IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY
On appeal from the Full Court,
Federal Court of Australia

No M127 of 2010

BETWEEN:

JEMENA ASSET MANAGEMENT PTY LTD ACN 086 013 461
First Appellant

JEMENA ASSET MANAGEMENT (4) PTY LTD ACN 009 641 187
Second Appellant

JEMENA ELECTRICITY NETWORKS (VIC) LTD ACN 064 651 083
Third Appellant

and

COINVEST LIMITED ACN 078 004 985
Respondent

RESPONDENT'S SUBMISSIONS

PART I – PUBLICATION ON THE INTERNET

1. This submission is in a form suitable for publication on the Internet.

PART II – ISSUES PRESENTED BY THE APPEAL

2. The Respondent does not accept the description of the issue raised by the appeal in the second sentence of paragraph 2 of the Appellants' submission – namely, "the extent to which the compact reached by the industrial parties in respect of long service leave and associated benefits can be interfered with and/or augmented by a State scheme imposing non-trivial obligations in respect of such leave or benefits" (emphasis added).

3. As articulated in the Appellants' submissions, the appeal presents the following issues.

   3.1 Does the scheme (the **CILSL scheme**) established by the *Construction Industry Long Service Leave Act 1997* (Vic) (the **CILSL Act**) entitle the Appellants' employees to take long service leave, or only to be paid moneys out of the Construction Industry Long Service Leave Fund (the **Fund**)?

Filed on behalf of the Respondent by
Maddocks Lawyers
140 William Street
MELBOURNE VIC 3000
Email: simone.holding@maddocks.com.au

Date of this document: 15 February 2011
Solicitor's Code: 230
DX 259 Melbourne
Tel: 03 9288 0555 Fax: 03 9240 0799
Ref: SXH:5366460

(a) If the former entitlement is created, the CILSL Act and scheme will be directly inconsistent with provisions of the *Workplace Relations Act 1996* (Cth) (the **WR Act**)[1] because they would alter, impair or detract from the scheme established by the Federal Instruments made under the WR Act.

(b) The resolution of this issue depends on identifying the entitlements created by the CILSL Act and scheme as set out in the trust deed and rules made under that deed.

3.2 Even if the CILSL Act and scheme do not give the Appellants' employees an entitlement to long service leave, are they in any event directly inconsistent with the relevant provisions of the WR Act because:

(a) the CILSL Act confers authority on the Respondent to provide for entitlements in those employees to take long service leave; or

(b) other provisions of the CILSL scheme are said to impose obligations that are inconsistent with the Federal Instruments and thereby detract from the scheme established by the Federal Instruments.

3.3 Will an indirect inconsistency within the meaning of s 109 of the Constitution arise where a State law alters, impairs or detracts from the object or purpose sought to be achieved by a Federal law?

3.4 Are the rights and entitlements established by the CILSL Act and scheme properly characterised as relating to the relationship of employee/employer, so that the CILSL Act and scheme intrude into a field that the Full Court found the Federal Instruments intended to deal with exhaustively,[2] and are indirectly inconsistent with the provisions of the WR Act referred to above?

PART III – SECTION 78B NOTICE

4. The Respondent considers that no further notice pursuant to s 78B of the *Judiciary Act 1903* (beyond the notice given by the Appellants[3]) is required.

PART IV – MATERIAL FACTS

5. The Respondent does not contest the Appellants' Chronology dated 1 February 2011.

The State Act and the State scheme

6. The summary of the Full Court's findings set out in Part V of the Appellants' submissions is incomplete. The Full Court also found as follows:

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1 Sections 170LZ(1) and 152 of the WR Act as it stood before 27 March 2006; and s 17(1) of the WR Act as it stood from 27 March 2006.

2 AB 449 at [45].

3 AB 458-459.

6.1 Part of the workforce in the Victorian construction industry is itinerant.[4]

6.2 Pursuant to s 6(3) of the CILSL Act, the ambit or content of the entitlement provided by s 6(1) (referred to in paragraph 20 of the Appellants' submissions) is determined from time to time by the trustee in accordance with the trust deed. Depending on the terms of the trust deed and the rules made under that deed, the entitlement may be limited to an entitlement to receive monetary benefits out of the Fund established under the CILSL Act.[5]

6.3 Despite the statement in the Second Reading Speech accompanying the Bill for the CILSL Act (see paragraph 17 of the Appellants' submissions), s 6 does not by itself provide workers with a statutory right to take long service, as s 40 of the 1983 Act did (see paragraph 18 of the Appellants' submissions).[6]

6.4 The rules made pursuant to the trust deed (although imperfectly drafted[7]) fundamentally provide an entitlement to be paid money out of the Fund and not an entitlement to long service leave or payment in lieu.[8]

6.5 The basic entitlement is to a "long service leave benefit", or "benefits", which can only be in the form of a payment from the Fund: rr 27.1, 28.1 and 29.1.[9] "Long service leave benefit" (see, for example, rule 27.1) is defined as an entitlement paid out of the Fund in accordance with the rules: see rule 1.1.[10]

6.6 The only obligation of the trustee under the rules is to pay moneys from the Fund on receipt of a request for the long service leave benefit: rules 27.4, 28.3 and 29.7.[11]

6.7 The Fund is only there to pay out moneys, including long service leave benefits: rule 6.2.[12]

6.8 Even if there is no entitlement to "long service leave", the trustee may pay a worker money from the Fund: rule 6.2(c)(ii).[13]

6.9 The primary rules are rr 27, 28 and 29. Read with ss 6(1) and 6(3) of the CILSL Act, those rules clearly define the entitlement under that Act. The rules focus on payment from the Fund, not the provision of long service leave by the employer.[14]

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4 AB 438 at [1].
5 AB 442 at [15].
6 AB 442 at [15].
7 AB 443 at [21].
8 AB 443 at [21].
9 AB 444 at [25]; AB 360/30, 362/10, 362/42.
10 AB 444 at [22]; AB 360/30; AB 331/22.
11 AB 444 at [25]; AB 362/3, 362/37, 364/45.
12 AB 444 at [23]; AB 340/30-341/8.
13 AB 444 at [23]; AB 341/1.
14 AB 444 at [26], AB 360/30-365/3.

