

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

THE STATE OF VICTORIA

FIRST APPELLANT

THE HONOURABLE STEPHEN
GEORGE ALLEY

SECOND APPELLANT

and

JOHN DAVID SUTTON

FIRST RESPONDENT

CONSTRUCTION, FORESTRY,
MINING AND ENERGY UNION

SECOND RESPONDENT

The State of Victoria v Sutton (M5-1997) [1998] HCA 56
2 September 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Industrial Relations Court of Australia.*
3. *Remit the matter to the Full Court of the Industrial Relations Court of Australia to determine any remaining issues under a Notice of Contention in or to the effect of that filed by the respondents in this Court and dated 1 April 1997.*

On appeal from the Industrial Relations Court of Australia

Representation:

I G Sutherland QC with L Kaufman for the appellants (instructed by Victorian Government Solicitor)

S C Rothman SC with H Borenstein for the respondents (instructed by R L Whyburn & Associates)

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

CATCHWORDS

The State of Victoria & Anor v John David Sutton & Anor

Property – Vesting of property of unincorporated association in Custodian – Inability of association to dispose of property vested in Custodian.

Property – Disposition – Prohibition on disposition without prior written consent of Custodian – Disposition in breach of prohibition "void, at the option of the Custodian" – Whether disposition in breach of prohibition void or voidable.

Property – Option to avoid disposition – Manner of exercising option – Period of time in which option to be exercised – Method of communicating exercise of option.

Industrial law (Cth) – Registered organisation – Cancellation of registration – Effect upon property of organisation.

Words and Phrases – "void" – "option" – "election".

Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth).

Builders Labourers' Federation (Cancellation of Registration Consequential Provisions) Act 1986 (Cth).

BLF (De-recognition) Act 1985 (Vic).

Workplace Relations Act 1996 (Cth), s 347.

Workplace Relations and Other Legislation Amendment Act 1996 (Cth), Sched 16.

1 GAUDRON, GUMMOW AND HAYNE JJ. On 30 March 1994, the Australian Building Construction Employees' and Builders Labourers' Federation ("the BLF") entered into a written agreement ("the amalgamation agreement") with the Construction, Forestry, Mining and Energy Union ("the CFMEU"). This was expressed to bring about "an amalgamation and/or merger of the BLF into the CFMEU" so that "all assets and liabilities of the BLF shall merge with the assets and liabilities of the CFMEU". At the date of the agreement the CFMEU was, and the BLF was not, an organisation of employees registered under the *Industrial Relations Act* 1988 (Cth) ("the 1988 Act")¹.

2 This case concerns the effectiveness of the amalgamation agreement in light of Orders in Council previously made under Victorian legislation, the *BLF (De-recognition) Act* 1985 (Vic) ("the De-recognition Act"). A consideration of the issues requires some treatment of earlier federal legislation.

The Commonwealth legislation

3 For many years, the BLF was an organisation of employees registered under the predecessor to the 1988 Act, the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"). The benefit of registration to the BLF was, among other things, the gaining, by force of the legislation, of the legal personality of a body corporate².

4 During the pendency of deregistration proceedings against the BLF under special provisions of the *Building Industry Act* 1985 (Cth)³, the Commonwealth Parliament enacted two further statutes dealing specifically with the BLF⁴. The first was the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth) ("the Cancellation Act") which came into operation on 14 April 1986.

1 Since 25 November 1996 titled the *Workplace Relations Act* 1996 (Cth) ("the Workplace Relations Act"). See s 2(1) and cl 1 of Sched 19 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

2 See *Williams v Hursey* (1959) 103 CLR 30 at 52; *Dobinson v Crabb* (1990) 170 CLR 218 at 233; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 635, 645-646.

3 The validity of the *Building Industry Act* 1985 (Cth) was upheld in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636.

4 Their validity was upheld in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.

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As the name suggested, the Cancellation Act by its own force (s 3) cancelled the registration of the BLF under the 1904 Act.

- 5 The second statute was the *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act* 1986 (Cth) ("the Consequential Provisions Act"). The Consequential Provisions Act took effect immediately after the Cancellation Act. It addressed the impact of cancellation of the registration upon, among other things, property belonging to the BLF. The Consequential Provisions Act provided essentially that, following the Cancellation Act, the property of the BLF was to belong to an unincorporated association and was to be held and applied in accordance with the constitution and rules of the unincorporated association. This was the effect of s 4(1) of that statute. This preserved in relation to the BLF the operation of s 143(6) of the 1904 Act⁵. Section 143(6) stated:

"Upon the cancellation of the registration of an organization, the organization shall cease to be an organization and a corporation under this Act, but shall not by reason of the cancellation cease to be an association. The property of the organization shall, subject to any order which the Court, upon application by a person interested, may make with respect to the satisfaction of the debts and obligations of the organization out of that property, be the property of the association and shall be held and applied for the purposes of the association in accordance with the constitution and rules of the organization insofar as they can be carried out or observed notwithstanding the deregistration of the organization."

The term "association" was defined in s 4(1) of the 1904 Act to mean "any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employees, or for furthering or protecting the interests of employers or employees".

- 6 At the time of the enactment of the Cancellation Act and the Consequential Provisions Act, the property of the BLF included funds on deposit⁶ and parcels of land under the provisions of the *Transfer of Land Act* 1958 (Vic) ("the Transfer of

5 The 1904 Act, including s 143(6), was repealed by s 3 of the *Industrial Relations (Consequential Provisions) Act* 1988 (Cth). The effect of s 6 of that statute was, notwithstanding the commencement of the 1988 Act, to continue the application of s 143(6) in relation to the cancellation of registration of the BLF as if the 1904 Act had not been repealed.

6 It would appear that the value of the funds on deposit, as at 22 February 1995, was approximately \$857,938.97.

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Land Act")⁷. The registered titles to the parcels of land (which were situated at 11 Lygon Street, 13-15 Lygon Street Carlton and 8-18 Orr Street Carlton) stood in the names of two (in one case) and three (in the other cases) officers or members of the BLF. Section 37 of the Transfer of Land Act forbade the entry in the register of any trusts.

7 Section 143(6) is not without difficulties of application to the situation with respect to the BLF. The phrase therein "the property of the association" has no clear legal meaning if the body is unincorporated. Subject to any provisions of the rules of the organisation, for example providing for the vesting of property in trustees or in some other body, the property would be that of the members. The rules of the BLF, as they stood on 13 April 1986, spoke of the "supreme control" being "vested" in the members (r 8.1) and also provided (rr 15, 16) for the custody, control and management of the property of the BLF. However, as the Full Court of the Federal Court pointed out in *Bacon v O'Dea*⁸, whilst the BLF retained its corporate status, there had been no practical necessity to have the title to property vested in trustees or in any other body.

8 The better view is that upon cancellation of registration on 14 April 1986, the property then was held by those who were members at that date. That is consistent with the conclusion which was reached by the Full Court of the Federal Court in *Bacon v O'Dea*⁹ after consideration of the terms of the rules of the BLF and of decisions upon the general law, including *Bacon v Pianta*¹⁰ and *Re Goodson, deceased*¹¹. Further, in *Dobinson v Crabb*, Dawson and McHugh JJ said¹²:

"[I]n our view what s 143(6) does is to provide for the destination of an organization's property upon deregistration. Thereafter, subject to any order of the Federal Court, the association, to which the property is destined by the sub-section, holds that property in accordance with the constitution and rules of the organization, but subject to the common or statutory law applying to unincorporated associations. Obviously, since deregistration takes the

7 It would appear that the value of the land was estimated at May 1988 as between \$1.78 million and \$1.95 million.

8 (1989) 25 FCR 495 at 503.

9 (1989) 25 FCR 495 at 504.

10 (1966) 114 CLR 634.

11 [1971] VR 801.

12 (1990) 170 CLR 218 at 230.

4.

association outside the mechanism of the [1904 Act], that law is primarily State law."

In the same decision, Gaudron J construed¹³ s 143(6) as evincing an intention "that the specific provisions thereby made with respect to the property which previously belonged to the organization should be supplemented by the general law, including applicable State law". We turn to consider the particular laws made in Victoria.

The Victorian legislation

- 9 The De-recognition Act received the Royal Assent on 30 July 1985 and s 7 thereof commenced on 1 August 1986. Section 7(1) empowered the Governor in Council, by Order published in the *Victoria Government Gazette*, to "provide for the restriction of the use of funds or property of BLF and for the control of those funds or that property". Such an Order would, unless sooner revoked, cease operation on the expiration of six months from the date on which it came into force, although s 7(2) permitted the extension of the Order by further Order. Section 7(3) provided that¹⁴:

"A person shall not contravene an Order made under sub-section (1).

Penalty: 100 penalty units."

Other relevant provisions of the De-recognition Act came into force before s 7, that is to say on 14 April 1986. This was the day the Cancellation Act and the Consequential Provisions Act came into operation.

- 10 Significantly, in s 3 of the De-recognition Act "BLF" was defined to mean:
- "(a) the organization registered pursuant to the Commonwealth Act^[15] and known as The Australian Building Construction Employees' and Builders Labourers' Federation;

...

13 (1990) 170 CLR 218 at 246.

14 Section 7(3) was later re-numbered s 7(5) by the *BLF (De-recognition) (Amendment) Act 1987* (Vic) ("the 1987 Act").

15 The "Commonwealth Act" was defined in s 3 of the De-recognition Act to mean the 1904 Act as amended and in force for the time being.

5.

- (c) if at any time the registration pursuant to the Commonwealth Act of the organization referred to in paragraph (a) is cancelled -
 - (i) the association within the meaning of the Commonwealth Act which was the organization referred to in paragraph (a) immediately before the cancellation of that organization's registration pursuant to the Commonwealth Act".

11 The definition speaks of the present, although in some respects by reference to past events. The expression in par (c)(i) "the organization referred to" identifies the BLF as it existed before the cancellation of registration. The term "the association within the meaning of the [1904 Act]" identifies the consequences of the operation of s 143(6) of the 1904 Act and the general law upon the BLF. In this judgment, the term "BLF" is used to identify the organisation whose registration under the 1904 Act was cancelled and the unincorporated association in respect of which thereafter s 143(6) and the general law operated.

12 Section 11 of the De-recognition Act provided that, unless certain events had by then occurred, that Act was to cease to have effect on the expiration of one year from the Royal Assent on 30 July 1985. However, ss 2(2) and 6 of the 1987 Act operated to repeal s 11 of the De-recognition Act from 30 July 1985. Accordingly, the operation of the De-recognition Act was continued beyond 30 July 1986.

13 With effect from 13 October 1987, the 1987 Act amended s 7(1) of the De-recognition Act so that it read:

"For the purpose of protecting the rights of persons who are or have ceased to be members of BLF, the Governor in Council may by Order published in the *Government Gazette* provide for the restriction or distribution of the use of funds or property of BLF and for the control, vesting and realisation of those funds or that property."

The opening words of s 7(1) disclose a particular statutory purpose.

14 In *Dobinson v Crabb*, Gaudron J said¹⁶:

"The definition of 'BLF' in the De-recognition Act is such that, when applied to s 7, s 7 operates on all property of the association, whether it previously belonged to the organization or whether it was later acquired by the association in its own right. Property acquired by the association in its own

16 (1990) 170 CLR 218 at 243. See also at 224 per Brennan J.

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right after deregistration of the organization is unaffected by s 143(6) of the [1904 Act]."

The Order

- 15 In purported reliance upon the De-recognition Act, the Governor in Council made an Order on 13 October 1987¹⁷. Clause 1 of the Order committed "[p]ossession, custody and control of the funds and property" of the BLF in a "Custodian", Dr Ian Gordon Sharp. Clause 7 required the Custodian "forthwith" to "take possession custody and control" of such funds and property and cl 5 restricted the ability of other persons to deal with such property¹⁸. At that stage, the Order did not provide for the vesting of funds and property in the Custodian. Clause 11 provided that no person was to "resist, hinder or obstruct" the Custodian performing his functions under the Order. Clauses 2 and 3 stated:

"2. No person shall pay or dispose of any of the funds or property of BLF or of any interest therein, or create any encumbrance or charge in respect thereof, without the prior written consent of the Custodian. Any such payment disposition encumbrance or charge shall be void, at the option of the Custodian.

