NEWSLETTER

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Note: the views of the contributors are not necessarily those of the IR Society of SA.

PRESIDENT'S MESSAGE

The New Year brings with it the prospect of significant change in our industrial relations system. As advised in my Christmas message, there will also be some changes to elements of this Society's services that will be progressively rolled out throughout this year. Stay tuned!

The Society's constitution permits the Committee to co-opt any member or members of the Society to assist in the conduct of the business of the Committee "as it may deem necessary or expedient" – rule 25. As in previous years, the Committee has considered the range of interests represented, particularly given the objective of the constitution to ensure a balance between the "occupational" groupings within our membership.

I am pleased to confirm that the Committee has co-opted Steve Brennan, the Employee Ombudsman, and Glen Seidel, Secretary of the Independent Eduction Union SA, to its ranks. I look forward to their contribution along with the other members of the Committee.

There are two national IR Society events that I should draw to your attention. The Tasmanian Convention is to be conducted in conjunction with the Australian Labour Law Association in Hobart on 21 to 23 February, and has as its theme: "Working and living with generational change." Details are available from the Tasmanian Society.

In the more distant future, the 15th Congress of the International Industrial Relations Association is to be conducted in Sydney from 24 to 27 August 2009. This is a major international event and although it is over 18 months away, significant planning by our national society is well under way. You might like to include it in next year's diary and plan to attend. Details are available at: http://www.iceaustralia.com/IIRA2009/

Finally, we intend that the newsletter will be issued more regularly and in a revised format this year. Contributions from members of the Society are always welcome so please contact the Editors, Craig Stevens or Josh Healey, or our Secretariat, with any material.

Peter Hampton
PRESIDENT
IRSSA

A single national IR system for the private sector?

The Society presented a well-attended and interesting seminar on the Federal ALP's industrial relations policy on 31 October 2007. Speakers included Society Vice-President Craig Stevens, the then ALP Candidate (and now member) for the seat of Port Adelaide, Mark Butler, Sandra Dann, Director of the Working Women's Centre of SA Inc, and Chris Platt, General Manager of Workplace Policy for the Australian Mines and Metal Association.

Obviously, with the election of the Rudd government in December, further attention now focuses upon the new Government's policies and actions; in particular, the aspect of the ALP policy, *Forward with Fairness,* which contemplates establishing a single national system in Australia for the private sector.

In South Australia, coverage of the federal system extends to in excess of 60 percent of the total workforce and in the order of 70 percent of the private sector. However, the continuing use of the corporations power - exemplified in the previous Government's WorkChoices amendments - is of itself unlikely to achieve a single system in the foreseeable future. It is conceivable, albeit difficult, for the Commonwealth to achieve a more extensive national system using the corporations power and other heads of power provided by the Constitution. Instead, the *Forward with Fairness* policy contemplates this being achieved with the cooperation of the States and Territories.

The response of the State and Territories is therefore crucial. Members of the Society might be aware that on 9 August 2007, the New South Wales Minister for Industrial Relations, the Hon John Della Bosca MLC, announced that the Iemma Government had commissioned an Inquiry into *Options for a New National Industrial Relations System*. In so doing, Minister Della Bosca said that the aim of the Inquiry would be "*to develop a series of options for a national system to replace the failed Work Choices regime."*

The Inquiry was headed by eminent constitutional expert Professor George Williams, the Anthony Mason Professor and Director of the Gilbert and Tobin Centre of Public Law at the University of New South Wales. It has also been publicly reported that in the course of the inquiry, Professor Williams met with most of the various State Ministers as well as many employer and union organisations.

Professor Williams released an issues paper in September 2007, in which he outlined a series of options including:

1A Full Referral: States refer all power over industrial relations to the Commonwealth, but build a strong inter-governmental decision-making role that ensures they can continue to represent the needs of their communities, yet are able to influence the development of the national industrial relations system.

1B Limited Referral: States refer defined powers to the Commonwealth, retaining other powers for themselves, and include a strong inter-governmental decision making role.

2A Mirror Legislation, State Enforcement: The Commonwealth enacts a model industrial relations law within one of the Territories, then in accordance with an inter-governmental agreement that legislation is adopted in each State. A strong governance model ensures that the States continue to be able to represent the needs of their communities and are able to influence the development and adjustment of the national industrial relations system. In the short to medium term, each State enforces its own laws to avoid the constitutional problems identified by the High Court.