6.10 The rules deal with payment from the Fund in respect of long service leave, such as employers' entitlements to reimbursement where they have paid long service leave: rule 40.3; and refunds of overpaid workers' benefits: rule 50.2.[15]

6.11 The rules ensure that there is no doubling up on charges over and above award long service leave payments and no worker may recover money from the Fund where the amount has been received from a non-CILSL Act source: rule 23(10).[16]

PART V – APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

7. The Respondent accepts the Appellants' statement of applicable constitutional provisions, statutes and regulations annexed to their submissions as Part VII.[17]

PART VI – RESPONDENT'S ARGUMENT

Inconsistency – principles of law

8. As the Appellants accept (paragraph 24), inconsistency for the purposes of s 109 of the Constitution may be found in at least two distinct situations:[18]

8.1 Where a Commonwealth law is intended as a complete statement of the law governing a particular matter or set of rights and duties, and a State law purports to regulate or apply to the same matter or relation or to enter the field covered by the Commonwealth law, the common description is "indirect inconsistency".[19]

8.2 Where a State law, if valid, would alter, impair or detract from the operation of a Commonwealth law – for example, by granting rights or imposing obligations that would deny or vary a right, power or privilege conferred by the Commonwealth law,[20] the common description is "direct inconsistency".[21]

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15 AB 444 at [26]; AB 376/20, 382/12.

16 AB 444 at [26], AB 358/40.

17 However, the definition of "director" in s 3(1) of the CILSL Act (up to 1 March 2005), on page 19 of the Annexure – Part VII, should refer to the "Corporations Act", not the "Corporations Law".

18 *Victoria v The Commonwealth* (***The Kakariki***) (1937) 58 CLR 618 at 630.5 (Dixon J); *Telstra Corporation Ltd v* (***Worthing***) (1999) 197 CLR 61 at [28]; *Dickson v R* (***Dickson***) (2010) 270 ALR 1 at [13]-[14].

19 *Dickson* (2010) 270 ALR 1 at [14].

20 *Worthing* (1999) 197 CLR 61 at [32], citing Wilson J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (***Wardley***) (1980) 142 CLR 237 at 290.3. In determining that the provisions of State anti-discrimination legislation were not directly inconsistent with the terms of an industrial agreement made under Federal law which gave to the employer an unqualified right of dismissal, Wilson J said that the "significant fact" was that the State Act did not "deny or vary a right, power or privilege conferred on Ansett by the Agreement, nor does it grant to Mrs Wardley a right which is denied or affected by the paramount law".

21 *Dickson* (2010) 270 ALR 1 at [14]. Direct inconsistency may also be found where the Commonwealth law and the State law impose contradictory obligations, so that simultaneous obedience is impossible: see *Worthing* (1999) 197 CLR 61 at [27]; *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 398.2 (Toohey and Gaudron JJ).

Characterisation

9. The characterisation of the laws in question is intrinsic to ascertaining whether there exists indirect inconsistency. Characterisation is an essential step in identifying the fields (or subject matters), with which the Federal laws and State laws are concerned.

9.1 The question whether a State law would, if operative, alter, impair or detract from the operation of the Federal law,[22] is not answered by the characterisation of the laws in question, although the subject dealt with by each law can be relevant.[23]

9.2 In *Dickson*, the question whether the Commonwealth and State laws were directly inconsistent was approached by analysing the operation and effect of the laws.[24] The character of the Commonwealth law was discussed in the context of indirect inconsistency.[25]

9.3 Gummow J (with whose reasons Hayne J agreed) expressed a clear view on the relevance of characterisation in *APLA Ltd v Legal Services Commissioner of NSW*.[26] His Honour referred to *Stock Motor Ploughs Ltd v Forsyth*, "the outcome [of which] depended upon the question of characterisation".

We address the issue of characterisation and direct inconsistency in paragraph 22 below.

Other propositions advanced by the Appellants

10. The claim in relation to direct inconsistency (paragraph 30 of the Appellants' submissions) that "there is no requirement that the obligation be on the Appellants to the employee directly or that it create rights in the employee against the Appellants" requires qualification. Whether a State law that creates obligations to, and rights against, a third party will be directly inconsistent with a Federal law must depend on the nature of the rights and duties created by the relevant Federal and State laws.

11. The Appellants submit (at paragraph 33) that indirect inconsistency will arise where the State law alters, impairs or detracts "from the object or purpose" sought to be achieved by

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22 *The Kakariki* (1937) 58 CLR 618 at 630.5. As was observed in *Worthing* (1999) 197 CLR 61 at [27] and in *Dickson* at [22], that would be a case of "direct collision" between Commonwealth and State laws (citing Barwick CJ in *Blackley v Devondale Cream (Vict) Pty Ltd* (1968) 117 CLR 253 at 258).

23 See *Wardley* (1980) 142 CLR 237 at 243.3 (Barwick CJ), 290.4 (Wilson J). In *Worthing* (1999) 197 CLR 61 at [32], the Court said (in the context of a State law that would qualify, impair or negate the application of federal law): "It would be no answer that the subject-matters of the two laws are not co-incident." In *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 220.6, Mason J noted that inconsistency was "less likely to occur" where the laws were not dealing with the same subject matter. Similarly, in *Wardley* (1980) 142 CLR 237 at 252.2, Stephen J said that collision was "not likely to occur between [the laws] because they are laws on different subjects".