3. The Custodian may refuse to give consent referred to in clause 2 hereof if he in his absolute discretion is not satisfied that the payment disposition encumbrance or charge is desirable to be made for the carrying out of the ordinary and proper affairs of BLF and for the benefit of its members."

It is upon the construction of these provisions that the present litigation largely turns.

- 16 The Order was made the day before the enactment of the 1987 Act and on the day of the deemed commencement of the 1987 Act (13 October 1987). However, s 5(b) of the 1987 Act inserted a new s 7(4) of the De-recognition Act. This stated:

17 *Victoria Government Gazette*, No S39, 13 October 1987.

18 By further Order in Council dated 17 May 1988, cl 7 was amended by adding at the end of it the words "other than membership contributions or sustenance fees received by the Victorian Branch or the Federal office on or after 13 October 1987 or funds or property acquired by the use of such contributions or fees": see *Dobinson v Crabb* (1990) 170 CLR 218 at 224, 228.

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"The Order in Council declared to be made pursuant to section 7 of this Act and section 5 of the *Police Regulation Act* 1958 and published in the *Government Gazette* on 13 October 1987 is hereby declared to be and to always have been as valid as if enacted herein."

17 Approximately one month later, on 10 November 1987, the Governor in Council made a Supplemental Order¹⁹. Clause 2 thereof empowered the Custodian to "vest in himself as Custodian any funds or property of [the] BLF". The Supplemental Order conferred other additional powers on the Custodian, including a power to bring or defend legal actions (cl 3). A further Supplemental Order was made on 22 December 1987²⁰.

18 It is clear that technical words are not necessary to give effect to the intention of a settlor to vest property upon an express private trust for persons taking beneficial interests in that property²¹. "Equivalent" expressions will suffice²². The same may be taken to be the case where the trust is created by statute and the intention is that of the legislature²³.

19 The Supplemental Orders did not provide that the vesting of property in the Custodian was to be on "trust" for the members. Further, the Supplemental Orders did not use equivalent expressions to indicate, for example, that the property, when vested, was to be held "on behalf of" or for "the benefit of" the members²⁴. The Custodian is thus not a trustee, in the ordinary sense, of the property which is vested in him. It nevertheless may have been the case that obligations in the nature of a trust not for beneficiaries but for statutory purposes²⁵ attached upon the vesting

19 *Victoria Government Gazette*, No S45, 10 November 1987.

20 *Victoria Government Gazette*, No S59, 22 December 1987.

21 *Re Armstrong, deceased* [1960] VR 202 at 205.

22 *Richards v Delbridge* (1874) LR 18 Eq 11 at 14.

23 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 166.

24 cf *Workers Compensation Act* 1958 (Vic), ss 35(1) and 35(4) considered in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166.

25 See *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264 at 274; *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 161-162, 165-168, 188-190.

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of the property in the Custodian. It is unnecessary to determine this question. What is of importance for this appeal is that, once any particular funds or other assets were vested in the Custodian by this means, they were beyond the reach of any purported disposition thereafter by the BLF. It could not then effectively deal in that which was already vested in the Custodian.

20 As we have indicated earlier in these reasons, s 7(2) of the De-recognition Act placed a temporal limitation upon these Orders. It stated:

"An Order made under sub-section (1) -

- (a) shall come into force upon the date of publication of the Order in the *Government Gazette*; and
- (b) shall, unless sooner revoked, cease to be in force at the expiration of 6 months from the date on which it came into force but may, at any time while it remains in force (including a time when it remains in force by virtue of a previous extension or previous extensions under this paragraph), be extended in duration by a further Order made by the Governor in Council and published in the *Government Gazette*."

The three Orders were extended (sometimes with variation) at intervals of approximately six months, with the last extension before the amalgamation agreement occurring on 17 March 1994 and operative until 16 September 1994. The latest extension after the amalgamation agreement which the evidence discloses occurred on 2 March 1995 and operated until 1 September 1995.

21 Pursuant to the first Supplemental Order, the Custodian took steps to vest in himself the funds on deposit of the BLF in Victoria. The Custodian did not obtain the registered title of the parcels of land. However, the Custodian caused the entry on the relevant certificates of title of Queen's caveats under s 106 of the Transfer of Land Act. These were lodged on 16 May 1988 and forbade the registration of any dealing by the registered proprietors "without the consent of the Custodian under the [De-recognition Act] first obtained (Order of the Governor in Council made 13 October 1987, Clause 2)". Yet, in circumstances apparently not disclosed by the evidence, by order of the Registrar of Titles dated 26 October 1993²⁶, the lands were "vested" in three persons who appear to have been officers or members of the BLF and were, it may be assumed, new trustees. The order was entered on each certificate of title on 9 May 1994.

26 Presumably made under the Transfer of Land Act, s 58.

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22 Accordingly, even after the Supplemental Orders took effect, the legal title of the parcels of land was retained by the respective registered proprietors, although the Custodian had placed Queen's caveats on the titles. It would appear that the beneficial interest in the land was retained by the members of the unincorporated association collectively.

23 However, the funds on deposit in Victoria were vested in the Custodian and insusceptible of disposition by the unincorporated association. Thus, irrespective of any subsequent avoidance of the amalgamation agreement by the Custodian, the subject-matter of that agreement could not have included the funds on deposit. They could not be included in the assets of the BLF of which that instrument spoke.

The BLF-CFMEU agreements

24 On 30 March 1994, the BLF and the CFMEU entered into the amalgamation agreement. At that time, the CFMEU was the product of a series of amalgamations of unions which were registered under federal law. Unlike the BLF, however, the CFMEU was a registered organisation of employees and thus possessed corporate status. The BLF appears to have executed the amalgamation agreement by affixing the "seal" of the BLF under the hand of the General Secretary and the Federal President.

25 The amalgamation agreement purported to do more than pass possession, custody or control of the assets of the BLF. It was a purported disposition thereof. The relevant provisions stated:

"3. On and from 31 March 1994 all assets and liabilities of the BLF shall merge with the assets and liabilities of the CFMEU to be held and controlled in accordance with the rules of the CFMEU and this agreement and shall be treated as if such assets and liabilities were, at all times, the assets and liabilities of the CFMEU. Such funds shall, to the extent that prior to 31 March 1994 they were funds under the control of a BLF branch, other than the BLF, Victorian Branch, be and become funds under the control of the respective Construction Labourers' Divisional Branch established consequent upon this agreement and, otherwise, the funds of the BLF shall be held in accordance with paragraph 11 herein. In the case of the funds of the BLF, Victorian Branch they shall be and become funds under the control of the Building Unions Division, Victorian Divisional Branch.

4. For all purposes and in all proceedings, an asset or liability of the BLF existing immediately before 31 March 1994 is taken to have become and to have been at all times an asset or liability of the CFMEU on and from 31 March 1994.

...

7. On and from 31 March 1994 any and all members of the remaining branches of the BLF, if not already members of the CFMEU, shall be and become members of the CFMEU and be treated in the CFMEU as if all of the period of their membership in the BLF was membership in the CFMEU and all other persons who, prior to the day fixed for the amalgamation and/or merger, were members of the BLF, shall, on and from 31 March 1994 cease to be members of the BLF.

...

11.

11. In relation to the funds of the BLF not under the control of any branch those funds shall also merge with the funds of the CFMEU and be and become the funds of the Building Unions Division of the CFMEU through its Divisional Office or funds under the control of the Building Unions Division of the CFMEU through its Divisional Office."

No provision of the amalgamation agreement referred to the circumstance that the funds on deposit were held by the Custodian nor did it deal with the Queen's caveats over the registered titles to the real estate. Significantly, the Custodian was unaware of the amalgamation agreement and so did not provide his consent to the disposition of any property of the BLF. The evidence of the Custodian in this respect was not challenged.

- 26 The rules of the BLF, as well as the rules of the CFMEU, were amended to enable both bodies to effect the amalgamation. State registered unions which were associated with the BLF also entered into agreements with the CFMEU in order to further achieve the purported amalgamation.

The proceedings

- 27 On 6 April 1994, Mr John Sutton, the National Assistant Secretary of the CFMEU, applied to the Industrial Relations Court of Australia ("the IRC") for various orders and declarations. The application was based in part on s 258 of the 1988 Act and in part on the jurisdiction with respect to "associated matters" conferred by s 430 of that statute²⁷. Section 258 empowered the IRC to determine whether an invalidity had occurred in the management or administration of a registered organisation. The relief sought by Mr Sutton included a declaration that no invalidity had occurred in relation to the merger of the BLF and the CFMEU; an order that the property of the BLF held prior to 31 March 1994 was now held by the CFMEU; and an order that the funds on deposit held by the Custodian be transferred to accounts held by the CFMEU. The Custodian, the State of Victoria, the CFMEU and certain officers and members of the BLF were named as respondents to the application. No registered proprietor of any of the real estate was joined as a party. Nor, as to the BLF, does there appear to have been any representative order in respect of members comprising the unincorporated association.

- 28 On 5 May 1994, Mr Sutton amended his application to change the CFMEU from a respondent to the second applicant. On the same day, Mr Sutton and the

27 A motion for a declaration that the IRC had no jurisdiction to hear and determine the proceeding and for its dismissal was refused by Wilcox CJ on 12 October 1994: *Sutton v Sharp* (1994) 1 IRCR 259; 125 ALR 643; 57 IR 102.

CFMEU filed a detailed statement of claim. On 28 October 1994, the Custodian and the State of Victoria filed their defence. In response to the allegation that the CFMEU and the BLF had entered into the amalgamation agreement which took effect on 31 March 1994, the Custodian and the State of Victoria pleaded that the amalgamation agreement "was and is void". They placed reliance on the terms of the Order and the lack of consent from the Custodian to the disposition of the property.

The litigation in the IRC

29 Wilcox CJ concluded²⁸ that the intention of cl 2 of the Order made 13 October 1987 was to render a disposition of property without the consent of the Custodian void if the Custodian so elected. Wilcox CJ stated that, whilst the first sentence of cl 2 gave rise to the inference that any breach of the prohibition contained within it would be void, the second sentence prevented the inference by evincing what his Honour held was a clear intention that an unauthorised disposition would be void at the election of the Custodian. As the Custodian had not exercised the option, cl 2 did not render the disposition to the CFMEU void²⁹.

30 On 24 August 1995, Wilcox CJ made various orders³⁰. The Court declared that the amalgamation agreement "was and is valid and effective in law" (order 1), that "no invalidity has occurred in the management or administration of [the] CFMEU or any branch of [the] CFMEU" (order 2), and that the CFMEU was "beneficially entitled" to the funds or property in the possession, custody or control of the Custodian including any funds or property vested in him as Custodian under any Order in Council (order 3). The Court also made a mandatory order that, within 60 days or such further time as a judge allows, the Custodian "do all things necessary" to vest in the CFMEU those funds and property (order 4).

31 Pursuant to s 420 of the 1988 Act, the Custodian and the State of Victoria appealed to the Full Court of the IRC. The Custodian sought a stay of execution of order 4 pending the appeal. The Full Court granted a stay of the order so far as it related to the real estate but refused a stay in respect of the funds on deposit. The Custodian thereafter transferred to the CFMEU the funds on deposit.

32 However, as indicated earlier in these reasons, irrespective of the effectiveness of any subsequent avoidance by the Custodian under cl 2 of the

28 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 147.

29 (1995) 62 IR 121 at 148.

30 (1995) 62 IR 121 at 149.

Order, the subject-matter of the amalgamation agreement could not and did not include in the first place the funds on deposit vested in the Custodian under cl 2 of the first Supplemental Order. That statutory title was superior to any rights which the BLF would otherwise have had under the general law to transfer to the CFMEU.

