HIGH COURT OF AUSTRALIA

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

THE PUBLIC SERVICE ASSOCIATION AND
PROFESSIONAL OFFICERS' ASSOCIATION
AMALGAMATED OF NSW APPELLANT

AND

DIRECTOR OF PUBLIC EMPLOYMENT & ORS RESPONDENTS

The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment
[2012] HCA 58
12 December 2012
S127/2012

ORDER

Appeal dismissed with costs.

On appeal from the Industrial Court of New South Wales

Representation

D F Jackson QC with A A Hatcher SC and M Gibian for the appellant (instructed by W G McNally Jones Staff Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick SC and A M Mitchelmore for the first to fourth respondents (instructed by Crown Solicitor (NSW))

Submitting appearance for the fifth respondent

Interveners

M G Hinton QC, Solicitor-General for the State of South Australia with J C Cox intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with K E Foley intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

S G E McLeish SC, Solicitor-General for the State of Victoria with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

G R Donaldson SC, Solicitor-General for the State of Western Australia with F B Seaward intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

CATCHWORDS

The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Institutional integrity of State court vested with federal jurisdiction – Section 146C(1) of *Industrial Relations Act* 1996 (NSW) provides that Industrial Relations Commission of New South Wales must "give effect to any policy ... that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission" when making or varying any award or order – Commission comprises judicial and non-judicial members – Judicial members of Commission sit as Industrial Court of New South Wales to exercise specific functions of Commission – Industrial Court is superior court of record and may be invested with federal jurisdiction – Whether s 146C(1) impairs institutional integrity of Industrial Court by requiring judicial members when sitting as Commission to comply with regulations when making or varying any award or order.

Words and phrases – "institutional integrity", "policy".

Constitution, Ch III.
Industrial Relations Act 1996 (NSW), Ch 4, s 146C(1).
Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW).

FRENCH CJ.

Introduction

1 Section 146C of the *Industrial Relations Act* 1996 (NSW) ("the IR Act") requires the Industrial Relations Commission of New South Wales ("the Commission"), when making or varying any award or order, to give effect to any policy on the conditions of employment of public sector employees that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission.

2 The Public Service Association and Professional Officers' Association Amalgamated of NSW ("the PSA") challenged the validity of s 146C in the Industrial Court of New South Wales ("the Industrial Court") on the basis that it imposes a requirement upon judicial members of the Commission who are also members of the Industrial Court to give effect to government policy when sitting as the Commission other than in Court Session[1]. The PSA submitted that the section thereby undermines the judicial integrity of the Industrial Court having regard to the overlapping composition and the proximate operations and functions of the Commission and the Industrial Court. The Industrial Court rejected that argument. The appeal, by way of special leave to this Court from the decision of the Industrial Court, should be dismissed.

3 Before referring to the procedural history, it is necessary to describe relevant elements of the statutory framework creating the Commission and the Industrial Court.

The statutory framework – the *Industrial Relations Act* 1996 (NSW)

4 The objects of the IR Act include the provision of a framework for the conduct of industrial relations that is fair and just[2] and the promotion of efficiency and productivity in the economy of the State[3]. The IR Act is subject to the *Fair Work Act* 2009 (Cth), including provisions of that Act which have effect in New South Wales because of the referral of certain matters to the Commonwealth Parliament by the *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW)[4].

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1 *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2011] NSWIRComm 143.

2 IR Act, s 3(a).

3 IR Act, s 3(b).

4 IR Act, s 9B(1).

5 The IR Act establishes the Commission[5]. The Commission consists of a President, a Vice-President, Deputy Presidents and Commissioners[6]. The President, the Vice-President and the Deputy Presidents are referred to in the IR Act as "Presidential Members"[7]. The Commission may be constituted by one member or a Full Bench of the Commission[8]. A Full Bench of the Commission consists of at least three members constituted by the President for the purposes of a proceeding and must include at least one Presidential Member[9].

6 The IR Act provides for the appointment of a Presidential Member of the Commission as a "Member of the Commission in Court Session"[10]. A person so appointed is referred to in the IR Act as a "judicial member" of the Commission[11]. To be appointed as a judicial member of the Commission, a person has to have held judicial office in New South Wales or in the Commonwealth or in another State or Territory, or be an Australian lawyer of at least seven years' standing[12]. Judicial members can constitute the Commission, other than in Court Session, when exercising other functions[13].

7 The term "Commission in Court Session" refers to the Commission "constituted by a judicial member or members only for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session by or under [the IR Act] or any other Act or law."[14] The Commission in Court Session is designated "the Industrial Court of New South Wales"[15]. Section 152(1) of the IR Act provides that:

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5 IR Act, s 145(1).

6 IR Act, s 147(1).

7 IR Act, s 147(2).

8 IR Act, s 155.

9 IR Act, s 156.

10 IR Act, s 149(1).

11 IR Act, s 149(3).

12 IR Act, s 149(2).

13 IR Act, s 151(2).

14 IR Act, s 151(1).

15 IR Act, s 151A.

"The Commission in Court Session is established by this Act as a superior court of record."

8 For the purposes of Pt 9 of the *Constitution Act* 1902 (NSW) ("the Constitution Act"), the Industrial Court is a court of equivalent status to the Supreme Court and the Land and Environment Court[16]. A Full Bench of the Industrial Court can be composed only of judicial members[17]. The term "judicial office" in Pt 9 of the Constitution Act includes the "Chief Judge, Deputy Chief Judge or Judge of the Industrial Court or member of the Industrial Relations Commission in Court Session"[18]. The office of a judicial member of the Commission therefore attracts the same protection, in relation to removal or suspension from office, as is afforded by the Constitution Act to judges of the Supreme Court of that State[19].

9 The general functions of the Commission are set out in s 146 of the IR Act. They include:

- setting remuneration and other conditions of employment[20];
- resolving industrial disputes[21]; and
- hearing and determining other industrial matters[22].

The Commission is required to take into account the public interest in the exercise of its functions, and for that purpose is required to have regard to the objects of the IR Act, the state of the economy of New South Wales and the likely effect of the Commission's decisions on that economy[23]. That requirement does not apply to criminal proceedings before the Industrial Court or proceedings

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16 IR Act, s 152(2).

17 IR Act, s 156(3).

18 Constitution Act, s 52(1)(b).

19 Constitution Act, ss 53-56.

20 IR Act, s 146(1)(a).

21 IR Act, s 146(1)(b).

22 IR Act, s 146(1)(c).

23 IR Act, s 146(2).

that the Industrial Court "determines are not appropriate."[24] The power to make awards is conferred in general terms by s 10, which provides:

> "The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees."

