IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S384 of 2011

BETWEEN:

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

Appellant

and

DIRECTOR OF PUBLIC EMPLOYMENT

First Respondent

ROADS AND TRAFFIC AUTHORITY OF NSW

Second Respondent

NSW ATTORNEY-GENERAL

Third Respondent

NSW MINISTER FOR FINANCE & SERVICES

Fourth Respondent

UNIONS NSW

Fifth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Date of document: 6 July 2012
Filed on behalf of: Attorney-General for the State of Victoria (Intervening)
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PART I: CERTIFICATION

1. The Attorney-General for the State of Victoria certifies that these submissions are suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents for the State of New South Wales.

3. In summary, s 146C of the *Industrial Relations Act 1996* (NSW) **(the Act)** provides that the Industrial Relations Commission of New South Wales **(the Commission)** must give effect to delegated legislation in the exercise of its statutory powers. In so doing, it merely sets the parameters for the Commission's exercise of its statutory powers without directing the outcome of particular proceedings. As such, s 146C is valid.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

4. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

5. It is necessary to add, to the statements of applicable constitutional and statutory provisions set out in the annexures to the submissions of other parties, reference to s 407 of the Act and ss 21 and 41 of the *Interpretation Act 1987* (NSW) (see the annexure to these submissions).

PART V: ARGUMENT

6. The Appellant contends that the Act, through s 146C, permits the executive to instruct the Commission "that it is required to comply with the identified policy of Government".[1] This in turn is said to subject the Commission to "direction from the executive" or to enlist it "in the implementation of legislative policy".[2] The Appellant asserts that it is "immaterial that the form of the direction of the executive is by way of regulation".[3]

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1 Appellant's Submissions at [39].

2 Appellant's Submissions at [37].

3 Appellant's Submissions at [39].

7. To the contrary, the fact that the relevant policy must be prescribed by regulation requires attention to be given at the outset to the character of the regulation in question. The answer to that inquiry is more important to addressing the Appellant's Chapter III argument than the characterisation of the content of the regulation as "policy". If, as submitted below, the making of regulations contemplated by s 146C is legislative in nature, then the question is no longer whether the Commission is liable to act at the behest or direction of the executive, but rather whether the legislative conferral of powers or functions on the Commission is contrary to Chapter III. For the reasons set out below, s 146C does no more than establish (through delegated legislation) the parameters of the Commission's exercise of its statutory power.

8. Section 146C(1) provides in relevant part that "[t]he Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees" declared by the regulations and which "applies to the matter to which the award or order relates". Section 146C applies where the Commission is "making or varying any award or order". For the purposes of s 146C, "award or order" includes:[4]

   (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.

9. The Appellant places emphasis on the use of the word "policy" in s 146C(1). However, by s 146C(1)(a), the policy must be "declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission". By sub-section (2), a 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". An award or order of the Commission does not have effect to the extent that it is inconsistent with the Commission's obligation under sub-section (1): s 146C(3).

10. The stipulation that s 146C(1) only applies to policy set out, or adopted in a document referred to, in regulations directs attention to the regulation-making power in s 407 of the Act. That power is exercisable by the Governor. The regulations in question are therefore "statutory rules" within the meaning of s 21(1) of the *Interpretation Act*,

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4 Section 146C(8).

subject to disallowance by the passing of a resolution by either House of the Parliament of New South Wales: s 41(1) of the *Interpretation Act*.

11. Both the description of the content of any regulation as "policy" to be given effect by the Commission only where it "applies", and the fact that the regulation is subject to parliamentary disallowance are strong indications that regulations under s 146C are legislative in character. First, s 146C empowers the Governor to make policies, or rules, of general application rather than rules governing only specific cases.[5] The generality of the rules' application is illustrated by the Appellant's submission that the Commission is required to apply them in "virtually all matters" in which it has jurisdiction.[6] Section 146C(1)(b) recognises that the Commission must decide whether or not a policy applies to a particular matter. Secondly, parliamentary control is a fundamental characteristic of the reposing of legislative power in the executive.[7] There are no indications that the regulation-making power contemplated by s 146C is other than legislative in nature.

12. Accordingly, this case does not involve executive direction to a statutory decision-making body.[8] Rather, it concerns the requirements prescribed by law for the exercise of a statutory body's decision-making powers. Section 146C enables the executive to make laws prescribing such requirements.

13. There is nothing unusual, or contrary to the Constitution, in a State tribunal, or court, having its functions circumscribed by legislation. Nor is there anything unusual in legislation, including delegated legislation, reflecting and enacting public policy. As stated by Gummow and Crennan JJ in *Thomas v Mowbray*, "[s]tatutes implement particular legislative choices as to what conduct should be forbidden, encouraged, or otherwise regulated".[9] Similarly, in *Baker v The Queen,*[10] Gleeson CJ observed that the legislation at issue in that case[11] revealed policy choices made by the New South

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5 *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ); *Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 66-67 (Latham CJ); see generally *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 at 194-196 [43]-[50] (the Court).

6 Appellant's Submissions at [42].

7 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 at 196-198 [51]-[56] (the Court).

8 Administrative law principles guiding the treatment of government policy by decision-makers are likewise not relevant; cf *Re Drake [No 2]* (1979) 2 ALD 634 at 639-641 (Brennan J); *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 205-208 (French and Drummond JJ).

9 (2007) 233 CLR 307 at 348 [82].

10 (2004) 223 CLR 513 (***Baker***).