24 See (2010) 270 ALR 1 at [22].

25 See (2010) 270 ALR 1 at [32].

26 (2005) 224 CLR 322 at [201]-[202] (Gummow J), [375] (Hayne J).

the Federal law. The submission, which rests on observations by Mason J in *New South Wales v Commonwealth* (the ***Hospital Benefits case***),[27] begs two questions:

11.1 The first question is: does the State law impair or detract from the object or purpose sought to be achieved by the Federal law?

11.2 The second question (as Mason J put it) is whether "the intention underlying the Commonwealth law was that it should operate to the exclusion of State law having that effect".

12. The Appellants also submit (paragraph 34) that, in cases involving Federal awards and agreements, there will be indirect inconsistency where the effect of the State law, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award or agreement. That submission begs the question: what is the adjustment of industrial relations established by the award or agreement?

Operation of the Federal Instruments

13. The Respondent accepts the description of the scheme created by the Federal Instruments advanced by the Appellants (in paragraphs 10-14 and 35).

Operation of the CILSL scheme

14. The Respondent is the trustee[28] of the Fund which is established under a trust deed executed by the Respondent on 1 April 1997 (the **Deed**).[29]

14.1 The Respondent is required to exercise its powers under the Deed in accordance with its terms and in accordance with the terms of the CILSL Act.[30]

14.2 The Respondent has made rules relating to the Fund (the **Rules**) which, subject to the terms of the Deed, are to be construed as part of the Deed.[31]

14.3 The version of the Rules that apply to the present matter were those made on 29 August 2006,[32] as amended on 2 December 2007.[33] A consolidated version of the Rules appears at AB 325-384.

15. The scheme established by the CILSL Act, the Deed and the Rules is a scheme for the payment of benefits out of the Fund established under the Deed and administered by the Respondent to "workers"[34] and "working sub-contractors"[35] in respect of their continuous

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27 (1983) 151 CLR 302 at 330.3.
28 AB 203/40.
29 AB 204/10, 249.
30 Clause 6.2.2 of the Deed (AB 259/22).
31 Clauses 5.1 and 5.3 of the Deed (AB 258/39, 259/1).
32 AB 205/1.
33 AB 388, paragraph 5. The amending deed poll appears at AB 391-408.
34 Being persons who, *inter alia*, perform work under a contract of employment: rule 1.1: AB 337/32.

service in the construction industry.[36] The following key aspects of the scheme are based on the CILSL Act:

15.1 An employer must pay to the Respondent a "long service leave charge" (the **charge**) in respect of every worker employed by the employer to perform construction work in the construction industry: s 4(1).[37]

15.2 A working sub-contractor[38] must pay to the Respondent the charge in respect of construction work performed by the working sub-contractor in the construction industry: s 4(1A).[39]

15.3 The amount of the charge (subject to a ceiling) and other aspects of the liability imposed by the CILSL Act are determined from time to time by the Respondent in accordance with the Deed: s 4(2) and (3).

15.4 The Respondent may recover any amount of long service leave charge owing to it by an employer or working sub-contractor: s 5(1).

15.5 Amounts of money received by the Respondent under the CILSL Act are paid into the Fund.[40]

15.6 Employers whose names are not included in the register of employers kept by the Respondent must not, for more than 5 days in any month, employ workers under a contract of employment to perform construction work in the construction industry: s 8(1)(a). An equivalent obligation is placed on working sub-contractors and on workers: s 8(2) and (3).

15.7 Employers must keep and retain records containing information relating to workers employed to perform construction work in the construction industry and provide the Respondent with information relating to those workers: s 9(1).

15.8 The Respondent may require employers and working sub-contractors to provide information and documents to the Respondent that is relevant to the ascertainment of the rights or liabilities of persons under the Deed: s 10; and the Respondent may seek orders for the enforcement of such notices: s 11.

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35 Being persons who, *inter alia*, perform work for a fee or reward under a contract, a substantial component of which is for labour and which is not a contract of employment: rule 1.1: AB 337/38-338/2.

36 Section 6 of the CILSL Act: see paragraph 16.1 below.

37 The relevant terms are defined in rule 1.1: AB 325-337; and those definitions are adopted by s 3(2) of the CILSL Act.

38 If that working sub-contractor has made an election under s 4(4) of the CILSL Act.

39 The relevant terms are also defined in clause 1.1 of the Rules: AB 325-337; and those definitions are adopted by s 3(2) of the CILSL Act.

40 See clauses 1 (definition of "Fund") and 2.1 of the Deed: AB 254/25, 256/5; and rule 6.1(a) of the Rules: AB 340/32.

16. Section 6 of the CILSL Act, read with the Rules, creates an entitlement to the payment of benefits out of the Fund. The CILSL Act and the Rules do not entitle an employee to take any period of long service leave; the only entitlement created is the entitlement to be paid benefits out of the Fund.

16.1 Section 6 of the CILSL Act is headed "Entitlements" and provides:

> (1) Every worker is entitled to long service leave, and to be paid benefits out of the fund, in respect of continuous service in the construction industry.
>
> (2) Every working sub-contractor who has paid long service leave charges is entitled to be paid benefits out of the fund in respect of continuous service in the construction industry.
>
> (3) The amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.

16.2 Although the entitlement in s 6(1) is expressed as one "to long service leave, and to be paid benefits out of the Fund," the only content given to the entitlement is, according to s 6(3), "[t]he amount ... as determined from time to time by the trustee in accordance with the trust deed".

