IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S127 of 2012

BETWEEN:

PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED OF NSW
Appellant

and

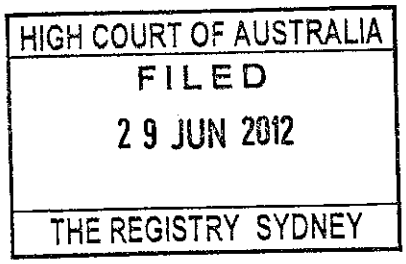
DIRECTOR OF PUBLIC EMPLOYMENT
First Respondent

ROADS AND MARITIME SERVICES
Second Respondent

ATTORNEY-GENERAL FOR NSW
Third Respondent

NSW MINISTER FOR FINANCE & SERVICES
Fourth Respondent

UNIONS NSW
Fifth Respondent



SUBMISSIONS ON BEHALF OF THE FIRST, SECOND, THIRD AND FOURTH RESPONDENTS

Part I: Certification for publication on the Internet

1. These submissions are in a form suitable for publication on the Internet.

Part II: The issue

2. The issue in this appeal is whether a State law requiring a State Industrial Commission to abide by particular government policies on public sector employment, as promulgated from time to time by regulation, contravenes the principle first enunciated in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

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("Kable") even though the law expressly does not apply to the State Industrial Court. Invalidity is said to arise in two ways: first, because there is an overlap between members of the Commission and the Court so that the same individual who is not bound by the impugned law as a judge, is bound by it as a Commission member, for example, when exercising arbitral functions; and second, because of the 'closely intertwined composition, operation and functions' of the Commission and the Court.

3. The First to Fourth Respondents contend that the impugned law, the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (NSW) (the "Amendment Act"), is valid, in summary, for the following reasons:

(a) Both the terms and the practical operation of the Industrial Relations Act 1996 (NSW) ("the Act") clearly delineate non-judicial powers conferred upon a Commission which administers (Judgment below, [2011] NSWIRComm 143 at [28]) 'a range of wage-fixing and other matters under' that Act; and the powers of a Court, which is a "court of a State" within the meaning of s 77(iii) of the Constitution, in which federal jurisdiction is vested by s 39(2) of the Judiciary Act 1903 (Cth), and whose members, as judges, have tenure protected by Part 9 of the Constitution Act 1902 (NSW): s 146C of the Act, as inserted by the Amendment Act, using clear and intractable language in a context which does not involve personal liberty, does not apply to the latter. Certainly, the impugned law manifests no government influence in administering the judicial functions invested in the Court.

(b) Section 146C of the Act requires the Commission to make determinations subject to criteria which are declared in a regulation, and, as such, cannot be altered without formal notification and parliamentary scrutiny.

(c) It is accepted that the Court may be called upon to enforce an arbitral award of the Commission whose terms have been influenced, perhaps decisively, by a regulation made under s 146C: an example is the current regulation which effectively limits public service wage rises to 2.5% per annum in the absence of productivity gains. But this is a constitutionally unremarkable example of the factum and consequence method of drafting: Baker v The Queen (2004) 223 CLR 513 at 532 [43] per McHugh, Gummow, Hayne and Heydon JJ.

(d) This aspect of the law cannot substantially impair the institutional integrity of the Industrial Relations Court. Neither does the overlap in membership, staff and facilities between the Court and the Commission. And, unlike the law in Wainohu v New South Wales (2011) 243 CLR 181, the Commission member who might also be a judge, when sitting as the former does not appear 'to all the world as a judge of the Court sitting as such' see Wainohu at 219 [67] per French CJ and Kiefel J.

Part III: Section 78B of the Judiciary Act 1903

10 4. The appellant has issued a notice under s 78B of the Judiciary Act 1903 (Cth). The respondents certify that they have given consideration to whether any further notice should be given in compliance with s 78B and consider that no further notice is required.

Part IV: Factual matters

5. The respondents largely accept the appellant's account of the factual background to the appeal. However, the respondents do not accept the appellant's limited summary of the content of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW), nor the description of that Regulation as "purporting" to set out matters that are declared to be aspects of government policy to be given effect by
20 the Commission for the purposes of s 146C of the Act (AWS [10]).

6. Clause 5 of the Regulation declares two "paramount policies", namely the entitlement to the guaranteed minimum conditions of employment set out in cl 7 of the Regulation, and equal remuneration for men and women doing equal work of equal or comparable value. The other policies which are declared in cl 6, including the cap on increases in remuneration or other conditions of employment (which may be exceeded if employee-related cost savings (see cl 9) have been achieved to fully offset the increased employee-related costs (see cl 8)), are subject to the declared paramount policies.