2B Mirror Legislation, Federal Enforcement: A referendum proposal is developed to put an end to the power sharing problems identified by the High Court. The model has the same approach to legislation and continued shared oversight as proposed in the Mirror Legislation, State Enforcement model, but with the capacity of Commonwealth courts and enforcement bodies to carry out judicial and enforcement functions.

2C Common Legislation, Shared Enforcement: A Commonwealth framework law is developed that the States adopt through their own legislation, much like the consumer protection model, but with stronger governance to ensure as much consistency as possible.

3 State systems underpinned by national standards: The Commonwealth legislates to create a safety net of national minimum employment conditions using its external affairs power or a limited referral of State power. State systems would continue to operate, but would not be able to undermine the national standards. Bargaining would be available at both the State and federal level. Each jurisdiction would have separate enforcement functions and judicial arrangements.

The report by Professor Williams was publicly released during January and the ultimate response from the Commonwealth and State Governments could well provide an insight into the future of our industrial relations system.

The Deputy Prime Minister, Hon Julia Gillard MP has already announced that a Transitional Bill will be tabled before the Federal Parliament during February. This Bill will deal with progressive abolition of Australian Workplace Agreements and certain other matters. It will not however deal with the major structural changes contained within the *Forward with Fairness* policy.

The Society will continue to provide information on the issue as developments take place. For members seeking further information in the interim, the following websites contain documents relevant to this issue:

Forward with Fairness (April 2007):
http://www.alp.org.au/download/forwardwithfairness.pdf

Policy Implementation Plan (August 2007):
http://www.alp.org.au/download/070828_dp_forward_with_fairness__policy_implementation_plan.pdf

Williams Inquiry Issues Paper (September 2007):
http://www.industrialrelations.nsw.gov.au/action/inquiry.html

Transitional Bill announcement:
http://mediacentre.dewr.gov.au/mediacentre/MinisterGillard/Releases/TransitionBillandnonewAWAs.htm

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New penalties under the *Occupational Health, Safety and Welfare Act 1986*

The *OHSW (Penalties) Amendment Bill 2006* (the Bill) was introduced into the South Australian Parliament after an extensive review of the existing levels of fines and the penalty structure under the OHSW Act. This review was separately undertaken in July 2006 by the SafeWork SA Advisory Committee and SafeWork SA through public consultation with stakeholders.

The Bill passed through the South Australian Parliament in November 2007. The *OHSW (Penalties) Amendment Act 2007* was assented to on 29 November 2007 and came into operation on 1 January 2008. The new penalties and other provisions apply to conduct taking place on and after 1 January 2008.

The *OHSW (Penalties) Amendment Act 2007* makes the following amendments to the *Occupational Health Safety and Welfare Act 1986*:

- The tripling of penalties applicable to corporations and administrative units of the public sector;
- The introduction of a revised section 59 offence dealing with conduct that creates a substantial risk of death or serious harm in a workplace, with significant additional penalties if this provision is breached; and
- The establishment of imputation provisions that provide a statutory scheme for determining the liability of corporations, government departments and their senior officers, where there is a breach of the OHSW Act and in particular, where it is necessary to demonstrate knowledge as part of the offence.

SafeWork SA has issued general guidance material explaining these new provisions. This is available at http://www.safework.sa.gov.au or by calling their Help and Early Intervention Centre on 1300 365 255.

To obtain a copy of the *Occupational Health, Safety and Welfare (Penalties) Amendment Act 2007* go to http://www.legislation.sa.gov.au.

Jurisdiction of the Industrial Court of South Australia to hear monetary claims relating to entitlements in preserved collective state agreements

THE INITIAL DECISION

Duthie* v *ISS Health Support Services Pty Ltd
[2007] SAIRC 9

(Hardy IM) (4662 of 2006) 27/2/07

Termination of employment — Redundancy pay claim — Claim arising under state enterprise agreement and state award — Whether State Industrial Court had jurisdiction to determine claim — Whether jurisdiction excluded by amended Workplace Relations Act 1996 (Cth).

The South Australian Industrial Relations Court (SAIRCt) found that it had jurisdiction to determine a claim for redundancy payments arising out of a preserved collective state agreement.

Background

Susan Duthie ("the employee") was employed by ISS Health Support Services Pty Ltd ("the employer") from 28 March 2001.

The employee's employment was governed by the *Tempo Health Support Services Enterprise Agreement 2004* (“the agreement”) which incorporated the terms of the *Private Contractors (Public Hospitals) Award* (“the award”).

On 2 July 2006 the employee's employment was terminated by the employer.

