of the appellants in respect of such leave. It was submitted that the Full Court erred in not characterising the State Act scheme as pertaining to the employment relationship between employers and employees.

55 In answer, the respondent essentially submitted that the State Act and the scheme made under it do not enter the field covered by the federal instruments because they do not regulate long service leave. Rather they provide portable long service leave benefits intended to apply in the construction industry in which workers may move from one employer to another, albeit whilst in continuous service in the industry.

56 The mischief[81] which the State Act remedies is that workers in continuous service in the construction industry will be disadvantaged if they cannot qualify for long service leave, by reason of the itinerant nature of their employment. That subject matter, of portable long service leave benefits in the construction industry, is not covered in the federal instruments.

57 There is no doubt that provision of long service leave for employees in continuous employment with an employer, and the provision of a long service leave benefit for workers in continuous service in the construction industry, are both just and beneficial legislative aims. As with the concurrent legislation for the removal of shipwrecks considered in the *Kakariki Case*[82], it is possible to infer from the beneficial nature of the federal instruments that the Commonwealth legislature did not intend to exclude a compatible State law.

58 In *Collins v Charles Marshall Pty Ltd*[83], indirect inconsistency was alleged between a federal award dealing comprehensively with conditions of

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81 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

82 (1937) 58 CLR 618 at 628 per Starke J, 630-631 per Dixon J.

83 (1955) 92 CLR 529.

employment but not long service leave, and State legislation dealing with long service leave[84], in circumstances where the power of the conciliation commissioner to deal with long service leave was expressly excluded. Although the federal award may have been an "exhaustive statement" of the relations between employer and employee in the relevant industry, there was "no attempt in the award" to deal with the subject matter of long service leave and, accordingly, there was "no real conflict" between the provisions of the federal award and the State legislation[85]. A similar result followed in *T A Robinson & Sons Pty Ltd v Haylor*[86] where a conciliation commissioner was empowered to deal with long service leave in an award but did not do so. It was concluded by a unanimous Court that "an award which has nothing to say about … a topic" (there, long service leave) cannot be said to be incompatible with a State law dealing with that subject matter[87]. The importance of clearly identifying the field said to be covered exhaustively by a law of the Commonwealth and correctly characterising a law of a State was also crucial in *New South Wales v The Commonwealth and Carlton* ("the *Hospital Benefits Case*")[88], which dealt with certain State levies[89] in the context of Commonwealth legislation regulating hospital benefits providers and contributors, particularly the benefits payable to the contributors.

59 Whilst the federal instruments deal with all the obligations and entitlements of employers and employees in respect of the grant of, and payment for, long service leave, arising in the employment relationship between employers and employees, they do not deal with, or even mention, portable long

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84 *Factories and Shops (Long Service Leave) Act* 1953 (Vic).

85 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

86 (1957) 97 CLR 177; [1957] HCA 76.

87 *T A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 183 per Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ.

88 (1983) 151 CLR 302 at 316-319 per Gibbs CJ, Murphy and Wilson JJ, 326-328 per Mason J; [1983] HCA 8.

89 Levies imposed under the *Hospital Benefits (Levy) Act* 1982 (Vic) and the *Health Insurance Levies Act* 1982 (NSW).

service leave benefits, for workers in continuous service within the construction industry.

Conclusions

60 The results of applying accepted tests of direct and indirect inconsistency in this appeal turn on the same consideration, namely that the State law providing for portable long service leave benefits for workers in the construction industry does not conflict with the federal instruments providing for the grant of, and payment for, long service leave arising in the employment relationship because, as demonstrated, the federal instruments are not incompatible with the State Act which operates in a manner which is complementary to the operation of the federal instruments. A consideration of the two different aspects of inconsistency relied upon by the appellants yields the same result, namely, that there is no real conflict between the State law and the Commonwealth law embodied in the federal instruments.

61 Accordingly the State Act is not invalid by reference to s 109 of the Constitution.

Orders

62 The appeal should be dismissed with costs.