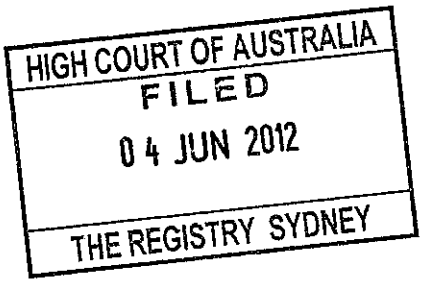
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

NSW ATTORNEY GENERAL
Third Respondent

NSW MINISTER FOR FINANCE & SERVICES
Fourth Respondent

UNIONS NSW
Fifth Respondent

APPELLANT'S SUBMISSIONS

W.G. McNALLY JONES STAFF
Level 10, Tattersalls Building
179 Elizabeth Street
SYDNEY NSW 2000

Telephone: (02) 9233 4744
Fax: (02) 9223 7859
Ref: NK:TM:1111024
Contact: Bill McNally/Nathan Keats

PART I: Suitability for Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: Concise Statement of Issues

2. The issues arising in this appeal are:

   (a) Whether the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) is invalid by reason that it undermines the institutional integrity of the Industrial Relations Commission of New South Wales ("the Commission") when constituted as the Industrial Court of New South Wales.

   (b) Whether the imposition of a requirement upon judges of a State court to give effect to any matter declared by the executive to be an aspect of government policy when exercising non-judicial functions as part of an arbitral tribunal undermines the institutional integrity, or appearance of the independence and impartiality, of that court.

   (c) Whether the requirement imposed upon judicial members of the Commission to give effect to government policy when sitting as the Commission (not constituted as the Industrial Court) undermines the institutional integrity of the Industrial Court having regard to the closely intertwined composition, operation and functions of the Commission and the Commission constituted as the Industrial Court.

PART III: Section 78B of the Judiciary Act

3. The appellant has given notice in accordance with s 78B of the *Judiciary Act 1903* (Cth) by letters dated 18 May 2012. The appellant does not consider that any further notices are required.

PART IV: Citations

4. The judgment of the Full Bench of the Industrial Court of New South Wales which is subject of this appeal is unreported and has the following medium neutral citation:

   Public Services Association and Professional Officers' Association Amalgamated Union of New South Wales v Director of Public Employment [2011] NSWIRComm 143.

PART V: Statement of Facts

Proceedings in the Industrial Relations Commission

5. On 7 March 2011, the appellant made application to the Industrial Relations Commission of New South Wales for the making of two new awards to apply to certain employees employed in service of the Crown in right of New South Wales. The proceedings were programmed for hearing to commence on 1 August 2011 and the appellant had filed its evidence on 21 April 2011.

6. The applications (which are yet to be finally determined) seek increases in salaries and allowances payable to employees of the Crown eligible to be members of the appellant. In the applications, the appellant asks the Commission to exercise its jurisdiction under s 10 of the *Industrial Relations Act 1996* (NSW) ("the Act") to make awards setting "*fair and reasonable conditions of employment for employees*".

7. On 12 May 2011, the New South Wales Government announced its intention to introduce into Parliament certain amendments to the Act with the stated intention of ensuring that the Industrial Relations Commission complied with the Government's policy dealing with public sector salaries.

8. On 17 June 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) ("the Amendment Act") received royal assent and commenced operation. The principal feature of the Amendment Act was to insert into the Act a new s 146C as follows:

> **146C. Commission to give effect to certain aspects of government policy on public sector employment**
>
> (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
>
> (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
>
> (b) that applies to the matter to which the award or order relates.
>
> (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
>
> (3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.
>
> (4) This section extends to appeals or references to the Full Bench of the Commission.
>
> (5) This section does not apply to the Commission in Court Session.

(6) This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.

(7) This section has effect despite section 10 or 146 or any other provision of this or any other Act.

(8) In this section:

"award or order" includes:

(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 section 50 of the principles or provisions of a National decision or the making of a State decision under section 51, and

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

"conditions of employment" -see Dictionary.

"public sector employee" means a person who is employed in any capacity in:

(a) the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown, or

(b) the service of any body (other than a council or other local authority) that is constituted by an Act and that is prescribed by the regulations for the purposes of this section.