The employee made an application to the SAIRCt seeking payment from the employer of the sum of $5,862.21 plus interest, in respect of 10.08 weeks' severance pay and three weeks' payment in lieu of notice in accordance with the terms of the agreement and award.

In response, the employer claimed that the SAIRCt lacked jurisdiction to hear and determine the matter and sought determination of this as a preliminary issue.

Submissions

The employer

The employer denied any liability in respect of the termination.

The employer submitted that on commencement of the ‘WorkChoices’ amendments to the *Workplace Relations Act 1996* (Cth) (“the WR Act”) on 27 March 2006, the instruments governing the employee's employment became a preserved state agreement and a notional agreement preserving a state award. The employer also claimed that section 16 of the WR Act excluded the operation of the *Fair Work Act 1994* (SA) in respect of the employee's employment. Furthermore, clauses 15 and 35 of Sch 8 of the WR Act excluded the SAIRCt from exercising any power in relation to the matter and as such it should be struck out.

The employer submitted that under section 720 of the WR Act, the jurisdictional precondition that needed to be satisfied was that the employer was *"required by an applicable provision"* to make the payments to the employee. The employer contended that this precondition had not been satisfied as the employee had not established or pleaded any liability on the employer's behalf to make severance payments under the relevant instruments. The employer also submitted that this was not a matter of *"recovery of wages"* but a claim for severance pay and that no requirement existed under the instruments in question to make severance payments to the employee.

The employer further submitted that the SAIRCt was denied jurisdiction to decide matters pertaining to employment relationships governed by preserved state agreements and notional agreements preserving a state award, as these were now federal instruments under section 16 of the WR Act and covered by exclusive federal jurisdiction unless an exclusion applied.

It was submitted by the employer that section 717 of the WR Act did not preserve the state jurisdiction in the SAIRCt as an "eligible court" because section 717 depended on section 720 for its operation and the requirement under section 720 that the employer be *"required by an applicable provision"* to make the relevant payments had not been satisfied. Without this, the employer contended no jurisdiction could be invoked and the employee had not brought a claim which satisfied the precondition for the exception to exclusive federal jurisdiction.

The employee

In response to the employer's jurisdictional objections, the employee argued that both the agreement and the award became a preserved collective state agreement after 27 March 2006, the terms of the award being taken to be terms of the collective state agreement under Sch 8 of the WR Act.

The employee's claim under the preserved collective agreement was submitted to be enforceable as if it were a collective agreement under the WR Act. The employee argued that an *"applicable provision"* under section 720 included a term of a collective agreement under section 717 of the WR Act, and an eligible court included the SAIRCt pursuant to section 717.

Decision

Industrial Magistrate Hardy preferred the employee's arguments. He determined that on commencement of the amended WR Act, a preserved collective state agreement came into

operation which incorporated the award. There were two parts to the claim, a claim for severance payments under the original enterprise agreement and a claim for payment in lieu of notice under the award.

Hardy IM observed that a preserved collective agreement could be enforced as if it were a collective agreement. He found that section 717 of the WR Act defined *"an applicable provision"* to include a collective agreement, and *"eligible court"* to include the SAIRCt. The court was therefore empowered by section 720 of the WR Act to hear claims for non-payment of monies due.

Hardy IM found that a preserved collective state agreement was not a law of a State or Territory or one applying to employment generally, or an instrument made under an Act of a legislative character. Section 16 of the WR Act was therefore not applicable to either the enterprise agreement or the award, and so it was not necessary to consider section 16(2) of the WR Act. The Industrial Magistrate found that there was no general standard relating to redundancy prescribed by the *Fair Work Act 1994* (SA) which might have been caught by section 16 of the WR Act.

Hardy IM next turned to clause15(1) of Sch 8 of the WR Act which stated that where powers were conferred by a preserved collective state agreement on a state industrial authority, those functions could not be performed or those powers exercised by the state authority after the commencement of the 'WorkChoices' reforms. He stated that the preserved agreement did not confer a power, function or jurisdiction on the SAIRCt. The power arose from section 720 of the WR Act, with the preserved agreement merely regulating the rights of the parties and creating the right to payment in this case.

Hardy IM therefore held that the SAIRCt had jurisdiction to hear the employee's claim for a redundancy payment.

THE APPEAL

ISS Health Support Services Pty Ltd v Duthie **[2007] SAIRC 94** Jennings SJ, Parsons and Gilchrist JJ.

HELD: Appeal dismissed. Full Court does not have the jurisdiction to entertain this appeal.