Part V: Legislative provisions

7. The respondents accept the appellant's statement of applicable constitutional provisions. The respondents also accept that the Acts and Regulations which the appellant has identified are applicable. In developing the argument below, the respondents rely upon additional provisions of the Industrial Relations Act, and its predecessors, as noted below.

Part VI: Argument

The Industrial Relations Commission and the Industrial Court of New South Wales

8. The history of the regulation of industrial relations in New South Wales indicates that the New South Wales Parliament has, over time, utilised a combination of judicial bodies and non-judicial bodies, exercising judicial and non-judicial functions, to deal with industrial matters. Pursuant to the Industrial Arbitration Act 1901 (NSW), the Court of Arbitration was constituted to perform award-making functions, hear and determine industrial disputes, including those arising out of industrial agreements; and to deal with all offences and enforce all orders under that Act. Subsequently, however, those functions were allocated as between the court and other non-judicial bodies.

9. The Industrial Disputes Act 1908 (NSW), for example, made provision for the constitution of industrial boards, which had the power to make awards and decide disputes with respect to the industry for which they were constituted: ss 14, 26-27. The Industrial Court constituted pursuant to that Act heard appeals from decisions of industrial boards, and dealt with matters such as recovery of payments due under awards and offences under the Act: see, for example, ss 38-39, 41-45. Pursuant to the Industrial Arbitration Act 1912, there remained a division between the newly constituted Court of Industrial Arbitration and industrial boards until 1926, when the Act was amended to replace the Court of Industrial Arbitration with the Industrial Relations Commission of New South Wales: Industrial Arbitration (Amendment) Act 1926 (NSW), s 3. Although the Commission was not initially constituted as a superior court of record, it was so constituted pursuant to the Industrial Arbitration (Amendment) Act 1927: s 2. In addition to the Commission, the Industrial Arbitration (Amendment) Act 1926 made provision for the establishment of conciliation

committees, which could inquire into any industrial matter in the industry for which it was established and could exercise the powers and jurisdiction of an industrial board: ss 8-9. The Commission's jurisdiction was limited in matters where a conciliation committee was established: see s 10.

10. The Industrial Arbitration Act 1940 (NSW) continued the regulatory system involving an Industrial Commission of New South Wales, being a superior court of record (s 14) and conciliation committees (s 18), together with the appointment of a conciliation commissioner: s 15. Under this Act, the Commission's jurisdiction was no longer limited by reason of the establishment of a conciliation committee: see s 30. The legislative predecessor to the Act under challenge, the Industrial Relations Act 1991 (NSW) established the Industrial Court of New South Wales, also being a superior court of record (s 288) and a separate Industrial Relations Commission of New South Wales (s 315), and maintained provision for the establishment, by the Commission, of conciliation committees to operate in relation to an identifiable industry or enterprise: s 328. As is the case under the present Act, a person could be appointed to hold office both as a Judge of the Court and as a Presidential Member of the Commission: s 290.

11. The provisions of the present Act are indicative of a legislative intention to maintain a clear division between the Commission and the Commission in Court Session, otherwise known as the Industrial Court.

12. The Commission is established pursuant to s 145(1) of the Act. The membership of the Commission comprises a President, a Vice-President and Deputy Presidents (collectively referred to in the Act as "Presidential members" (s 147(2)) and Commissioners (s 147(1)), each of whom are appointed by the Governor under the public seal of the State: s 148.

13. The Industrial Court, which is established pursuant to s 151A and 152 of the Act, is a superior court of record of equivalent status to the Supreme Court and the Land and Environment Court: see 152(2) and s 52(2) of the Constitution Act 1902 (NSW). Proceedings in the Industrial Court may be transferred to the Supreme Court, and vice versa, if either Court is satisfied that it is more appropriate that proceedings before it be heard in the other court, or if there are related proceedings in the other court with which it would be appropriate to hear the proceedings listed before it; the transfer may

occur on application by a party to the proceedings or of the court's own motion: see s 151 of the Civil Procedure Act 2005 (NSW).