9. In addition, an amendment was made to s 105 of the Act which operated to restrict the power of the Industrial Court under s 106 to declare void or to vary contracts whereby a person performs work in an industry which it found to be unfair. The Amendment Act inserted a new subsection (2) as follows:

105. Definitions

...

(2) A contract is not an unfair contract for the purposes of this Part merely because of any provision in the contract that gives effect to a policy that is declared under section 146C.

10. On 20 June 2011, the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) was promulgated and purports to set out matters that are declared to be aspects of government policy to be given effect by the Commission for the purposes of s 146C. The principal feature of the Regulation is that the Commission may not award increases in remuneration or other conditions of employment for public sector employees that increase employee-related costs by more than 2.5% per annum unless offset by

employee-related costs savings.[1]

11. On 23 June 2011, the appellant indicated to the Commission that it intended to submit, among other things, that the Amendment Act and the Regulation were invalid and did not constrain the powers of the Commission. The appellant asked the Commission to determine that matter in the course of hearing its applications for the making of new awards coving its members.

12. On 15 July 2011, the Attorney-General for the State of New South Wales submitted to the Commission that the question of the validity of the Amendment Act raised by the appellant should be determined by the Commission in Court Session and that there should be a reconstitution of the Commission for that purpose.

13. By statement given on 18 June 2011, the President of the Commission, Justice Boland, directed that the appellant file a notice of motion setting out the relief claimed in relation to the validity of the Amendment Act and that the Commission *"sit as a Full Bench of the Commission in Court Session"* to hear the parties and interveners on the motion.

14. On 20 July 2011, the appellant filed a notice of motion seeking, among other things, a declaration that the Amendment Act is invalid. The notice of motion was heard by a Full Bench of the Industrial Court on 1 and 2 August 2011. By decision given on 31 October 2011, the Full Bench held that the Amendment Act was not invalid and dismissed the appellant's notice of motion.

15. The appellant was granted special leave to appeal to this Court from that decision on 11 May 2012.

History of the Industrial Relations Commission and its predecessors

16. The Commission and its predecessors have a long history.

17. A Court of Arbitration was first established by the *Industrial Arbitration Act 1901* (NSW). The Court of Arbitration was a court of record and consisted of a President, who was to be a judge of the Supreme Court, together with one member nominated by employers and one member nominated by industrial unions.[2] The Court of Arbitration had jurisdiction to hear and determine any industrial dispute or industrial matter, to make any order or award or give any direction in pursuance of such hearing or determination as well as to deal with all offences and enforcement.[3]

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[1] *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW), reg. 6(1)(a) and (b).
[2] *Industrial Arbitration Act 1901* (NSW), ss 16-17.
[3] *Industrial Arbitration Act 1901* (NSW), s 26.

18. The Court of Arbitration was replaced by the Industrial Court under the *Industrial Disputes Act 1908* (NSW)[4] and then by the Court of Industrial Arbitration under the *Industrial Arbitration Act 1912* (NSW). The Court of Industrial Arbitration was a superior court and court of record and had jurisdiction to fix minimum wages and other conditions of employment as well as hear and determine proceedings for offences and with respect to enforcement.[5]

19. The *Industrial Arbitration Act 1912* (NSW) was amended by the *Industrial Arbitration (Amendment) Act* 1926 (NSW) so as to establish the Industrial Commission of New South Wales which was vested with the jurisdiction and powers of the Court of Industrial Arbitration.[6] Provision was made for the appointment of industrial commissioners to the Commission.[7]

20. The *Industrial Arbitration Act 1940* (NSW) similarly made provision for the establishment of the Industrial Commission of New South Wales to be comprised of five or six members who were to have the same rank, status and precedence as a puisne judge of the Supreme Court.[8] The 1940 Act also made provision for the appointment of conciliation commissioners.[9] In 1947, this Court found that the Industrial Commission established by the 1940 Act was a "court" for the purposes of the *Judiciary Act 1903* (Cth).[10]

21. The *Industrial Relations Act 1991* (NSW) abolished the Industrial Commission and established a superior court of record known as the Industrial Court comprised of a Chief Judge, Deputy Chief Judge and other judges[11] and a separate Industrial Relations Commission comprised of a President, Vice-President, Deputy President and Conciliation Commissioners.[12] The conciliation and arbitration and award-making functions were conferred on the Commission with other functions, such as enforcement, conferred on the Industrial Court.