How did the State industrial instruments regulating Ms Duthie's employment become enforceable under the WRA?

Tempo Agreement became a "preserved collective State agreement". Clause 13 of Sch 8 of the WRA provides that a preserved collective State agreement is taken to include the terms of the original collective agreement. This means that the agreement and the Award became, by reason of the amendments to the WRA, enforceable under that Act.

Does this Court have jurisdiction to hear and determine a claim enforceable under the WRA?

The WRA contains a specific grant of jurisdiction to this Court. Section 720 of the WRA provides:-

> *"If an employer is required by an* ***applicable provision*** *(except a term of an AWA) to pay an amount to an employee or to pay an amount to a superannuation fund on behalf of an employee, the employee, or an inspector on behalf of the employee, may, not later than 6 years after the employer was required to make the payment to the employee or fund, sue for the amount of the payment in an* ***eligible court****."*

Clause 20(1) of Sch 8 specifically provides *that "a preserved collective State agreement may be enforced as if it were a collective agreement".*

It follows that in issuing proceedings in this Court Ms Duthie was entitled to rely upon the combined effects of sections 717 and 720 of the WRA and section 14(a)(ii) of the FWA and that the action was within jurisdiction.

Does a State Court have jurisdiction to construe an industrial instrument enforceable under the WRA?

The Industrial Magistrate held that sections 717 and 720 conferred jurisdiction on the SAIRCt to determine the claim and that the provisions of the WRA referred to by ISS, in asserting the contrary view, did not qualify the jurisdiction that sections 717 and 720 empowered him to exercise.

On direct appeal to the Full Court of the SAIRCt,[1] Mr Rochow, counsel for ISS, maintained that the SAIRCt was without jurisdiction. The main focus of

[1] FWA s 187(2).

his arguments concerned sections 848 and 849 of the WRA.

Section 848 of the WRA confers jurisdiction upon the Federal Court and the Federal Magistrates Court of Australia to give an interpretation of a Federal award. It provides:-

> *"(1) The Court[2] or the Federal Magistrates Court may give an interpretation of an award on application by:*
>
> *(a) the Minister; or*
>
> *(b) an organisation or person bound by the award.*
>
> *(2) The decision of the Court or the Federal Magistrates Court is final and conclusive and is binding on the organisations and persons bound by the award who have been given an opportunity of being heard by the Court or the Federal Magistrates Court."*

Section 849 of the WRA creates an identical jurisdiction in relation to collective agreements.

Mr Rochow contended that the jurisdiction conferred by these sections was exclusive and could only be exercised by the Federal Court and the Federal Magistrates Court. He submitted that there is no express conferral pursuant to those provisions upon an eligible court as defined by section 717 and that accordingly, any question of the interpretation of the Agreement and the Award, fell within the exclusive jurisdiction of the Federal Court and the Federal Magistrates Court.

Furthermore, he submitted that it is the exclusive role of the Federal Court and the Federal Magistrates Court to determine whether there is an "applicable provision"[3] providing for redundancy or severance pay and that the role of the eligible court is confined to making a monetary award of such amount once the instrument has been interpreted by the appropriate Federal Court.

Mr Love, agent for Ms Duthie, submitted that the ISS's argument misunderstood the status of the Award and its relationship to the preserved collective State agreement. He argued that section 848 has no application to the Award, which is now taken to be part of the preserved collective State agreement. As to section 849, Mr Love submitted that this section did not confer exclusive jurisdiction on the Federal Court or the Federal Magistrates Court and that the Industrial Magistrate's jurisdiction to determine the claim was firmly supported by the terms of sections 717 and 720.

The Full Court decided that a more fundamental issue arose, namely: Does this Court have jurisdiction to hear and determine the appeal? In particular, the issue was whether the Court had the jurisdiction necessary to even determine its capacity to construe an industrial instrument enforceable under the WRA.

The Attorney-General of South Australia intervened to make submissions.

Does this Full Court have jurisdiction to hear an appeal from a State Court that has determined a claim enforceable under the WRA?

Section 853(1) of the WRA provides:-

> *"An appeal lies to the Court [4] from a judgment of a court of a State or Territory in a matter arising under this Act…".*

Section 850(2) provides:-

> *"The jurisdiction of the Court under section 853 is exclusive of the jurisdiction of any court of a State or Territory to hear and determine an appeal from a judgment from which an appeal may be brought to the Court under that section."*

The Appeal Court was concerned that the expression *"exclusive of the jurisdiction of any court of a State or Territory"* might exclude the possibility of an appeal from the decision of an Industrial Magistrate on a claim based on an amount allegedly due under an applicable provision pursuant to section 720 of the WRA to either a single Judge or a Full Court of this Court.[5]

Both the Attorney-General and Mr Love supported that construction. The ISS argued to the contrary.