33 Between the decision at first instance and the appeal to the Full Court, Dr Sharp died. The Governor in Council made an Order which was published on 20 August 1996³¹. The Order committed possession, custody and control of the funds and property of the BLF to the Honourable Stephen George Alley and provided that Mr Alley was to have the same functions and powers as were exercised or held by Dr Sharp immediately prior to his death. He is the second appellant in this Court³².

34 On 23 August 1996, the Full Court (Spender, Ryan and North JJ) dismissed the appeal³³. On 14 February 1997, pursuant to s 432(2) of the Workplace Relations Act, this Court granted leave to appeal.

The submissions

35 In this Court, the appellants made three principal challenges to the judgment of the Full Court:

- (1) the Full Court erred in treating a disposition of property of the BLF as voidable at the option of the Custodian and not void;
- (2) in the alternative, if the Order rendered any disposition of property of the BLF voidable, the Full Court erred in concluding that the Custodian had not elected to treat the disposition as void; and
- (3) it followed that there was lacking the necessary foundation for the declaratory and mandatory orders made by Wilcox CJ and affirmed by the Full Court.

Submissions (2) and (3) should be accepted. The purported disposition of the BLF's interest in the real estate was voidable. The funds on deposit stand in a different position. They had been vested in the Custodian before the amalgamation

31 *Victoria Government Gazette*, No S95, 20 August 1996.

32 Pursuant to a grant of special leave made on 6 November 1997 at the substantive hearing.

33 *Sharp v Sutton* (1996) 73 IR 185.

agreement and thus, in any event, could not have been divested by the BLF, so no question of later avoidance by the Custodian arose. However, there remain for consideration certain grounds upon which, by Notice of Contention, the respondents seek to retain the orders in their favour made by Wilcox CJ and affirmed by the Full Court.

The construction of the Order

36 The Order is to be read with the De-recognition Act and, in particular, with s 7 which conferred the power to make the Order. The text of cl 2 and 3 is set out earlier in these reasons. The first sentence of cl 2 of the Order creates and imposes a norm of conduct. The relevant requirement is that no person shall pay or dispose of any of the funds or property of the BLF or of any interest therein, without the prior written consent of the Custodian. The Custodian may refuse consent if not satisfied, in his absolute discretion, of the matter referred in cl 3. The legal consequences of failure to observe the norm imposed by the first sentence of cl 2 are provided for elsewhere in the legislation³⁴. One consequence is to engage the criminal law. Section 7(3) of the De-recognition Act makes it an offence to contravene an Order made under s 7(1).

37 Secondly, cl 2 itself goes on to attach civil consequences to payments, dispositions, encumbrances and charges which are, respectively, paid, disposed of or created in contravention of the first sentence of cl 2. The dealings in question "shall be void, at the option of the Custodian".

38 Windeyer J said of the term "void" that it "has never been an easy word" and pointed out that it did not necessarily mean that the void act had no legal effect at all³⁵. In particular, where (as here) a disposition between two parties is described as "void" at the will of a third, the preferred construction is to read "void" as "voidable"³⁶. The submission to the contrary which was at the forefront of the appellants' submissions should not be accepted. However, in the alternative, the appellants proffered the construction which we would accept.

34 cf *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348; 35 ALR 79 at 86; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 473.

35 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 459.

36 *Davis v Bryan* (1827) 6 B & C 651 at 655-656 [108 ER 591 at 592]; *Hughes v Palmer* (1865) 19 CB (NS) 393 at 407-408 [144 ER 839 at 845]; *In re London Celluloid Company* (1888) 39 Ch D 190 at 203.

- 39 The Order uses the expression "at the option of the Custodian". There is no specification of a temporal limitation upon the exercise of the "option". It is sufficient for the purposes of the present litigation to construe cl 2 as authorising the Custodian to exercise his "option" and communicate the fact of that exercise within a reasonable time of awareness of the facts giving rise to the right³⁷.
- 40 In submissions, the term "election" was used as a synonym for "option" as it appears in cl 2. The true nature of "election" is the confrontation of the person electing with two mutually exclusive courses of action between which a choice must be made, for example, to terminate or keep a contract on foot³⁸. In its setting in cl 2 of the Order, "option" is best understood as identifying a power, but not a duty, which is thereby conferred upon the Custodian.
- 41 Clause 2 of the Order prescribes no particular formality for the exercise of the power conferred therein. However, that power is supplemented by the power conferred by cl 2 of the first Supplemental Order. This enables the Custodian to "vest in himself ... any funds or property of [the] BLF". The avoidance by the Custodian, under the Order, of a disposition of the property of the BLF does not thereby vest in the Custodian any title which before the disposition was vested, not in the Custodian, but in the disponor. However, the disponor is to be treated as if the disposition had not taken place. In that state of affairs, the Custodian may exercise the power conferred by cl 2 of the first Supplemental Order to vest the property in himself. Clause 2 includes the taking of such steps as the notification of a debtor of an assignment of a debt and the securing of registration as a shareholder or as registered proprietor of land³⁹.
- 42 In the present case, no question arises as to the effect of the exercise by the Custodian of the power of avoidance upon third parties claiming through or under the CFMEU. Nor does any question arise of the taking of steps by the Custodian to get in a legal or registered title. Subject to the operation of the Order, the amalgamation agreement disposed of the rights and interests of the members of the BLF in the real property identified earlier in these reasons. The funds had been invested by the Custodian. The registered proprietors had remained on the titles to the land and at no stage did the Custodian vest the registered titles in himself. The consequence was that no legal title in respect of any funds or property of the

37 cf *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 633-634.

38 *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 41-42.

39 cf *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 657.

BLF was transferred or made over to the CFMEU by the amalgamation agreement. The exercise of the power of avoidance under cl 2 of the Order did not call for any consequential vesting of legal title in the Custodian under cl 2 of the first Supplemental Order.

43 The Order does not stipulate any means for the communication to the parties to a disposition of the exercise of the power of avoidance conferred by cl 2 thereof. Any means will suffice, at least if it is apt to draw to the attention of the parties to the dealing in question the exercise by the Custodian of the power conferred by cl 2. A pleading in litigation in which the relevant actors are parties may be a sufficient vehicle. The respondents submitted that this could be so in the present litigation only if the pleading had been tendered in the appellants' case at trial. This submission should be rejected.

44 The Custodian became aware of what had been done only with the initiation by the CFMEU of the litigation in the IRC. The pleading by the Custodian in the defence on 28 October 1994 that "the purported amalgamation agreement was and is void" was sufficient exercise of the power of avoidance and communication of its exercise. It follows that on 24 August 1995 the IRC should not have granted a declaratory order that the CFMEU was "beneficially entitled" to funds or property vested in the Custodian. As to beneficial entitlement to real property, any such disposition in favour of the CFMEU had been avoided. As to the funds on deposit, they had been vested in the Custodian and his statutory title to them had not been divested by the amalgamation agreement.

Conclusion

45 The order of the Full Court was that the appeal to it be dismissed. The appeal to this Court from that order should be allowed and the order should be set aside. The matter should be remitted to the IRC for determination of any remaining issues under a Notice of Contention in or to the effect of that filed by the respondents in this Court and dated 1 April 1997. During argument in this Court, the parties concurred in that course. It will be for the Full Court of the IRC to determine what, if any, leave is required from it before those issues may be raised and whether any leave should be given.

46 If the appellants ultimately are successful in the Full Court, it will be for it to determine what, if any, order should or can be made in the proceeding itself to reverse the consequences of compliance with order 4 of the orders made by Wilcox CJ.

47 If the respondents ultimately are successful in the outcome of the appeal, it would still be for the Full Court to consider whether the relief given by Wilcox CJ requires variation to bring it into proper form. We refer, for example, to the

absence of any representative order with respect to the members of the BLF and also to the making of a declaration as to the title to the real property in the absence of the registered proprietors.

48 Schedule 16 to the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) provides in certain circumstances for the exercise by the Federal Court of Australia of the jurisdiction of the IRC with respect to acts or omissions occurring before the "transfer day" (25 May 1997). However, item 63 of Sched 16 provides that this transfer of jurisdiction does not apply to a proceeding (defined in item 62 so as to include an appeal) which had been completed in the IRC before 25 May 1997. The appeal to the Full Court of the IRC had been completed by the order dismissing it made on 23 August 1996. Indeed, the jurisdiction of this Court under s 73 of the Constitution had been enlivened by the grant on 14 February 1997 of leave to appeal pursuant to s 432(2) of the Workplace Relations Act. Schedule 16 does not operate by intervening between the grant of leave in this Court and the delivery of its judgment so as to require any remitter to be directed to the Federal Court rather than the IRC. It is to the IRC, not the Federal Court, that the remitter from this Court should now be directed.

49 Having regard to s 347 of the Workplace Relations Act, there will be no order as to costs in this Court or as to the proceedings to date in the IRC.

50 McHUGH J. The State of Victoria and the Honourable Stephen George Alley ("the Custodian") appeal against an order of the Full Court of the Industrial Relations Court of Australia ("the IRCA")⁴⁰ which dismissed their appeals against four orders made by Wilcox CJ in that Court⁴¹. By Order 1, the IRCA declared "valid and effective in law" an agreement made between the Australian Building Construction Employees' and Builders Labourers' Federation ("the BLF") and the Construction, Forestry, Mining and Energy Union ("the CFMEU") which transferred all the property and liabilities of the BLF to the CFMEU. By Order 2, it declared that "no invalidity has occurred in the management or administration of [the] CFMEU or any branch of [the] CFMEU". By Order 3, it declared that the CFMEU was beneficially entitled to property in the possession, custody or control of the Custodian of the property of the BLF. By Order 4, it directed the Custodian within 60 days to do all things necessary to vest that property in the CFMEU.

51 The principal issue in the case is whether the whole or part of a purported transfer of property, then owned beneficially by members of the BLF, is void. The State and the Custodian contend that it was void because, acting under Orders in Council enacted before the transfer was made, the Custodian has elected to treat the transfer as void. In my opinion, the purported transfer of property to the CFMEU has been avoided by the Custodian in accordance with his powers under the Orders in Council and the CFMEU is not beneficially entitled to the property.

Factual background

52 The CFMEU is an organisation of employees registered under the *Industrial Relations Act* 1988 (Cth). The BLF was formerly an association registered under the *Conciliation and Arbitration Act* 1904 (Cth). Its registration was cancelled on 14 April 1986 pursuant to the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth). Immediately before its de-registration, the BLF, as a federally registered organisation, held corporate status under the *Conciliation and Arbitration Act*. Upon de-registration, pursuant to s 143(6) of the then *Conciliation and Arbitration Act*⁴², the BLF lost its corporate status and its property reverted to "the association" to be dealt with according to the rules of the

40 *Sharp v Sutton* (1996) 73 IR 185.

41 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 149.

42 Which continues to apply pursuant to the *Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act* 1986 (Cth).

organisation⁴³. That is, the property became the property of the members of the association collectively at the time of de-registration⁴⁴.

53 In 1985, in anticipation of the Commonwealth legislation, the Parliament of Victoria enacted a statute entitled the *BLF (De-recognition) Act* 1985 (Vic) which was to come into force after the Commonwealth legislation cancelling the registration of the BLF took effect. Section 7 of that Act provided that:

"7(1) For the purpose of protecting the rights of persons who have ceased to be members of BLF, the Governor in Council may by Order published in the *Government Gazette* provide for the restriction of the use of funds or property of BLF and for the control of those funds or that property.

(2) An Order made under sub-section (1) –

(a) shall come into force upon the date of publication of the Order in the *Government Gazette*; and

(b) shall, unless sooner revoked, cease to be in force at the expiration of 6 months from the date on which it came into force but may, at any time while it remains in force (including a time when it remains in force by virtue of a previous extension or previous extensions under this paragraph), be extended in duration by a further Order made by the Governor in Council and published in the *Government Gazette*.

(3) A person shall not contravene an Order made under sub-section (1).