10 Certain functions of the Commission can only be exercised by the Industrial Court. They include proceedings relating to:

- unfair contracts[25];
- breach of industrial instruments[26]; and
- the recovery of money, other than small claims under s 380[27].

The Industrial Court may make binding declarations of right in relation to a matter in which it has jurisdiction and may do so whether or not any consequential relief is or could be claimed[28].

11 If a matter arises in proceedings before the Commission (other than in Court Session) that is within the jurisdiction of the Industrial Court, then "the Commission may continue to deal with that matter as the Commission in Court Session"[29]. It must be duly constituted or reconstituted by a judicial member or members[30], and any member who is not a judicial member cannot take part in the proceedings on that matter[31].

12 There was no dispute that the Industrial Court is a "court" for the purposes of s 71 of the Commonwealth Constitution, and a court of the State of New South

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24 IR Act, s 146(2).

25 IR Act, s 153(1)(c); being proceedings under Ch 2, Pt 9 of the IR Act.

26 IR Act, s 153(1)(f); being proceedings under Ch 7, Pt 1 of the IR Act.

27 IR Act, s 153(1)(g); being proceedings under Ch 7, Pt 2 of the IR Act.

28 IR Act, s 154(1).

29 IR Act, s 176(3).

30 IR Act, s 176(3)(a).

31 IR Act, s 176(3)(b).

Wales for the purposes of s 77(iii)[32]. It is designated as a court by the IR Act, its members are accorded the protections of judicial office and its functions involve the exercise of judicial power[33]. The Industrial Court is a "court of a State" in which the Commonwealth Parliament can invest federal jurisdiction.

13 It is questionable whether the Commission and the Industrial Court should be characterised as two distinct legal entities. The first to fourth respondents and the Attorney-General of Queensland argued, in effect, that they should. The PSA submitted that they are a single body. The text of the IR Act supports the characterisation of the Commission as one body clothed with distinct legal characters according to its composition and functions. It exercises what might broadly be called arbitral functions in its character as the Commission sitting other than in Court Session. There may be some "arbitral" functions which could also be classified as "judicial". The boundary between those classifications is not necessarily defined by a bright line[34]. It is, however, clear that the Industrial Court exercises judicial functions.

14 It was not suggested that the conjunction of different legal characterisations and functions in the one body gives rise to any constitutional infirmity. The doctrine of the separation of judicial from executive and legislative powers, which is derived from the text and structure of the Commonwealth Constitution, has the consequence that a body like the Commission, combining non-judicial and judicial functions, could not be established by a law of the Commonwealth[35]. State legislatures, however, are not constrained by that doctrine. As Spigelman CJ said in relation to the Commission in Court Session in *Powercoal Pty Ltd v Industrial Relations Commission (NSW)*[36]:

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32 The Industrial Court so regards itself – see *Morrison v Chevalley* (2010) 198 IR 30 at 73-77 [141]-[150] per Boland J, President, Walton J, Vice-President, Haylen and Staff JJ.

33 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 535-539 [113]-[131] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 4.

34 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 446 per Griffith CJ, 452 and 455 per Barton J, cf at 464-465 per Isaacs and Rich JJ; [1918] HCA 56.

35 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

36 (2005) 64 NSWLR 406 at 411 [48], Mason P agreeing at 412 [126], Handley JA agreeing at 412 [127].

> "The mere fact that powers are not strictly separated does not impair the institutional integrity of the court."

Further, nothing in this case turns upon the question of whether the Commission when sitting other than in Court Session can be characterised as a "court" for the purposes of particular statutory provisions[37].

The Amendment Act and the procedural history

15 On 7 March 2011, the PSA filed an application in the Commission seeking two new awards. The awards claimed provided for increases in salaries and allowances for a wide range of public sector employees. The first claim related to employees already covered by a number of awards, agreements and determinations specific to particular government departments and authorities. The second claim concerned employees covered by awards relating to the Roads and Traffic Authority of New South Wales. The application was made on the basis that the nominal terms of the existing awards would expire on 30 June 2011 and that increases in salaries and allowances were justified under current "Wage Fixing principles". Considerations said to support the PSA's claims included the need for economic adjustments having regard to the current rate of inflation, changes in the cost of living and improvements in productivity and efficiency in aggregate across the public sector.

16 While the proceedings were pending, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 (NSW) ("the Amendment Act") was enacted[38]. It introduced a new s 146C into the IR Act. That section provides, inter alia:

> "**Commission to give effect to certain aspects of government policy on public sector employment**
>
> (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:

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37 For an example of such a characterisation, see *Brian Rochford Ltd v Textile Clothing & Footwear Union of NSW* (1998) 47 NSWLR 47. See also *Australian Liquor, Hospitality and Miscellaneous Workers' Union v Home Care Transport Pty Ltd* (2002) 117 FCR 87; *Melbourne University Student Union Inc (In Liq) v Sherriff* [2004] VSC 266; *Watervale Pty Ltd v Abey* (2005) 15 Tas R 79.

38 The Amendment Act was repealed on the day after all of its provisions had commenced, pursuant to s 30C of the *Interpretation Act* 1987 (NSW). The repeal did not affect the amendments made by the Amendment Act.

(a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and

(b) that applies to the matter to which the award or order relates.

(2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.

(3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.

(4) This section extends to appeals or references to the Full Bench of the Commission.

(5) This section does not apply to the Commission in Court Session.

(6) This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.

(7) This section has effect despite section 10 or 146 or any other provision of this or any other Act."

It is not necessary for present purposes to set out s 146C(8), which defines "award or order", "conditions of employment" and "public sector employee".

17 Sections 10 and 146 of the IR Act are expressly subordinated to s 146C by operation of s 146C(7) and thereby to any declared policy upon conditions of employment. That is to say, the constraint imposed on the award-making power by s 10, that it relate to "fair and reasonable conditions of employment", may be displaced or qualified. So, too, may the requirement, in s 146, to have regard to the objects of the IR Act, the state of the economy of New South Wales and the likely effect of the Commission's decision on that economy. In effect, a policy declared by a regulation made under s 146C may preempt judgments by the Commission of those matters. It was not suggested that s 146C is invalid on that account. A parliament can confer a decision-making power on a body of its own

creation, and authorise regulations which limit or qualify the exercise of that power in particular circumstances[39].

18 A parliament may also authorise the making of regulations which have effect notwithstanding provisions of the Act under which they are made. Section 146C does that. Such powers are analogous to so-called "Henry VIII" clauses[40], authorising the making of regulations which amend the Act under which they are made. Those powers have been criticised for their effects upon the relationship between the parliament and the executive[41], but not held invalid on that account under either the Commonwealth Constitution or constitutions of the States[42].