The WRA provides for appeals and the principle (*R v Longshaw)* does not assist in determining how sections 853(1) and 850(2) of the WRA are to be

[2] In this context "Court" is defined as meaning the Federal Court of Australia.
[3] WRA s 720.

[4] In this context the reference to Court is the Federal Court of Australia. It could be to a single Judge or if referred pursuant to s 852 of the WRA to a Full Court of the Federal Court.
[5] These being the appeal options available in respect of an appeal from the decision of an Industrial Magistrate on an underpayment of wages claim as provided for by ss 187 and 188 of the FWA.

construed and, in particular, whether the appeal rights provided are exclusive to the Federal Court.

The Full Court said that the appellate jurisdiction that the Court exercises hearing an appeal as a single Judge and as a Full Court is a different jurisdiction to that which is provided for by sections 853(1) and 850(2) of the WRA. It noted that the appeal rights under the FWA are wider than those provided for by the WRA because they allow for the receipt of further evidence and review on appeal of the findings of fact made at trial. It argued that the only effect of sections 853(1) and 850(2) in the context of the FWA was to exclude appeals to the Full Court of the Supreme Court of South Australia[6], as it is not an "eligible court" as defined.

The above proposition leads to one of two outcomes. If the eligible court is one created by a State Act that provides for an internal appeal, it could mean that a litigant has to exhaust those appeal rights before having access to the Federal Court. Alternatively, it could mean that there are two avenues of appeal, one internal, and the other to the Federal Court.

The Full Court held that it was much more likely that the Commonwealth Parliament, in enacting sections 853(1) and 850(2) of the WRA, intended for there to be a single mechanism of appeal creating uniform appeal rights from the decision of any court empowered by the WRA to hear claims for amounts allegedly due under an applicable provision pursuant to section 720 of the WRA. This would mean that the appeal rights conferred upon the parties would in all circumstances be the same and not subject to the idiosyncrasies of the individual State systems. Moreover, the requirement for there to be a single appeal mechanism to a single Court would better enhance the prospect of a consistent approach to the construction of industrial instruments enforceable under the WRA.

The Full Court held there is no reason to assume that the literal interpretation of sections 853(1) and 850(2) of the WRA does not accurately reflect the Commonwealth Parliament's intention. A literal interpretation does not lead to an outcome that could be described as *"'absurd', 'extraordinary', 'capricious', 'irrational', or 'obscure'"*[7]. Quite to the contrary, it produces an entirely reasonable result.

That interpretation leads to the conclusion that the **right of appeal from a decision of the SAIRCt following a hearing and determination of a claim for an amount allegedly due under an applicable provision pursuant to section 720 of the WRA is conferred by section 853(1) of the WRA to the Federal Court and by reason of s 850(2) that appeal right is exclusive to the Federal Court.** The Full Court noted that Jessup J supported that construction in *Compass Group (Australia) Pty Ltd t/as ESS World Wide Services v Bartram.*[8] There the issue was whether an appeal lay from the Industrial Division of the Magistrates Court of Victoria to the Federal Court. Jessup J stated that if it did, *"the operation of subs (2) of s 850 of the [WRA]…makes the jurisdiction of this court [the Federal Court], if validly invoked under s 853, exclusive of the jurisdiction of any Victorian court".*[9]

The Full Court concluded that although State industrial instruments initially governed Ms Duthie's employment, amendments to the WRA that took effect before her termination from employment rendered her rights upon termination enforceable under that Act. Despite the Federal status of the WRA this Court **had jurisdiction** to determine her claim. **However, whether that jurisdiction includes a jurisdiction to construe those instruments is a matter that the SAIRCt cannot determine because this Full Court did not have the jurisdiction to entertain the appeal.**

The appeal was therefore **dismissed.**

[6] S 191 of the FWA allows the possibility of an appeal to the Supreme Court from a decision of the Full Court of this Court.

[7] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner for Taxation* (1981) 147 CLR 297 at 321.

[8] [2006] FCA 1337 at para 3.

[9] The Full Court of the Federal Court confirmed that it had jurisdiction to entertain the appeal in *Compass Group (Australia) Pty Ltd t/as ESS World Wide Services v Bartram* [2007] FCAFC 26.