22. The current Commission is established by s 145(1) of the 1996 Act. The Act repealed the *Industrial Relations Act 1991* (NSW) and replaced the separate Commission and Industrial Court with a single body known as the Industrial Relations Commission of New South Wales. In the second reading speech, the then Attorney General and Minister for Industrial Relations said:[13]

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[4] *Industrial Disputes Act 1908* (NSW), s 13.
[5] *Industrial Arbitration Act 1912* (NSW), s 13.
[6] *Industrial Arbitration (Amendment) Act 1926* (NSW), s 3.
[7] *Industrial Arbitration (Amendment) Act 1926* (NSW), s 6.
[8] *Industrial Arbitration Act 1940* (NSW), s 14.
[9] *Industrial Arbitration Act 1940* (NSW), s 15.
[10] See *Re: An Application by the Public Service Association of NSW* (1947) 75 CLR 430.
[11] *Industrial Relations Act 1991* (NSW), s 288.
[12] *Industrial Relations Act 1991* (NSW), s 315.
[13] *New South Wales Parliamentary Debates (Hansard), Legislative Council, 23 November 1995,* p3851 as adopted on 17 April 1996, p81-82.

> Chapter 4 deals with the new commission, which will replace the existing Industrial Court and commission. Part 1 provides for the establishment of the Industrial Relations Commission of New South Wales and sets out its general functions. The commission will occupy a central role in the regulation of industrial affairs in this State exercising, either as the commission or the commission in court session, the range of functions currently divided between the Industrial Court and commission. In accordance with our pre-election commitment and the weight of submissions from interested parties, the Industrial Court will be abolished and its functions integrated into the commission and commission in court session. (Emphasis added)

23. The present functions and composition of the Commission and Court are set out in Part VI.

PART VI: Appellant's Argument

Introduction

24. The Amendment Act, and s 146C in particular, is invalid by reason that it impairs the institutional integrity of the Industrial Court in a manner inconsistent with Chapter III of the Constitution. The Amendment Act does so by requiring judges of the Court to give effect to any government policy dictated by the executive and act, in effect, as an arm of the executive, when acting as presidential members of the Commission.

Functions and composition of the Commission and the Industrial Court

25. The functions of the Commission include setting remuneration and other conditions of employment, resolving industrial disputes, hearing and determining other industrial matters, inquiring into any matter referred to it by the Minister as well as other functions conferred by the Act or any other law.[14] Among other things, the Commission may make awards *"setting fair and reasonable conditions of employment"*.[15]

26. The Commission consists of a President, a Vice-President and Deputy Presidents (who are known as "presidential members") as well as an unlimited number of Commissioners.[16] A presidential member of the Commission may be appointed as a member of the Commission in Court Session and, if so appointed, is known as a *"judicial member of the Commission"*.[17] By amendment, the name of the Commission in Court Session is now the Industrial Court of New South Wales.[18]

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[14] *Industrial Relations Act 1996* (NSW), s 146(1).
[15] s 10.
[16] s 147.
[17] s 149(1) and (3).
[18] s 151A.

27. The Industrial Court *"is the Commission constituted by a judicial member or members only for the purposes of exercising functions that are conferred or imposed on the Commission in Court Session"*.[19] The Commission, when constituted as the Industrial Court, is established as a superior court of record and is a court of equivalent status to the Supreme Court and the Land and Environment Court.[20] The only persons who may be appointed as members of the Industrial Court are presidential members of the Commission.[21]

28. The Act requires that certain functions *"of the Commission"* be exercised only when it is constituted as the Industrial Court, including proceedings for an offence, declarations of right, breach of industrial instruments or for contempt.[22] If a matter arises in proceedings before the Commission (otherwise than in Court Session) within the jurisdiction of the Industrial Court, the Commission may continue to deal with a matter if constituted or reconstituted by a judicial member.[23] The rules of evidence and other formal procedures of a superior court of record apply to the Industrial Court.[24]

