**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY** **NO M127 OF 2010**

On appeal from the Full Court of the Federal Court of Australia

**BETWEEN:** **JEMENA ASSET MANAGEMENT (3) PTY LTD (ACN 086 013 461)**
First Appellant

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

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

**AND:** **COINVEST LIMITED (ACN 078 004 985)**
Defendant

# SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)



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## PART I FORM OF SUBMISSIONS

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

## PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in the interests of the Respondent and submits that there is no inconsistency between ss 16-17, 152 and 170LZ (as relevantly applicable) of the *Workplace Relations Act 1996* (Cth) (**Commonwealth Act**) and the provisions of, and scheme established by, the *Construction Industry Long Service Leave Act 1997* (Vic) (**State Act**).

## PART III LEGISLATIVE PROVISIONS

3. Subject to the addition of s 16 of the Commonwealth Act annexed to these submissions at Annexure A, the Commonwealth agrees with the statement of applicable constitutional and statutory provisions set out in the annexure to the Appellants' submissions.

## PART IV ISSUES PRESENTED BY THE APPEAL

### A. THE SCOPE OF THE APPEAL

4. This is an appeal (AB 454) from orders made by the Full Court of the Federal Court (AB 451) dismissing an appeal from orders made by a single judge (AB 429) by which answers were given to separate questions stated pursuant to r 29.02 of the *Federal Court Rules* (AB 415).

5. Those questions arose on the pleadings (AB 5 and 17) because the Appellants apprehended imminent prosecution by the Respondent for failure to comply with notices given under s 10 of the State Act (AB 10-11 at [15]-[19]). By the notices, the Respondent sought information on certain persons employed by the Appellants between 21 January 2000 and 28 February 2007 (**relevant period**). It is in that context that the Appellants sought the declarations and injunctions set out in their application (AB 1).

6. In the interests of clarifying the applicable provisions of the Commonwealth Act for the purposes of this appeal, some brief understanding of the history of the provisions is necessary.

7. For the purposes of this appeal, there were two relevant and applicable periods of the operation of the Commonwealth Act.

7.1. First, the Commonwealth Act in its operation from the commencement of the relevant period, being 21 January 2000, to 26 March 2006, during which period the applicable provisions were ss 152 and 170LZ.[1]

7.2. Secondly, the Commonwealth Act in its operation from 27 March 2006 to the end of the relevant period, being 28 February 2007, during which period the applicable provisions were ss 16-17 and 170LZ.

8. The federal award[2] and federal certified agreements[3] were made before or during the first period of operation of the Commonwealth Act.

9. Following the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (**2005 Amendment Act**), whose commencement marks the start of the second period of operation:

9.1. The federal award was replaced by a "pre-reform award" in the same terms as the federal award by operation of item 4 of Sch 4 to the 2005 Amendment Act and s 152 of the Commonwealth Act was repealed. From that point, ss 16-17 applied to the federal award.

9.2. As to the federal certified agreements, upon the coming into force of the 2005 Amendment Act, s 170LZ was repealed, but by operation of cll 2(1)(g) and 13(1)(i) of Part 2 of Sch 7 to the 2005 Amendment Act, s 170LZ of the Commonwealth Act continued to apply to pre-reform agreements.

10. Finally, the Appellants correctly note in the annexure to their submissions that items 5 and 5A of Part 2 of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) provides for the continued existence of the pre-reform award and pre-reform agreements as transitional instruments and for those instruments, after the enactment of the *Fair Work Act 2009* (Cth) (**FW Act**), to continue to be subject to the same "instrument interaction rules" and "State and Territory interaction rules" that applied under the Commonwealth Act. The relevant State and Territory interaction rules are those in ss 16-17 (for the pre-reform award) and s 170LZ (for the pre-reform agreements) of the Commonwealth Act.[4]

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1 Sections 152 and 170LZ of the Commonwealth Act were in operation when the award and the first certified agreement were made before the commencement of the relevant period but, for the purposes of this appeal, it is only their operation on and from 21 January 2000 that is relevant.

2 Power and Energy Industry Electrical, Electronic and Engineering Employees Award 1998 (AB 92).

3 AGL Electricity and Agility (Victoria) Certified Agreement 2004 (AB 135); AGL Electricity and Agility Certified Agreement (Victoria) 2002 (AB 107); AGL Electricity Limited Enterprise Agreement 1999 (AB 102).

