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

and

ROADS AND MARITIME SERVICES

Second Respondent

and

ATTORNEY-GENERAL FOR NSW

Third Respondent

and

NSW MINISTER FOR FINANCE & SERVICES

Fourth Respondent

and

UNIONS NSW

Fifth Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

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PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the First – Fourth Respondents.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Appellant's Submissions and Part VI of the First-Fourth Respondents' Submissions.

PART V: SUBMISSIONS

The Commission and the Industrial Court

5. The composition of the Commission is provided for in s.147 of the *Industrial Relations Act 1996* (NSW). The Commission, in exercising its jurisdiction in respect of non-Court Session matters, can comprise non-Judicial Members.[1] Judicial Members can exercise the whole of the non-Court Session jurisdiction of the Commission.[2] Only Judicial Members can exercise Court Session jurisdiction.[3] Accordingly; judicial power is exercisable only by Judicial Members sitting in the Industrial Court, while Judicial Members and non-Judicial Members can exercise non-judicial power as members of the Commission. Section 146C(1)(a) applies to a Judicial Member exercising jurisdiction under s.146C when sitting as a Commissioner.[4]

6. The Commission, when exercising its "general" jurisdiction pursuant to s.146(1), is required to take into account the matters referred to in s.146(2). The proviso in s.146(2) has the section operate differently in respect of the Commission in Court Session. The proviso in s.146(2) does not operate where a Judicial Member sits as

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[1] Except practically where all Presidential Members are also Judicial Members. Non-Judicial Members can comprise Full Benches of the Commission; see s.156(2).
[2] See s.155 and s.151(2).
[3] See s.151(1).
[4] It is unclear whether the Appellant contends that, had s.146C been limited in its operation to non-Judicial Members only, any issue of validity would arise.

a Commissioner and exercises the general, or non-Court Session, jurisdiction of the Commission.

7. Section 146(2) requires a Judicial Member exercising the general jurisdiction to have regard, *inter alia,* to the objects of the *Industrial Relations Act 1996* (NSW) set out in s.3.

8. It is not contended in this matter that exercise of this general jurisdiction by Judicial Members or the constraint on the jurisdiction of the Commission of s.146(2) presents any issue of validity; and specifically that it "impairs the reality and/or appearance of the independence and impartiality of the Industrial Court"[5] whether the Commission sits by a Judicial Member or otherwise. A Judicial Member, exercising the general jurisdiction of the Commission, can exercise wide ranging inquisitorial powers, see s.162(2)(j).[6] No issue is taken in this matter as to the validity of this exercise of power.

9. The only issue of constitutional significance arises in respect of a Judicial Member exercising general jurisdiction under s.146C(1), having regard to s.146C(1)(a).

The criterion of incompatibility

10. There is a wide variety of circumstances in which Chapter III judges[7] exercise judicial and non-judicial power as part of their day by day functions. The model of judges being simultaneously appointed to a court and an administrative tribunal or body, and for judges to discretely exercise judicial and non-judicial power, is unproblematic, as this matter demonstrates; the Appellant complains only of s.146C, not of s.146.

11. Other models of judges exercising judicial and *ex officio* non-judicial power are similar to the relationship between Judicial Members of the Commission and the Industrial Court. An example is the Administrative Appeals Tribunal, the President

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[5] Appellant's Submission [45].

[6] In so doing, a Judicial Member is not exercising judicial power and any exercise of the inquisitorial powers in s.162(2)(j) is not, and likely could not be, incidental to any exercise of judicial power; though see, *Saraceni -v- Jones* [2012] WASCA 59.

[7] This Court, any federal court for the purpose of s.77(i) of the *Constitution* and any State court for the purpose of s.77(iii).

of which must be a Federal Court judge,[8] likewise Federal Court judges who are members of the Australian Competition Tribunal, the Copyright Tribunal and the Defence Force Discipline Appeal Tribunal, and as it was of the Federal Police Disciplinary Tribunal.[9]

12. It has been commonplace to refer to appointments such as these as appointments *persona designata* or as a personal appointment.[10] Although the term, in either language, may have some utility, its ascription is not determinative, or often clarifying. Indeed, to describe the appointment of a Federal Court judge to the Administrative Appeals Tribunal as an appointment *persona designata* obscures the distinction between this sort of dual appointment and appointments such as that considered in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs.*[11] That said, the validity of s.146C involves the same criterion of validity that is engaged when appointments *persona designata* or other dual appointments are questioned. Centrally, this is "the notion of incompatibility".[12] But this notion is to be applied in this matter with the understanding that the model of simultaneous appointments to courts and administrative bodies, and distinct exercise of judicial and non-judicial power, is a model of long standing, is common place and has not affected the reality or appearance of independence and impartiality of the Courts of which these judges are serving members.

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[8] *Administrative Appeals Tribunal Act 1975* (Cth), s.7(1).

