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 REPLY

PART I: Suitability for Publication

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

PART II: Reply

2. The submissions of the parties and interveners are referred to below as "AS" (Appellant's Submissions), "RS" (First to Fourth Respondents' Submissions), "WA", "Qld", "Vic" and "SA" (Submissions for the Attorneys General of Western Australia, Queensland, Victoria and South Australia respectively).

3. *Re RS [3(a)], [8]-[21]; Qld [17]-[24].* It may be accepted that the recitation of the

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

various provisions regulating the establishment, jurisdiction and procedures of the Industrial Commission indicates that they are to be treated, in one sense, as bodies which are separate. That description, however, tends to mask the features of present importance, namely (a) that the members of the Industrial Court cannot hold that office unless they are members of the Commission, and (b) that as members of the Commission they are bound to apply governmental policies as declared from time to time pursuant to regulations under s.146C(1) of the *Industrial Relations Act 1996*.

4. *Re RS [3(b)], [36], [30]-[31]; Vic [6]–[12]; WA [23]-[27]; SA [9].* The fact that the "policy" contemplated by s.146C(1) is to be declared by regulation in a manner referred to in s.146C(1) does not alter its nature as "an aspect of governmental policy", (s.146C(1)(a)), i.e. as an element of the policy of the executive government of New South Wales.

5. To suggest, as does in Vic [6]-[12], that regulations under s.146C(1) "are legislative in character" is to look only to form, but overlook content. Certainly as a matter of form the regulations may be regarded as made in the exercise of a statutory power. As a matter of content, however, the "policy" being declared by such regulations is the policy of the executive government. Regulations are made by the Governor[1], i.e. the Governor "with the advice of the Executive Council"[2], that is the executive government.

6. Further, the operation of the incompatibility doctrine does not depend on whether the actual or perceived interference in the decisional independence of a Chapter III court results from a direct act of the legislature or an act of the executive government as authorised by statute. Legislative or executive intrusion upon the institutional integrity of the court is not constitutionally permissible.[3] Legislation which draws a court into the implementation of government policy, however enunciated, such as to deprive the court of the characteristics of an independent and impartial tribunal, will render the court an unsuitable repository of federal jurisdiction.[4]

7. The requirement of a regulation does not prevent changes being made to the policies required to be given effect to by members of the Commission at any time, including so as to dictate the outcome of pending proceedings. Any policy declared or adopted by regulation applies to pending proceedings, unless the regulation provides otherwise: s.146C(6).

8. *Re Vic [13-16]; SA [24].* Of course a grant of jurisdiction may be expressed in circumscribed terms such as to reflect a policy choice by the legislature. But this is

---

[1] *Industrial Relations Act 1996*, s.407(1)
[2] *Interpretation Act 1987*, s.14
3 Wainohu v State of New South Wales (2011) 243 CLR 181 at [105] per Gummow, Hayne, Crennan and Bell JJ.
4 *South Australia v Totani* (2010) 242 CLR 1 at [428] per Crennan and Bell JJ.

to be distinguished from a legislative direction as to the manner and outcome of the exercise of jurisdiction.[5] The "evaluative judgment"[6] required for questions of compatibility would place s 146C in the latter category, while the pre-existing s 146(2) would fall in the former category.

9. *Re RS [32], [33].* The contention that s.146C does not confer new functions on judicial members of the Commission in their capacity *"as individuals"*[7] reflects a formalistic approach to the incompatibility principle which is intended to be *"functionalist rather than formalist in character"*[8] and determined by reference to *"concrete, practical issues"*.[9] The contention ignores the fact that only a person who is a presidential member of the Commission is able to be appointed as a judicial member.

10. Whilst in the past it may have been unremarkable that the Industrial Court enforced awards made by the Commission, what is now significant now is that a judge of the Industrial Court can be placed in a position of enforcing orders or industrial instruments created by the same or another judge (sitting as a presidential member of the Commission) which give effect to the dictates of government policy. For example, it could be made an aspect of government policy that public sector employees not participate in industrial action and that the Commission be required, on application by the government, to make dispute orders that employees cease or refrain from taking industrial action: see s.137(1)(d). The same member could then, again on application by the government, impose penalties – s.139 - on a person who contravenes the obligation created in implementation of government policy. The interference in the appearance of independence of the Industrial Court in the exercise of its judicial functions is clear.

