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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Certified on and certificate issued	Cancelling No.
CA/2008/63	UNiTAB Agents Association (Glenice Latimer & Desley Morris) Enterprise Bargaining - Certified Agreement 2008	25/7/08	
CA/2008/64	UNiTAB Agents Association (Judith Anne Piva) Enterprise Bargaining - Certified Agreement 2008	25/7/08	
CA/2008/65	UNiTAB Agents Association (Rhonda Davies) Enterprise Bargaining - Certified Agreement 2008	25/7/08	
CA/2008/66	UNiTAB Agents Association (Denise Law) Enterprise Bargaining - Certified Agreement 2008	25/7/08	
CA/2008/67	UNiTAB Agents Association (Deborah Goulder) Enterprise Bargaining - Certified Agreement 2008	25/7/08	

G.D. SAVILL,
Industrial Registrar.

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 - s. 282 - case stated to industrial court

**Blemrose Pty Ltd AND Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees
(C/2008/17)**

and

**Stateguard Group Pty Ltd AND Queensland Industrial Relations Commission (First Respondent) and Liquor
Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (Second Respondent) (C/2008/19)**

PRESIDENT HALL

31 July 2008

DECISION

The matters currently before the Court had their origin in the events of July/August 2002.

On 15 August 2002, the Queensland Industrial Relations Commission certified an agreement which bore the title *Building Service Contractors' Association of Australia - Queensland Division - Certified Agreement 2002* (CA320 of 2002). The *Agreement* (a multi-employer agreement) had been made on 16 July 2002, between the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Industrial Union of Employees and a variety of natural and artificial persons. Materially, the corporate employers included Blemrose Pty Ltd and Stateguard Security Services Pty Ltd. The *Agreement* replaced the *Australian Building Services Association - Queensland Division - Certified Agreement 1999* (CA409 of 1999).

On 14 February 2006, application was made to the Commission for certification of a new multi-employer Agreement which, in anticipation of success, was entitled *Building Service Contractors Association of Australia - Queensland Division Certified Agreement 2005*. This *Agreement* had been made on 27 January 2006, between the Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees and many of the natural and artificial persons who were parties to the *Building Service Contractors' Association of Australia - Queensland Division - Certified Agreement 2002* (CA320 of 2002). Materially, Blemrose Pty Ltd was a party to the proposed certified agreement but Stateguard Security Services Pty Ltd, which on 3 April 2003 had changed its name to Stateguard Group Pty Ltd, was not a party to the proposed certified agreement. For completeness, I should interpolate that by 27 January 2006, the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Industrial Union of Employees had changed its name to Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (hereafter LHMU).

The application of 14 February 2006, having come before Commissioner Edwards (as Mr Edwards then was) on 1 and 7 March 2006, Mr Edwards generated the following document (formal parts omitted) on 7 March 2006:

"CERTIFICATE

This matter coming on for hearing before the Commission on 01 and 07 March 2006 the Commission certifies the following written agreement as amended:

Building Service Contractors Association of Australia - Queensland Division Certified Agreement 2005 - CA/2006/61.

Made between:

Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees; and Building Service Contractors' Association of Australia - Queensland Division, Industrial Organisation of Employers and various Building Service Contractors as listed in attached Appendix A.

The agreement was certified by the Commission on 07 March 2006 and shall operate from 07 March 2006 until its nominal expiry on 28 February 2009.

This agreement cancels CA320 of 2002 - Building Service Contractors' Association of Australia - Queensland Division, Certified Agreement 2002.". [Emphasis added]

The sentence, "This agreement cancels CA320 of 2002 - Building Service Contractors' Association of Australia - Queensland Division, Certified Agreement 2002", has been emphasised because it is critical to both matters before the Court.

Twenty days after Mr Edwards generated the document set out above, the provisions of the *Workplace Relations Amendment (Work Choices) Act 2005* which exclude the operations of certain State and Territory laws so far as they would otherwise apply in relation to the employment relationship between a constitutional corporation and its employees, commenced to operate. It is common ground that each of Blemrose Pty Ltd and Stateguard Group Pty Ltd is a constitutional corporation, that each of the two Certified Agreements *viz.*, CA320 of 2002 and CA/2006/61 impinged upon the relationship which each corporation had with its employees and that the *Industrial Relations Act 1999* (the IR Act), was amongst the excluded State laws.

On 19 October 2007, Blemrose Pty Ltd made application under s. 280 of the IR Act to re-open the proceedings which had been before Mr Edwards on 1 and 7 March 2006. The relief sought was:

- "(a) That the order of Commissioner Edwards dated 7 March 2006 be amended to say that 'This agreement cancels CA320 of 2002 - Building Service Contractors' Association of Australia - Queensland Division Certified Agreement 2002 in respect of those parties who are parties to this Agreement only'."