29. The Industrial Court is conferred with jurisdiction under other State legislation, including in relation to proceedings for offences[25] as well as certain civil proceedings.[26] The Industrial Court is also an "*eligible State or Territory court*" for the purposes of s 12 of the *Fair Work Act 2009* (Cth)[27] and is able to exercise jurisdiction with respect to proceedings seeking the imposition of pecuniary penalties for contraventions of that Act and recovery of underpayments.[28]

30. The Commission, when not constituted as the Industrial Court, is not required to act formally, is not bound by the rules of evidence and may inform itself as it considers just.[29] However, the Act contemplates that the Commission will

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[19] s 151(1).
[20] s 151(1) and (2).
[21] s 149(1).
[22] s 153(1) and (4).
[23] s 176(3).
[24] s 163(2).
[25] *Work Health and Safety Act 2011* (NSW), ss 229B and 255; *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 245; *Building and Construction Industry Long Service Payments Act 1986* (NSW), s 64; *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* (NSW), s 103; *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW), s 47; *Rail Safety Act 2008* (NSW), s 132; *Explosives Act 2003* (NSW), s 32; *Workplace Surveillance Act 2005* (NSW), s 45.
[26] *Superannuation Administration Act 1996* (NSW), ss 40 and 88; *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW), s 23; *Essential Services Act 1988* (NSW), ss 19 and 22-24; *Employment Protection Act 1982* (NSW), s 15; *Annual Holidays Act 1944* (NSW), s 12-13; *Long Service Leave Act 1995* (NSW), s 14; *Long Service Leave (Metalliferous Mining Industry) Act 1963* (NSW), s 12; *Apprenticeship and Traineeship Act 2001* (NSW), s 55; *Transport Appeals Board Act 1980* (NSW), s 23A; *Health Services Act 1997* (NSW), s 97.
[27] See paragraph (ca) in the definition of "eligible State or Territory court" in s 12 of the *Fair Work Act 2009* (Cth).
[28] *Fair Work Act 2009* (Cth), Part 4-1.
[29] s 163(1).

conduct proceedings by holding hearings. The Commission may exercise the powers of the Supreme Court with respect to the attendance and examination of witnesses or the production of documents[30] and issue summons.[31] Parties are entitled to be represented by a legal practitioner or agent.[32]

31. The Commission must be constituted only by a judicial member or members when sitting as the Industrial Court.[33] The Commission, when not sitting as the Industrial Court, can be constituted by any member for the purposes of exercising its functions.[34] A Full Bench of the Commission must include at least one presidential member.[35] Some functions of the Commission, however, can only be exercised by a judicial member even if the Commission is not constituted as the Industrial Court.[36]

Validity of the Amendment Act

32. The Commission, when constituted as the Industrial Court, is a "*court of a State*" capable of being invested with federal jurisdiction for the purposes of s 77(iii) of the Constitution and is invested with federal jurisdiction by operation of s 39(2) of the *Judiciary Act 1903* (Cth).[37] As has been mentioned, the Industrial Court also has federal jurisdiction under the *Fair Work Act 2009* (Cth).

33. It is axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Chapter III of the Constitution. A State legislature cannot legislate so as to confer upon a State court a function which substantially impairs its institutional integrity and which is therefore incompatible with or repugnant to its role, under Chapter III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian judicial system.[38]

34. The limitation upon State legislative power enunciated in *Kable* also leads to the conclusion that a State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the

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[30] s 164(1).
[31] s 165.
[32] s 166(1).
[33] ss 151(1), 156(3) and 176(3).
[34] s 155.
[35] s 156(2).
[36] *Police Act* 1990 (NSW), s 181K; *Health Services Act 1997* (NSW), s 90.
[37] *Morrison v Chevalley* (2010) 198 IR 30 at [141]-[151] and the approach in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [113]-[131] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ
[38] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J, at 103 per Gaudron J, at 116-119 per McHugh J, at 127-128 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [15] per Gleeson CJ; *South Australia v Totani* (2010) 242 CLR 1 at [69] per French CJ, at [201]-[202] per Hayne J; *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [44] per French CJ and Kiefel J, at [105] per Gummow, Hayne, Crennan and Bell JJ; *Crump v New South Wales* [2012] HCA 20 at [31] per French CJ.