11. *Re RS [35],[36].* The considerations which arise in this matter are not identical to those which arose in *Wainohu*: see RS [35],[36]. However, they are no less serious in the effect they have upon the institutional integrity of the relevant court. In *Wainohu* judges of the Supreme Court were to determine a contested application having serious consequences for the parties in the absence of any obligation to provide reasons.[10] The appearance of a judge making a declaration was thereby created *"whilst the giving of reasons, a hallmark of that office, is denied."*[11]

---

[5] *South Australia v Totani* (2010) 242 CLR 1 at [133] per Gummow J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ.
[6] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [30] per French CJ and Kiefel J.
[7] RS, paragraph [32].
[8] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [52] per French CJ and Kiefel J.
[9] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [107] per Gummow, Hayne, Crennan and Bell JJ.
[10] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [67]-[68] per French CJ and Kiefel J; at [109] per Gummow, Hayne, Crennan and Bell JJ.
[11] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [68] per French CJ and Kiefel J.

12. As a result of s.146C, judges of the Industrial Court are required (as presidential members of the Commission) to determine contested applications having serious consequences for the parties in circumstances in which the judge has little or no decisional independence[12] and in which one party has the capacity to dictate the outcome. The appearance of a judge making orders or awards is created, but the central hallmark of that office, decisional independence, is absent. The appearance of institutional impartiality is an essential characteristic of a Court.[13]

13. *Re RS [38]-[40].* Section 105(2) directly interferes with a function conferred on the Industrial Court. It denies the Industrial Court the capacity to determine that the contract or arrangement whereby work is performed is unfair by reference to whatever policy of government is selected for the purposes of s.146C from time to time. It does not simply confine the statutory jurisdiction of the Industrial Court relating to unfair contracts and cannot be described as similar in its operation to statutory provisions providing for limitation periods, thresholds for the award of damages, caps on damages or minimum sentences: This direct interference in the functions of the Industrial Court further erodes the appearance and reality of the independence of the Industrial Court.

14. *Re RS [13].* If proceedings are transferred to the Industrial Court from the Supreme Court under s.151 of the *Civil Procedure Act 2005* (NSW), the Industrial Court is able to exercise all the jurisdiction of the Supreme Court in relation to the proceedings.[14] Impairment of the institutional integrity of the Industrial Court should be assessed in light of the fact that the Industrial Court is able to exercise the jurisdiction of the Supreme Court.

15. *Re RS [22].* The capacity of the Commission to "reconstitute" into the Industrial Court does not involve the Commission constituting itself as something else. The Act provides that *"the Commission may continue to deal with [a matter required to be determined by the Industrial Court] as the Commission in Court Session"*: s.176(3). The Commission is only required to "reconstitute" (in the sense that another member of the Commission is allocated to the proceedings) if the Commission is not already constituted by a judicial member: s.176(3(a).

16. *Re WA [5]-[9], [16]-[30].* The contention that the difference between s.146C and the pre-existing and unproblematic s.146(2) (which requires the Commission to "take into account" the public interest and *"have regard to"* the objects of the Act

---

[12] *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [61] per French CJ and Kiefel J.
[13] *Grollo v Palmer (*1995) 184 CLR 348 at 377 per McHugh J.; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 133-134 per Gummow J.; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J (accepted by the plurality in *Northern Australia Legal Service v Bradley* (2004) 218 CLR 146 at 163, [28]; 172, [65]; *South Australia v Totani* (2010) 242 CLR 1 at 52-53, [83] per French C.J., 156-157 [426] per Crennan and Bell JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 AT 206, [38]-[39] per French C.J. and Kiefel J.
[14] *Civil Procedure Act* 2005 (NSW), s 154.

and the state of the economy of New South Wales) is one of nomenclature only, not one of substance, should be rejected for two reasons. *First*, it erroneously equates the expression *" must... give effect to"* in s.146C with the expressions *"must take into account"* and *"must have regard to"* in s.146(2). To take something into account or to have regard to it does not require that it be given effect to as an outcome of that process; it only means that it be considered and treated as a matter of significant importance[15] (with the corollary that it may ultimately not be determinative of the outcome). *Secondly*, the submission is founded upon an analysis of the effect of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* rather than s.146C itself: see WA [19]-[27]. This approach ignores or at least diminishes the actual and potential effects of s.146C[16] by incorrectly focusing merely on the current way in which the Government has chosen to direct the Commission as to arbitral outcomes.