The Application was subsequently amended by substitution of "7 March 2006" for "1 March 2006" in the statement of relief sought.

On 21 April 2008 Commissioner Fisher, into whose hands the Application for a Re-opening had fallen, exercised the power at s. 282 to state a case to the Court. The questions posed were:

- "(i) Is the amended application a matter that is within the jurisdiction of the Commission?
(ii) If the answer to (i) above is in the affirmative, does the applicant have standing to make the amended application?
(iii) If the answer to each of (i) and (ii) above is in the affirmative, then, in respect of the purported decision sought to be amended, is that 'a decision' within the meaning of s. 280(3)(a) of the *Industrial Relations Act 1999*?"

Shortly thereafter, on 2 May 2008, Stateguard Group Pty Ltd sought prerogative relief against the Queensland Industrial Relations Commission and the LHMU. It will be necessary shortly to set forth the precise orders sought. For present purposes, it is sufficient to say that the orders are directed to freeing Stateguard Group Pty Ltd from any suggestion that CA320 of 2002 is cancelled insofar as it applied to that corporation.

For convenience, the Case Stated and the Application for Prerogative Relief were heard contemporaneously. The Queensland Industrial Relations Commission appeared to advise that it would abide the order of the Court and was granted leave to withdraw from further participation in the proceedings.

It is convenient to commence with consideration of the Case Stated and to deal with the questions in reverse order.

The thrust of question (iii) is whether the sentence, "This agreement cancels CA320 of 2002 - Building Service Contractors' Association of Australia - Queensland Division, Certified Agreement 2002", encapsulates a "decision" for the purposes of s. 280 of the IR Act. The importance of the question arises from the circumstance that only a "decision"* may be revoked or amended on an application to re-open, see s. 280(3). [*There is no suggestion that Mr Edwards was making a recommendation.]

The relief sought in the Application to Re-open, *viz.*:

- "(a) That the order of Commissioner Edwards dated 7 March 2006 be amended to say that 'This agreement cancels CA320 of 2002 - Building Service Contractors' Association of Australia - Queensland Division Certified Agreement 2002 in respect of those parties who are parties to this Agreement only'."

rather assumes that Mr Edwards had made an order cancelling CA320 of 2002. Commissioner Fisher had reservations about the assumption and I share Commissioner Fisher's concerns. The Commissioner had not been asked to cancel CA320 of 2002. It is entirely understandable that no such request was made. The Commissioner is neither required nor authorised to cancel a certified agreement. The concept adopted by the IR Act is not "cancellation" but "termination". Critically, s. 164 provides:

"164 When a certified agreement is in operation

- (1) A certified agreement starts operating when it is certified.
- (2) The agreement continues to operate until -
 - (a) after its nominal expiry date, it is replaced by another certified agreement; or
 - (b) it is terminated under section 158, 171, 172 or 173."

There is no suggestion that ss. 158, 171, 172 and 173 have any application in the matters before the Court. It is plain from the circumstance that by 14 February 2006, CA320 of 2002 had passed its nominal expiry date and from the assertion in the application of 14 February 2006 (CA/2006/61) that CA320 of 2002 was to be replaced, the application was a s. 164(2)(a) application. There is no express provision in the IR Act to suggest that a certified agreement which is replaced or terminated is "cancelled". Indeed, the circumstance that s. 164 carefully strikes a temporal connection between replacement/termination and continuity of operation of the certified agreement which is replaced/terminated and the further circumstance that a "cancellation" could operate from the date of operation, or could operate *ab initio*, suggests that there is no utility in substituting one concept for another.

Mr Edwards' language is not the language that one would expect where the Commissioner is making an order. I rather apprehend that Mr Edwards was engaged in a task no more significant than following the Practice Note about Certified Agreements of 16 March 2004, see 175 QGIG 1084, which requires that the certificate issued on certifying an agreement will, *inter alia*, specify the number and title of any agreement "cancelled" as a result of the agreement being certified. However, even on that view of the document generated on 10 March 2006, it seems to me that there was a "decision" to revoke or amend.