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39 See, for example, *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 508-509 [30]-[31]; [2003] HCA 21; *Minister for Home Affairs (Cth) v Zentai* (2012) 86 ALJR 930 at 935 [15]-[17] per French CJ, 944 [59] per Gummow, Crennan, Kiefel and Bell JJ; 289 ALR 644 at 649-650, 661; [2012] HCA 28; *O'Connell v Nixon* (2007) 16 VR 440 at 448 [32] per Nettle JA, Chernov JA agreeing at 441 [1], Redlich JA agreeing at 453 [49]; Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 292-293.

40 A well-known example of such a provision is the *Proclamation by the Crown Act* 1539 ("An Act that Proclamations made by the King shall be obeyed"; 31 Henry VIII, c 8), also known as the *Statute of Proclamations*. As reproduced in *The Statutes of the Realm*, vol 3 (reprinted 1993) at 726, that Act provided that:

> "The King for the time being with the advice of his honourable Council … may set forth at all times by [authority of this Act his] proclamations, under such penalties and pains and of such sort as to his Highness and his said honourable Council … shall see necessary and requisite; And that those same shall be obeyed, observed and kept as though they were made by Act of Parliament for the time in them limited, unless the King his Highness dispense with them or any of them under his great seal."

See Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 5, 22-24, 139-140 and 292-293.

41 Lord Scarman described such a power as "startling": *Lees v Secretary of State for Social Services* [1985] AC 930 at 933. See also *Protean (Holdings) Ltd v Environment Protection Authority* [1977] VR 51 at 55-56 per Gillard J.

42 A regulation of that kind was upheld, albeit without reference to that characteristic, in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34. See generally Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 22-24 and 139-140.

19 The Amendment Act affected the powers of the Industrial Court in one particular respect. The Industrial Court, as noted earlier, has jurisdiction in proceedings under Ch 2, Pt 9 of the IR Act relating to unfair contracts. It can declare void or vary a contract which it finds to be unfair[43]. The Amendment Act amended s 105 to provide that a contract is not an unfair contract "merely because of any provision in the contract that gives effect to a policy" declared under s 146C[44]. The PSA submitted that the amendment to s 105 significantly restricts the Commission's powers. The first to fourth respondents' answer was that the Amendment Act merely confined, in one respect, the existing statutory jurisdiction of the Industrial Court by removing a particular ground on which unfairness might be alleged. Whichever characterisation is preferred, the amendment to s 105 does not support any argument that s 146C is invalid. It does not subject the Industrial Court to any impermissible executive intrusion into its functions.

20 There is a general regulation-making power conferred on the Governor by s 407(1) of the IR Act. That subsection authorises the Governor to make regulations "not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act." The reference to "the Governor" in s 407(1) is a reference to "the Governor with the advice of the Executive Council."[45] The regulation-making power is subject to the general constraint imposed by s 31(1) of the *Interpretation Act* 1987 (NSW), that it "shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament."

21 Section 146C does not, in terms, create a regulation-making power distinct from the general power conferred on the Governor by s 407. However, it attaches legal consequences to the kind of regulation for which it provides. It also has the effect that the requirement in s 407(1) that regulations be "not inconsistent with this Act" is qualified in respect of regulations of the kind to which s 146C refers. To that extent, it may be regarded as having expanded the power conferred by s 407.

22 The Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 ("the Regulation") was made on 20 June 2011 pursuant to s 146C. It declared certain aspects of government policy to be given effect to by

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43 IR Act, s 106.

44 IR Act, s 105(2). See Amendment Act, Sched 1[1].

45 *Interpretation Act* 1987 (NSW), s 14. By that section, the reference to the Governor extends to "any person for the time being lawfully administering the Government."

the Commission when making or varying awards or orders. Those aspects of government policy are referred to later in these reasons.

23 On 20 July 2011, the PSA filed a Notice of Motion before the Industrial Court, seeking a declaration that the Amendment Act is invalid. In the alternative, the PSA sought a declaration that the Regulation is invalid. The motion was heard by the Industrial Court on 1 August 2011. On 31 October 2011, the Industrial Court dismissed the motion and reserved the costs.

24 On 11 May 2012, this Court (Gummow, Hayne and Kiefel JJ) granted the PSA special leave to appeal from the refusal of the Industrial Court to declare that the Amendment Act is invalid. Before turning to the decision of the Industrial Court and the grounds of appeal, it is necessary to refer to the terms of the Regulation.

The Regulation

25 The object of the Regulation, according to the Explanatory Note, was "to declare the Government's public sector policies for the purposes of section 146C of the *Industrial Relations Act 1996*." Clause 4 of the Regulation provides:

> "The matters set out in this Regulation are declared, for the purposes of section 146C of the Act, to be aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders."

What are called "paramount policies" are declared in cl 5, being:

> "(a) Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).
>
> (b) Equal remuneration for men and women doing work of equal or comparable value."

Other policies are declared in cl 6(1) but stated to be subject to compliance with the declared paramount policies. Those policies include:

> "(a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.
>
> (b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings

have been achieved to fully offset the increased employee-related costs.[46]

(c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.

(d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.

(e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).

(f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments."

26 Definitions of the terms "guaranteed minimum conditions of employment", "employee-related costs" and "employee-related cost savings" are set out in the Regulation[47].

The decision of the Industrial Court

27 It is no disrespect to the careful reasoning of the Industrial Court to observe that the essential steps in that Court's reasons for dismissing the PSA's motion were:

- The motion required consideration of the effect of the Amendment Act on the functions of the Industrial Court and whether the impugned legislation would lead to an identification of the Court in

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46 Principles relating to such increases are set out in subparagraphs (i), (ii) and (iii) of cl 6(1)(b) of the Regulation.

47 Regulation, cll 7, 8 and 9.

the exercise of its functions with the Executive Government of New South Wales[48].

- The IR Act provides for the creation of two related but distinct bodies, the Industrial Court and the Commission. Section 146C expressly does not apply to the Industrial Court. That is a complete answer to the suggested invalidity of the Amendment Act[49].

- As to the validity of the Regulation, it is sufficiently authorised by s 146C[50], which prescribes the field of operation to which the Regulation needs to be connected in order to be valid[51].

The grounds of appeal

28 By its Notice of Appeal to this Court, the PSA challenged the proposition that the exclusion of the Industrial Court from the application of the Amendment Act answers its complaint that the Amendment Act undermines the institutional integrity of the Industrial Court. The PSA contended that the Industrial Court erred in failing to consider whether the requirement imposed upon judicial members of the Commission to give effect to government policy, when sitting as the Commission other than in Court Session, undermines the institutional integrity of the Industrial Court having regard to the closely intertwined composition, operation and functions of the Commission and the Industrial Court. The PSA also asserted that the Industrial Court and the Commission are a single body constituted in different ways so as to exercise particular functions. The Industrial Court was said to have erred in finding that incompatibility or repugnance could only arise as a result of non-judicial functions conferred on a judge *persona designata*.