functions of the court of which the judge is a member.[39] Such incompatibility may exist where the function conferred on a judge gives rise to a substantial impairment of the essential curial characteristics of independence and the appearance of independence from the executive government.[40]

35. French CJ described the principles as follows in *Crump v New South Wales* [2012] HCA 20 at [31]:

> Limits upon the power of State legislatures to make laws affecting State courts and their decisions are derived by implication from Ch III of the Constitution as explained in a number of decisions of this Court beginning with Kable v Director of Public Prosecutions (NSW). State legislatures cannot abolish State Supreme Courts nor impose upon them functions incompatible with their essential characteristics as courts, nor subject them, in their judicial decision making, to direction by the executive. A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the court's institutional integrity. Nor can a State legislature enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member. State legislatures cannot immunise statutory decision-makers from judicial review by the Supreme Court of the State for jurisdictional error.

36. Whilst *"the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcome"*,[41] the essential characteristics of a court include (at a very minimum) the reality and appearance of the court's independence from the executive and the legislature and of its impartiality.[42]

37. The risk of a finding that a law is inconsistent with the limitations imposed by Chapter III is particularly significant where the law impairs the reality or appearance of the decisional independence of the court.[43] The Court has been particularly scrupulous in its scrutiny of legislative measures that call upon courts or judges to *"act and decide, effectively as the alter ego of the legislature or the executive"*,[44] or subject a court *"in reality or appearance to direction from the*

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[39] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 117-118 per McHugh J; *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [47] per French CJ and Kiefel J, at [105] per Gummow, Hayne, Crennan and Bell JJ; *Crump v New South Wales* [2012] HCA 20 at [31] per French CJ.
[40] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [47] per French CJ and Kiefel J,
[41] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [104] per Gummow J.
[42] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 116 per McHugh J, at 134 per Gummow J; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29]-[30] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [219] per Callinan and Heydon JJ.
[43] *South Australia v Totani* (2010) 242 CLR 1 at [69] per French CJ and also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [39] per Gummow, Hayne, Heydon and Kiefel JJ.
[44] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [219] per Callinan and Heydon JJ.

executive as to the content of judicial decisions"[45] or enlist a court or judge *"in the implementation of legislative policy"*.[46]

38. The primary function of the Industrial Relations Commission is arbitral.[47] The performance of the Commission's traditional arbitral functions of setting conditions of employment and undertaking the task of the conciliation and arbitration of industrial disputes in a manner which is independent of government, and does not require it to act at the behest of government, would not impair the institutional integrity of the Commission when constituted as the Industrial Court.[48]

39. The Amendment Act, however, goes further and affects critically the functions of the Commission in a manner which substantially impairs the reality and appearance of its independence. The Commission is directly subject of the dictates of government policy and is required by s 146C(1) to *"give effect to any policy on conditions of employment of public sector employees ... that is declared by the regulations"* when making or varying any award or order. The declaration constitutes an instruction to the Commission by the executive that it is required to comply with the identified policy of Government. It is immaterial that the form of the direction of the executive is by way of a regulation.

40. The obligation to give effect to government policy extends to any act or decision of the Commission. The concept of an *"award or order"* extends to *"anything done in arbitration proceedings or proceedings for a dispute order"*[49] and an award or order has no effect to the extent that it is inconsistent with the obligation to give effect to government policy.[50]

41. The requirement to give effect to government policy operates *"despite section 10 or 146 or any other provision of this or any other Act."*[51] The Commission must give effect to government policy whether or not doing so will provide *"fair and reasonable conditions of employment"* or accord with the public interest or the objects of the Act.[52] That is, judges of the Industrial Court, when sitting as the presidential members of the Commission, are required to make orders and awards as directed by government policy irrespective of the fairness or

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[45] *South Australia v Totani* (2010) 242 CLR 1 at [71] per French CJ.
[46] *South Australia v Totani* (2010) 242 CLR 1 at [428] per Crennan and Bell JJ.
[47] See, for example, s 146(1) and *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 64 NSWLR 604 at [39].
[48] *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 64 NSWLR 604 at [48].
[49] s 146C(8).
[50] s 146C(3).
[51] s 146C(7).
[52] This distinguishes s 146C from provisions applying to administrative tribunals such as the Administrative Decisions Tribunal which is required by s 64 of the *Administrative Decisions Tribunal Act* 1997 (NSW) to give effect to any relevant government policy in force at the time a reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision.

reasonableness of the result or the effect upon the public interest. And, as noted earlier, a person cannot be appointed a member of the Industrial Court unless the person holds office as a presidential member of the Commission.