17. Rule 27 of the Rules is headed "Entitlement to Long Service Leave of Worker".[41] The rule consists of three elements:

17.1 First, a statement of the benefit to which workers are entitled. Rule 27.1[42] provides:

> Every Worker is entitled to a Long Service Leave Benefit in respect of Continuous Service performing Construction Work for an Employer (whether before or after the commencement of the Trust Deed (or these Rules)).

Rule 1.1 defines the "long service leave benefit", to which workers are entitled under rule 27.1, as "an entitlement paid out of the Fund, in accordance with these Rules".[43]

17.2 Secondly, as indicated by the opening words of rule 27.2,[44] detailed provisions define "the amount of the entitlement" established by rule 27.1. The amount of a worker's entitlement varies according to the years of continuous service in the construction industry.[45] Rule 27.3 is a deeming provision that applies "for the purposes of determining the amount of a Worker's entitlement to a long service leave benefit".[46]

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41 AB 360-362.
42 AB 360/30.
43 AB 331/22.
44 AB 360/33.
45 For example, a worker who completes 10 years' continuous service in the construction industry on and after 1 July 2002 is entitled to a payment from the Fund of 13 weeks' long service leave on full pay: rule 27.2(b): AB 360/40.
46 AB 361/35.

17.3 The third element is an obligation on the Respondent to provide to workers the entitlement established by rules 27.1-27.3. Rule 27.4 states:[47]

> The Trustee must pay from the Fund to the Worker forthwith upon receipt of a request in writing from the Worker the Long Service Leave Benefit to which he is entitled.

18. As is apparent from the above provisions, the only entitlement and reciprocal obligation created by rule 27 is an entitlement for workers to receive (and for the Respondent to pay) a "long service leave benefit," namely, "an entitlement paid out of the Fund, in accordance with these Rules".

18.1 Neither rule 27, nor any other provision of the Rules, gives to workers an entitlement to take long service leave.

18.2 Contrary to the Appellants' submissions (paragraphs 36(g)(ii) & (vii)), this conclusion is unaffected by the references in the detailed provisions of rule 27.2 to periods of "long service leave". That term is defined in rule 1.1 to mean "long service leave which a Worker is entitled to under these Rules by virtue of the Act".[48] As noted in paragraph 18 above, the only entitlement provided by rule 27.1 is an entitlement to "a long service leave benefit," that is, "an entitlement paid out of the Fund, in accordance with these Rules".

18.3 Contrary to the Appellants' submissions (paragraph 36(g)(i)), the Rules do not define "long service leave" as "a distinct and separate entitlement to long service leave benefit". That term is defined to mean "long service leave which a Worker is entitled to under these Rules by virtue of the Act".[49] Rule 1.1 is a definitional provision that does not itself prescribe any entitlement.

18.4 Similarly, rule 21,[50] which deals with the determination of what constitutes continuous service, does not provide for any entitlement to long service leave: it is to be applied to determine an employee's entitlement to a "long service leave benefit".[51]

19. It is correct, as the Appellants note (paragraph 36(d)), that the Rules in their original form included rule 35.1, which required employers to grant long service leave to their employees when the latter became entitled to a Long Service Benefit.[52] That rule was deleted in its entirety on 2 December 1997.[53] At the same time, rule 35.2 was substantially replaced.[54]

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47 AB 362/3.
48 AB 331/20.
49 Rule 1.1: AB 331/23.
50 AB 354-357.
51 See rule 27.2: AB 360/32-361/33; and the definition of "Continuous Service" in rule 1.1: AB 328/25.
52 AB 311/25.
53 AB 388, paragraph 5; AB 403/35.

Rules 35.2, 35.3, 35.4 and 35.5 were then re-numbered as 35.1, 35.2, 35.3 and 35.4,[55] and appear in their current (amended and re-numbered) form at AB 372.

20. In paragraph 36(g)(v)-(vi), the Appellants also refer to rules 35.1 and 35.2, which they suggest indicate that the Rules contemplate the taking of long service leave.

20.1 As the Full Court observed, the Rules do contain some inconsistencies.[56] However, the rules referred to by the Appellants can be reconciled with the other provisions of the scheme (in particular, s 6(3) of the CILSL Act and rules 27.1[57] and 27.4[58]), which identify the entitlement to long service leave as an entitlement to payment of a long service leave benefit.

20.2 The apparent differences in those provisions can be resolved if rules 35.1[59] and 35.2[60] are read as applying to the specific situation of an employer agreeing to a request by an employee to take long service leave.

20.3 Likewise, the references in rules 30.1[61] and 31.1[62] to the taking of leave by an employee should also be understood as referring to an employee taking leave (by agreement) with his or her employer.

Relationship between the Federal Instruments and the CILSL Act and scheme

21. The analysis of the CILSL Act and scheme developed in paragraphs 15-20 above supports the Full Court's conclusions:

21.1 The CILSL Act imposes an additional duty on particular employers, but that duty is not inconsistent or in conflict with those imposed by the Federal Instruments.[63]

21.2 In no way does the CILSL Act or scheme deny or vary any right, power or privilege conferred by the Federal Instruments; there is no negating of the essential Federal legislative scheme set up by the Federal Instruments.[64]

21.3 The CILSL Act and the Federal Instruments "coexist in harmony such that each of them may be considered supplementary to or cumulative upon the other".[65]

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54 AB 388-389, paragraph 5; AB 403/38.
55 AB 389, paragraph 5.
56 AB 443 at [21].
57 AB 360/30.
58 AB 362/3.
59 AB 372/2.
60 AB 372/11.
61 AB 365/10.
62 AB 365/38.
63 AB 447 at [37].
64 AB 447 at [37].
65 AB 447 at [38].