14. The Court is a "court of a State" within the meaning of s 77(iii) of the Constitution, vested with federal jurisdiction under s 39(2) of the Judiciary Act: Morrison v Chevalley (2010) 198 IR 30, per the Court at 77 [150]-[151]. It consists of so many of the Presidential members of the Commission as the Governor may appoint as members of the Court under s 149(1) of the Act, provided they satisfy the eligibility requirements in s 149(2). Although membership of the Court may only be drawn from the pool of Presidential members of the Commission, the judges of the Court hold separate commissions, and only that separate appointment is protected by Part 9 of the Constitution Act 1902 (NSW) (the Judicial Officers Act 1986 (NSW) applies to members of both institutions (Judgment below at [33])). Pursuant to s 149(3), a person appointed to the Court is known as a judicial member of the Commission.

15. The functions of the Commission include setting remuneration and other conditions of employment (s 146(1)(a)), resolving industrial disputes (s 146(1)(b)), hearing and determining other industrial matters (s 146(1)(c)), and inquiring into, and reporting on, any industrial matter referred to it by the Minister (s 146(1)(d)). A member of the Commission may also be involved in Industrial Committees established by a Presidential Member pursuant to s 198(1). Section 199 of the Act, which sets out the functions of such a Committee, expressly excludes functions that may only be exercised by the Commission in Court Session.

16. Section 153 of the Act identifies functions which are only to be exercised by the Industrial Court. Those functions include proceedings under Part 9 of Chapter 2 of the Act (Unfair contracts), proceedings under s 139 (Contravention of dispute order), proceedings under Parts 3, 4 and 5 of Chapter 5 (Registration and regulation of industrial organisations) (other than Division 3 of Part 4 (Election of officers)), proceedings under Part 1 of Chapter 7 (Breach of industrial instruments), and proceedings for recovery of money under Part 2 of Chapter 7 (other than small claims under s 380). Although the Court has an obligation to use its best endeavours to bring the parties to a settlement before making an order under Part 2 of Chapter 7, the Act does not impose formal conciliation functions on the Court, unlike the Commission (see Chapter 3 of the Act).

17. Some of the functions conferred on the Industrial Court pursuant to s 153(1) may only be exercised by the Full Bench of the Court, including proceedings for cancelling the registration of an industrial organisation, and proceedings on an appeal from a member of the Commission exercising the functions of the Commission in Court Session, or on an appeal or case stated from an Industrial Magistrate or any other court: see s 153(1)(i) and (j) and s 153(2). The Full Bench of the Court may also hear appeals from orders made by the Local Court, including for payment of money (or dismissal of an application for such) and convictions for offences against the Act: s 197.

18. Appeals from decisions of the Commission are made, by leave, to the Full Bench of the Commission: s 188. Whereas a Full Bench of the Commission consists of three members only one of whom must be a Presidential member, a Full Bench of the Court must include only judicial members, being those Presidential members whom the Governor has appointed to the Court: s 156(1), s 156(2).

19. In addition to the functions conferred pursuant to s 153 of the Act, s 154 confers power on the Industrial Court, in a manner similar to the conferral of power on the Supreme Court in s 75 of the Supreme Court Act 1970 (NSW), to make binding declarations of right in relation to a matter in which the Commission (however constituted) has jurisdiction. Pursuant to s 154, the Industrial Court may make declarations in a matter notwithstanding that no consequential relief is or could be sought. The Court also has jurisdiction to deal with offences against other Acts and Regulations, including the Dangerous Goods (Road and Rail Transport) Act 2008 (NSW) (see s 47(2)), the Rail Safety Act 2008 (NSW) (see s 132(1)), and the Work Health and Safety Act 2011 (NSW): see s 229B and s 33.

20. Unlike the Commission, the Court cannot exercise its functions on its own initiative (s 162(2)(i)), and it is bound by the rules of evidence and other formal procedures of a superior court of record: s 163(2). Both the Commission and the Court may exercise the functions of the Supreme Court in relation to compelling the attendance of witnesses and examining them on oath, compelling the production, discovery and inspection of records and other documents, and compelling witnesses to answer questions (s 164(1)), but only a Full Bench of the Court may exercise the functions of the Supreme Court in relation to the apprehension, detention and punishment of

persons guilty of contempt of the Commission: s 164(2) and s 153(3). The Court has broader powers than the Commission to make non-disclosure orders under the Act, and its power otherwise to make such orders is unconstrained: see s 164A(2), (3) and (5) of the Act and s 3 and Part 2 of the Court Suppression and Non-Publication Orders Act 2010 (NSW).