42. The Commission is required to give to government policy in circumstances in which its employment jurisdiction is limited to public sector employees.[53] The *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) has referred to the Commonwealth matters relating to the terms and conditions of employment of employees and the rights and responsibilities of employers, employees and associations with the exception of State public sector employees, law enforcement officers and local government sector employees. The Commission is required, therefore, to give effect to government policy in virtually all matters over which it has jurisdiction and in matters in which the Government itself, or a government entity, will be a party.[54]

43. Section 146C expressly applies to pending proceedings and any policy declared by regulation for the purposes of the section will apply to proceedings pending at the time the policy is so declared.[55] The capacity to direct the Commission to give effect to government policy in pending proceedings permits the Government to alter or dictate the outcome or require the acceptance of the Government's own submissions in the proceedings.

44. Indeed, that is the consequence of the Government's conduct with respect to the award applications made by the appellant. The appellant made application for the making of new awards providing for increases in salaries and allowances for public sector employees. The Government's position with respect to those applications was that any increase in salaries should be no more than 2.5% per annum. Well after the proceedings had been commenced, s 146C was enacted and the Government promulgated the Regulation to ensure that the Government's position was accepted by the Commission and the Commission was unable to decide the applications independently.

45. Although s 146C is said not to apply directly to the Commission in Court Session,[56] the composition, organisation and functions of the Commission demonstrate that the interference in the functions of the Commission when not constituted as the Industrial Court significantly impairs the reality and/or appearance of the independence and impartiality of the Industrial Court. In *Wainohu*, for example, French CJ and Kiefel J said (at [61]) by reference to the legislation there under consideration:[57]

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[53] Including local government employees.
[54] The Commission acknowledges that, with the transfer of the private sector to the federal jurisdiction, it is clear that the public sector now makes up the bulk of the Commission's jurisdiction: see *State Wage Case 2010* [2010] NSWIRComm 183 at [90].
[55] s 146C(6).
[56] s 146C(5).
[57] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [61] per French CJ and Kiefel J.

> Whether or not an eligible judge acts persona designata under Pt 2 or as a member of the Supreme Court, requirements of compatibility direct attention to the functions conferred upon the judge, the extent to which they are connected to or integrated with the exercise of the Court's jurisdiction, and the degree of decisional independence enjoyed by the judge in the exercise of those functions.

46. The focus must be upon the extent to which the non-judicial functions performed by a judge are connected to or integrated with the exercise of the court's jurisdiction and the degree of decisional independence enjoyed by the judge in the exercise of those functions.

47. Most courts have some qualifications for appointment, usually that of having held judicial office or having standing as a legal practitioner for a specified period.[58] In the case of the Industrial Court, there is a further requirement, namely that only a presidential member of the Commission may be appointed as a judicial member.[59] That is, judicial members who sit as the Industrial Court are *necessarily* persons subject to the direction of the executive to comply with government policy when exercising functions conferred on the Commission.

48. This is significant when assessing the effect of the Amendment Act upon the independence and impartiality of the Industrial Court. The incompatibility principle enunciated in *Kable* and subsequent cases is intended to be *"functionalist rather than formalist in character"*[60] and determined by reference to *"concrete, practical issues"*.[61] The potential for it to appear that a court as an institution is not independent of executive government[62] is amplified if all judges of the court are required as a condition of appointment to be members of a body subject to the direction and control of the executive. In considering the practical operation of s 146C, it is to be noted that seven of the eight presidential members of the Commission are also appointed as judicial members, including the President, Justice Boland, and Vice President, Justice Walton.