21.4 The field of the CILSL Act and scheme is the provision of a portable scheme for the benefit of workers to access a fund set up by and under that Act. That field does not intrude into the field of the industrial relationship between employer and employee in a way that the Federal Instruments expressly or impliedly exclude.[66]

Direct inconsistency

22. To the extent that the characterisation of the Federal Instruments and the CILSL Act and scheme bear on the question of direct inconsistency (see paragraphs 9.1-9.3 above), they are of different characters, as the Full Court found (see paragraph 21.4 above):

22.1 the Federal Instruments define and regulate the industrial relationship between employee and employer, and define the obligations and liabilities created through and by that relationship; but

22.2 the CILSL Act and scheme provide for a portable scheme for the benefit of workers to access a special fund set up under the Act, supported by a levy on employers, and do not create or modify any of the obligations and liabilities between any employer and its employees.

23. The Appellants argue (in paragraph 39) that s 6 of the CILSL Act confers an entitlement to long service leave; and the Full Court's construction "sets at nought" the entitlement conferred by the CILSL Act.

23.1 That argument fails to address s 6(3) of the CILSL Act, which directs that "the amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee". As explained in paragraph 16 above, the Respondent determines the content of the s 6(1) entitlement.

23.2 The analysis of the Rules set out in paragraphs 17-20 above demonstrates that, in making the Rules, the Respondent has not purported to establish any right for workers to take long service leave from their employers.

24. The Appellants' contention (paragraphs 40-42), that their proposed construction of s 6 of the CILSL Act is consistent with the stated purpose of that Act and the Second Reading Speech, should be rejected.

24.1 Although a construction of an Act that would promote its purpose or object is to be preferred over one that would not promote the purpose or object, it is essential that the language of the Act support the former construction.[67]

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66 AB 449 at [46]-[47].

67 *Mills v Meeking* (1990) 169 CLR 214 at 236.7-237.1 (Dawson J); *Thompson v Byrne* (1999) 196 CLR 141 at [49] (Gaudron J).

24.2 The question whether the CILSL Act and scheme gives workers an entitlement to take long service leave depends principally on the text of the Act, the trust deed and the Rules, rather than general statements of purpose.[68]

24.3 Nor does the Second Reading Speech assist the Appellants. The task of the Court is to give effect to the will of Parliament as expressed in the terms of the Act.[69] "The words of a Minister must not be substituted for the text of the law".[70] That statement was recently referred to at length by five Justices of this Court who observed:[71]

> Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

25. In paragraph 43 of their submissions, the Appellants accept that the Rules do not place a time limit on the taking of long service leave.

25.1 The absence of any limit undermines the argument that the Rules confer an entitlement to the taking of long service leave. The Rules contain detailed provisions regulating the payment of the long service leave benefit; if they were intended to provide an entitlement to take leave, one would expect similarly detailed provisions regulating when leave is to be taken, as is the case under the Federal Instruments.[72]

25.2 The Appellants also contend that the removal of rule 35.1 did not change the clear words of s 6 of the CILSL Act. So much may be accepted. However, the assumption that s 6(1) prescribes an entitlement to leave is flawed for the reasons set out in paragraphs 16 and 18 above.

25.3 The suggestion, also made in paragraph 43, that a dispute about the timing of leave would be a dispute concerning the CILSL scheme and fall within s 12(1)(c) of the CILSL Act assumes that the scheme confers a right to take leave or regulates the taking of leave: the assumption is unfounded: see paragraphs 16 and 18 above.

26. The Appellants contend (paragraph 44) that, by empowering the Respondent to amend the Rules, so as to provide an entitlement to long service leave, the CILSL Act indirectly overrides or renders ineffective the scheme contained within the Federal Instruments.

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68 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

69 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.4 (Mason CJ, Wilson and Dawson JJ); *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at [29] (Gummow and Hayne JJ).

70 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.2-518.4 (Mason CJ, Wilson and Dawson JJ).

71 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Alcan (NT) Alumina Pty Ltd v Commissioner Of Territory Revenue* (2009) 239 CLR 27 at [47].

72 See cl 24.3 of the "Power and Energy Industry Electrical, Electronic and Engineering Employees Award 1998", AB 98/35-99/36.

26.1 There is no impairment of the operation of the Federal Instruments in the grant of power. Inconsistency would arise if, but only if, the power were exercised so as to impair or detract from the operation of the Federal Instruments.

26.2 Section 109 is not concerned with "legal fictions," but with the "reality of contemporaneous inconsistency between a valid law of the Commonwealth and an otherwise valid law of a State".[73]

26.3 In *The Kakariki,* the inconsistency of the State law relating to the removal of wrecks only arose when the Commonwealth proceeded under Federal law to remove a wreck. Dixon J said that the State authority became powerless "when, but not before" steps were taken under Federal law, and the inconsistency extended no further.[74] As Mason J later observed, "no inconsistency will arise until the powers are actually exercised".[75]

26.4 The same point was made by McTiernan, Williams, Fullagar and Taylor JJ (with whom Dixon J agreed) in *Clarke v Kerr.*[76]

26.5 In *Commonwealth v Western Australia (*the ***Mining Act Case***),[77] Gleeson CJ and Gaudron J said, in the course of considering whether the *Mining Act 1978* (WA) was inconsistent with Defence Regulations made under the *Defence Act 1903* (Cth):[78]

> Nor, in our view, can it be said that any provision of the *Mining Act* would, if valid, alter, impair or detract from the operation of the Defence Regulations or that the Act is otherwise inconsistent with the Regulations ... That is because the *Mining Act* does not confer rights to enter upon or use land in the perimeter area. Rather, it simply allows that authority may be granted to persons to enter or conduct mining operations on that land.
>
> The Defence Regulations do not operate to prevent entry or activity on the perimeter area, except if a defence operation or practice has been authorised by a chief of staff pursuant to reg 51(1). It would seem clear that, were authority to be granted pursuant to the *Mining Act* to enter upon or conduct mining activities on land in the perimeter area at a time or times specified in an authorisation under reg51(1) for the conduct of a defence operation or practice, there would be direct inconsistency between that authorisation and the authority granted under the *Mining Act* ...