11 Section 13A of the *Sentencing Act 1989* (NSW).

Wales Parliament and that, as a matter of legislative power, it was entitled to make those choices.[12] In *Thomas v Mowbray*, Gummow and Crennan JJ went on to observe that "[c]ourts are now inevitably involved on a day-to-day basis in the consideration of what might be called 'policy', to a degree which was never seen when earlier habits of thought respecting Ch III were formed".[13]

14. For example, even before the insertion of s 146C, the Act required the Commission to take account of matters of policy. The point may be illustrated by reference to s 146(2) of the Act, which provides:

> (2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
>
> (a) the objects of this Act, and
>
> (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

15. Apart from the requirement that the Commission take "the public interest" into account, the requirement that the Commission have regard to the objects of the Act brings matters of policy to the forefront of the Commission's exercise of its statutory functions. Section 3 sets out the objects of the Act, and all of the matters specified therein may be described as "policy". For example, by s 3(h), it is an object of the Act "to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations". The same point may be made in relation to s 146(2)(b), which requires the Commission (in taking into account the public interest in the exercise of its functions) to have regard to "the state of the economy of New South Wales and the likely effect of its decisions on that economy". These are also matters of policy.

16. Against that background, the effect of s 146C is to provide for the designation, by subordinate legislation, of overriding matters of policy to which the Commission must give effect, where applicable, in making or varying an award or order. Nothing in that scheme changes the fundamental nature of the Commission's function of making awards and orders. The Commission still makes awards and orders in particular cases based on the circumstances of each case, and is not subject to executive direction in doing so. Only the scope of the Commission's powers in the performance of that function has altered.

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12 *Baker* at 521-522 [8].

13 (2007) 233 CLR 307 at 350 [88].

17. As disclosed by the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW) (**the Regulation**), the alterations themselves are general rather than specific in nature. Minimum conditions of employment are guaranteed, including as to parental leave, long service leave, annual leave, sick leave and other entitlements (in most instances reflective of other legislation): regs 5(a) and 7. Equal remuneration is prescribed for men and women doing work of equal value: reg 5(b). Subject to these "paramount policies", increases in remuneration and other conditions of employment are not to exceed 2.5% per annum unless sufficient employee-related cost savings, as defined, are achieved: reg 6(1)(a)-(c). These provisions, like those in the remainder of the Regulation, contain rules capable of general application by the Commission to any cases that come before it in which they apply.

18. Section 146C does not purport to confer upon the executive a role in determining the outcome of a proceeding before the Commission, still less a judicial process. In contrast, in *South Australia v Totani* (***Totani***), the vice in the impugned legislation was the "dominance of the executive declaration in the outcome of a control order application".[14] While the Magistrates Court gave the process the appearance of judicial independence, in reality the Attorney-General's act determined the outcome. It was this interference with the independence and impartiality of the Magistrates Court that created repugnancy with Chapter III.[15]

19. The effect of s 146C is therefore not that the Commission is "required to make orders and awards as directed by government policy",[16] or that the government (through s 146C) is able to direct the Commission as to the precise order or award it must make. The Court need not decide in this appeal whether such a direction would be within the scope of s 146C, nor whether, if so, it would give rise to particular Chapter III concerns. None of the policies in the Regulation is of that nature.

20. For these reasons, s 146C is valid.

Dated: 6 July 2012

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14 (2010) 242 CLR 1 at 28 [28] (French CJ). See also at 52 [81] (French CJ), 66 [142] (Gummow J), 89-90 [229] (Hayne J), 160 [435]-[436] (Crennan and Bell JJ), 172-173 [480] (Kiefel J).

15 *Totani* at 52 [82] (French CJ), 67 [149] (Gummow J), 88-89 [226], 90 [230] (Hayne J), 160 [436] (Crennan and Bell JJ), 172-173 [479]-[480].

16 Appellant's Submissions at [41].

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ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The provisions set out below are still in force, in this form, at the date of making these submissions.

Industrial Relations Act 1996 (NSW)

407 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may prescribe the forms required or permitted to be used for the purposes of this Act or the regulations (including provision for any such forms to be as approved by the Minister or other body or officer).

(3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.

Interpretation Act 1987 (NSW)

21 Meanings of commonly used words and expressions

(1) In any Act or instrument:

...

statutory rule means:

(a) a regulation, by-law, rule or ordinance:

(i) that is made by the Governor, or
(ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or

(b) a rule of court.

...

41 Disallowance of statutory rules

(1) Either House of Parliament may pass a resolution disallowing a statutory rule:

(a) at any time before the relevant written notice is laid before the House, or

(b) at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid.

(2) On the passing of a resolution disallowing a statutory rule, the rule shall cease to have effect.

(3) The disallowance of a statutory rule has the same effect as a repeal of the rule.

(4) If:

(a) a statutory rule ceases to have effect by virtue of its disallowance, and
(b) the rule amended or repealed some other Act or statutory rule that was in force immediately before the rule took effect, the disallowance of the rule has the effect of restoring or reviving the other Act or statutory rule, as it was immediately before it was amended or repealed, as if the rule had not been made.

(5) The restoration or revival of an Act or statutory rule pursuant to subsection (4) takes effect on the day on which the statutory rule by which it was amended or repealed ceases to have effect.

(6) This section applies to a portion of a statutory rule in the same way as it applies to the whole of a statutory rule.

(7) Any provision of an Act that relates to the disallowance of statutory rules made under the Act is of no effect.

(8) This section does not apply to the Standing Rules and Orders of the Legislative Council and Legislative Assembly.

(9) This section does not limit any provision of an Act (for example, section 14A (6) of the Constitution Act 1902) that provides that a statutory rule shall not cease to have effect upon its disallowance by either House of Parliament unless it has previously been disallowed by the other House of Parliament.