

**JEMENA ASSET MANAGEMENT (3) PTY LTD & ORS v COINVEST LIMITED  
(M127/2010)**

Court appealed from: Full Court, Federal Court of Australia  
[2009] FCAFC 176

Date of judgment: 18 December 2009

Date special leave granted: 3 September 2010

The appellants ('Jemena') are successors to part of the electricity distribution business formerly undertaken by the State Electricity Commission of Victoria and, at material times, employed persons in their business who were engaged in the construction industry. The respondent is the trustee of the Construction Industry Long Service Leave Fund ('the fund') established under the *Construction Industry Long Service Leave Act 1997 (Vic)* ('the CILSL Act'), which creates a scheme requiring employers to contribute to the fund which is disbursed in a way which provides portable long service leave entitlements for workers in the construction industry. The appellants are said to be obliged to participate in the scheme but are also parties to federal industrial instruments which touch upon long service leave benefits for their employees. The issue in this appeal is whether there is an inconsistency (within the meaning of s 109 of the Commonwealth Constitution) between: (a) the federal industrial instruments binding the appellants (providing an entitlement to paid long service leave); and (b) the CILSL Act and the scheme created by it.

Marshall J, in the Federal Court, held that the CILSL Act and the scheme which it provided did not alter, impair or detract from the operation of the federal industrial instruments. The State law and the federal instruments co-existed in harmony such that each of them could be considered supplementary to or cumulative upon the other.

The appellants' appeal to the Full Federal Court (Moore, Middleton and Gordon JJ) was dismissed. The Court noted that the principles applicable to s 109 are relatively well settled: see *Telstra Corporations Ltd v Worthing* (1999) 197 CLR 61. A law of a State will be inconsistent with a law of the Commonwealth where (a) the State law would alter, impair or detract from the operation of a Commonwealth law or the exercise of a power under a Commonwealth law; or (b) the State law enters a field that the law of the Commonwealth was intended to cover exclusively or exhaustively. In this case, there was an imposition of an additional duty on particular employers under the State Act, but no inconsistent duty or conflicting duty to that imposed by the federal scheme instruments. In no way did the CILSL Act or scheme deny or vary any right, power or privilege conferred by the federal scheme instruments.

With respect to part (b) of the test, the Court found that the proper characterisation of the field or subject matter of the federal scheme instruments was that they related to the industrial relationship between employee and particular employer, and the obligations and liabilities created through and by that relationship. The field did not extend to the complete subject matter of rights and liabilities of the employees and employers sourced otherwise than through that relationship. The field of the State Act and State Scheme was the provision of a portable scheme for the benefit of workers to access a fund set up by and under the State Act. That field did not

intrude into the field of the industrial relationship between employer and employee in a way that the federal scheme instruments expressly or impliedly excluded.

The appellants have filed a Notice of a Constitutional Matter. The Commonwealth Attorney-General is intervening in the appeal.

The grounds of appeal include:

- The Full Court erred in holding that there was not an inconsistency within the meaning of:
  - (a) s 170LZ(1) of the *Workplace Relations Act* 1996 (Cth) as it stood prior to 27 March 2006;
  - (b) s 17(1) of the *Workplace Relations Act* 1996 (Cth) as it stood on or after 27 March 2006; or
  - (c) s 109 of the Commonwealth Constitution;  
between the *Construction Industry Long Service Act* 1997 (Vic) (and the instruments referred to therein being the trust deed as defined therein and the Rules of the Construction Industry Long Service Leave Fund) and the AGL Electricity and Agility (Victoria) Certified Agreement 2004; the Agility Certified Agreement (Victoria) 2002; and/or the AGL Electricity Certified Agreement 1999.