Penalty: 100 penalty units."

43 s 143(6) of the *Conciliation and Arbitration Act* provides that:

"(6) Upon the cancellation of the registration of an organization, the organization shall cease to be an organization and a corporation under this Act, but shall not by reason of the cancellation cease to be an association. The property of the organization shall, subject to any order which the Court, upon application by a person interested, may make with respect to the satisfaction of the debts and obligations of the organization out of that property, be the property of the association and shall be held and applied for the purposes of the association in accordance with the constitution and rules of the organization insofar as they can be carried out or observed notwithstanding the deregistration of the organization."

44 *Dobinson v Crabb* (1990) 170 CLR 218 at 220-221; *Bacon v O'Dea* (1989) 25 FCR 495.

54 Pursuant to the power conferred by s 7, the Governor in Council made an Order which was published in the Victorian *Government Gazette* on 13 October 1987.

55 The Order provided that:

"1. Possession, custody and control of the funds and property of BLF is hereby committed to Ian Gordon Sharp (hereinafter called 'the Custodian').

2. No person shall pay or dispose of any of the funds or property of BLF or of any interest therein, or create any encumbrance or charge in respect thereof, without the prior written consent of the Custodian. Any such payment disposition encumbrance or charge shall be void, at the option of the Custodian.

...

5. A person who is in possession of or who has the custody or control of any funds or property of BLF or of any document or title thereto ... :

(a) shall forthwith inform the Custodian thereof;

...

(c) shall not part with such possession, custody or control save to the Custodian or such authorised person."

56 On 10 November 1987, the Governor in Council made a second Order which empowered Dr Sharp to "vest in himself as Custodian any funds or property of BLF". After the decision of Wilcox CJ, but before the hearing of the appeal in the Full Court, Dr Sharp died. Subsequently, the Honourable Stephen George Alley was substituted as Custodian.

57 The Orders in Council were extended at intervals of about six months. At the date of the hearing before Wilcox CJ⁴⁵ the relevant extension was operative until 16 September 1994.

The CFMEU and BLF agreements

58 On 30 March 1994, the CFMEU and the BLF entered into an agreement to effect an amalgamation or merger between it and various State registered unions. The CFMEU also entered into separate agreements with each of the State registered Unions including the BLF's Victorian Branch, which still existed as an

45 *Sutton v Sharp* (1994) 1 IR 259; 125 ALR 643; 57 IR 102.

unincorporated association. The Custodian was unaware that the BLF had entered into any of these agreements and has never consented to them. The relevant clauses of the CFMEU-BLF agreement read:

"1.The BLF and CFMEU agree that on and from 31 March 1994 there shall be an amalgamation and/or merger of the BLF into the CFMEU.

...

3. On and from 31 March 1994 all assets and liabilities of the BLF shall merge with the assets and liabilities of the CFMEU to be held and controlled in accordance with the rules of the CFMEU and this agreement and shall be treated as if such assets and liabilities were, at all times, the assets and liabilities of the CFMEU. Such funds shall, to the extent that prior to 31 March 1994 they were funds under the control of a BLF branch, other than the BLF, Victorian Branch, be and become funds under the control of the respective Construction Labourers' Divisional Branch established consequent upon this agreement and, otherwise, the funds of the BLF shall be held in accordance with paragraph 11 herein. In the case of the funds of the BLF, Victorian Branch they shall be and become funds under the control of the Building Unions Division, Victorian Divisional Branch.

4. For all purposes and in all proceedings, an asset or liability of the BLF existing immediately before 31 March 1994 is taken to have become and to have been at all times an asset or liability of the CFMEU on and from 31 March 1994."

59 The relevant clause of the CFMEU-BLF Victorian Branch agreement reads:

"4.On and from the amalgamation day the CFMEU shall assume control of and responsibility for all assets and funds which, immediately before the amalgamation day, comprised the Branch Funds of the Victorian Branch under Rule 17 of the rules of the BLF, and all liabilities of the Victorian Branch and/or the BLF in relation to the Victorian Branch, and such assets, funds and liabilities shall be managed and controlled in CFMEU by the CFMEU Building Unions Division, Victorian Divisional Branch."

60 In anticipation of these agreements, the BLF amended its rules in relation to the ownership of the property:

"42B(ii) On and from the day fixed for the amalgamation and/or merger in paragraph (i) herein, all assets and liabilities of the Australian Building Construction Employees and Builders' Labourers' Federation ('the BLF') shall merge with the assets and liabilities of the CFMEU to be held and controlled in accordance with the rules of the CFMEU ... and shall be treated

as if such assets and liabilities were, at all times, the assets and liabilities of the CFMEU. ...

(iii) For all purposes and in all proceedings, an asset or liability of the BLF existing immediately before the day fixed for the amalgamation and/or merger is taken to have become and to have been at all times an asset or liability of the CFMEU on and from the day fixed for the amalgamation and/or merger."

61 It is common ground between the parties that, pursuant to these agreements, the BLF purported to transfer to the CFMEU certain funds on deposit and three parcels of land registered under the *Transfer of Land Act* 1958 (Vic). The appellants contend that these funds and parcels of land were the property of the members of the Victorian branch of the BLF prior to the de-registration of the BLF and remain the property of those members.

62 It is also common ground that neither the BLF nor the CFMEU sought or obtained the Custodian's consent to the merger agreement or the purported transfer of the property. Since learning of the agreement, the Custodian has maintained that the transfer of property was void because his consent had not been obtained. In the defence, filed by the Custodian in the present proceedings, par 5(e)(iii) asserted that "the first respondent regards any attempt by the BLF to dispose of funds or property of the BLF to the second applicant as void".

63 On the view that I take of the construction of the Order in Council of 13 October 1987, the critical question in the appeal is whether this pleading constituted an exercise of the power to avoid dispositions of property of the BLF pursuant to cl 2 of that Order.

The history of the litigation

64 On 6 April 1994, Mr John Sutton, the Assistant National Secretary of the CFMEU, commenced the present proceedings in the IRCA. Later, the CFMEU was joined as an applicant for relief. The litigation gave rise to two main issues: the validity of the CFMEU and BLF merger and the entitlement of the CFMEU to the assets held by the Custodian pursuant to the *BLF (De-recognition) Act* 1985 (Vic). The proceedings came before Wilcox CJ who held that on the proper construction of cl 2 of the Order of 13 October 1987 any transfer of property by the BLF was valid unless avoided by the Custodian and that the Custodian had not avoided the transfer of the property of the BLF to the CFMEU. His Honour declared that the CFMEU was entitled to the property and made the orders to which I have referred⁴⁶.

46 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 149.

65 The Full Court of the IRCA (Spender, Ryan and North JJ) dismissed an appeal by the State and the Custodian⁴⁷. The Court agreed with Wilcox CJ that the CFMEU was entitled to the property because, on its proper construction, cl 2 of the Order in Council of 13 October 1987 merely gives the Custodian the right to elect to avoid a payment, disposition, or encumbrance made without his or her consent and does not make the payment, disposition, or encumbrance void *ab initio*. The Full Court held that on the evidence the Custodian had not elected to avoid the transaction. The Full Court raised the question whether the Custodian could still elect to avoid the transfer of property but declined to decide the issue⁴⁸.

Effect of the *BLF De-recognition Act* and the consequential Orders in Council on the ownership of the property

66 The Order in Council of 13 October 1987 "committed" to the Custodian "possession, custody and control of the funds and property of BLF". The Order in Council of 10 November 1987 gave a discretion and power to the Custodian to "vest in himself as Custodian any funds or property of BLF". Pursuant to this Order, the Custodian vested in himself some of the property, namely those funds which he deposited in his name "as trustee for the BLF". However, the Custodian did not register the real property in his name. Instead the Custodian placed a Queen's Caveat on the title to each property. The effect of the caveats was to restrict dealings with the property, but not to transfer the title. The property remained registered in the name of certain members of the BLF, each of whom held the position of "trustee" under the BLF rules. They held it on trust for the members of the BLF. Nevertheless, although the Custodian did not hold the legal or beneficial title to the real property, he had a statutory right to control the disposition of that property and to avoid any disposition made without his written consent.

67 It is not open to doubt that the Custodian had the legal title to the funds which were invested in his name. Furthermore, in my opinion, he held those funds as trustee for the members of the BLF, notwithstanding that the *BLF De-recognition Act* and the Orders in Council vested the Custodian with a wide discretionary power to deal with the property of the BLF and does not mention the term "trust". Section 7 of the *BLF De-recognition Act*⁴⁹ emphasises that the restriction on use or distribution of the funds of the BLF was undertaken "[f]or the purpose of

47 *Sharp v Sutton* (1996) 73 IR 185.

48 *Sharp v Sutton* (1996) 73 IR 185 at 198.

49 As amended on 13 October 1987 by *BLF (De-recognition) (Amendment) Act* 1987 (Vic).

protecting the rights of persons who are or have ceased to be members of BLF". Further, cl 3 of the Order of 13 October 1987 provided:

"3. The Custodian may refuse to give consent referred to in clause 2 hereof if he in his absolute discretion is not satisfied that the payment disposition encumbrance or charge is desirable to be made for the carrying out of the ordinary and proper affairs of BLF and for the benefit of its members."

68 It follows from these provisions that, when the Custodian took control of the funds and invested them in his name, he became the trustee and not the beneficial owner of the funds. It is true that neither the legislation nor the orders described the Custodian as a "trustee". However, the purpose of the legislation was to protect the property for the members of the BLF. That is a sufficient indication that the Custodian was to hold the property as trustee and not beneficially. In *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*⁵⁰, this Court found that a trust arose out of legislation which similarly did not expressly provide for a trust and allowed a wide discretion to the trustee. The Court said that⁵¹:

"A trust may be created without use of the word 'trust'⁵². And, unless there is something in the circumstances of the case to indicate otherwise, a person who has 'the custody and administration of property on behalf of others'⁵³ or who 'has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit'⁵⁴ is a trustee in the ordinary sense."

To the extent that it is relevant, the Custodian also recognised that he held the funds as trustee and not beneficially, for he deposited the funds in his name "as trustee".

69 It follows that, immediately before the amalgamation agreement, the beneficial interest in the funds was held collectively by the members of the BLF and was not transferred to the Custodian under the Orders in Council or the legislation. The real property and the beneficial interest in the funds were therefore available to be dealt with by the members of the BLF collectively in accordance

50 (1993) 178 CLR 145.

51 (1993) 178 CLR 145 at 165-166 per Mason CJ, Deane, Toohey and Gaudron JJ.

52 See *In re Kayford Ltd* [1975] 1 WLR 279 at 282; [1975] 1 All ER 604 at 607 per Megarry J; *Tito v Waddell [No 2]* [1977] Ch 106 at 211 per Megarry V-C. See also *Brisbane City Council v Attorney-General* [1979] AC 411 at 421.

53 *Taylor v Davies* [1920] AC 636 at 651.

54 *Cohen v Cohen* (1929) 42 CLR 91 at 100 per Dixon J.

with the BLF Rules. However, any dealing with the funds or property was subject to the statutory rights of the Custodian under the Orders in Council.

The effect of the Victorian legislation and the conduct of the Custodian on the purported disposition of property

70 Despite the earnest argument of the appellant, it is not open to doubt that cl 2 of the Order in Council of 13 October 1987 by stating that any "payment disposition encumbrance or charge shall be void, at the option of the Custodian" merely gives the Custodian a right to avoid a dealing made without the written consent of the Custodian. Clause 2 does not itself operate to avoid such a dealing. It does not regard a dealing without the consent of the Custodian as having no force and effect. On the contrary, it assumes that the dealing will be valid until the Custodian exercises his right to avoid the dealing.