4 Entitlements to long service leave under a pre-reform award became legislative entitlements on 1 January 2010: s 113(1) of the FW Act. The paramountcy provisions in ss 26 and 27 of the FW Act would apply from that date and not ss 16 and 17 of the Commonwealth Act. However, s 113(1) will not apply where a pre-reform certified agreement applied to the employee and dealt with long service leave.

11. Thus, it is the Commonwealth Act, as in force during the relevant period, and the awards and agreements made under its authority, that apply to this appeal. No issue arises about the construction and operation of the FW Act.

**B. THE ALLEGED INCONSISTENCIES**

12. Many of the seminal cases on s 109 of the Constitution arose in the employment context. In each of those cases, the Court was careful to identify the precise manner in which the asserted inconsistency was said to arise. That is because awards and agreements made under the Commonwealth Act and its predecessors are not themselves laws of the Commonwealth and could not, without more, attract the operation of s 109 of the Constitution.[5]

13. Here, the Appellants allege two grounds of inconsistency being between:

    13.1. on the one hand, the federal award and, on the other hand, the State Act and instruments referred to in that Act (AB 455 at [3]); and

    13.2. on the one hand, federal certified agreements and, on the other hand, the State Act and instruments referred to in that Act (AB 454 at [2]).

14. The alleged inconsistency, then, is between the provisions of the Commonwealth Act which authorised the making of the federal award and the federal certified agreements so as to constitute them as exhaustive and exclusive regulations of the subject-matter and the State Act.[6] Of critical importance are ss 152 and 170LZ of the Commonwealth Act (as in force in the relevant period before 27 March 2006) and ss 16-17 and 170LZ of the Commonwealth Act (from that date).

15. Adopting the explanation in *Ex parte McLean*:[7]

    15.1. The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorise awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law.

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5 *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 641 (Gibbs CJ, Wilson and Dawson JJ) and 648 (Mason, Brennan and Deane JJ).

6 *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 641-642 (Gibbs CJ, Wilson and Dawson JJ) and 648 (Mason, Brennan and Deane JJ).

7 (1930) 43 CLR 472 at 484-485 (Dixon J); *TA Robinson & Sons v Haylor* (1957) 97 CLR 177 at 183 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ); *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 648 (Mason, Brennan and Deane JJ).

15.2. The Commonwealth Act conferred such a power upon the Commission, which could therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law.

15.3. Section 109 gave paramountcy to the Commonwealth Act so empowering the Commission, with the result that State law could not validly operate where the Commission had exercised its authority to determine a dispute in disregard of State regulation.

## C. THE TEST FOR INCONSISTENCY

16. Inconsistency, within the meaning of s 109 of the Constitution, in every case lies in a State law in its legal or substantive operation altering, impairing or detracting from a Commonwealth law in its legal or substantive operation.[8]

17. The application of that test turns on the extent (if at all) that it is the intention of the Commonwealth Parliament – determined as a matter of statutory construction[9] – to make its enactment the complete, exhaustive or exclusive statement of legal rights or liabilities.[10]

18. The Commonwealth law may state expressly the extent to which the enactment is or is not intended to be a complete, exhaustive or exclusive statement of applicable legal rights or liabilities.[11] Such statements operate as an interpretative guide and must be supported by the substantive provisions of the Act.[12]

19. Absent such an express provision, it is necessary to engage in an inferential interpretative exercise in relation to the Commonwealth law, by reference to matters including the nature of the conduct governed by the law, the purpose of the enactment, the pre-existing state of the law, the mischief to which the enactment is directed and the drafting history.[13]

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8 *Ex parte McLean* (1930) 43 CLR 472 at 483-486 (Dixon J); *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

9 *Dickson v R* (2010) 84 ALJR 635 at 642-643 [32], [34].

10 *Ex parte McLean* (1930) 43 CLR 472 at 483, 485 (Dixon J); *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237 at 280 (Aickin J).

11 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 -564 (Mason J); *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 466 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 465 (the Court); *Bayside City Council v Telstra Corporation* (2004) 216 CLR 595 at 627-629 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). See also Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38 *Federal Law Review* 445, 457-459.

12 *John Holland v Victorian Workcover Authority* (2009) 239 CLR 518 at 527 [20] (the Court).

13 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630-632 (Dixon J); *Dickson v R* (2010) 84 ALJR 635 at 640-641 [20]-[28].

## D. EXPRESS STATEMENTS IN THE COMMONWEALTH ACT ABOUT OPERATION OF STATE LAW

20. In the present case, there are express statements in the Commonwealth Act about the extent to which awards and agreements made under the Act are intended to be exclusive of State laws.