[9] See *Wainohu v New South Wales* [2011] HCA 24 at [25] (French CJ and Kiefel J). There are numerous other models that provide for the eligibility of Chapter III judges to exercise executive or non-judicial power of various kinds. The Inspector-General of Intelligence and Security is one; ss.6(4) & 7 *Inspector-General of Intelligence and Security Act 1986* (Cth). Though eligible, no Federal Court judge has served in this position. Federal Court judges are also eligible for appointment as the Director-General of Security; s.15 *Australian Security Intelligence Organisation Act 1979* (Cth). From 1976 to 1981 Justice Woodward was the Director General. Justice Reed of the Supreme Court of South Australia served as Director General from 1949-1950, at a time that ASIO operated purely as an executive agency and not pursuant to legislation; see Woodward *One Brief Interval – A Memoir by Sir Edward Woodward* (2005) p.154. Membership of the Australian Law Reform Commission has always included holders of judicial office. Federal Court judges are eligible for appointment as Presidential members of the National Native Title Tribunal; ss.110 and 253 *Native Title Act 1993* (Cth). From 1923 to 1989 the Chief Justice of the High Court was a member of the National Debt Commission which administered the Commonwealth Sinking Fund. The second reading speech of the Bill to amend s.6 of the *National Debt Sinking Fund Act 1966* (Cth), to remove the Chief Justice as a member of the National Debt Commission, referred to a request by the then Chief Justice referring to two reasons identified by the Chief Justice; that the activities of the National Debt Commission bore no relationship to the responsibilities of the Chief Justice and that the Chief Justice was ordinarily unable to contribute any economic expertise to the Commissions deliberations; Commonwealth, *Parliamentary* Debates, House of Representatives, 24 May 1989, p.2824 (Peter Morris). Sir Anthony Mason appears to have made no express reference to incompatibility.

[10] In respect of the AAT, see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 583-584 (per Bowen CJ, Deane J).

[11] [1996] HCA 18; (1996) 189 CLR 1.

[12] *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128; (2008) 169 FCR 241 at 261 [70].

13. Also relevant is the observation that incompatibility is not a notion of precision or strict determinacy. As explained by Gummow J in *Fardon v Attorney-General (Qld)*:[13]

> "... the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."

14. It is also relevant to observe that the notion of incompatibility has different aspects. Some were described by Brennan CJ, Deane, Dawson and Toohey JJ in *Grollo v Palmer*:[14]

> "The incompatibility condition may arise in a number of different ways. Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a Judge that the further performance of substantial judicial functions by that Judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the Judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual Judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth. So much is implied from the separation of powers mandated by Chs I, II and III of the Constitution and from the conditions necessary for the valid and effective exercise of judicial power."

15. In this matter the central issue of incompatibility is as to the possible affect on the institutional integrity of the Industrial Court,[15] not that of individual judges.

Validity in this matter

16. The challenged provisions do not impair the reality and/or appearance of the independence and impartiality of the Industrial Court because the power exercised by the Commission pursuant to s.146C is substantively indistinguishable from the unproblematic exercise of power under s.146. To the extent that there is a distinction, it is one of nomenclature that can readily be "ameliorated" if problematic.

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[13] [2004] HCA 46; (2004) 223 CLR 575 at 618 [104].
[14] (1995) 184 CLR 348 at 365 (Brennan CJ, Deane, Dawson and Toohey JJ).
[15] Appellant's Submission [45], see also [2(a)-(c)].

17. It is instructive to consider the substantive differences between the exercise by a Judicial Member of the general jurisdiction of the Commission pursuant to s.146, and the particular non-judicial jurisdiction constrained by s.146C.[16]

18. In respect of general matters, the obligation is to "have regard to the objects of this Act, the state of the economy of New South Wales and the likely effect of its decisions on that economy", with the objects being prescribed by s.3. In respect of matters falling within s.146C(1) the obligation is to "give effect to any [applicable] policy ... that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission".

10 19. Section 146C(1)(a) requires regard to the substance of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW), and the comparison of these requirements with the (valid) requirement that the exercise of the general jurisdiction of the Commission (constituted by a Judicial Member) have regard to the objects of this Act set out in s.3.

The *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) and the objects of the *Industrial Relations Act 1996* (NSW)

20. Regulation 5(a) is uncontroversial. The "guaranteed minimum conditions of employment" provided for in Regulation 7(1)(c) and 7(2) incorporate legislated work conditions. The "guaranteed minimum conditions of employment" defined in
20 Regulation 7(1)(a) and (b) simply adopt widely applied conditions of employment. The matters referred to in Regulation 5(a) are all matters to which the Commission would in any event have regard. The matters prescribed by Regulation 5(a) correspond with those set out in s.3(a) of the Act.