Industrial tribunals in New South Wales

29 The PSA, in its submissions, emphasised the close connection between the functions conferred on the Commission and the Industrial Court, including the

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48 [2011] NSWIRComm 143 at [27] per Walton J, Vice-President, Kavanagh and Backman JJ.

49 [2011] NSWIRComm 143 at [49] per Walton J, Vice-President, Kavanagh and Backman JJ.

50 [2011] NSWIRComm 143 at [60] per Walton J, Vice-President, Kavanagh and Backman JJ.

51 [2011] NSWIRComm 143 at [66] per Walton J, Vice-President, Kavanagh and Backman JJ.

Court's jurisdiction to enforce orders and awards of the Commission. It pointed to the dual functions of judicial members of the Commission. The organisational overlap of the Commission in its non-judicial and judicial characters and the involvement of judicial members in the non-judicial work of the Commission was the foundation for the PSA's argument that s 146C provides impermissibly for the Commission, including its judicial members, to be subject to direction and control by the Executive Government from time to time. It is desirable to put that argument in context by reference to the variable proximity of non-judicial and judicial functions in the history of labour market regulation in New South Wales. So much is indicated by reference to the relevant legislative history.

30 In 1901 a "court of arbitration" was established in New South Wales[52]. Its jurisdiction covered the hearing and determination of industrial disputes[53]. It was also empowered to make awards including the prescription of a minimum rate of wages or other remuneration[54]. The membership of the Court comprised a President and, at the request of the President, a Deputy President, both of whom were to be judges of the Supreme Court of New South Wales[55]. In 1908 the Court of Arbitration was replaced by an "Industrial Court"[56]. Industrial "boards" were established with power to make awards and decide disputes with respect to the industries for which they were constituted[57]. The Industrial Court's jurisdiction was primarily concerned with appeals from decisions of the boards[58], the enforcement of awards[59] and proceedings in respect of offences such as

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52 *Industrial Arbitration Act* 1901 (NSW), s 16.

53 *Industrial Arbitration Act* 1901 (NSW), ss 2, 26(a).

54 *Industrial Arbitration Act* 1901 (NSW), ss 26(b), 36.

55 *Industrial Arbitration Act* 1901 (NSW), ss 16-17. Two other members of the Court were to be appointed by the Governor: one nominated by delegates from industrial unions of employers, the other by delegates from industrial unions of employees.

56 *Industrial Disputes Act* 1908 (NSW), ss 4, 13.

57 *Industrial Disputes Act* 1908 (NSW), ss 14, 27.

58 *Industrial Disputes Act* 1908 (NSW), ss 38-39.

59 *Industrial Disputes Act* 1908 (NSW), ss 41, 43.

prohibited strikes or lockouts[60]. Membership of that Court was limited to Supreme Court or District Court judges[61].

31 The Industrial Court was replaced by the Court of Industrial Arbitration in 1912[62]. The Court of Industrial Arbitration was designated a superior court. Its jurisdiction and powers extended to those conferred upon the industrial boards[63], including the making of an award if a board refused to do so[64]. The Court was to be constituted by the judge of the former Industrial Court[65]. Supreme Court or District Court judges or barristers of at least five years' standing were entitled to be appointed if the office of the judge became vacant, or as an additional judge of the Court[66].

32 In 1926 the Industrial Commission of New South Wales was established. The jurisdiction and powers of the Court of Industrial Arbitration were vested in the Commission[67]. The amending legislation provided for "conciliation committees", each of which was empowered to "inquire into any industrial matter in the industry for which it is established" and to "make an order or award binding on any or all employers and employees in the industry"[68]. The jurisdiction of the Commission was limited by reference to that of the conciliation committees. The Commission could not determine any industrial matter or make an award relating to the industry for which a committee was established, except upon appeal from a committee or unless satisfied that the proceedings before a committee had failed to result in an award[69]. In 1927 the Commission was established as a superior court of record[70]. Its membership was

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60 *Industrial Disputes Act* 1908 (NSW), ss 42-45.

61 *Industrial Disputes Act* 1908 (NSW), s 13(2).

62 *Industrial Arbitration Act* 1912 (NSW), s 13(1).

63 *Industrial Arbitration Act* 1912 (NSW), s 14.

64 *Industrial Arbitration Act* 1912 (NSW), s 25(3).

65 *Industrial Arbitration Act* 1912 (NSW), s 13(2).

66 *Industrial Arbitration Act* 1912 (NSW), s 13(2) and (3).

67 *Industrial Arbitration (Amendment) Act* 1926 (NSW), s 3.

68 *Industrial Arbitration (Amendment) Act* 1926 (NSW), ss 8, 9(1).

69 *Industrial Arbitration (Amendment) Act* 1926 (NSW), s 10.

70 *Industrial Arbitration (Amendment) Act* 1927 (NSW), s 2(1)(a).

limited to a Supreme Court or District Court judge, a barrister of at least five years' standing or a solicitor of at least seven years' standing[71].

33 The *Industrial Arbitration Act* 1940 (NSW) constituted a new Industrial Commission of New South Wales. Like its predecessor, that Commission was designated as a superior court of record[72]. The qualifications for appointment to the new Commission remained the same[73]. Unlike its predecessor, however, the new Commission's jurisdiction and powers extended to those conferred on conciliation committees[74]. Upon an application for a new award or the renewal of an award, the Industrial Commission was empowered to "review the conditions of the industry or calling, together with the wages payable in such industry or calling"[75].

34 The *Industrial Arbitration Act* 1940 (NSW) was repealed by the *Industrial Relations Act* 1991 (NSW)[76]. That Act constituted an Industrial Relations Commission of New South Wales[77]. It also constituted the Industrial Court of New South Wales as a superior court of record[78]. The Commission was empowered to establish conciliation committees in relation to an identifiable industry or enterprise[79]. That Act provided that a person might be appointed and hold office both as a judge of the Industrial Court and as a Presidential Member of the Commission[80]. In 1996, the *Industrial Relations Act* 1991 (NSW) was repealed by the IR Act[81], which is the legislation under consideration in these proceedings.

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71 *Industrial Arbitration (Amendment) Act* 1927 (NSW), s 2(1)(a).

72 *Industrial Arbitration Act* 1940 (NSW), s 14(1).

73 *Industrial Arbitration Act* 1940 (NSW), s 14(2).