The definition of "decision" at Schedule 5 to the IR Act has been the subject of comment on other occasions see e.g. *Queensland Public Sector Union of Employees v Department of Corrective Services* (2002) 170 QGIG 422 at 425. The core of the difficulty is that the noun "decision" is defined, *inter alia*, by reference to the noun "decision". However, even if the statement was not a "ruling" within the definition, in the context of s. 280 where the reference is to "decision or recommendation", the conclusion seems to me to be inescapable that in publishing the sentence, "This agreement cancels CA320 of 2002 - *Building Service Contractors' Association of Australia - Queensland Division, Certified Agreement 2002*", Mr Edwards did make a "decision" which might be revoked or amended pursuant to s. 280(3). The statement was formally made in a document purporting to be a "CERTIFICATE" of the Commission and was plainly calculated to state the effect of certification of CA/2006/61 upon the earlier CA320 of 2002. The statement was likely to be treated seriously by persons to whose notice the "CERTIFICATE" came, and has the potential to embarrass those seeking to contend that certification of CA/2006/61 did not have the effect of "cancelling" CA320 of 2002.

The submission which lies behind question (ii) is that an application under s. 280 may be brought only by a party directly affected or aggrieved by the original decision. In general, a party will have standing where the party can show actual or apprehended injury to the party's property or proprietary rights, business or economic interest or (perhaps) secular political interests; compare *Australian Conservation Foundation v The Commonwealth* (1978-1980) 146 CLR 493 at 547 per Mason J and *R v The Electricity Authorities Industrial Causes Tribunal and His Honour Judge Pratt Q.C., ex parte The Electrical Trades Union of Employees of Australia, Queensland Branch* [1987] 2 Qd.R 249 at 261 per Connolly J (with whom Kneipp and Vasta JJ. agreed). However, s. 280 does not expressly confine the right to enliven the section to such persons. Section 280 vests a discretion. There is no reason for thinking that issues about interest in the outcome of an application may not adequately be weighed at the point of granting relief. To impose the suggested limitation on the capacity to make application under the section, seems to me, to edit the section rather than construe the section. It should be borne in mind that even if the matter is approached as one of *locus standi*, "...the cases are infinitely various and so much depends on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.", *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327 to 328 per Mason J. In my view, Blemrose Pty Ltd did have standing to make the application under s. 280. The Commission's function was to consider whether Blemrose Pty Ltd's "interest" justified the grant of relief.

The issue which lies behind question (i) is whether the Commission was denied authority to exercise its powers at s. 280 by the operation of s. 16(1) of the *Workplace Relations Act 1996* (hereafter the WR Act).

The starting point is s. 16(1) of the WR Act which provides:

"16(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or an employer:

- (a) a State or Territory industrial law;
- (b) a law that applies to employment generally and deals with leave other than long service leave;
- (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined by section 623);
- (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
- (e) a law that entitles a representative of a trade union to enter premises."

To understand s. 16(1) of the WR Act one must; (a) bear in mind that s. 6(1) of the WR Act provides - that unless a contrary intention appears, "employer" means, *inter alia*, a constitutional corporation so far as it employs, or usually employs an individual; (b) bear in mind that s. 5(1) of the WR Act provides that unless a contrary intention appears,

"employee" means an individual so far as he or she is employed, or usually employed, as described in the definition of "employer" in s. 6(1), by an employer, except on a vocational placement; (c) bear in mind that s. 7(1) of the WR Act provides that unless a contrary intention appears, "employment" means the employment of an employee by an employer; and (d) bear in mind that by s. 4 of the WR Act the IR Act is a State law. If s. 16(1) of the WR Act stood alone, the jurisdiction of the Commission under s. 280 would be excluded. Section 16(1) of the WR Act does not stand alone. Section 16(2) of the WR Act provides:

- "(2) However, subsection (1) does not apply to a law of a State or Territory do far as:
- (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
 - (b) the law is prescribed by the Regulations as a law to which subsection (1) does not apply; or
 - (c) the law deals with any of the matters (**the non-excluded matters**) described in subsection (3)."

For the purposes of s. 16(2)(b) of the WR Act the relevant regulation is Reg 1.2 of the *Workplace Relations Regulations 2006* which relevantly provides:

"Division 2 Act excludes some State and Territory laws

1.2 State and Territory laws that are not excluded by the Act - general

- (1) For paragraph 16(2)(b) of the Act, subsection 16(1) of the Act does not apply to a law of a State or Territory of a kind that is mentioned in this regulation.

Note Under subsection 16 (1) of the Act, the Act is intended to apply to the exclusion of specified laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer. The Subsection lists the kinds of laws that are excluded.

However, subsection 16(1) does not apply to a law of a State or Territory so far as the law is prescribed by the regulations as a law to which the subsection does not apply.

Rights and obligations - general

- (2) Subsection 16(1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to compliance with an obligation:
- (a) under:
 - (i) that law; or
 - (ii) another law of a State or Territory ;
 Which would otherwise be excluded by subsection 16(1) of the Act; and
 - (b) in respect of an act or omission which occurred prior to the reform commencement.