49. The effect upon the appearance of the independence of the Industrial Court is demonstrated by reflecting upon the fact that a member of the Commission will one day hear proceedings in which he or she is required to give effect to any policy determined by the Government. The same day (or the next) the same member of the Commission may sit in the same courtroom with the same staff but constituted as the Industrial Court to determine judicial proceedings involving

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[58] See, for example, *High Court of Australia Act* 1979 (Cth), s 7; *Federal Court of Australia Act* 1976 (Cth), s 6(2); *Supreme Court Act* 1970 (NSW), s 26(2).
[59] s 149(1).
[60] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [52] per French CJ and Kiefel J.
[61] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [14] per Gleeson CJ; *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [107] per Gummow, Hayne, Crennan and Bell JJ.
[62] To use the words of McHugh J in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 117-118.

the Government as a party. An intelligent observer would find no basis upon which to distinguish between the two proceedings or have confidence that the member will (as required) give effect to Government policy in one proceeding, but bring an impartial and independent mind to bear upon the other.

50. As Mason and Deane JJ observed in *Hilton v Wells*:[63]

> ... when a function is entrusted to a judge by reference to his judicial office the legislators and the community are entitled to expect that he will perform the function in that capacity. To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as 'distinctions without differences' (Meyer), 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. Such an observer might well think, with some degree of justification, that it is all an elaborate charade."

51. That effect increases further in circumstances in which the judicial functions of the Industrial Court are not far removed from the functions of the Commission, but closely related.[64] The Industrial Court enforces the very awards and orders made by the Commission to give effect to Government policy by imposition of penalties or making of monetary orders.[65] Judges of the Industrial Court can hear and determine enforcement proceedings at the suit of the Government (including proceedings involving the imposition of penalties) with respect to rights and obligations the Commission itself has created in implementation of government policy. The Industrial Court may also make binding declarations of right in relation to a matter in which the Commission (however constituted) has jurisdiction.[66] The Industrial Court could, for example, make declaratory orders determining whether an award or order of the Commission was made in accordance with Government policy as declared for the purposes of s 146C and whether therefore it was effective having regard to s 146C(3).

52. In any event, any effect upon the independence and impartiality of the Commission directly affects the Commission constituted as the Industrial Court. On the proper construction of the Act, the Commission and the Industrial Court are established as a single body that may be constituted in different ways for different purposes. It may be constituted by judicial members for the purposes of exercising functions conferred on the Commission when sitting as the Industrial Court. The Act describes the Industrial Court as *"the Commission constituted by a judicial member for the purposes of exercising function*

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[63] *Hilton v Wells* (1985) 157 CLR 57 at 83-84 cited in *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [106] per Gummow, Hayne, Crennan and Bell JJ.
[64] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [61] per French CJ and Kiefel J.
[65] see s 153(1)(d), (f) and (g) and s 139 (contravention of dispute orders), s 357 (breach of award), ss 365-380 (recovery of underpayments).
[66] s 154.

conferred or imposed on the Commission in Court Session."[67] Members of the Commission in Court Session are described as *"judicial members of the Commission"*.[68]

53. There is no clear delineation between proceedings in the Commission and the Commission constituted as the Industrial Court. If a matter arises in proceedings before the Commission (otherwise than in Court Session) that is within the jurisdiction of the Industrial Court, the Commission may continue to deal with the matter as the Industrial Court if constituted or reconstituted by a judicial member.[69] Accordingly, the Industrial Court may determine a proceeding which, at least in part, has been directly subject to the requirement to give effect to government policy.

54. It has been a common feature of the Commission's operation for the Industrial Court to continue dealing with a matter which has arisen in Commission proceedings. This has frequently occurred as a result of a question of legal rights amenable to declaratory orders arising in industrial dispute proceedings. For example, a question may arise in industrial dispute proceedings concerning the award,[70] statutory[71] or contractual[72] entitlements of employees. The question of the validity of the purported dismissal of an employee under statute may also arise in industrial dispute or unfair dismissal proceedings.[73] Such cases have frequently involved a judicial member of the Commission commencing to deal with the matter sitting as a presidential member of the Commission, and then the same judicial member continuing to deal with the matter sitting as a judge of the Industrial Court.