74 *Industrial Arbitration Act* 1940 (NSW), s 30.

75 *Industrial Arbitration Act* 1940 (NSW), s 32.

76 *Industrial Relations Act* 1991 (NSW), s 750(1).

77 *Industrial Relations Act* 1991 (NSW), s 315.

78 *Industrial Relations Act* 1991 (NSW), s 288.

79 *Industrial Relations Act* 1991 (NSW), s 328.

80 *Industrial Relations Act* 1991 (NSW), s 290.

81 IR Act, s 408(1).

35 The legislative history indicates a longstanding, albeit varying, connection between non-judicial and judicial functions in labour market regulation in New South Wales. Those relationships may be seen as reflecting the constitutional authority of the State legislature in structuring the regulatory and judicial institutions of the State unconstrained by the doctrine of separation of executive and judicial powers applicable to federal courts. There are, however, as this Court has held in a number of decisions, limits upon the powers of State legislatures to make laws imposing on State courts functions which are incompatible with their institutional integrity as courts. A State legislature cannot subject State courts to direction by the executive government of the State[82], nor enlist a court of the State to implement decisions of the executive in a way that is incompatible with the court's institutional integrity[83]. Nor can it confer upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member[84].

36 There is no suggestion in this case that, apart from s 146C itself, the IR Act creates a relationship between the Commission and the Industrial Court which gives rise to any impermissible incompatibility between the exercise by the judicial members of their functions as members of the Commission and their functions as members of the Industrial Court. As appears from what follows, s 146C does not give rise to any such incompatibility.

The operation of s 146C and the Regulation

37 The operation of s 146C and the nature of the Regulation determine the disposition of this appeal. It was submitted by the PSA that s 146C(1) requires the Commission, in making or varying an award or order, to give effect to any policy on conditions of employment of public sector employees that is declared by the regulations. The declaration, it was submitted, amounts to an instruction to the Commission by the Executive, requiring it to comply with the identified policy of the Government. It was said to be immaterial that the direction takes the form of a regulation. The PSA also pointed to the express application of s 146C to pending proceedings and the application of any policy declared by

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82 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49.

83 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J, see also at 92-93 [236] per Hayne J; [2010] HCA 39.

84 *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [47] per French CJ and Kiefel J, 229 [105] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 24. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 117-118 per McHugh J; [1996] HCA 24.

regulation to proceedings pending at the time of the making of such regulation. The PSA submitted that the capacity to direct the Commission in pending proceedings permits the Government to alter or dictate the outcome, or require the acceptance of the Government's own submissions, in those proceedings.

38 The PSA submissions require attention to be given to the following questions:

- What is the proper construction of the term "policy" in s 146C?
- What is the constitutional character of a regulation of the kind referred to in s 146C – in particular, does it require the Commission to respond to a direction of the Executive Government?

39 As to the first question, the relevant ordinary meaning of the word "policy" is "a course or principle of action adopted or proposed by a government, party, business, or individual"[85]. The first limb of that definition sits awkwardly with the requirement that the Commission "give effect to" the relevant policy. Section 146C(1), however, readily accommodates the concept of "policy" as a principle or principles adopted or proposed by government. That meaning of the word "policy", particularly in a context in which it gives content to delegated legislation, does not extend to a policy which is ambulatory. That is to say, it does not extend to a policy which requires compliance with future variations of its terms or with future ministerial directions.

40 The word "policy" has a range of possible applications, from the specific to the general. An example of the constructional choice which that range may present was considered by the Full Court of the Federal Court in *Leppington Pastoral Company Pty Ltd v Department of Administrative Services*[86]. The scope of a "policy" which could be stated in a ministerial pre-acquisition declaration under s 22(5) of the *Lands Acquisition Act* 1989 (Cth) defined a field of enquiry from which the Administrative Appeals Tribunal was precluded in reviewing the declaration. The Full Court rejected a construction of "policy" in s 22(5) which would extend to a proposal to acquire a particular parcel of land. The Court observed[87]:

> "As one progresses downwards on the scale of generality, into the realm of considerable particularity, the less apt becomes the use of the word

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85 *The Australian Oxford Dictionary* (1999) at 1045, "policy", sense 1.

86 (1990) 23 FCR 148.

87 (1990) 23 FCR 148 at 158 per Lockhart, Wilcox and Hill JJ.

'policy', as that term is normally understood in the Australian political context."

Analogical arguments about the construction of terms taken from one statutory context and applied to another must be treated with caution. Nevertheless the observation of the Full Court in *Leppington* is consistent with general usage of the word "policy" in relation to the executive branch of government. It supports the conclusion that as used in s 146C(1), "policy" does not extend to a direction as to the outcome of a particular matter before the Commission which leaves the Commission with nothing to do but to translate the direction into its order. The term does, however, encompass principles of the kind embodied in the Regulation.

41 The regulations referred to in s 146C are made in the exercise of the general power conferred by s 407. As explained earlier, s 146C may be taken as modifying that general power but it does not alter its character as a delegated legislative power. Consistently with that character, s 146C cannot be construed as extending to a regulation incorporating by reference a policy which consists simply of a direction about the outcome of a particular case before the Commission[88].

42 It is not necessary in these proceedings to express a view about whether such a regulation would fall within the scope of s 407. Properly construed, s 146C does not encompass that kind of regulation. That is because of the constraint imposed by the use of the term "policy" in that section.

43 The second question relates to the constitutional character of a regulation of the kind referred to in s 146C. That question is shortly answered. A regulation of the kind referred to in s 146C declares a policy in the sense explained above and attaches legal consequences to it, including the Commission's duty to give effect to it. The policy becomes part of the body of law which the Commission is required to apply in the proceedings before it.

44 Government policy is the product of executive activity. When declared by a regulation of the kind contemplated by s 146C, it becomes part of the content

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88 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 per Latham CJ; [1943] HCA 47. See also *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37 at 67 per Latham CJ; [1945] HCA 55. Nevertheless a norm applicable only to the action of a single person on a single occasion may still be classed as a law – see *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 635 per Gummow J; *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 at 194-195 [44]-[47] per Wilcox, Branson and Lindgren JJ.

of legislation. All legislation reflects policies attributable to the legislature but, in many if not most cases, they are policies originating with the executive government as the proponent of most statutes enacted by the parliament. The use of the word "policy" in s 146C does not alter the constitutional character of the class of regulation to which it refers. The point should also be made that the mechanism created by s 146C, read with the regulation-making power in s 407, differs from an Act or regulation which authorises a Minister to do an executive act to which the Act or regulation attaches legal consequences. Examples in the latter class include provision for the making of a ministerial direction which must be complied with[89], or a determination of the price of a specified class of goods[90].