71 By contesting the transfer of property before the primary judge and pleading that the transfer of property was and is void, the Custodian exercised his legal right to avoid the transfer. Nothing in the terms or purpose of cl 2 requires the Custodian to use the word "elect" before he can avoid a dealing made without his written consent. Clause 2 did not put the Custodian to an "election". That term is not used in the Order in Council. Moreover, when used for legal purposes, it ordinarily implies a duty on a person to choose between competing alternatives at a particular time or during a particular period. In its context and having regard to the purpose of the legislation, the better view of cl 2 is that it simply confers a power on the Custodian and does not put him to an election. It simply gives the Custodian power to avoid a disposition made without his written consent. Prima facie, the power may be exercised at any time while the Order in Council is in force. The fact that considerable time could elapse between a disposition of BLF property and the Custodian becoming aware of it strengthens the case for that construction.

72 The question in each case therefore is not whether the Custodian has elected to avoid a disposition of property, but whether he has manifested an intention to avoid the disposition. It may be that the power can be validly exercised whether or not the Custodian does or is able to inform the parties to the dealing that he has exercised the power.

73 The Custodian became aware of the transfer of property by the BLF only when Mr Sutton initiated the present litigation. Upon being met with the claim that the property had been transferred, the Custodian defended the claim by asserting that the transfer was void. That indicated in the clearest terms that, so far as he was concerned, he was treating the transfer as void. That was a sufficient manifestation of the exercise of the power invested in him by cl 2. It was not necessary, as the respondent contended, for the Custodian's pleading to be tendered in the action before it could be treated as an exercise of the power or, as the respondents would have it, as an election. Upon filing the pleading, the CFMEU

became aware of the Custodian's decision to exercise the power with the result that, as against the CFMEU, the transfer of property to it was void.

- 74 The CFMEU was well aware of the risk that it was taking in entering into this agreement without obtaining the consent of the Custodian. It entered into the merger agreement fully aware of the provisions of the *BLF De-recognition Act*. That is evident from cl 5 of the agreement between the BLF, the BLF Victorian Branch and the CFMEU which provided:

"5 CFMEU acknowledges that it enters this agreement with the knowledge of the actions taken in relation to the assets and funds of the Victorian Branch under the BLF (Derecognition) Act 1985 (Vic)."

- 75 The appeal must be allowed.

The question of parties

- 76 In addition to the reasons already canvassed for allowing the appeal, the failure to join the registered proprietors of the real estate and members of the BLF in a representative capacity as a party is a further reason for setting aside the orders of the Industrial Court. Some individual members of the BLF were joined as defendants. However, neither the Federal executive council, nor any other relevant officers were joined⁵⁵.

- 77 The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order⁵⁶. That practice also assists in avoiding duplication of hearings on the same

55 Before Wilcox CJ and the Full Court the parties consisted of the applicants, Mr Sutton (Assistant National Secretary of the CFMEU) and the CFMEU (the "second applicant"). The respondents consisted of the Custodian (Dr Sharp), the State of Victoria and various sets of members or former members of the BLF being: the third respondents Atkinson and others (representing 62 respondents), the fourth respondents Ferguson and others (representing 12 respondents), the fifth respondents Young and others (5 respondents). No officers or Trustees of the BLF were joined in the proceedings.

56 *News Ltd v ARL* (1996) 139 ALR 193; *Grovenor v Permanent Trustee Company of NSW Limited* (1966) 40 ALJR 329. This rule is derived both from the common law and by implication through the power of courts to join parties who are necessary and proper for hearing, for example, New South Wales Supreme Court Rules Pt 8 r 8, High Court Rules O 16 r 4.

issues and in avoiding the spectre of inconsistent decisions by courts or the judges of the same court. In *Pegang Mining Co Ltd v Choong Sam*⁵⁷ Lord Diplock, delivering the opinion of the Judicial Committee of the Privy Council, said:

"In their Lordships' view one of the principal objects of the rule⁵⁸ is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard ... a better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

- 78 The test for determining whether a person is a necessary party has usually arisen in the context of a person seeking to join proceedings rather than a failure to join a relevant person. But the same principle must apply in both situations. Thus, in *News Ltd v ARL*⁵⁹, the Full Federal Court held that an order "which directly affects a third person's rights against or liabilities to a party should not be made unless the person is also joined as a party. If made, the order will be set aside."⁶⁰ The Full Court pointed out that O 6 r 7 of the Federal Court Rules⁶¹ which states that proceedings will not be defeated by a misjoinder or non joinder was "intended to give effect to the abolition of the plea of abatement"⁶². The Court said that the rule was directed "to cases where there is a curable defect, for example the misnaming of a party"⁶³.

57 [1969] 2 MLJ 52 at 55-56.

58 The precursor to O 6 r 8 in the Federal Court.

59 (1996) 139 ALR 193.

60 (1996) 139 ALR 193 at 298. Note that the New South Wales Court of Appeal in *Chappuis v Filo* (1990) 19 NSWLR 490 at 511-512 held that where a necessary party is not joined in the proceedings, the Court could determine the issues in the absence of the party although that party would, if prejudiced by the orders, have a right to apply to have the orders set aside.

61 A similar rule is present in many jurisdictions including the High Court Rules, O 16 r 4(1).

62 (1996) 139 ALR 193 at 297.

63 (1996) 139 ALR 193 at 298.

79 In the present case, the learned Chief Justice of the IRCA made several binding declarations of right, including that⁶⁴:

"3. CFMEU is beneficially entitled to the funds and property presently in the possession, custody or control of the first respondent, Ian Gordon Sharp, including any funds or property vested in him as Custodian under an Order in Council, subject to deduction therefrom of any costs, charges and expenses properly incurred by him as Custodian pursuant to an Order in Council."

80 The declaration as to the right of the beneficial entitlement to the property in par 3 clearly affects the interests of members of the BLF and the registered proprietors of the real estate. Prior to the amalgamation agreement, the members of the BLF were beneficially entitled to the property in question. In *Bacon v O'Dea*⁶⁵ the Federal Court held that the beneficial interest of the property was vested in all the members but that each individual member only holds a contractual right to have that property dealt with in accordance with the rules. That may be so, but a declaration concerning the entitlement to the beneficial interest in the property affects the interest of all of the members of the BLF.

81 Both before and after the filing of the Custodian's pleading, the beneficial interest in the property belonged either to the CFMEU or to the members of the BLF. Consequently, they were entitled to be heard and should have been represented in the proceedings. It may be that the interests of the BLF members could have been represented at trial by relevant officers of the federal executive council or a member in a representative capacity. However, the only members joined did not represent all members of the BLF. In addition, neither the Federal Executive Council nor the Trustees were joined as parties or heard in the proceedings. Accordingly, O 3 at least ought not have been made in the absence from the proceedings of the members of the BLF.

Conclusion

82 The appeal should be allowed and the orders made in the IRCA should be set aside. The proceedings should be remitted to the Full Court of the IRCA to deal with any outstanding issues between the present parties and the problems which derive from the failure to join the registered proprietors of the real estate and the members of the BLF as parties to the proceedings.

64 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 149.

65 (1989) 25 FCR 495.

83 KIRBY J. This is the latest proceeding to arise out of the deregistration of the Australian Building Construction Employees' and Builders Labourers' Federation ("the BLF"). The deregistration deprived the BLF of the benefits of the then *Conciliation and Arbitration Act* 1904 (Cth)⁶⁶. One of those benefits was recognition, in law, of a separate corporate identity. Those with a taste for the delicate intricacies of industrial litigation may read the background to the deregistration in earlier decisions of this Court⁶⁷ and of other courts⁶⁸.

84 Now, by leave⁶⁹, an appeal has been brought to this Court from a judgment of the Full Court of the Industrial Relations Court of Australia ("the Full Court")⁷⁰. By that judgment, the Full Court dismissed an appeal from a judgment of Wilcox CJ, sitting at first instance⁷¹. That judgment determined a large number of challenges to a purported amalgamation between the Construction, Forestry, Mining and Energy Union ("CFMEU") and the unincorporated association and its

66 That Act was replaced by the *Industrial Relations Act* 1988 (Cth) under s 258 of which these proceedings were commenced. On 25 November 1996 the short title to that Act was changed to the *Workplace Relations Act* 1996 (Cth) by the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), s 3 and Sched 19, Pt 1. The principal Act was substantially amended at the same time. However, it was not suggested that these amendments altered the rights or obligations of any of the parties to the appeal.

67 *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416; *Re Building Workers' Industrial Union of Australia; Ex parte Gallagher* (1988) 62 ALJR 81; 76 ALR 353; *Dobinson v Crabb* (1990) 170 CLR 218.

68 *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1985) 1 NSWLR 197; (1986) 7 NSWLR 372; *Re Minister for Employment and Industrial Relations and Australian Building Construction Employees' & Builders Labourers' Federation ("BLF Deregistration Case")* (1986) 12 IR 442; *Australian Building Construction Employees' & Builders Labourers' Federation v Master Builders' Association of NSW* (1986) 18 FCR 18; *Bacon v O'Dea* (1989) 25 FCR 495.

69 *Industrial Relations Act* 1988 (Cth), s 432(2).

70 *Sharp v Sutton* (1996) 73 IR 185.

71 *Sutton v Sharp (No 2)* (1995) 62 IR 121. Wilcox CJ had earlier rejected a motion for summary dismissal of the proceeding on the ground that he had no jurisdiction to entertain it: *Sutton v Sharp* (1994) 1 IRCR 259; 125 ALR 643; 57 IR 102.

members which continued to constitute what was left of the BLF. The CFMEU is an organisation of employees registered under the successive federal industrial relations statutes. It was, in its turn, formed out of earlier amalgamations. It is not unusual for the amalgamation of industrial organisations, such as the CFMEU and the BLF, to attract fierce opposition from industrial competitors and dissident members. Such litigation typically summons forth objections of exquisite technicality. Those who still find such matters fascinating will uncover a rich seam of the *genre* in the successive opinions of Wilcox CJ in this litigation.

85 Fortunately, in this appeal, this Court is confined to a relatively narrow set of questions. The appeal by the State of Victoria challenged one aspect only of the decision of the Full Court. After the hearing had commenced, the Court insisted that there be added to the proceedings, a second appellant, the Honourable Stephen Alley. He is the present office holder of the position of Custodian appointed under and pursuant to legislation of the State of Victoria. Mr Alley had been a party to the proceedings below. When joined in this Court, he made common cause with the State of Victoria.

86 The respondents to the appeal are Mr John Sutton, an officer of the CFMEU and the CFMEU itself. Within the CFMEU, Mr Sutton is described as an Assistant National Secretary and the Divisional Secretary of the Building Unions Division. The apparent purpose of the amalgamation between the CFMEU and the BLF was to permit the CFMEU, through the Division, to represent the industrial interests of the remaining members of the BLF. It was thereby to bring them out of the industrial wilderness, in which they had existed as members of an unincorporated association, into the federal industrial relations system within which the CFMEU is a registered organisation.

87 This purpose was apparently uncongenial to the State of Victoria and to Mr Alley's predecessor as Custodian, the Honourable Dr Ian Sharp. It was the latter's death on 26 July 1996, after the conclusion of the proceedings before Wilcox CJ, which occasioned the appointment of Mr Alley as Custodian. However Mr Alley has merely succeeded to the rights (if any) of Dr Sharp. Dr Sharp's objections at first instance, supported by the State of Victoria, raised no fewer than nine grounds to contest the amalgamation⁷². Only one of those grounds is still alive. It concerns the effect of the amalgamation agreement between the CFMEU and the BLF for the transfer of certain assets in Victoria⁷³ to the CFMEU. The contest turns on the provisions of the Victorian law which had been made long before the amalgamation and indeed before the deregistration of the BLF in

72 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 122.

73 The amalgamation agreement also provided for the transfer of liabilities. Its terms are set out in *Sutton v Sharp* (1994) 1 IRCR 259 at 264-267; 125 ALR 643 at 647-650; 57 IR 102 at 104-107.

anticipation of the federal legislation enacted to achieve that end. The Victorian law is the *BLF (De-recognition) Act* 1985 (Vic) ("the De-recognition Act"). It is pursuant to s 7(1) of that Act⁷⁴ that the Governor in Council was empowered, by order published in the *Victorian Government Gazette*, to "provide for the restriction or distribution of the use of funds or property of BLF and for the control, vesting and realisation of those funds or that property". The section went on to provide, in sub-s (2), that an order made under its terms, unless revoked, would cease to be in force at the expiration of six months from the date on which it came into force although it might be extended by further order.