17. WA [26] also relies upon the proposition that the Commission's arbitral functions may be exercised entirely by the non-judicial members of the Commission. This is correct in theory, but it ignores the critical role of the judicial members in the "*practical operation*"[17] of the Commission's arbitral powers under the *Industrial Relations Act*: see AS [48], [49].

18. *Re Qld [27-[29]; SA [83].[103].* The Queensland contentions seem inconsistent with the observation of French C.J. in *Crump v. New South Wales* [2012] HCA 20 at [31] that:

> "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."

19. *Re Qld [20].* An appropriately qualified person may be appointed as a Presidential Member of the Commission and as a judicial member of the Court by way of a single commission (under s.148 and s.149(1)). A separate commission is required only where the judicial appointment is subsequent to the Presidential appointment. It underlines the closeness of the interrelationship between the Commission and the Court.

20. *Re SA [8], [10], [18].* One aspect of the concept of "institutional integrity" in this context is that it recognises that institutional integrity may be substantially impaired by a requirement that a judge perform non-judicial functions, a situation exacerbated

---

[15] See *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J; *Edwards v Giudice* [1999] FCA 1836; 169 ALR 89 at [5] per Moore J.
[16] As identified in AS [39]-[44].
[17] See *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [107] per Gummow, Hayne, Crennan and Bell JJ.

if the conclusion to be arrived at when performing those functions is dictated by policy of the executive government.

21. *Re SA [23]-[32].* It may be accepted that s.146C does not *itself* require members of the Industrial Court to apply government policy. Accepting for the moment also that, as suggested at SA [30], the Commission is left with *some* aspects of the matter not determined by policy pursuant to s.146C(1), the position which remains is that the Commission sits as an apparently adjudicative body. In doing so, it is required to implement decisions of the executive government. The persons required so to do, however, will very often be persons who are judges of the Industrial Court. The propositions in AS [56]-[58], it is submitted, remain true.

22. *Re SA [31].* The provision cannot be saved by the application of s 31 of the *Interpretation Act 1987* (NSW). Section 31 has been construed in the same way as s 15A of the *Acts Interpretation Act 1901* (Cth). In *Attorney-General (NSW) v 2UE Sydney Pty Ltd*[18] Spigelman CJ[19], with whom Ipp JA agreed[20],

> The equivalent section in the *Acts Interpretation Act* 1901 (Cth) is s15A, which has been considered in a number of cases. The following observations of Brennan J from *Re Dingjan; ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 339 are, in my opinion, applicable to s31:
>
> > "Section 15A can save a provision that is literally in excess of legislative power only if two conditions are satisfied: first, that the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of the law and, second, that the operation of the law upon the subjects within power is not changed by placing a limited construction upon the law."

23. Neither condition in *Dingjan* is satisfied here. Section 146C discloses no standard or test which would limit the type of regulation declaring government policy which could be made for the purpose of the operation of the provision. Further, to read s146C down in a way which does not authorise certain types of government policy to be declared by regulation for the purpose of the provision would be to substantially change its operation in a way not intended by the legislature. The terms of s.407(1) are such that it is ultimately s.146C from which any regulations must derive validity.

---

[18] [2006] NSWCA 349; (2006) 236 ALR 385.
[19] At [27].
[20] At [118].

Dated: 13 July 2012

.....	.....	.....
D F Jackson QC	A A Hatcher SC	M Gibian
Seven Wentworth	H B Higgins Chambers	H B Higgins Chambers
Tel: (02) 8224 3009	Tel: (02) 9223 3633	Tel: (02) 9223 3633
Fax: (02) 9233 1850	Fax: (02) 9232 1124	Fax: (02) 9232 1124
jacksonqc@sevenwentworth.com.au	hatcher@hbhiggins.com.au	gibian@hbhiggins.com.au