45 The application by the Commission of a regulation of the kind contemplated by s 146C does not involve the Commission in giving effect to an executive direction. It is simply required to apply the law as set out in the IR Act and the relevant regulation, which incorporates by reference the principles set out in a policy declared by the regulation. Such a policy could be embodied in the text of the regulation itself without any need to separately identify it as a "policy". There is no relevant constitutional distinction to be drawn between the making of a regulation which creates decision-making rules that have been formulated by the executive government to give effect to its policies, and the making of a regulation which incorporates by reference a statement of a policy setting out those rules.

46 As an element of its incompatibility argument the PSA pointed out that seven of the eight Presidential Members of the Commission had also been appointed as judicial members. A member of the Commission could, on the one day, hear proceedings (other than in Court Session) in which the Commission would be required to give effect to a government policy declared by regulation and on the same day, in the same courtroom with the same staff, sit as the Industrial Court to determine judicial proceedings involving the Government as a party. The PSA submitted that an intelligent observer would find no basis upon which to distinguish between the two proceedings, or to have confidence that the member of the Commission would, as required, give effect to government policy when sitting other than in Court Session but bring an impartial and independent mind to bear when sitting as a member of the Industrial Court. Those submissions are sufficiently answered by the characterisation of the Commission's function, in responding to a regulation of the kind contemplated by s 146C, as a function of applying the relevant law. No question of incompatibility arises between the role of the judicial members of the

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89 *The Commonwealth v Grunseit* (1943) 67 CLR 58.

90 *Arnold v Hunt* (1943) 67 CLR 429; [1943] HCA 23. See generally Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 1-4.

Commission as members of the Industrial Court and their functions as members of the Commission other than in Court Session giving effect to such a regulation.

Conclusion

47 For the preceding reasons the appeal should be dismissed with costs.

48 HAYNE, CRENNAN, KIEFEL AND BELL JJ. The facts, circumstances and statutory provisions which give rise to this appeal are set out in the reasons of French CJ. It is not necessary to repeat them.

49 The *Industrial Relations Act* 1996 (NSW) ("the IR Act") establishes[91] the Industrial Relations Commission of New South Wales ("the Commission"). The IR Act provides[92] that persons may be appointed, if qualified, as judicial members of the Commission. Some, but not all, members of the Commission are judicial members.

50 Some functions of the Commission are to be exercised[93] by the "Commission in Court Session" and the Commission must then be constituted[94] only by one or more of its judicial members. The "Commission in Court Session" is now designated[95] as the "Industrial Court of New South Wales" ("the Industrial Court"). The Industrial Court is a superior court of record[96] and, for the purposes of Pt 9 of the *Constitution Act* 1902 (NSW), is a court of status equivalent to the Supreme Court of New South Wales and the Land and Environment Court[97]. It was not disputed in this appeal that the Industrial Court may be invested with, and may exercise, federal jurisdiction.

51 As already noted, there are some functions of the Commission which the IR Act provides may be performed only by the "Commission in Court Session" (which is to say by the Industrial Court). Other functions of the Commission, notably the functions[98] of resolving industrial disputes and making or varying industrial awards setting remuneration and other conditions of employment, are

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91 s 145(1).

92 s 149.

93 s 153(1).

94 s 151(1).

95 s 151A.

96 s 152(1).

97 s 152(2).

98 s 146(1).

not, and may not be[99], exercised by the Industrial Court. But judicial members of the Commission, not sitting as the Industrial Court, may exercise those functions.

52 Section 146C(1) of the IR Act provides that the Commission, "when making or varying any award or order", must "give effect to any policy on conditions of employment of public sector employees ... that is declared by the regulations [made under the IR Act] to be an aspect of government policy that is required to be given effect to by the Commission". The Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW) ("the Regulation") stated policies affecting public sector employment. One of the policies stated in the Regulation limited the increases in remuneration that may be awarded by the Commission.

53 The appellant ("the PSA") alleged that s 146C is invalid because it "impairs the institutional integrity of the Industrial Court in a manner inconsistent with Chapter III of the Constitution". The PSA submitted that the institutional integrity of the Industrial Court is impermissibly affected because judicial members of the Commission, who sit as the Industrial Court, must comply with government policy when exercising the arbitral functions conferred on the Commission.

54 This submission must be rejected.

55 Section 407(1) of the IR Act provides a regulation making power "for or with respect to any matter that by this Act is required or permitted to be prescribed". Section 146C envisages the making of regulations that, in the circumstances to which they apply, govern what awards may be made and what orders may be made varying an existing award. Neither s 146C nor the regulations it contemplates permit, let alone require, the Industrial Court to decide any question in any matter that is committed to it except in accordance with law. When the Industrial Court is required to interpret or enforce any award, the terms of the award, to be valid, must be fashioned according to any requirements fixed by the regulations to which reference is made in s 146C. Those requirements (described in s 146C(1)(a) and cl 4 of the Regulation as "government policy") are fixed by law, for they take effect only when fixed by regulation. The fixing of those requirements, by regulation, is an exercise of legislative power[100]. It does not amount, as the PSA's submissions appeared to

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99 s 151(1).

100 See generally *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34.

imply, to any executive interference in, or direction of, the Commission in its (non-judicial) task of making or varying an award.

56 Central to the PSA's submissions was the observation that members of the Commission who are judicial members may exercise both judicial functions (when sitting as a member of the Industrial Court) and non-judicial functions (when performing other functions of the Commission). This observation is, of course, accurate. But it does not lead to the conclusion that s 146C is invalid. Two points may be made about the fact that the Commission and its judicial members perform both judicial and non-judicial functions.

57 The first is that whether or not the Commission and the Industrial Court can be said to be separate entities, as the first to fourth respondents and the Attorney-General of Queensland intervening suggested, the PSA did not submit that the conferral of both judicial and non-judicial functions on the one body was invalid. It was right not to do so. The doctrine of separation of powers developed and applied in *R v Kirby; Ex parte Boilermakers' Society of Australia*[101] in respect of the Commonwealth Court of Conciliation and Arbitration does not apply to the States[102]. Accordingly, it is not necessary to consider the "separate entities" submissions made by the first to fourth respondents and the Attorney-General of Queensland, although it is as well to add that the submissions appeared to depend upon definitional questions the utility of which is at least doubtful.

58 The second point is dispositive of this appeal. The Commission is constrained, when making or varying an award, by the provisions of regulations made under s 407(1) and referred to in s 146C. In performing its functions, the Commission must act according to law. That s 146C and the Regulation refer to the rules and principles which may be, or have been, made by regulation as statements of "policy" or "government policy" does not deny that those rules and principles form a part of the body of law which governs the Commission's performance of its arbitral functions. The institutional integrity of the Industrial Court is not, and cannot be said to be, affected by its members applying the law when performing non-judicial functions.