20.1. Section 152 of the Commonwealth Act (applicable before 27 March 2006), in its application to inconsistency between federal awards and State laws, is akin to provisions of the *Conciliation and Arbitration Act 1904* (Cth) previously considered by this Court.[14] It evinces a statutory intention that an award made pursuant to the Commonwealth Act is to operate to the exclusion of any State law. The critical question that arises is: what is the conduct or matter with which the award deals?[15]

20.2. Section 170LZ(1) of the Commonwealth Act (applicable throughout the relevant period), in its application to inconsistency between federal certified agreements and State laws (including instruments made under a law of a State), though differently worded to s 152, similarly evinces a statutory intention that an agreement certified under the Commonwealth Act is to operate to the exclusion of State law. A State law will be regarded as being inconsistent with the Commonwealth Act itself where terms and conditions of employment specified in the State law are inconsistent with a certified agreement. The critical question that arises is: what are the terms and conditions of employment with which the agreement deals?[16]

20.3. Section 17 of the Commonwealth Act (applicable after 27 March 2006), in its application to inconsistency between the award and State laws, must also be read with s 16(1)-(3). Section 16 evinces an intention that the Commonwealth Act is not intended to apply to the exclusion of State laws about long service leave. Section 17 evinces a statutory intention that an award or agreement made pursuant to the Commonwealth Act is to operate to the exclusion of any State law to the extent of any inconsistency. The critical question that arises is: what is the conduct, matter or terms and conditions of employment with which the award or agreements deal?

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[14] *Collins v Charles Marshall* (1955) 92 CLR 529; *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237; *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632.

[15] *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 649 (Mason, Brennan and Deane JJ).

[16] *Compass Group (Australia) v Bartram* (2007) 239 ALR 262 at 266 [21] (Jessup J, Lander J agreeing).

21. Each of the above questions directs attention to the legal and substantive operation of the award and agreements, in particular to a consideration of the terms and nature of each and the subject-matter with which it deals.[17]

## E. CONSTRUING THE AWARD AND AGREEMENTS

### The nature of awards and agreements

22. That the award and agreements do not of themselves attract the operation of s 109 of the Constitution[18] has an effect on the manner in which those instruments are construed. Those instruments are not laws of the Commonwealth,[19] but settlements of industrial disputes or agreements reached between employer and employee. Few awards or agreements reflect an intention to express completely, exhaustively and exclusively the law governing the contract between the parties.[20]

23. It is well accepted that awards and agreements are construed against the background of State and federal law.[21] In that context it is important to observe that the State Act predated the making of the award and agreements. The silence of an award or agreement on a matter dealt with in an existing State law is usually a factor telling strongly against exclusion of State law: had the Commission or the parties had an intention to exclude State law, it would have been easy for them to have expressed that intention in the award or agreement.[22]

24. As to the provisions of the award and agreements in this case, there is no express provision in the award or agreements that either establishes a portable long service leave scheme or ousts the operation of the State Act.

### Greater obligations

25. The central contention for the Appellants is that the State Act imposes obligations in addition to and inconsistent with the award and agreements[23] and they rely on the decisions in *Blackley v Devondale Cream (Vic)*[24] and *Telstra Corporation v Worthing*.[25] *Dickson v R*[26] should presumably be added to that list.

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17 *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 650 (Mason, Brennan and Deane JJ).

18 See above at [12].

19 See, eg, *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 641 (Gibbs CJ, Wilson and Dawson JJ).

20 *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237 at 287 (Wilson J).

21 *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237 at 246 (Stephen J), 263-264 (Mason J); *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642 (Gibbs CJ, Wilson and Dawson JJ), 651 (Mason, Brennan and Deane JJ).

22 *TA Robinson & Sons v Haylor* (1957) 97 CLR 177 at 184 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).

23 Appellants' Submissions at [30], [37], [45]-[48].

24 (1968) 117 CLR 253.

25 (1999) 197 CLR 61.