21. The business of the Commission, including the Court, is to be directed by the President: s 159(1). Where, however, the President is not a judicial member, the most senior judicial member is responsible for allocating a matter for hearing and determination by a judicial member as the Commission in Court Session (including a Full Bench): s 159(2). Pursuant to s 176(1) of the Act, the President may not replace a member of the Court after the hearing of a matter has commenced if the member becomes unavailable for any reason, or ceases to be a member, before the matter is determined, unless the parties consent; by contrast, the President may take that course without the parties' consent if the proceedings are in the Commission.

22. There is capacity, no doubt for reasons of administrative convenience, to constitute or "reconstitute" the Commission into the Industrial Court: s 176. However, such a step involves, as the term "reconstitute" itself denotes, constituting the original body as something else. Section 176(3) of the Act provides in this respect that if a matter arises in proceedings (other than criminal proceedings) before the Commission (otherwise than in Court Session) that is within the jurisdiction of the Commission in Court Session, the Commission may continue to deal with that matter as the Court only if:

(a) the Commission is duly constituted or reconstituted by a judicial member or members, and

(b) any member who is not a judicial member does not take part in the proceedings on that matter, and

(c) only such evidence given in the existing proceedings before the Commission as is admissible in evidence in proceedings before the Commission in Court Session is taken into account in determining that matter.

Do the provisions of the Amending Act impair the institutional integrity of the Industrial Court?

23. By reason of the constitutional placement of State courts in the integrated Australian court system for the exercise of the judicial power of the Commonwealth, a State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction: Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 96, 103, 116-119, 127-128. State legislation will bear that character if it confers upon a State court a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth: South Australia v Totani (2010) 242 CLR 1 at 47-48 [69] per French CJ; see also Baker v The Queen (2004) 223 CLR 513 at 519 [5] per Gleeson CJ, Forge v Australian Securities and Investments Commission (2006) 228 CLR 45 at 67 [40] per Gleeson CJ.

24. It is important to recall that the principle first set out in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 was concerned with legislation that conferred a function on a court – being a court in which federal jurisdiction had been invested under Chapter III – that was incompatible with that exercise of jurisdiction. The principle extends to legislation that confers what would otherwise be an appropriate function on the court in question, but requires the function to be carried out in a way that is inconsistent with the nature of judicial power. This was the finding in relation to the legislation in question in International Finance Trust Co Limited v New South Wales Crime Commission (2009) 240 CLR 319 and in Wainohu v New South Wales (2011) 243 CLR 181 (notwithstanding the fact that in the latter case the legislative direction concerned a function conferred on a judicial officer not as a member of the relevant court, but as a *persona designata*).

25. In deciding whether a law offends Chapter III of the Constitution, its operation and effect will define its constitutional character. The question of infringement of the principle in Kable requires examination of the relevant provisions and the impact of those provisions, if any, upon the institutional integrity of the court, including the reality and appearance of its independence and impartiality: North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 at 163 [29]-[30] per

McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; K-Generation Pty Ltd v Liquor Licensing Court (2008) 237 CLR 501 at 530 [90] per French CJ; South Australia v Totani (2010) 242 CLR 1 at 47-48 [69] per French CJ.

Section 146C

26. Section 146C(1) of the Act requires the Commission to give effect to a declared policy on conditions of employment of public sector employees "when making or varying any award or order". That function is conferred on the Commission as a whole; members of the Commission are not appointed to carry it out by reference to any judicial office (which, in any event, only some of them might hold).

27. The phrase "award or order" is defined, in s 146C(8), to include:

(a) an award (as defined in the Dictionary) or an exemption from an award, and

(b) a decision to approve an enterprise agreement under Part 2 of Chapter 2, and

(c) the adoption, under s 50, of the principles or provisions of a National decision, or the making of a State decision under s 51, and

(d) anything done in arbitration proceedings or proceedings for a dispute under Chapter 3.

28. Although the definition is formulated in inclusive terms, the functions to which it refers are vested in the Commission – in some cases the Full Bench of the Commission – and not the Industrial Court, with any right of appeal limited (by leave) to the Full Bench of the Commission (ss 187-188):

(a) as noted above, the power to make awards is vested in the Commission: s 10, s 146(1)(a);

(b) the Commission is responsible for deciding whether to approve an enterprise agreement, in accordance with principles set by the Full Bench: ss 32-36;

(c) a decision to adopt the principles or provisions of a National decision pursuant to s 50 of the Act, and the making of a State decision under s 51, rest with the Full Bench of the Commission; and

(d) pursuant to Chapter 3 of the Act, the Commission is responsible for, first, seeking to conciliate an industrial dispute and, secondly, if the matter is not so resolved, arbitrating the industrial dispute, and making or varying an award or 'dispute order'.