55. The Amendment Act also operates directly upon functions conferred on the Industrial Court. The new s 105(2) operates upon unfair contract proceedings, a function conferred on the Industrial Court,[74] and provides that a contract is not to be found to be unfair *"merely because of any provision in the contract that gives*

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[67] s 151(1).
[68] s 149(3).
[69] s 176(3).
[70] *Kellogg (Aust) Pty Ltd v National Union of Workers, NSW Branch* (1998) 89 IR 391; *New South Wales Teachers' Federation v Director-General, Department of Education and Training* (2002) 112 IR 185; *Unilever Australia Ltd v Australian Workers' Union (NSW)* (2005) 141 IR 266.
[71] *"A" v Commission for Children and Young People* (2001) 107 IR 211; *Police Association of New South Wales v Commissioner of Police* (2002) 123 IR 301.
[72] *Director-General, Department of Health (NSW) v NSW Nurses' Association* (2011) 209 IR 49; *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2011] NSWIRComm 152.
[73] *PSA and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment by his agent the Director-General of the Department of Human Services (Juvenile Justice)* [2010] NSWIRComm 32; *Public Service Association and Professional Officers Association Amalgamated Union of NSW v Director of Public Employment by his agent the Director General of the Department of Justice and Attorney General* [2010] NSWIRComm 36; *Public Service Association and Professional Officers' Association Amalgamated Union of NSW (on behalf of Costello) v Director of Public Employment by his agent, Secretary of the Treasury (2010) 200 IR 226.*
[74] s 153(1)(c).

effect to a policy that is declared under section 146C". The Government may therefore, by regulation, declare a policy which affects the determination of unfair contract proceedings before the Industrial Court, in that it prohibits a ground upon which the Court could find contractual unfairness which would otherwise be available. This is a significant restriction on the Court's powers.

Conclusion

56. The Amendment Act does not directly regulate the conditions of employment of public sector employees by legislation. It seeks to utilise the apparently impartial procedures of the Commission, including when constituted by individuals who are judges of the Industrial Court, to cloak the implementation of government policy in the appearance of independent arbitral proceedings, but which are in truth always subject to the direction, or potential direction, of the executive.

57. The appearance and reality of the independence of the Industrial Court is critically undermined in circumstances in which all its judges are members of a Commission which is subject to the unfettered direction of the executive with respect to any order or award it makes. The judges when sitting as the Commission must comply with Government policy as directed in the vast bulk of proceedings before it and irrespective of any consideration of fairness, reasonableness or public interest.

58. The use of judges of a State court as presidential members of the Commission to implement government policy in proceedings which cannot be described as involving a *"genuine adjudicative process"*[75] is incompatible with the role of those judges as judicial members of the Industrial Court, impairs the institutional integrity of that Court and destroys the appearance of its independence and impartiality. The Amendment Act is accordingly invalid and the Industrial Court erred in failing to so find.

PART VII: Legislation

59. The applicable constitutional provisions are ss 71, 73 and 77 of the Commonwealth Constitution.

60. The relevant legislative provisions are:

    (a) *Industrial Relations Act 1996* (NSW), ss 3, 10, 105(2), 146, 146C and Chapter 4.

    (b) *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW).

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[75] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [219] per Callinan and Heydon JJ.

(c) *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW).

PART VIII: Orders Sought

61. The appeal be allowed with costs.

62. Judgment and orders of the Industrial Court of New South Wales given on 31 October 2011 in Matter No. IRC 1276 of 2011 be set aside.

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63. In lieu thereof a declaration be made that the *Industrial Relations Amendment (Public Service Conditions of Employment) Act 2011* (NSW) is invalid.

Dated: 4 June 2012

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D F Jackson QC
Seven Wentworth
Tel: (02) 8224 3009
Fax: (02) 9233 1850
jacksonqc@sevenwentworth.com.au

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A A Hatcher SC
H B Higgins Chambers
Tel: (02) 9223 3633
Fax: (02) 9232 1124
hatcher@hbhiggins.com.au

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.....
M Gibian
H B Higgins Chambers
Tel: (02) 9223 3633
Fax: (02) 9232 1124
gibian@hbhiggins.com.au