26.6 It follows that inconsistency within s 109 could only arise if the Respondent made a rule giving the Appellants' employees a right to take long service leave.

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73 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 478.7 (Deane J). See also 473.3-473.9 (Brennan J).

74 *The Kakariki* (1937) 58 CLR 618 at 631.7.

75 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 221.6. See also Gibbs CJ at 217.2-217.9.

76 (1955) 94 CLR 489 at 302.6.

77 (1999) 196 CLR 392.

78 (1999) 196 CLR 392 at [60]-[61]. See also Gummow J at [139].

26.7 Even in that hypothetical situation, the grant of power would be invalid only to the extent that it empowered the Respondent to make a rule that was inconsistent with the Federal Instruments: that is the explicit limit of the invalidity brought about by s 109.[79] The grant of power would continue to authorise the making of rules that did not impair or detract from the operation of the Federal Instruments, such as those providing only for the payment from the Fund of a long service leave benefit as reflected in the Rules in their current form.

27. In paragraphs 46-48, the Appellants contend that, even if the CILSL scheme does not confer an entitlement to long service leave, it is nonetheless inconsistent with the scheme established by the Federal Instruments because it imposes obligations in addition to and inconsistent with the Federal scheme.

28. First, it is said that the CILSL scheme alters an employee's entitlement to long service leave under the Federal Instruments by contemplating "payment without the taking of leave" and altering "the nature of the service to be accrued" prior to the entitlement arising: see Appellants' paragraphs 46(a) and (b) and 47. The CILSL scheme does not have that effect. It creates an additional and separate entitlement in employees against the Fund, not against their employers. The entitlements of employees as against their employers under the Federal instruments are unaltered.

29. The CILSL scheme is also said to impose additional and inconsistent obligations by requiring employers to make contributions pursuant to the CILSL scheme for all construction employees, including those who ultimately accrue an entitlement to, and take, leave under the Federal Instruments: paragraph 48(a). This is not the effect of the CILSL scheme.

29.1 The Rules prevent an employee from receiving payment of a long service leave benefit from the Fund where that person has already received long service leave payments from an employer.[80]

29.2 The Rules also provide that, where an employer has paid long service leave charges in respect of a an employee to whom the employer grants long service leave on ordinary pay or pay in lieu, the employer shall be entitled to be reimbursed from the Fund any payments made in respect of employee.[81]

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79 In *Wenn v Attorney General (Vic)* (1948) 77 CLR 84 at 122.3, Dixon J observed that s 109 "means a separation to be made of the inconsistent parts from the consistent parts of a State law", save where "division is only possible at the cost of producing provisions which the State Parliament never intended to enact". In *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 283.5, Taylor J referred to the "substantive connotation" of the words "to the extent of the inconsistency". See also *Western Australia v The Commonwealth* (the *Native Title Act case*) (1995) 183 CLR 373 at 465.3 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ): "The extent of the inconsistency depends on the text and operation of the respective laws."

80 Rule 23.10, AB 358/40.

81 Rule 40.3, AB 376.

29.3 Neither the limitation of the amount that an employer can be reimbursed (the amount paid by the employer to its employee) nor the absence of a right to reimbursement of contributions in respect of employees who do not accrue sufficient service for long service leave under the Federal Instruments impairs the operation of the Federal Instruments, or their "object or purpose": cf the Appellants' paragraphs 48(d) and 48(e).

29.4 The Appellants rely on the provisions of the CILSL Act that impose a requirement on employers to make returns: paragraph 48(b); and that prohibit employment of workers unless registered under the CILSL scheme: paragraph 48(c). The Appellants have not identified how those provisions operate to deny or vary a right, power or privilege conferred by the Federal instruments and thereby impair the operation of the Federal Instruments.

30. The rights, powers and privileges provided for by the Federal Instruments, such as the right afforded to employees to take paid long service leave on the completion of prescribed periods of service and the related obligations on employers in respect of that entitlement, are unaffected by the liabilities and rights that the CILSL Act provides. The fact that the CILSL Act imposes obligations on employers and confers rights on employees in addition to the obligations and rights as between employers and employees provided for by the industrial instruments is immaterial.

30.1 The obligations imposed on employers by the CILSL Act are not obligations to their employees; and the rights conferred on employees by the CILSL Act are not rights against their employers.

30.2 Employees have no rights against their employers under the CILSL Act that are additional to those conferred by the Federal Instruments; and employers have no obligations to their employees under the CILSL Act additional to those imposed by the Federal Instruments.

30.3 By analogy with the analysis in the *Hospital Benefits case*,[82] the CILSL Act does not operate to require the Appellants, as employers, to provide leave or to make any payment in lieu of leave to their employees; it does not operate to alter, impair or detract from the operation of the Federal Instruments.

Indirect inconsistency

31. There will be indirect inconsistency between a State and Federal law, in the sense identified in paragraph 8.1 above:

> ... if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or

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[82] (1983) 151 CLR 302 at 327.4 (Mason J).

apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.[83]

32. Inconsistency in this sense will only arise if "the field said to be exhaustively covered by the Commonwealth law [is] clearly identified and ... the State laws [are] shown to enter upon that field"[84] – that is, if the State law "deal[s] with a subject matter which the Commonwealth Act intends to regulate completely and exclusively".[85] On this approach, inconsistency necessarily depends on the characterisation of the two laws in question[86] and, as observed by the Court in *Dickson*,[87] will turn on the "proper interpretation of the federal law in question, having regard to its subject, scope and evident purpose".