29. As the Full Bench of the Industrial Court observed below (at [28]), "[t]he legislative dictates of the Amendment Act are restricted in their true effect to the Commission constituted as a tribunal administering a wide range of wage fixing and other matters under the Act". There is nothing in s 146C to suggest a legislative intention to apply its requirements to the exercise by the Industrial Court of any of its functions. To the contrary, s 146C(5) states that the section does not apply to the Court, in language which is clear and intractable.

30. The range and nature of statutory commands to a State tribunal are not limited by either Chapter III of the Constitution or the doctrine first stated in Kable: see Powercoal Pty Ltd v Industrial Relations Commission (NSW) (2005) 64 NSWLR 406 at 411 [46]. Nonetheless, in so far as s 146C applies to the exercise by the Commission of its functions, s 146C(2) confines the scope of the policy, to which the Commission must give effect, to what is either set out in a regulation made under the Act, or in a document to which the regulation made under the Act refers. Either way, the provision requires a clear statement, in a regulation or by way of cross-reference in a regulation, of the applicable policy.

31. The power to make a regulation pursuant to s 146C is vested in the Governor pursuant to s 407 of the Act, and is subject to disallowance by Parliament: Interpretation Act 1987 (NSW), s 41. A regulation that has been disallowed may not again be published until four months after the date of disallowance: Subordinate Instruments Act 1989 (NSW), s 8(2). The operation of s 146C is thus not productive of a situation in which the Commission is making determinations subject to opaque criteria which are amenable to change without formal notification and parliamentary scrutiny. The appellant's reliance on the potential for the Commission to have to make awards or

orders contrary to the public interest by reason of a declared policy should be considered in this context (AWS [41]). To the extent that the scenario of concern to the appellant may be theoretically possible, it is unlikely, and is thus of little assistance in determining the validity s 146C: see by way of analogy Forge v ASIC at 69 [46] per Gleeson CJ; Wainohu at 240 [152]-[153] per Heydon J.

32. Section 146C does not confer any new functions on members of the Industrial Court in their capacity as individuals. Nor does it confer any new functions on members of the Court in that capacity. There may be circumstances in which the Court has cause to consider an award that has been made in accordance with s 146C of the Act, for example in proceedings for breach of an industrial instrument brought under Part 1 of Chapter 7, or proceedings for recovery of moneys under Part 2 of Chapter 7. However, the presence of the directive to the Commission in s 146C does not alter the nature of the task before the Court from what it would be otherwise, namely, construction of an instrument that the Commission has made, in the exercise of its functions, in accordance with its terms. Nor does the performance of that task by Judges who are also members of the Commission impair the reality or appearance of the decisional independence of the Court: see South Australia v Totani (2010) 242 CLR 1 at 47-48 [69] per French CJ. Section 146C(3) does not direct the court as to its determination of a collateral attack on the legal effect of an award or order in the course of enforcement proceedings. The Court's task here is the same as what it would be when applying other provisions of the Act that certain awards or orders of the Commission will not have legal effect if inconsistent with legislative requirements: see ss 146D(4), 405(1).

33. Contrary to the appellant's submissions, the fact that judicial members of the Commission may also sit as members of the Commission is not of itself sufficient to impugn the validity of the provision (AWS [46]-[50]). It is constitutionally unremarkable that the Industrial Court (which is not bound by s 146C) is required to enforce an award made by the Commission (which is). In general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence: Baker v The Queen (2004) 223 CLR 513 at 532 [43] per McHugh, Gummow, Hayne and Heydon JJ.

34. When s 146C is examined in detail, it is not apparent that the function it requires the Commission to exercise would, in the words of McHugh J in Kable (at 118-119), lead "ordinary reasonable members of the public" to conclude that the Industrial Court as an institution "was not free of government influence in administering the judicial functions invested in the court" (emphasis added), here, the Industrial Court. His Honour's observations indicate that the problem with the identification of a State court with the executive government is the effect or perception of government influence on the administration of the court's judicial functions. Whatever the role of the Commission in this case, there is no basis for any fair-minded person to imagine that s 146C would result in the effect or perception of the requisite nature in relation to the functions of the Industrial Court. See also Totani at 50 [75], 66 [142], 160 [436] and 172-173 [480].