Rights and obligations - injunctions

- (3) However, Sub-regulation (2) does not apply to the extent to which the law of a State or Territory, or another law, provides for the granting of an injunction in relation to conduct that has not yet occurred.

Note The effect of Sub-regulation (3) is that subsection 16(1) of the Act will apply to the law of a State or Territory to the extent to which it deals with injunctions about rights or obligations in relation to future conduct, and the Act will apply to the exclusion of that law of the State or Territory.

Termination of Employment

- (4) Subsection 16(1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to a termination of employment that occurred before the reform commencement.

Unfair contracts

- (5) Subsection 16(1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it:
- (a) relates to proceedings that 'c' commenced before the reform commencement; and
 - (b) provides for the variation or setting aside of rights and obligations arising under:
 - (i) a contract of employment; or
 - (ii) another arrangement for employment;

That a court or tribunal finds is unfair.

Succession, transmission or assignment of business

- (6) Subsection 16(1) does not apply to a law of a State or Territory (including a law relating to appeals) to the extent to which it relates to a succession, transmission or assignment of a business, or a part of a business, that occurred before the reform commencement."

Here, reliance is placed upon Reg 1.2(2). The contention is that in its natural meaning "obligation" includes obligations of the Queensland Industrial Relations Commission and that the Commission breached its obligations before the reform commencement on 27 March 2006. By his written submissions, Counsel for Blemrose Pty Ltd summarises the submission as follows:

- "27. Relevantly, therefore, there were two obligations imposed upon the QIRC in the certification of the 2005 Agreement. First, it was obliged to certify the agreement only if satisfied of the various matters set out in s. 156(1). It can be assumed by the fact of certification itself that the QIRC was so satisfied in relation to the application to certify the 2005 Agreement as brought to it by the parties to that agreement. Therefore, it was obliged to certify the agreement as made with those employer parties, the effect of which, in terms of s. 164(2)(a), was the replacement of the 2002 Agreement with the 2005 Agreement insofar as the former related to employer parties to the latter, but only to that extent and not otherwise. [Emphasis added*]
28. Secondly, the QIRC was obliged not to otherwise terminate the 2002 Agreement, unless upon application by a party with standing and upon notice to all other parties bound by the agreement, it was satisfied that it was in the public interest to do so.
29. The application to re-open the certification proceedings by Blemrose relates to the compliance by the QIRC with those obligations imposed upon it by ss. 156 and 173 IRA. It is ultimately not to the point that the relevant obligations here are imposed upon the QIRC rather than on Industrial party such as on employer or an employee. Regulation 1.2(2) is sufficiently broad in its terms to extend to an obligation imposed upon an industrial tribunal by a State industrial law. Further, the act or omission of the QIRC in respect of those obligations occurred prior to the commencement of the Work Choices reforms of the WRA on 26 March 2006 thus satisfying the second limb of r.1.2(2)."

[*I expressly refrain from comment upon the passage emphasised.]

I am unable to accept that broad interpretation of obligation. The purpose of s. 16(1) of WR Act is not the exclusion of State law from a field. The purpose of s. 16(1) of WR Act is exclusion of State law from a field which WR Act identifies and manifests an intention to cover. In *New South Wales v The Commonwealth* (2006) 229 CLR at paras 369 to 370 the majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) said [footnotes omitted]:

"369 *The Commonwealth's arguments.* The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law. It was concluded above that the Commonwealth has power to regulate the relationships between employees and employers as defined in ss 5(1) and 6(1) by reliance on the heads of power referred to in paras (a), (e) and (f) of the definition of 'employer in s 6(1). The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it), because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above (541), the Commonwealth chose to exclude State law only in respect of the relations of employees an employers as defined in ss 5(1) and 6(1).

370 *No bare attempt to limit or exclude State legislative power.* The Commonwealth's submissions are to be preferred. Western Australia pointed to nothing in s 109 itself or in the case law on s 109 suggesting that s 109 will not cause Commonwealth law to prevail over an inconsistent State law and render it invalid to the extent of the inconsistency unless the Commonwealth law provides some regime for regulating each particular aspect of the topics dealt with by the State law. Rather, as Dixon CJ put it in *Lamshed v Lake* (542), the distinction is between a law which lays down a positive rule and a law 'seeking rather to limit State power'. Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than state law

provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides (543). And s 109 may operate where the Parliament has done what it has in the new Act - to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects. The Commonwealth has legislated to provide a detailed set of rules for particular agreements; it has not dealt, for example, with unfair contracts except in relation to independent contractors, but that does not preclude it from defining a field of relationships between s 5(1) employees and s 6(1) employers, and occupying parts of that field, like unfair contracts, to the exclusion of State law."