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[16] It should be noted, in passing, that s.146B confers powers on the Commission (not the Industrial Court) to undertake a dispute resolution process arising under a "federal enterprise agreement" (which includes an enterprise agreement made under the *Fair Work Act 2009* (Cth); ss.146B(1), 153 *Industrial Relations Act 1996* (NSW). In doing so, the Commission may exercise any functions as are conferred or imposed on it by or under the federal enterprise agreement and the *Fair Work Act 2009* (Cth); s.146B(2) *Industrial Relations Act 1996* (NSW). Further, the regulations may make provision for or with respect to the application of any of the provisions of the *Industrial Relations Act 1996* (NSW). However, there are no such regulations, see only rule 5.9 of the *Industrial Relations Commission Rules 2009*. There is no challenge to the validity of this provision.

21. Regulation 5(b) is likewise uncontroversial. The matters prescribed correspond with the constraint on the jurisdiction of the Commission imposed by s.146(2) and s.3(f).

22. To the extent that there is an issue it must emerge then from Regulation 6.

Regulation 6

23. Regulation 6 inspires a number of observations.

24. *First*, it does not mandate a result; the Commission exercises discretion. It could order increases of less than 2.5%.

25. *Second*, the Parliament of New South Wales could enact valid legislation to the general effect of Regulation 6 by imposing a 2.5% increase in remuneration as a condition of the employment of public sector employees. The executive could validly declare a regulation to this effect pursuant to a general enabling provision.

26. *Third*, that this regulated outcome could be effected by direct legislative or executive action, gives rise to the inquiry of whether the jurisdiction under s.146C is reposed where it is, and exercisable how it is, to impermissibly clothe executive or legislative action with ulterior judicial respectability. This is the kind of inquiry made in cases such as *Wainohu v New South Wales,*[17] *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*[18] and *Grollo v Palmer.*[19] In this matter the answer to any such inquiry must be – no; for at least two reasons. First, the regulated outcome could emerge from the Commission comprising a non-Judicial Member, and, second, the strictures of s.146C do not apply to the Industrial Court. Rather than seeking to clothe the operation of s.146C with judicial respectability, the legislature has sought to separate it from the Industrial Court.

27. *Fourth*, in respect of Regulation 6 it can also be said that, even though a Judicial Member, as a Presidential Member, in exercising jurisdiction under s.146C, constrained by s.146C(1)(a), is not exercising judicial power, substantial truncation of discretion is not necessarily incompatible with judicial power in any event. An

[17] [2011] HCA 24; (2011) 243 CLR 181.
[18] [2008] HCA 4; (2008) 234 CLR 532.
[19] (1995) 184 CLR 348.

example is *Baker v R*[20] where power to order a minimum sentence for certain crimes was limited to those who had served a minimum period. In this sense judicial discretion was not exercisable until this minimum period had been served (and an application made). This is the nature of the truncation of Regulation 6, which places a cap on increases in remuneration and other conditions of employment. More similar perhaps are various legislative schemes that impose caps on the right to recover damages for personal injury at common law, caps on damages for libel and slander and limitation legislation, none of which give rise to judicial power issues.[21] None of these kinds of legislative restrictions have been found to be invalid.

Nomenclature

28. That the stricture of s.146C(1)(a) is not substantively different to the requirement that a Judicial Member, in exercising the general jurisdiction of the Commission, must have regard to the objects set out in s.3 gives rise to the observation that any issue of validity of s.146C is, at its highest, one of nomenclature, or (perhaps) inelegancy in the description of the limitation on jurisdiction as being a "policy on conditions of employment ... declared by the regulations to be an aspect of government policy". No issue of validity would arise had the section provided that:

> The Commission must, when making or varying any award or order, give effect to any matter declared by the regulations to be ~~an aspect of government policy that is~~ required to be given effect to by the Commission.

29. Such a formulation would direct focus solely upon the lawfulness of the substantive matter expressed in the regulations.

30. To the extent that there is an issue with s.146C deriving from (perhaps exuberant) drafting, it could readily be alleviated by severance of the struck through words at [28] hereof. Such severance better expresses the legislative purpose of the

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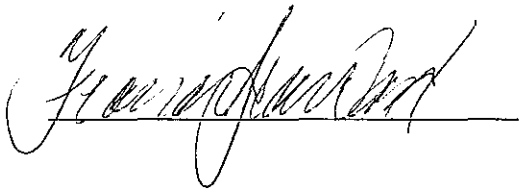
[20] [2004] HCA 45; (2004) 223 CLR 513.

[21] An example is *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297 where judicial power issues were not raised. Likewise in none of the string of cases leading to *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 were these issues raised; *Breavington v Godleman* [1988] HCA 40; (1988) 169 CLR 41, *McKain v RW Miller & Company (SA) Pty Ltd* [1991] HCA 56; (1992) 174 CLR 1, *Stevens v Head* [1993] HCA 19; (1992) 176 CLR 433.

provision,[22] being to ensure that the Commission, when making or varying an award or order, gives effect to any policy on conditions of employment of public sector employees identified in Regulations.

DATED the 6th day of July 2012



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[22] *State of Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ; *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 per Dawson J.