59 Section 146C is not invalid. The appeal should be dismissed with costs.

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101 (1956) 94 CLR 254; [1956] HCA 10.

102 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 78-80, 92-94, 109, 118; [1996] HCA 24; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69]; [2010] HCA 1.

60 HEYDON J. The Attorney-General for the State of South Australia accurately encapsulated the issue in this appeal as follows:

> "Does the operation of s 146C of the *Industrial Relations Act* 1996 (NSW) ('the Act'), which has no direct application to the exercise of the jurisdiction vested in the Industrial Court of New South Wales ('Industrial Court'), undermine the institutional integrity of that Court by reason of the members of that Court also being members of the Industrial Relations Commission of New South Wales ('Commission') to which the Act does have direct application, requiring the Commission to give effect to Government policy on conditions of employment of public sector employees, or by reason of the interrelationship of the functions of the Commission and the Court?"

61 A federation is a system of government permitting diversity. It allows its component units to engage in their own legislative experiments. It leaves them free to do so untrammelled by what other units have done or desire to do. And it leaves them free to do so untrammelled by what the central legislature has done or desires to do, subject to a provision like s 109 of the Australian Constitution[103].

62 In 1996, *Kable v Director of Public Prosecutions (NSW)*[104] cut into that concept of the Australian federation by reducing the legislative freedom of the States. Statements in that case have been much debated in this Court over the last 16 years. Some of them have been invoked successfully to strike down State legislation. Those statements are in an entirely different category from s 109. Section 109 is an express provision. No express language in the Constitution corresponds with the *Kable* statements. The *Kable* statements have received a remarkably chilly reception from some academic lawyers – a class usually keen to salute and foster modernity in constitutional law[105]. They have been questioned by experienced constitutional law practitioners[106]. But sections of the

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103 It provides: "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."

104 (1996) 189 CLR 51; [1996] HCA 24.

105 For example, Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 421-422 and the writings cited in *South Australia v Totani* (2010) 242 CLR 1 at 96 [245] n 388; [2010] HCA 39.

106 For example, Mason, "The distinctiveness and independence of intermediate courts of appeal", (2012) 86 *Australian Law Journal* 308 at 316 (pointing to the "potential" for *Kable's* case "to become the means of entrenching transient judicial

(Footnote continues on next page)

Bar have been more enthusiastic. If a modern equivalent to Pope Leo X were alive and well and practising law in Australia today, he might say: "We have been given *Kable's* case; now let us enjoy it." No party to litigation has ever challenged the correctness of the relevant statements in *Kable's* case. The courts have had no alternative but to apply them whatever they think about their merits. But those statements raise questions. Has the basis of the decision changed over time[107]? Does the case lack a ratio decidendi? Are the *Kable* statements, being "insusceptible of further definition in terms which necessarily dictate future outcomes"[108], inconsistent with the rule of law because they are so uncertain that they make prediction impossible and give too much space within which the whims of the individual judge can take effect without constraint? "As law becomes more abstract and more generously endowed with doctrinal axioms and categories, the doctrines themselves seem to become emptied of real significance; they become compatible with more or less any conclusion in concrete cases."[109] These, perhaps, are the questions of a harsh critic. A harsher critic still might reflect on Tom Lehrer's dictum that when his erstwhile faculty colleague at Harvard, Professor Henry Kissinger, received the Nobel Peace Prize, political satire became obsolete. That critic might conclude that legal satire became obsolete when *Kable's* case referred to the need to keep State courts as fit receptacles for the exercise of the judicial power of the Commonwealth, untainted by powers repugnant to or incompatible with that exercise, as if those State courts were inferior institutions, uncouth, uncultured and coarse, needing always to be scrutinised to prevent pollution of the snow-white purity of federal jurisdiction.

63 The appellant is an important and well-advised trade union. When special leave was granted for the appellant to bring this appeal, the appellant was not

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enthusiasms in a nation justifiably suspicious of a judicially-managed Bill of Rights").

107 In *Kable v Director of Public Prosecutions (NSW)* (1989) 189 CLR 51 at 98, 107-108, 116-118, 124 and 133 four Justices relied on the need to maintain public confidence in the independence of the courts. A retreat soon began: see *Baker v The Queen* (2004) 223 CLR 513 at 519-520 [6] and 542-543 [79]-[80]; [2004] HCA 45 and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23], 617-618 [102] and 629-630 [144] (3); [2004] HCA 46. It has now accelerated: see *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 122 [194] and 149 [274]; [2006] HCA 44 and *South Australia v Totani* (2010) 242 CLR 1 at 49-50 [73], 82 [206] and 95-96 [245].

108 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [104].

109 Simpson, "Innovation in Nineteenth Century Contract Law", in *Legal Theory and Legal History: Essays in the Common Law*, (1987) 171 at 202.

called on to present oral argument. On the appeal, its arguments were detailed. The arguments were supported by a plausible apparatus of scholarship involving numerous footnotes, some lengthy. In this, the appellant aped a modern judicial fashion which has not grown up without criticism[110]. It took the better part of a day for these arguments to be presented by the appellant and attacked by the first to fourth respondents. The Attorneys-General of four States evidently thought that there was so real a risk that the appellant's arguments might succeed that they should intervene. So the circumstances were auspicious. The solemn and impressive trappings attending the appeal suggested a "great" constitutional case resting on a contest between evenly balanced arguments of a fundamental kind. But the appeal must be dismissed as hopeless. If there had been sufficient force in the appellant's arguments to justify allowing the appeal, it would have cast grave doubt on the correctness of the *Kable* statements. It may sometimes be wrong to blame the parents for the sins of their children. But that so much time, money and effort could be wasted on an empty point suggests difficulties and flaws in the statements from which the point is derived.

64 Section 146C(1)(a) of the Act, none too elegantly, imposes an obligation on the Commission. That obligation is to:

> "give effect to any policy on conditions of employment of public sector employees:
>
> (a) that is declared by the regulations to be *an aspect of government policy that is required to be given effect to by the Commission*". (emphasis added)

65 The appellant's submission was couched in the hallowed but hollow phrases of the *Kable* line of cases. The appellant submitted that s 146C(1)(a) "impairs the institutional integrity of the Industrial Court in a manner inconsistent with Chapter III of the Constitution … by requiring judges … to give effect to any government policy dictated by the executive and act, in effect, as an arm of the executive, when acting as presidential members of the Commission." The appellant also submitted that s 146C(1)(a) "affects critically the functions of the Commission in a manner which substantially impairs the reality and appearance of its independence. The Commission is directly subject [to] the dictates of government policy". And the appellant submitted that the declaration in the regulations "constitutes an instruction to the Commission by the executive that it is required to comply with the identified policy of Government. It is immaterial that the form of the direction of the executive is by way of a regulation."