The field covered by the Federal Instruments

33. In their discussion of indirect inconsistency, the Appellants mis-describe the area of operation of the Federal Instruments. The Instruments do not "comprehensively regulate the Appellants' obligations in respect of long service leave and the entitlements of employees of the Appellants in respect of such leave": paragraph 50. The Federal Instruments regulate employers' obligations to provide long service leave to their employees, and employees' rights to demand long service leave from their employers.

34. The inaccurate description of the area of operation of the Federal Instruments leads the Appellants to describe the field covered by the Federal Instruments in unduly wide terms as "the Appellants' obligations in respect of long service leave accrued in whole or in part through service with the Appellants and the entitlements of employees of the Appellants in respect of such leave": paragraph 52. Because of the nature and character of the Federal Instruments, the field they cover is necessarily confined to the industrial relationship between employee and employer, one part of which is the mutual obligations and rights of employer and employees to long service leave.

35. In paragraph 51 the Appellants submit that, because the 2004 Agreements were made when the CILSL scheme was in place, the Court should assume that the parties would not have agreed on the form of regulation made by those Agreements if they intended the CILSL scheme to operate in respect of employees to whom the Federal Instruments applied.

36. The assumption is unsound. Although it is readily apparent that the parties to the 2004 Agreements intended that its terms would regulate the industrial relationship between the

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83 *The Kakariki* (1937) 58 CLR 618 at 630.6 (Dixon J).

84 The *Hospital Benefits case* (1983) 151 CLR 302 at 316.8 (Gibbs CJ, Murphy and Wilson JJ).

85 The *Hospital Benefits* case (1983) 151 CLR 302 at 319.6 (Gibbs CJ, Murphy and Wilson JJ).

86 See *Clyde Engineering Company Ltd v Cowburn* (1926) 37 CLR 466 at 489.7-489.9, 491.9-492.1 (Isaacs J); *Ex parte McLean* (1930) 43 CLR 472 at 483.3-483.7 (Dixon J); *The Kakariki* (1937) 58 CLR 618 at 630.6 (Dixon J).

87 (2010) 270 ALR 1 at [34].

Appellant and its employees, they could not have intended to exclude a State law that imposed a tax and provided a right for payment of benefits from a fund.

The distinct character of the CILSL Act and scheme

37. The Appellants contend that the CILSL scheme does pertain to the employment relationship and that the Full Court erred by finding to the contrary: paragraphs 53-56.

38. The Respondent does not take issue with the Appellants' proposition that the employment relationship "extends to the obligations and duties owed by one party to the employment relationship to the other, even where performance of the obligation results in a benefit to third parties": paragraph 54.

39. However, the rights and duties created by the CILSL scheme are not of that type.

39.1 The Appellants owe no obligation to their employees under the CILSL scheme; they are obliged to contribute to the Fund; enforcement of that obligation is a matter for the Respondent, not the employees.

39.2 The employees' rights under the CILSL scheme do not depend on the Appellants having made any contribution to the Fund.

40. In paragraph 55, the Appellant cites the judgment of the Full Federal Court in *Australian Maritime Officers Union v Sydney Ferries Corporation*,[88] for the proposition that "a payment made for the benefit of an employee by an employer is normally presumed to pertain to the relationship". That general statement obscures the relevant principle, which was earlier identified by the Full Court in its judgment,[89] where the following proposition from *R v Kelly; Ex parte The State of Victoria* (***R v Kelly***)[90] is extracted:

> The words "pertaining to" mean "belonging to" or "within the sphere of", and the expression "the relations of employers and employees" must refer to the relation of an employer as employer with an employee as employee. [Emphasis added by Full Federal Court.]

That principle has also been applied by this Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (***Electrolux***).[91]

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88 (2009) 190 IR 193.

89 (2009) 190 IR 193 at [3]. See also at [11] where the Full Court cited the decision of this Court in *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufacturers* (***Manufacturing Grocers***) (1986) 160 CLR 341 at 353.8 where, after referring to *R v Kelly*, the Court stated: "For present purposes it is sufficient to say that a matter must be connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential for it to be an industrial matter capable of being the subject of an industrial dispute."

90 (1950) 81 CLR 64 at 84.3.

91 (2004) 221 CLR 309 at [161]: Gummow, Hayne and Heydon JJ quoted with obvious approval the statement in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (***Alcan***) (1994) 181 CLR 96 at 106.5: "for a matter to 'pertain to the

41. Further, this Court has held that, in many and perhaps most cases, the fact that an employer has no power to grant a particular claim will mean that the claim does not pertain to the relationship between employers and employees.[92]

42. The application of the principle identified in *R v Kelly*, *Manufacturing Grocers* and *Electrolux* is illustrated in the judgments of this Court concerning payment of union dues.[93] In *Alcan*,[94] the Court said, of a claim that employers pay union dues out of employees' salaries: "[A]lthough the subject matter pertains to a relationship between employers and employees, it is a relationship involving employees as union members and not as employees".

43. The same reasoning could be applied in the present case: even if the Court were to find that the subject matter of the CILSL scheme pertains in some way to the relationship between the Appellant and its employees, it would be a relationship involving employees as beneficiaries under the Fund and not as employees of the Appellants.

44. The Appellants contend in the alternative that the question whether the CILSL scheme pertains to the relationship of employer and employee is not determinative of whether the scheme destroyed or varied the adjustment of industrial relations established by the Federal Instruments, or "whether it intruded into the field that the parties to the 2004 Agreements are taken to have exclusively or exhaustively regulated": paragraph 57.

45. It necessarily follows from the characterisation of the field covered by the Federal Instruments as the industrial relationship between employee and employer (see paragraph 34 above), that a finding that the CILSL scheme does not pertain to the relationship of employer and employee determines the question whether that scheme intruded into the field taken to have been exclusively or exhaustively regulated by the Federal Instruments.