88 Acting in purported compliance with s 7 of the De-recognition Act (and other powers), the Governor in Council made an order duly published on 13 October 1987 ("the Order"), the effect of which is the principal concern of this appeal. Clauses 2 and 3 of that Order provided:

"2. No person shall pay or dispose of any of the funds or property of BLF or of any interest therein, or create any encumbrance or charge in respect thereof, without the prior written consent of the Custodian. Any such payment disposition encumbrance or charge shall be void, at the option of the Custodian.

3. The Custodian may refuse to give consent referred to in clause 2 hereof if he in his absolute discretion is not satisfied that the payment disposition encumbrance or charge is desirable to be made for the carrying out of the ordinary and proper affairs of BLF and for the benefit of its members."

74 As amended by the *BLF (De-recognition) (Amendment) Act* 1987 (Vic), s 5(a). At first instance, the respondents questioned the application of the amendments (which came into force on 14 October 1987) to the Order in Council made on 13 October 1987. This issue was determined against them: (1995) 62 IR 121 at 142. It was not re-agitated before the Full Court. As I have stated below, it was agreed during the hearing in this Court that, should it become necessary to deal again with the issue, it would be remitted to the Industrial Relations Court.

The issues

89 From the issues raised in the original notice of appeal, as elaborated by a proposed amended ground of appeal which the appellants tendered during the hearing, four questions fall to be considered:

1. On a true construction of cl 2 of the Order, did the Full Court err in confirming the opinion of Wilcox CJ that "void" in the context of the Order meant subject to be avoided at the option of the Custodian and not void *ab initio*? (The void *ab initio* point).
2. If, on its true construction, "void" in cl 2 of the Order did not mean void *ab initio* but conferred on the Custodian an option to avoid any payment, disposition, encumbrance or charge ("disposition") relating to the funds or property of BLF, did the Full Court err in holding that the Custodian had not in fact exercised his option to avoid such disposition? (The exercise of the option point).
3. Whatever the answer to the foregoing points, should the appellants at this stage be permitted to rely on a ground of appeal challenging the declarations of right and orders made by Wilcox CJ upon a basis not raised before the Full Court, namely that "the CFMEU did not acquire any legal or beneficial interest in the funds and property in the possession, custody or control of the former Custodian"? This point was tendered to this Court on the footing that no-one on behalf of the BLF had any power to pay or dispose of any such funds or property. (The power of disposal point).
4. Are there any other reasons, notably the form of the declarations of right and the relevant orders made by Wilcox CJ, which would occasion the intervention of this Court? (The form of the orders point).

90 The grounds upon which the State of Victoria initially, and later also Mr Alley, were granted leave to appeal to this Court were confined to the first two points just stated. To that stage, the principal argument against the judgment of the Full Court was (as, on this issue, it had been at trial) that the Industrial Relations Court had misconstrued the Order. When the Order said "void" it meant "void" and not "voidable" at the option of the Custodian. However, in the Full Court and in the appeal to this Court, the case of the appellants was presented in the alternative. If, in the context, "void" did not mean void *ab initio* as primarily asserted, the Full Court had erred in holding that "the learned Chief Justice was correct in finding nothing in the pleadings capable of constituting an election by the Custodian to treat the disposition as void."⁷⁵

75 (1996) 73 IR 185 at 198.

91 The other two points relating to the power of disposal and the form of the orders were not initially raised in argument by the appellants. These points arose out of questioning from the Court. The power of disposal point, at least, was embraced by the appellants, as evidenced by an amended ground of appeal. In response to the original grant of leave to appeal, the respondents filed a notice of contention asserting that the De-recognition Act as amended⁷⁶ and cl 2 of a Supplemental Order in Council⁷⁷ ("the Supplemental Order") were invalid. Amongst other grounds, constitutional objections were raised in opposition to these Victorian laws. Notices were duly given under the *Judiciary Act* 1903 (Cth). However, it was agreed during the hearing that if the need arose to deal with those issues they should be remitted to the appropriate court. If the appellants failed in their appeal, the need for remitter would not arise. For the respondents, the points were defensive. They were designed to support the declaration and orders so hard won at trial.

Common ground

92 Before turning to the four stated issues, it is worth recording a number of points which were common ground, or which are at least not now in issue:

1. Before Wilcox CJ, there was a major attack on the invocation of the jurisdiction of the Industrial Relations Court. It was argued that the matters at stake were basically the application of Victorian law to the members of an unincorporated association which should proceed in the State courts. It was suggested that the jurisdiction of the Industrial Relations Court was merely colourable. The submission that that Court lacked jurisdiction was rejected at first instance⁷⁸ as was the request to decline the exercise of federal jurisdiction on discretionary grounds⁷⁹. These points were not re-agitated before the Full Court. I will assume that the Industrial Relations Court had jurisdiction. The assumption is safe enough having regard to the reasons given by Wilcox CJ to support that conclusion and the absence of a continuing challenge by parties not adverse to technicalities.

76 By the *BLF (De-recognition) (Amendment) Act* 1987 (Vic).

77 Of 10 November 1997. Clause 2 empowered the Custodian, relevantly, to "vest in himself as Custodian any funds or property of BLF". Other clauses in the Order also conferred on him additional powers to bring and defend legal proceedings, conduct investigations and otherwise.

78 (1994) 1 IRCR 259 at 270-279; 125 ALR 643 at 653-661; 57 IR 102 at 111-119. Reliance was had on ss 258 and 430 of the *Industrial Relations Act* 1988 (Cth).

79 (1994) 1 IRCR 259 at 279; 125 ALR 643 at 661-662; 57 IR 102 at 119-120.

2. The substantial subject matter of the dispute concerns a number of parcels of real property in Carlton, in Melbourne, in the State of Victoria. The registered titles to those properties stand in the names of persons who are said to be members of the BLF. It was not contested that those persons held such interest as trustees for the BLF prior to its deregistration. Since then, by inference, they continued to do so presumably for the members of the unincorporated association which continued in existence after the deregistration of the BLF was effected⁸⁰. The Court was told that the properties and funds were valuable, being worth around \$3 million to \$4 million. If, apart from the dispute as to the devolution of the assets and liabilities of the BLF, the unincorporated association has now successfully achieved amalgamation with the CFMEU, it was not clear what the Custodian, consistent with his limited duties under the Order, would propose should be done with the valuable properties. If they did not pass to the amalgamated organisation (the CFMEU) it is uncertain who would take the benefit of them. From the evidence at trial it appears that the properties, or most of them, had been occupied as BLF premises by the continuing association. Their natural terminus would seem to be, as Wilcox CJ observed, with the industrial organisation which will henceforth represent the industrial interests of the erstwhile members of the BLF⁸¹. The appellants shrank from a submission that, after the amalgamation had been effected, the funds and properties were *bona vacantia* or without a lawful owner. However, no hint was given by them as to the alternative disposition which either the Custodian or the State of Victoria had in mind. By the same token, it was not contested (as Dr Sharp had stated in an affidavit filed at first instance) that the Custodian had never been consulted about, nor had he consented to, any disposition of the BLF funds or property in terms of the amalgamation agreement signed by the office-holders of the CFMEU and the BLF⁸². When the purported dealings in the funds and property of the BLF came to the notice of Dr Sharp he did not exhaust the powers afforded to him by the Order, to get in all of the assets of the BLF. Specifically, in relation to the real property, he failed to secure the vesting in his own name, as Custodian, of the legal title to the several properties in Carlton. Instead, he appears to have been content to rely upon the filing of Queen's caveats⁸³ which were lodged to signify his interest in the title to the properties. He also relied on his construction of the Order. That construction was that "void" meant void *ab initio* and hence that any dealings whatever by the trustees, or anyone else on behalf of the BLF or its members, would be void as against

80 See *Bacon v O'Dea* (1989) 25 FCR 495 at 503-505.

81 (1995) 62 IR 121 at 148.

82 (1995) 62 IR 121 at 147.

83 Pursuant to *Transfer of Land Act* 1958 (Vic), s 89.

the Custodian. When under the amalgamation agreement between the BLF and the CFMEU⁸⁴, it was agreed that the assets and liabilities of the BLF should "merge with" the assets and liabilities of the CFMEU and be taken to have become assets and liabilities of that body, the Custodian promptly objected. But he did so on the basis that the purported disposition of funds and property were "void"⁸⁵.

3. Notwithstanding the deregistration of the BLF, the property formerly belonging to the corporation was, by federal law⁸⁶ to be held and applied by the continuing "association"⁸⁷, for its purposes, in accordance with its constitution and rules, so far as these could be "carried out and observed notwithstanding the deregistration". The association continued to exist. In *Dobinson v Crabb*, this Court accepted two points presently relevant. The first was that the federal Act had placed the BLF "back in the position of an association existing within a legal framework outside that of the *Conciliation and Arbitration Act*"⁸⁸. The second was that the constitution and rules of the association were not immutable but subject to change in accordance with any applicable laws governing unincorporated associations⁸⁹. So long as the BLF association acted within its rules, and was not forbidden by any State law, it was entitled to resolve to amalgamate with another body, such as the CFMEU. Nothing in the appeal to this Court raises a doubt concerning the validity of the amalgamation. It was apparently approved by the federal body of the BLF, by members of that association in several Australian States as well as by the Victorian Branch of the association⁹⁰. The only issue now

84 The relevant terms are set out in the reasons of other members of the Court.

85 Defence to Amended Statement of Claim, filed 28 October 1994, par 5(e)(iii).

86 *Conciliation and Arbitration Act* 1904 (Cth), s 143(6). The terms of the sub-section are set out in the reasons of other members of the Court.

87 As defined in *Conciliation and Arbitration Act* 1904 (Cth), s 4(1).

88 (1990) 170 CLR 218 at 231.

89 (1990) 170 CLR 218 at 230-231. See also at 236-237.

90 The Court was informed, without objection, that at the time of the amalgamation, there were between 18,000 and 20,000 members of the BLF, of whom only 90 members, financial and unfinancial, were resident in Victoria and 12 in New South Wales. Prior to the amalgamation a ballot was conducted of all members in Western Australia, South Australia, Queensland and Tasmania where the vast majority of members resided. In Victoria, the decision was made by the branch. By that stage there was no branch in New South Wales. According to evidence given below by
(Footnote continues on next page)

raised by the appeal is whether, in the case of the BLF in Victoria, the valuable property rights will follow the members into the CFMEU (as the Industrial Relations Court held) or remain in the possession, custody and control of the Custodian under Victorian law to await his disposition in his absolute discretion (as the appellants argued).

The amalgamation agreement about assets is not void

93 I return to the appellants' primary argument. This was that the purported disposition of funds and property of the BLF's Victorian Branch, made without the prior written consent of the Custodian, was void in the sense of void *ab initio*. It had no legal effect. As a consequence the declarations of right and orders made by Wilcox CJ required correction. In support of this argument, the appellants relied upon four features of the Order of 13 October 1997:

1. The use of the word "void" instead of the word "voidable" which might otherwise have been suggested by the reference to the "option of the Custodian".
2. The use of the imperative verb "shall" which, it was submitted, indicated an unequivocal insistence upon avoidance *ab initio*.
3. The use of the comma after the word "void", signifying (as it was put) a prima facie avoidance against which the option of the Custodian lay only to provide *ex post* relief by way of subsequent validation.
4. The general principle of construction that where a statute imposes a penalty for the doing of an act in breach of its terms, as the De-recognition Act did⁹¹, this may be taken as an indication that Parliament intended to render that act void⁹².