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110 Munday, "Fish with Feathers: English Judgments with Footnotes", (2006) 170 *Justice of the Peace* 444; Munday, "Judicial Footnotes: A Footnote (With Footnotes)", (2006) 170 *Justice of the Peace* 864.

66 If these submissions are correct, *either* most regulations will be invalid *or* the words in s 146C(1)(a) emphasised above mean something other than "mandatory". In truth "mandatory" is all they mean, and the submissions are incorrect.

67 The appellant's counsel was asked: "if … [s] 146C … said regulations may prescribe the limits or conditions to be applied to awards regarding remuneration …, that would not be a problem, would it, *expressed* in that way?" (emphasis added) Counsel said: "No". He explained: "the feature that gives rise to the difficulty is the way in which [s] 146C(1) *expresses* itself." (emphasis added) The appellant's point is thus a formal one only. It ignores criteria of substance. It passes by the fact that questions going to the constitutional validity of legislation generally turn on questions of substance, not of form. It overlooks the fact that the words italicised in the above quotation from s 146C(1)(a) mean only "mandatory".

68 The *Kable* statements cannot possibly be applied to invalidate regulations merely on the ground that the courts are obliged to apply them. If they did, there would be a fatal flaw at their heart. That flaw is that the enactment of a s 146C(1)(a) regulation as part of an Act of Parliament would be equally vulnerable to invalidity on *Kable* grounds. Vulnerability of that kind would destroy the legislation-making power of the States. Yet the Constitution contemplates that there will be a wide field for State legislative activity outside the potential restrictions created by the interaction of ss 51 and 52 and s 109. Non-lawyers might applaud or deprecate the reference to policy in s 146C(1)(a). They might applaud or deprecate the suggestion that some battle of the Caudine Forks has taken place as a result of which the Commission must pass beneath the Samnite yoke of a regulation the Executive drafted pursuant to the power s 146C(1)(a) confers. But applause does not matter. Neither does deprecation.

69 In a system of responsible government, all legislation enacted substantially in conformity with a Bill presented to the legislature by the Executive may be said to "give effect to … government policy dictated by the executive". Most legislation is of that kind – not all, for Members of Parliament acting or claiming to act independently of the political parties consistently supporting the executive government in the legislature can sometimes procure the enactment of legislation. And when legislation enacted in conformity with the will of the Executive contains regulation-making power, the regulations, which are themselves a form of legislation and which are subject to parliamentary scrutiny and the power of disallowance[111], may equally be said to "give effect to … government policy dictated by the executive". Once that

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111 See *Interpretation Act* 1987 (NSW), s 41; *Subordinate Legislation Act* 1989 (NSW), s 8.

"policy" is reflected in statutes and regulations, it is binding as a matter of law. The judicial branch of government declares and enforces the law. In that sense, the judiciary gives effect to government policy dictated by the Executive. If the *Kable* statements invalidate legislation giving effect to government policy on that ground alone, they are wrong for that reason. They do not. Whether the *Kable* statements are wrong for other reasons need not be investigated in this appeal. That is because the statements will not bear the weight which the appellant places on them.

70 It is the law that courts are subject to legislative power. And it is the law that courts are subject to acts of the Executive, including the making of regulations, carried out pursuant to valid delegations of legislative power. Section 146C(1)(a) is a perhaps excessively colourful and triumphalist grant of regulation-making power. But it is no more than a grant of regulation-making power. Section 146C(1)(a) and the regulations which may be made under it do not suffer from the substantive vices which affected the legislation impugned in *Kable's* case and in other cases where *Kable's* case has been successfully invoked. As the Attorney-General for the State of Victoria submitted, s 146C(1)(a) provides that the Commission "must give effect to delegated legislation in the exercise of its statutory powers", but "merely sets the parameters for the Commission's exercise of its statutory powers without directing the outcome of particular proceedings." The members of the Commission are not required to implement government policy in a way which adversely affects the capacity of the Industrial Court when it is comprised of those members to be a fit repository of federal jurisdiction.

71 The statements in *Kable's* case are thus not fatal to the validity of s 146C(1)(a). But the fact that the statements were thought capable of useful employment for the appellant's ends raises questions about their correctness. As already indicated, those questions do not call for further discussion on this appeal.

72 There are two particular arguments of the appellant which remain to be dealt with.

73 The first was:

> "Section 146C expressly applies to pending proceedings and any policy declared by regulation for the purposes of the section will apply to proceedings pending at the time the policy is so declared. The capacity to direct the Commission to give effect to government policy in pending proceedings permits the Government to alter or dictate the outcome or require the acceptance of the Government's own submissions in the proceedings." (footnote omitted)

It is not necessary to decide the validity of s 146C(1)(a) in relation to its possible conferral of power to make a regulation declaring that the government's submissions in a particular case are an aspect of government policy which is required to be given effect to. Nor is it necessary to consider the validity of s 146C(1)(a) in relation to its possible power to make a regulation the only effect of which is to alter or dictate the outcome of particular proceedings. The appellant has not demonstrated that the regulation relevant to this appeal falls into the first category of regulation. And, despite the appellant's submission to the contrary, the regulation is not within the second category of regulation either. It applies to the pending proceedings before the Commission, but not to them exclusively. The terms of s 146C(1)(a) permit regulations going well beyond these categories. The validity of s 146C(1)(a) in its possible conferral of power to make a regulation in either category can be put aside until an occasion on which the issue arises.

74 Secondly, the appellant submitted:

> "The effect upon the appearance of the independence of the Industrial Court is demonstrated by reflecting upon the fact that a member of the Commission will one day hear proceedings in which he or she is required to give effect to any policy determined by the Government. The same day (or the next) the same member of the Commission may sit in the same courtroom with the same staff but constituted as the Industrial Court to determine judicial proceedings involving the Government as a party. An intelligent observer would find no basis upon which to distinguish between the two proceedings or have confidence that the member will (as required) give effect to Government policy in one proceeding, but bring an impartial and independent mind to bear upon the other."

In one sense, the proceedings are not to be distinguished. In each set of proceedings the Commission member is applying the law and, so far as a particular law takes the form of an enactment, that member will usually give effect to government policy. In each set of proceedings, the tribunal will bring an impartial and independent mind to bear, subject to what the law commands.

75 The appellant laid stress on the interrelationship of the functions of the Commission and those of the Industrial Court, but that analysis raised no point not considered above.

76 The appeal must be dismissed with costs.