46. In paragraph 58, the Appellants argue that the requirement that they pay money into a fund administered by the Respondent does not prevent inconsistency because the Scheme "is about funding long service leave benefits"; and it does not matter that the CILSL Act is characterised as "social legislation".

47. Central to that argument is the proper characterisation of the CILSL scheme. The description of the CILSL scheme as being "about funding long service leave benefits" does not reflect the essential nature and character of the scheme as manifested by the core provisions of the CILSL Act.

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relations of employers and employees' it must affect them in their capacity as such"; see also at [60] (McHugh J); and *Wesfarmers Premier Coal Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* (2004) 138 IR 362 at [76] (French J).

92 *Amalgamated Metal Workers Union; Ex parte Shell Co of Australia* (1992) 174 CLR 345 at 358.6 (Mason CJ, Deane, Toohey and Gaudron JJ).

93 *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353; *Alcan* (1994) 181 CLR 96.

94 (1994) 181 CLR 96 at 107.5.

47.1 Section 6(1) of the CILSL Act makes clear that the Act is directed at the subject matter of long service leave for continuous service by workers in the construction industry as an industry – not with a particular employer. The benefits conferred by the CILSL Act are not contingent on a worker's continuous service with an employer.

47.2 The difference between that subject matter and the subject matter of the Federal Instruments is clear from the fact that the benefits provided by the CILSL Act take the form of monetary payments, rather than leave;[95] with the benefits paid by the Fund, not by the employer, and not confined to persons employed under contracts of employment, but extending to "working sub-contractors".[96]

47.3 The CILSL Act serves the broader social purpose of providing "for a portable long service leave scheme".[97] In contrast, the manifest purpose of the Federal Instruments is to prescribe terms and conditions of employment of the Applicants' employees.

48. A comparison of the purposes served by a State and Federal law may be a significant factor in illuminating whether an indirect inconsistency arises. For example, in *Wardley*, the different purposes served by an industrial instrument and a State law were significant in Stephen J's conclusion that there was no inconsistency:[98]

> I have sought in the foregoing to give effect to what I regard as important factors in this case: the contrast between the Agreement, in itself an unremarkable instrument serving the useful but quite limited purpose of settling a particular dispute between one employer and a class of its employees, and the Act, a measure of general application giving effect to far-reaching social reforms …

49. Although the Full Court observed that "the provisions of the [CILSL] Act impact upon the long service leave benefits of employees",[99] the CILSL Act does not purport to regulate in any way the industrial relations between employers and employees in their capacities as employers and employees: it does not enter on the field from which Commonwealth law displaces State law – even if "[f]rom a practical point of view the [CILSL Act] may affect

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95 See paragraphs 6.5-6.8 and 21 above.

96 See footnote 35 above.

97 Legislative Assembly, *Debates*, 23 April 1997, p 823. In *Irving v Construction Industry Long Service Leave Board* 1996) 22 ACSR 566 at 567/40, O'Loughlin J said, of the equivalent South Australian legislation: "There can be no doubt that this is beneficial legislation that has been enacted with the dominant purpose of giving aid and benefits to workers in the construction industry. The legislation reflects Parliament's recognition that there is a social and therapeutic need to ensure that such workers have the opportunity to benefit from long service leave." (The judgment was upheld on appeal: *Construction Industry Long Service Leave Board v Irving* (1997) 74 FCR 587.)

98 *Wardley* (1980) 142 CLR 237 at 253.

99 AB 449 at [45].

the finances of [the Applicants]" as "would any other cost incurred in carrying on their business".[100]

50. In paragraphs 59-60, the Appellants seek to distinguish the *Hospital Benefits case*. Although Gibbs CJ, Murphy and Wilson JJ relied in part on specific features of the Federal law, the following aspects of their reasoning can be applied in the present matter.

50.1 Their Honours found that the Commonwealth law was intended to cover the relationship between a registered hospital benefits organisation and its contributors, including the benefits to be provided to contributors and the purposes for which moneys in the fund could be applied.[101]

50.2 The State Acts, they said, imposed a tax, paid into the consolidated fund; what happened thereafter was immaterial to the character of the tax.[102]

50.3 The State Acts did not deal with the benefits that registered organisations provided to their contributors, and so did not "enter upon a field from which the Commonwealth Act displaces State law".[103]

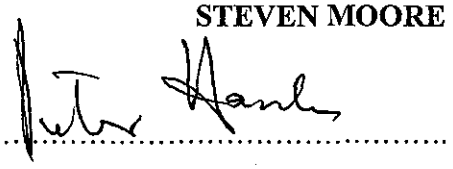
50.4 The State Acts were therefore not "legislation on a subject which is dealt with exhaustively and exclusively by the Commonwealth Act".[104]

51. The CILSL Act imposes a tax on employers who employ workers in the construction industry, with the proceeds of that tax paid into the Fund. The Fund is then used to satisfy workers' entitlements as given by the CILSL Act. The CILSL Act does not regulate the benefits (including long service leave) that employers provide to their employees, and does not enter upon the field covered by the industrial instruments.

DATED: 15 February 2011

PETER HANKS

STEVEN MOORE



Name: Peter Hanks QC
Telephone: 03 9225 8815
Facsimile: 03 9225 7293
Email: peter.hanks@jr6.com.au

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100 Compare the *Hospital Benefits case* (1983) 151 CLR 302 at 320.3 (Gibbs CJ, Murphy and Wilson JJ).

101 (1983) 151 CLR 302 at 317.7.

102 (1983) 151 CLR 302 at 319.3.

103 (1983) 151 CLR 302 at 319.6.

104 (1983) 151 CLR 302 at 320.2.