94 From these considerations, the appellants argued that the preferable construction of the Order was that "void" meant what it said. They urged that such a construction would reinforce the apparent policy of the Order. Against the background of the history of the BLF, this was to preserve to the Custodian an absolute discretion to ensure that the residual property of the association and its

Mr Owens, membership in New South Wales and Victoria was negligible because most of the former members of the BLF had joined the CFMEU instead.

91 See s 7(3), dealing with contravention of an Order made under that Act.

92 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423. But see *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 454; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 428.

members was disposed of for the designated purposes, principally "the benefit of its members"⁹³. Nothing would reinforce that objective more effectively, so it was argued, than the absolute avoidance of any dealings in funds or property without the prior written consent of the Custodian.

95 Although the appellants' arguments are not meritless (as I hope I have indicated), like everyone else who has passed upon the meaning of this Order, I prefer the construction urged for the respondents:

1. The word "void" is inherently ambiguous⁹⁴. It sometimes means that the act in question has not, and never has had, any legal effect (void *ab initio*). But sometimes it means that the act becomes void as against the world or against those who cannot enforce or take advantage of it subsequently (void *ex post facto*). "Void" is in some contexts treated as synonymous with "voidable" or voidable at the election of the party for whose benefit a legal rule makes the transaction void⁹⁵. The task of a court, in differentiating between the available meanings of the word, is to ascertain the objective of the lawmaker in the particular circumstances⁹⁶. It is to discover the meaning to be attributed to the word which is natural to its context. Many past cases demonstrate that the use of the word "void" presents a problem of statutory construction. There is no settled meaning⁹⁷.
2. When the context of the word in the Order is examined, it is relevant to take into account, most especially, the words which immediately follow the word "void". Thus, the disposition here is only void "at the option of the Custodian". Without the exercise of that option, the disposition must therefore be other than "void". Were it not so the reference to "the option of

93 Order, cl 3.

94 See *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 459.

95 *Brady v Stapleton* (1952) 88 CLR 322 at 333-334; *Amatruda v Roberts* [1938] VLR 154 at 156 per Gavan Duffy J; cf the opinion of Priestley JA (with whom Clarke JA concurred) in *National Acceptance Corporation Pty Ltd v Benson* (1988) 12 NSWLR 213 at 218. The context requires a result different from that which I there expressed (at 214). In a contractual context, see *Raysun Pty Ltd v Taylor* [1971] Qd R 172 at 181; *Carpentaria Investments Pty Ltd v Airs* [1972] Qd R 436 at 441.

96 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423.

97 This is partly because the word may arise in so many different contexts. See for example *In the Marriage of Teves and Campomayor* (1994) 18 Fam LR 844 at 849; [1995] FLC ¶92-578 at 81,734-81,735, dealing with the meaning of "void" in the *Family Law Act 1975* (Cth).

the Custodian" would be surplusage. This unpleasant reality being brought home to them, the appellants argued that, "at the option of the Custodian" was equivalent to providing the Custodian with a power to "validate" dispositions made without his prior written consent. This is an unattractive argument given that the word used is "void" not "valid". On either approach to the meaning of the Order, the Custodian enjoyed very considerable powers. Subject to any arguments which might arise as to the lawful exercise of his statutory power, the Custodian had the last say on whether a disposition would be rendered void or not. The very reference to his "option" suggests that a specific power had been conferred to make a choice on the effectiveness of any disposition made without the Custodian's prior written consent. That choice could not be excised from the Order without removing the option of the Custodian or altering the character which it apparently takes from its language.

3. The fact that contravention of the requirements of an Order attracts in this case a criminal penalty is not determinative of the meaning of the word "void". That penalty arises, in an appropriate case (relevantly), from a breach of the first sentence of cl 2 of the Order. But the civil consequences of a breach are expressly provided for in the second sentence which envisages the exercise of the Custodian's option. Any general principle of construction⁹⁸ must therefore be read as subject to the express terms of the Order dealing with such civil consequences.
4. Considerations of legal policy also support this construction. If "void" meant void *ab initio*, the results could be devastating to innocent third parties who took funds or property in ignorance of the requirements of the Order. The fact that, as was argued in the present case, the officers of the Victorian Branch of the BLF and the trustees of the real estate were not "innocent" of knowledge of the obligation to secure the prior written consent of the Custodian is irrelevant to the meaning of cl 2 of the Order. The provision of a power *ex post facto* to render dispositions void may readily be explained by the need to protect innocent third parties dealing in good faith with those paying or disposing of funds or property in which the BLF or its members had a legal or beneficial interest. In such a case, the Custodian retained the power of avoidance. But that consequence did not flow automatically. Whether it was appropriate and just in the circumstances to opt for that consequence could be safely left to the Custodian's decision.
5. A number of contextual arguments also support the foregoing conclusion. The De-recognition Act and the Order apparently contemplated the provision to the Custodian of transitional powers expected to endure for a limited time

⁹⁸ Relevantly, that explained in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423.

only⁹⁹. It was envisaged by the successive Orders that the Custodian could enter and seize property. After the Supplemental Order, he had additional powers to bring the legal estate of what might be called BLF property under his control so that he might vest himself with the legal estate¹⁰⁰. The Order, as thus supplemented, appears to have contemplated that the Custodian would actually put himself in a position of control with vested rights so as to minimise the risk of damage to the "ordinary and proper affairs of BLF" and harm to the members. Although this was not in fact done by the Custodian, at least in relation to vesting in himself the legal estate in the real property, it is appropriate to read the exceptional power of avoidance in the context of a scheme which envisaged that the Custodian could effectively take control of the BLF's assets, retaining the option of avoidance for any residual funds and property over which effective control had not been exerted.

6. The construction which I favour also helps to avoid the curious result which would otherwise flow from the appellants' argument. Thus, if the amalgamation of the CFMEU with the Victorian Branch of the BLF were (as has been held) validly effected, the purpose for the performance by the Custodian of his function to refuse to give consent under the Order¹⁰¹ may have been eliminated. There would be no apparent foundation for concluding that the disposition of the funds and property was not then desirable "for the carrying out of the ordinary and proper affairs of BLF and for the benefit of its members"¹⁰². The BLF, as such, would have ceased to exist being merged by amalgamation in the CFMEU. The "benefit of its members" would cease to have any reality once the BLF itself had effected its amalgamation with the CFMEU.

96 The Full Court correctly dismissed the appellants' arguments on the void *ab initio* point. The disposition of the property of the BLF, and specifically of the Victorian Branch, in terms of the provisions of the amalgamation agreement which the appellants attacked, was not void *ab initio*. The appellants' persistent argument to that effect should once again be rejected.

99 As indicated by the limited duration of the orders made under s 7 of the De-recognition Act. Section 7(2)(b) provides that the Order shall "cease to be in force at the expiration of 6 months from the date on which it came into force but may ... be extended in duration by a further Order".

100 Supplemental Order, cl 2.

101 cl 3.

102 Order, cl 3.

The Custodian did not exercise the option to avoid

97 In light of this conclusion, it is necessary to address the alternative argument. The appellants presented it to this Court as a second preference. The argument went thus. If, contrary to the primary argument, "void" in the Order meant "voidable", or some notion akin to that, the Custodian, by his conduct, had exercised the option to render the disposition of funds and property referred to in the amalgamation agreement void. What was in issue was not his subjective intention or understanding of his conduct but whether such conduct amounted to an exercise of the "option" which the Order had been construed as allowing. The conduct relied upon by the appellants was (a) the pleading of the defence to the respondents' application which initiated these proceedings; (b) the defence of, and resistance to, the proceedings; and (c) the action of the Custodian in lodging the Queen's caveats and thereby taking steps to ensure that he was given notice of any dealings in real estate as well as his action in bringing under his control the funds of the BLF association in Victoria.

98 In the Full Court, the reference in the Order to the "option of the Custodian"¹⁰³ was read as akin to the provision to him of a right to elect to treat the disposition as void. From this, guidance was sought from those authorities which deal with election, namely where a facility is granted to choose between alternative and inconsistent rights¹⁰⁴. I am prepared to agree that some assistance may be found, by analogy, in such authorities. But the purpose of the option provided to the Custodian by the Order must be kept steadily in mind. It was an option to render void a disposition of property. Obviously, the exercise of such an option might potentially have serious disruptive effects for those concerned in the disposition, as well as for the "ordinary and proper affairs of BLF" and "the benefit of its members"¹⁰⁵. I find it hard to accept that the "option" could be exercised by the Custodian although unaware of it, or whilst denying its very existence. However, assuming this to be possible, it is clear enough that the exercise of the option could not, once performed, be kept locked in the Custodian's mind. It would have to be conveyed to those who were affected. No other construction would carry into operation the intended purpose of avoidance of dispositions for which the Order provided. Where the Custodian acted adversely to a person's property interests, it is essential to the kind of option for which this Order provides that the exercise would be effected promptly and promptly made known to those whose rights were altered.

103 cl 2.

104 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 655.

105 cl 3.

99 Having regard to this analysis of the nature and purposes of the option afforded to the Custodian, and with respect to those of a different view, I cannot accept that any of the factual matters relied upon by the Custodian constituted the exercise by him of the option whose existence he so long mistook:

1. No express avoidance of any disposition occurred. It would have been easy for the Custodian, referring to his powers under the Order, to notify the officers of the CFMEU, the BLF, the trustees and anyone else concerned, in terms, that he was exercising the option provided in the Order. This was never done. The exercise, if it truly occurred, was left to nothing but inference and implication.
2. The reason for this course is not hard to find. It lay in the fact that the Custodian, from the first, asserted that the disposition was, by the Order, void *ab initio* without any action on his part. In that sense, the taking of steps to exercise an option to secure avoidance of the disposition was inconsistent with the interpretation of the Order which he upheld. Although it might have been possible for him to assert his preferred interpretation and, in case it was wrong, to opt for avoidance, this was never attempted. The Custodian, doubtless on advice, persisted in this Court with a course of conduct based on his preferred construction of the Order. That construction excluded the possibility of the exercise of an option *ex post* to invalidate dispositions of funds and property.
3. One reason why contractual analogies are of doubtful validity in this context is that the Custodian is not exercising a private right. He is fulfilling a function as a donee of statutory powers. To exercise those powers, he had to do so in the way proper to such an office-holder. Relevantly, he was required to fulfil the purposes for which the powers in question were granted¹⁰⁶. He was obliged to take into account considerations relevant to the exercise of the power, ignore considerations irrelevant and to act honestly, fairly and reasonably. This can scarcely be done in a state of absence of mind. The difficulty of interpreting the conduct pursued by the Custodian for other purposes as a discharge of his statutory powers to avoid a disposition of BLF funds or property is that the Order itself provided criteria for the exercise of his powers. It directed the Custodian's attention to a consideration of what was "desirable ... for the carrying out of the ordinary and proper affairs of BLF" and "the benefit of its members"¹⁰⁷. Unless the Custodian turned his mind to these considerations, he would not be discharging the option in terms of the Order. The explanation for his failure to do so clearly lies in the fact

¹⁰⁶ See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42.

¹⁰⁷ Order, cl 4.

that he misconstrued the Order. He did not consider that it was necessary for him to exercise an option so as to render the disposition void. His conduct should be construed by reference to that stand. It should not, retrospectively, be reinterpreted to accord with an opinion as to his powers which he had at all relevant times resolutely rejected. The Court should not re-write history to save the Custodian from his legal error, obdurately adhered to even into this appeal.

4. Even if, contrary to the foregoing, it was possible to reinterpret the Custodian's conduct in filing pleadings and defending proceedings as an exercise of the option provided for in the Order, such conduct would, on the face of things, only constitute an exercise of the option in relation to the parties to the proceedings. As the trustees were not parties, it is difficult to see how the pleadings or proceedings could amount to an election effective against them. The Custodian's defence, in any case, represented an assertion of his primary interpretation of the Order. It did not convey on its face any decision of the Custodian to exercise an option to avoid the disposition of transactions which he was asserting were already void. During the hearing before Wilcox CJ, counsel for the respondents made it plain that, if a different position was asserted for the Custodian, they required him to "elicit" it. The written submissions for the Custodian took a position which could not have been clearer. They said:

"No situation has arisen or can arise whereby the Custodian is called upon to exercise his powers under paragraph 2 to treat a disposition as void."