35. The situation that arose in Wainohu may be contrasted in this context. The majority posed the question (at 229 [107]) of whether the relevant provision displayed "in its practical operation within the scheme of the Act repugnancy to or incompatibility with the institutional integrity of the Supreme Court". Immediately before posing this question, the majority quoted from the judgment of Mason and Deane JJ in Hilton v Wells (1985) 157 CLR 57 (at 83-84) in relation to the concept of *persona designata*:

> ... it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. (Emphasis added.)

36. The difficulty with the provision at issue in Wainohu was that it utilised public confidence in impartial, reasoned and public decision-making of eligible judges in the daily performance of their offices to support inscrutable decision-making: at 210 [47] per French CJ and Kiefel J, at 228-229 [105], 229-230 [109] per Gummow, Hayne, Crennan and Bell JJ. The vice in the impugned provision in that case, as described by the majority (at 229-230 [109]), was that it permitted, but did not require, an eligible judge to give reasons for making a decision in that capacity. In the absence of reasons, the Judge, in his or her capacity as an individual, could exercise the functions conferred by the legislation in a contested application with an outcome that could not be assessed according to the terms in which it was expressed. The opaque nature of the outcome made any collateral attack on the decision, and any application for judicial review for jurisdictional error, more difficult. It also contrasted with the

subsequent use of that outcome to make other orders under the Act, such as control orders.

37. For the reasons outlined above, s 146C of the Act does not bear the same character. It constitutes a legislative directive to the Commission to give effect to such policy as may be declared in a regulation to be applicable to the matter in question when making an award or order. The provision is not repugnant to the integrity of the Commission, being a non-judicial body, nor is it repugnant to the institutional integrity of the Industrial Court merely because the two bodies share common membership, common staff or common administration. The appellant's challenge to the provision should be dismissed.

Section 105

38. The Amending Act also amended s 105 of the Act, which defines unfair contracts for the purposes of Part 9 of Chapter 2 of the Act, to insert s 105(2). The subsection provides that a contract is not an unfair contract for the purposes of Part 9 "merely because of any provision in the contract that gives effect to a policy that is declared under section 146C". It does no more than confine, in one respect, the existing statutory jurisdiction of the Industrial Court relating to unfair contracts, by removing a particular ground on which an allegation of unfairness might be made. The provision constitutes a legislative choice to carve out from the scope of unfair contracts one that is said to be unfair merely because of the existence of provisions giving effect to declared policy. Contrary to the appellant's submissions (AWS [55]), it does not otherwise affect the determination of unfair contract proceedings before the Industrial Court. The use of the word "merely" indicates that the existence of such provisions may be considered if there is some additional aspect of the contract which makes it unfair.

39. The operation of s 105(2) is relevantly similar to numerous statutory provisions which constrain courts in the orders that they might make in the course of litigation. Further examples include:

(a) the imposition of limitation periods in relation to the bringing of actions;

(b) the imposition of impairment thresholds before damages may be awarded, for example in s 26C of the Civil Liability Act 2002 (NSW) and s 314 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW);

(c) caps on damages, such as s 35 of the Defamation Act 2005 (NSW), which is a uniform provision in the other States and Territories; and

(d) implementation of mandatory minimum sentences for offences, as in s 236B of the Migration Act 1958 (Cth).

40. The application of s 105(2) when determining whether a contract is an unfair contract cannot properly be characterised as impugning the institutional integrity of the Industrial Court. All that the section requires of the Court is to carve out from its consideration of unfair contracts a particular category of provision, if the existence of such a provision is the only basis on which unfairness is advanced. The process involved in applying the subsection does not "compromise or jeopardise the integrity" of the Industrial Court, nor is it apt to lead "reasonable and informed members of the public" to conclude that the Court is "not free from the influence of other branches of government in exercising [its] judicial function": North Australian Aboriginal Legal Aid Service Inc v Bradley at 172 [65] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 595-596 [33], 600-601 [41]-[42] per McHugh J. Rather, it involves the most basic quality of courts in which the public should have confidence, namely the administration of justice according to law: Baker at 519-520 [6] per Gleeson CJ.

Conclusion

41. For the reasons outlined above, the appeal should be dismissed with costs.

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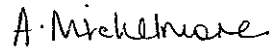

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