26. Before turning to each of those cases, it is important to note, as accepted by the Full Court (AB 442 at [15]), that s 6 of the State Act does not confer a right or entitlement on an employee to long service leave. The Commonwealth agrees with the submissions of the Respondent on this point and with the Respondent's concession that if, contrary to that submission, the State Act does confer such a right, then the State Act is, to that extent, invalid.[27]

27. As to each of the decisions relied upon by the Appellants:

27.1. Chief Justice Barwick's holding in *Blackley* – that there was a "direct collision" because the State law, if allowed to operate, would impose an obligation greater than that which the federal law has provided – was based on his immediately preceding observation that the minimum wage fixed by the award was "the largest wage which the employer is required by the Act and the award to pay".[28] Thus, a State law that required the payment of a larger sum by way of wages detracted from the federal law. That reveals an important point about the inquiry that must be undertaken. It is not every obligation imposed by State law on an employer that is relevantly "greater" or "additional" to those obligations imposed by federal awards or instruments. A State payroll tax law imposes additional obligations on an employer. Rather, it is necessary first to identify the precise obligation(s) imposed by the award or instrument and then to ask, in respect of each particular obligation, whether a "greater" or "additional" obligation is imposed by State law. The obligations imposed by the award and agreements are obligations on the employer vis-à-vis its employees to grant and pay for long service leave to particular employees (AB 97-101). The provisions of the State Act and the trust deed say nothing about those obligations.

27.2. In *Telstra Corporation v Worthing*, the Court's conclusion that the application of the State compensation law would "qualify, impair and in some respects, negate the application of federal law"[29] was based on a thorough review of the provisions of the State and federal laws dealing respectively with entitlements to, and conditions imposed upon, compensation for total continuing incapacity, permanent injuries, medical payments, non-economic loss and interest. It was not the mere existence of two schemes that led to inconsistency, but that the particular rights granted by State law would deny or vary rights, powers or privileges conferred by federal law. There is nothing about the State Act in this case that undermines or negates the criteria adopted in the award and

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26 (2010) 84 ALJR 635.

27 Respondent's Submissions at [3.1]. The Commonwealth also agrees with the Respondent's submissions to the effect that even though s 6 of the State Act might authorise the making of rules inconsistent with the award and agreements, no such rules have been made and so no inconsistency arises.

28 (1968) 117 CLR 253 at 258.

29 (1999) 197 CLR 61 at 78. The test stated by Isaacs J in *Clyde Engineering Co v Cowburn* (1926) 37 CLR 466 at 499 is to similar effect ("A state law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute").

agreements for the grant of leave or payment in respect of that leave. The relevant obligation imposed by the trust deed is to pay a charge into a fund. Furthermore, the recoupment provisions (AB 376) ensure that where the operation of the State Act and trust deed might have led to an employer not only paying for long service leave, but also paying the charge in respect of a particular employee, that effect, which might otherwise have involved some undermining or negation of the award and agreements, is not realised.

27.3. In *Dickson*, the Court's conclusion that s 321 of the *Crimes Act 1958* (Vic) was inconsistent with s 11.5 of the *Criminal Code* (Cth) was relevantly based on the proposition that the State law rendered criminal conduct not caught by and "deliberately excluded from" the conduct rendered criminal by the federal law.[30] The "deliberate legislative choice" ascertained by construing the federal law led to the conclusion that there was an area of liberty designedly left and which should not be closed up.[31] In accordance with the propositions about construction of the award and agreements in this case, there is no basis for a conclusion that portable long service leave was deliberately excluded from the award and agreements.

28. Finally, far from altering, impairing or detracting from the substantive operation of the long service leave provisions of the award and agreements, the recoupment mechanism in the State law may be seen as furthering the operation of those provisions as:

28.1. the fund, and the system for payments into it, provide a system of provisioning for long service leave liabilities (AB 344-348);

28.2. it encourages employers to grant long service leave by allowing for recoupment of costs paid to employees from the fund; and

28.3. it provides a fund against which recourse might be had for payment of long service leave entitlements in the event of the employee's termination (AB 365).

**F. "INDIRECT INCONSISTENCY"**

29. While the concept[32] and terminology[33] of "indirect" inconsistency are reflected in the reasons of Isaacs J in *Clyde Engineering v Cowburn*,[34] the way Isaacs J employed the terminology emphasises there is no dichotomy between "direct" and "indirect" inconsistency:[35]

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30 (2010) 84 ALJR 635 at [22].

31 (2010) 84 ALJR 635 at [25].

32 (1926) 37 CLR 466 at 489.

33 (1926) 37 CLR 466 at 491, 492.

34 (1926) 37 CLR 466

35 (1926) 37 CLR 466 at 491 (emphasis in original).

> Assuming the existence of an inter-State dispute, the Federal law is to be obeyed. No State law can in the presence of sec.109 of the Constitution be permitted to stand in the way of the settlement so authorized or directed. No State law can prevent that settlement by direct prohibition, either wholly or partly. *And what it cannot do directly it cannot do indirectly.* ... Where, therefore, a Federal dispute exists, no existing State law, whatever its terms, can indirectly or to any extent be regarded as presenting a legal bar to the full exercise of the Federal arbitral power.