At several later points in the trial, the issue was raised again. The respondents repeatedly made it plain that, if an "election" by the Custodian was asserted, that claim ought to be made clear and evidence adduced. If such a claim was to be made, the respondents at trial insisted on the right to cross-examine Dr Sharp about it. To permit the appellants, after the trial, to change their position and to assert that the Custodian's conduct was actually directed at exercising an option which he had at all times disclaimed, presents at least two elements of procedural unfairness to the respondents. The first is that they have lost the chance of cross-examining the late Dr Sharp: a right which they had expressly reserved. The second is that they have almost certainly lost remedies which they might have pursued under the *Administrative Law Act* 1978 (Vic) to obtain judicial review of the Custodian's purported exercise of his statutory powers. This Court should not permit such procedural unfairness over the objection of the respondents¹⁰⁸. There are perfectly good explanations for the conduct of the Custodian which do not betoken the

108 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

exercise of an option to avoid the dispositions of funds or property of the BLF in terms of the power conferred on him by the Order.

100 The Custodian until a very late stage of these proceedings adhered to his opinion that the dispositions of BLF property to the CFMEU were already void. That opinion was wrong. The Custodian never exercised his option under the Order. It would be unfair to permit him, retrospectively, to suggest that his conduct may now be reinterpreted to amount to such an exercise. In any case, when analysed, the conduct referred to falls far short of establishing that the Custodian's statutory powers were invoked by him for the purposes for which they were given. The appellants therefore fail on the exercise of the option point.

The BLF's powers of disposal

101 During the hearing the appellants sought leave to add an amended ground of appeal to the effect that the Industrial Relations Court had erred in making the declaration and order complained of "because by virtue of the Orders in Council made pursuant to [the De-recognition Act] the CFMEU did not acquire any legal or beneficial interest in the funds and property in the possession, custody or control of the former Custodian". In order to understand this and the next point of complaint concerning the form of the orders of the Industrial Relations Court, it is necessary to set out the terms of those orders. Wilcox CJ made the following binding declaration of right¹⁰⁹:

"3. CFMEU is beneficially entitled to the funds and property presently in the possession, custody or control of [the Custodian] including any funds or property vested in him as Custodian under an Order in Council, subject to deduction therefrom of any costs, charges and expenses properly incurred by him as Custodian pursuant to an Order in Council." [Declaration 3]

The succeeding orders were:

"4. Within sixty (60) days or such further time as a judge may allow, [the Custodian] do all things necessary to vest in CFMEU the said funds and property, subject to any deduction as aforesaid; and [Order 4]

5. All parties have liberty to apply." [Order 5]

102 Two objections, relevant to power, were taken to Declaration 3 and Order 4. The first was that the clear purpose of the Order was to reserve dispositions of BLF funds and property to those which had the prior written consent of the Custodian. On that footing, the officers and the trustees of the BLF had no power to act as

109 *Sutton v Sharp (No 2)* (1995) 62 IR 121 at 149.

they did, unilaterally and without the prior written consent of the Custodian. Secondly, if in relation to the real property the Custodian had not put himself in "possession, custody or control", for example by failing to vest in himself the legal title to such property after the Supplemental Order permitted that course, this limited the effectiveness of Order 3, according to its terms. All that the CFMEU was "beneficially entitled to" was the "funds and property presently in the possession, custody or control of [the Custodian]". If, then, he was not in "possession, custody or control" of the legal estates in the real property, the principal subject matter of this litigation, Declaration 3 was silent as to such property. Accordingly, so the argument ran, Order 4 should not have required the Custodian to "do all things necessary to vest in CFMEU" such funds and property.

103 There are several answers to these arguments. I shall deal first with those which concern their substance. It is true that the Order contemplated that "[p]ossession, custody and control of the funds and property of BLF" were committed to the Custodian¹¹⁰. However, it also proceeded to recognise that certain dispositions of such funds and properties might continue to be made subject (as I have held) to being avoided at the option of the Custodian¹¹¹. The Custodian was armed with powers under the Order to take possession, custody and control of the funds and property¹¹² and under the Supplemental Order to "vest in himself as Custodian any funds or property"¹¹³. Until such powers were exhausted, the differentiation between the legal and beneficial interests in the property of the BLF in Victoria was virtually assured. The legal interest in the real property held by the trustees might be in their name. The beneficial interest would be enjoyed by the BLF association and its members. By the Order, that beneficial interest was committed to the Custodian. It was that interest with which Wilcox CJ was concerned. Having found that (by the amalgamation agreement) such BLF interests had merged with the assets and liabilities of the CFMEU, his Honour was understandably minded to provide, by his orders, for the beneficial interests in the funds and property. The reference in the terms of Order 4 to the funds and property makes it plain that all that the Custodian was required to do was to "vest in CFMEU the *said* funds and property"¹¹⁴. As the beneficial interest in the real estate committed to the Custodian was all that he then held, and as that interest was notified by the Queen's caveats lodged by the Custodian, by inference, "all things necessary" would involve the removal of such caveats. Only then would it be open to the trustees, in accordance with a lawful resolution of the BLF, to convey the

110 Order, cl 1.

111 Order, cl 2.

112 cl 7. See also cll 4, 5, 6 and 8.

113 cl 2.

114 Emphasis added.

legal title to the real property to the CFMEU or to such persons as under the rules of the CFMEU were entitled to hold real property on behalf of that organisation. In the event that there was any uncertainty concerning the requirements of Declaration 3 and Order 4 they could be clarified, as Order 5 contemplated, by a single judge of the Industrial Relations Court. It is not appropriate that such a matter should concern this Court.

104 If there were more substantial arguments as to the powers of the officers of BLF, on behalf of that association and its members, to enter into those provisions of the amalgamation agreement which dispose of the funds and property of the BLF and its members in Victoria, which I have failed to appreciate because of the way this ground of appeal so belatedly arose following suggestions from the Court, there is a readier answer to it. In this intricate and hard-fought litigation, the appellants should not, in my opinion, have leave to raise in this Court, for the first time, a completely new issue. Amongst all of the many technical objections which were argued at first instance, this one was not. It was not even argued in the Full Court. It was not suggested on the leave application. It was not even conceived of by the appellants themselves. It is unreasonable, therefore, at the death knock, to permit the enlargement of the appeal (which is not by way of rehearing¹¹⁵). Any matter which is within the liberty reserved by Order 5 may still be raised in the Industrial Relations Court. Any matter outside that liberty should now be taken as spent. There must be an end to litigation. It is not as if this was a case in which the appellants lacked legal representation of a high quality or in which they are otherwise deserving of protection from oversight of a legal technicality. Were such a point now permitted, the respondents could not be protected, at least in the Industrial Relations Court, by an order that the appellants pay the costs incurred to date¹¹⁶. Although I am far from convinced that the power of disposal point is a good one, it is my view that this Court should decline the appellants' application for leave to add the proposed new ground of appeal.

The form of the orders and other issues

105 Questions were also raised by members of the Court concerning the form of Declaration 3 and whether such a declaration ought to have been made. Specifically, it was suggested that the declaration obliged the joinder, as parties to the proceedings, of the trustees vested with the legal estate of the real property in which the BLF association and its members originally had the beneficial interest. Whilst various criticisms can be made of the form of Declaration 3, I have elsewhere expressed my view that this Court should resist attempts to involve it in

115 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 87, 110-111, 113; *Petreski v Cargill* (1987) 18 FCR 68 at 77.

116 *Industrial Relations Act* 1988 (Cth) (now *Workplace Relations Act* 1996 (Cth)), s 347.

such interlocutory matters. They properly belong to the practice of another superior court¹¹⁷. Least of all should this Court yield to any temptation to do so where the point has never been raised before the appeal reached the Court and where liberty is specifically reserved to all parties to apply to the Industrial Relations Court should clarification or elaboration of its orders be deemed necessary.

106 There is no merit in the suggested failure of the Industrial Relations Court to ensure that all persons potentially affected by its orders (notably the trustees) be joined as parties to the proceedings before the orders were made affecting them. The proceedings before that court were unusual. They involved an application by the CFMEU pursuant to s 258 of the *Industrial Relations Act* 1988 (Cth) for a determination, by declaration, of a question as to whether an invalidity had occurred, relevantly, in connection with the amalgamation effected between the CFMEU and the BLF.

107 The predecessor to s 258¹¹⁸ was enacted following the report of the Committee of Inquiry on Co-ordinated Industrial Organisations¹¹⁹. It was the product of widespread frustration with the invalidation, following litigation, of the actions of industrial organisations performed by the officials of those organisations in good faith, but in a manner that rendered them technically invalid¹²⁰. Such litigation had caused enormous dislocation. It encouraged expensive and often meritless proceedings which the Parliament, advised by the Committee, was determined, where appropriate, to remedy. Although the terms of the provision enacted by Parliament differed from what was proposed by the Committee¹²¹, it is nonetheless appropriate to have regard to the history and purpose of s 258. This background makes it clear that the provision should not be given a narrow construction. Nor should its operation be defeated by the same kind of meritless technicalities which gave birth to the enactment in the first place. By s 258(6), the Industrial Relations Court was empowered to determine what notices should be

117 *Re JJT and Ors; Ex parte Victoria Legal Aid* (1998) 155 ALR 251 at 272; cf *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 873 at 894; 153 ALR 643 at 670.

118 *Conciliation and Arbitration Act* 1904 (Cth), s 171C, inserted by *Conciliation and Arbitration (Organizations) Act* 1974 (Cth), s 16.

119 Sweeney, *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations* (1974) at 57.

120 Sweeney, *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations* (1974) at 38-40.

121 *Sutton v Sharp* (1994) 1 IRCR 259 at 271-272; 125 ALR 643 at 654; 57 IR 102 at 112.

given to other persons of the intention to make an application for an order under the section. Pursuant to that provision, the Industrial Relations Court in these proceedings ordered notices to be given to individuals and, through newspaper advertisements, to the public. Notices were specifically given to the trustees. As this Court was informed, the trustees appeared before the Industrial Relations Court. They consented to the making of the declarations and orders by that Court. In such circumstances, their absence from the record, and for that matter the absence of other officers and members of the BLF, is now immaterial. If, belatedly, it were considered in some way material and that could be shown, the party contending as much could doubtless chance its arm under Order 5 reserving liberty to apply. Neither the objection to the form of the orders nor to the parties in the proceedings before the Industrial Relations Court has any merit which this Court needs to address. The form of the orders point also fails.

Conclusion

108 None of the challenges to the declaration and orders of the Industrial Relations Court succeeds. I need not address several other issues which were raised during argument. These included whether, even now, the Custodian could exercise the option to avoid the disposition of BLF funds and property to the CFMEU. The appellants properly conceded that it was inherent in cl 2 of the Order that the Custodian would be bound to exercise his powers reasonably. That would presumably include within a reasonable time of being aware of circumstances giving rise to their exercise. Were an exercise of the option now attempted serious questions would arise as to its validity, the amalgamation agreement otherwise being declared valid and effective¹²². For example, it would be necessary for the Custodian to show that a foundation still existed for the exercise of his powers, or the extension of the Order, beyond the date of the amalgamation. These questions were not determined in the proceedings giving rise to this appeal. I would give no encouragement to fresh proceedings. But that is where any such matters would now have to be agitated. Not in this Court. Not on new grounds added at the end of extended litigation. Not on points unconceived by a well advised governmental party but arising for the first time during argument before this Court.

Order

109 The appeal should be dismissed.

122 Declaration 1 of Wilcox CJ read "The amalgamation that was effected on and from 31 March 1994 between CFMEU and the Australian Building Construction Employees' and Builders Labourers' Federation ('the BLF') was and is valid and effective in law": (1995) 62 IR 121 at 149.