30. For that reason, and because of the particular propositions that attach to the construction of awards and agreements, an enquiry into whether there is "indirect" inconsistency between the instruments and the State Act and trust deed is of doubtful utility.

31. Nevertheless, to the extent that the Full Court characterised the field covered by the award and agreements in a way that denied that a portable long service leave scheme was a matter pertaining to the industrial relationship between employers and employees, it was in error (AB 449 at [45], 455 at [5]).[36]

32. A provision in an award or agreement that provided for long service leave entitlements and otherwise excluded the application of a State portable long service leave scheme would be one pertaining to the relationship between the employer and its employees.[37] A scheme that exists to provide benefits for employees and into which contributions are made by an employer, is one pertaining to the employment relationship between employers, as such, and employees, as such.[38] Here, for the duration of the employment relationship, the employer is obliged to pay a long service leave charge to the trustee "in respect of every worker employed by the employer to perform construction work in the construction industry".[39]

33. That is sufficient to bring the scheme within reasoning from analogical cases concerning payments made by employers into superannuation funds for the benefit of employees. Thus in *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufacturers*, the Court held such payments to be matters pertaining to the employment relationship and said:[40]

> The words "pertaining to" in the definition of industrial matters mean "belonging to" or "within the sphere of" and the expression "the relations of employers and employees" refers to the relation of an employer as such with an employee as such ... The matters which will answer that description have been dealt with from time to time and the

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36 As was observed in *Electrolux Home Products v AWU* (2004) 221 CLR 309 at 369-371 [157]-[163] (Gummow, Hayne and Heydon JJ), the "matters pertaining" phrase has a long history in industrial relations law and particularly in applicable statutes. During the first part of the relevant period in this case, the "matters pertaining" phrase was contained in the definition of "industrial dispute" and in s 170LI of the Commonwealth Act.

37 *ColNVEST v Visionstream* (2005) 144 IR 137 at [14].

38 *Electrolux Home Products v AWU* (2004) 221 CLR 309 at 369-371 [157]-[163] (Gummow, Hayne and Heydon JJ).

39 State Act, s 4 (in its form during the relevant period both before and after the amendment effective from 1 March 2005: see the annexure to the Appellants' submissions) and trust deed rules, r 11 (AB 289-290, 344).

40 (1986) 160 CLR 341 at 353.

> propositions to be derived from the cases are collected by Mason J. in *Federated Clerks' Union (Aust.) v. Victorian Employers' Federation.* 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.

34. As to the proposition from *Re Amalgamated Metal Workers Union; Ex parte Shell Co of Australia*[41] – that if an employer has no power to grant a particular claim then that will indicate that it is not a matter pertaining to the employment relationship – three things may be said:

34.1. First, the proposition is but an "indication" and as the Court said immediately afterwards one "that will not always be so".

34.2. Secondly, one instance where the proposition will not hold is where the employer's assent or dissent to the claim is relevant.

34.3. Thirdly, it is important to identify the claim before treating the proposition as determinative. Here, the claim would be one by employees for the applicability of the State Act. The employer's ability to dissent disposes of the proposition.

That the Full Court erred to the extent it considered that a portable long service leave scheme is not one that pertains to the industrial relationship between employer and employee does not mean that a conclusion of inconsistency follows. The Full Court was otherwise correct to hold that the State scheme "does not intrude into the field of the industrial relationship between employer and employee in a way that the Federal Scheme Instruments expressly or impliedly exclude" (AB 449 at [47]). That characterisation of the "field" is borne out by the construction of the award and agreements.

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41 (1992) 174 CLR 345 at 358 (Mason CJ, Deane, Toohey and Gaudron JJ).

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## ANNEXURE A: SECTION 16 OF THE COMMONWEALTH ACT

*Workplace Relations Act 1996* (Cth) (after 27 March 2006)

**16 Act excludes some State and Territory laws**

(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:

(a) a State or Territory industrial law;

(b) a law that applies to employment generally and deals with leave other than long service leave;

(c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);

(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines ***applies to employment generally.***

*State and Territory laws that are not excluded*

(2) However, subsection (1) does not apply to a law of a State or Territory so far as:

(a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the non-excluded matters ) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

*This Act excludes prescribed State and Territory laws*

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

*Definition*

(6) In this section:

"this Act" includes the Registration and Accountability of Organisations Schedule and regulations made under it.