If the field be the relationship between s. 5(1) employees and s. 6(1) employers, it is difficult to resist the conclusion that the "obligations" at Reg 1.2(2) are the obligations between s. 5(1) employees and s. 6(1) employers. By way of confirmation of that interpretation, Counsel for the LHMU refers the Court to the Explanatory Statement issued with the *Workplace Relations Regulations 2006*. Paragraphs 17 and 18 of the Explanatory Statement are in the following terms:

- "17. Sub-regulation 1.2(2) will apply to compliance with obligations, and the enforcement of accrued rights, which exist at the reform commencement under, for example, State and Territory industrial laws and instruments made under such laws. For example, if an employer failed to pay an employee in accordance with a State award prior to the reform commencement, then the employee may bring proceedings under the relevant State or Territory law to enforce the employer's award obligation. This is consistent with the approach taken (for appeals of Commonwealth laws) in paragraph 8(c) of the *Acts Interpretation Act 1901* in relation to rights, privileges, obligations or liabilities which were acquired, accrued or incurred under a repealed act before the act was repealed.
18. To the extent that a State or Territory law is within the scope of subsection 16(1), and is not prescribed under this regulation or otherwise saved by subsections 16(2) and 16(3), the State or Territory law will be excluded in relation to an employee or employer within the meaning of subsections 5(1) or 6(1). The effect of this is that, for example, the State and Territory industrial laws will cease to apply in relation to an employee or employer within the meaning of subsection 5(1) or 6(1) for the following kinds of matters:
- matters about state awards (other than compliance with award obligations before the reform commencement), including the making or variation of an award;
 - matters about wages (other than compliance with wage obligations before the reform commencement), including applications to vary awards to amend wages provisions, State wage cases, and applications for general orders to apply to a State or industry in a State, relating to wages;
 - matters about agreements between employers and employees, and employers and unions (other than compliance with agreement obligations before the reform commencement), including certification, registration and variation;
 - matters involving workplace dispute resolution;
 - matters about industrial action, including strike pay (other than compliance with award obligations before the reform commencement) - except for industrial action affecting essential services (which is a non-excluded matter under paragraph 16(3)(k));
 - matters about terminations of employment that occur after the reform commencement;
 - matters where proceedings have not yet commenced at the reform commencement, where the applicant seeks the variation or setting aside of rights and obligations under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; and
 - matters about a transmission, succession or assignment of a business, or part of a business, that occurs after the reform commencement."

Reference to the Explanatory Statement for the purpose of confirming the interpretation of a provision is authorised by s. 46(1)(a) of the *Acts Interpretation Act 1901* (C'wth) which applies s. 15AB(1) of the *Acts Interpretation Act 1901* (C'wth) to an instrument as if it were a statute. One must accept that the Court's function is to give effect to Reg 1.2(2) and that it is not the function of the Court to construe and give effect to the Explanatory Statement, *Nominal Defendant v GLG Australia Pty Ltd* (2005-2006) 228 CLR 529 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ and [82] per Kirby J. In particular, one must recognise potential difficulty in exploring the analogy between Reg. 1.2(2) and 5.8(c) of the *Acts Interpretation Act 1901*(C'wth). However, reading the Explanatory Statement as a whole, what is conveyed (amongst

other things) is an intention to distinguish between matters about agreements and matters about enforcement of obligations under agreements breached prior to 27 March 2006.

In my view the Amended Application by Blemrose Pty Ltd to re-open the proceedings before Mr Edwards on 1 and 7 March 2006 is not within the jurisdiction of the Queensland Industrial Relations Commission and the answer to question (i) is "No". It becomes unnecessary to provide answers to questions (ii) or (iii).

I turn then to Stateguard Group Pty Ltd's Application for Prerogative Relief. The orders sought (against the Queensland Industrial Relations Commission and the LHMU) are:

- "(a) A declaration that the certificate issued by Queensland Industrial Relations Commission on 7 March 2006 under Chapter 6, Part 1, Division 2 of the *Industrial Relations Act 1999* in proceedings CA/2006/61, insofar as it purportedly cancelled CA320 of 2002 - *Building Service Contractors' Association - Queensland Division, Certified Agreement 2002*, was issued in excess of its jurisdiction;
- (b) In the alternative to (a), a declaration that the certificate issued by Queensland Industrial Relations Commission on 7 March 2006 under Chapter 6, Part 1, Division 2 of the *Industrial Relations Act 1999* in proceedings CA/2006/61, insofar as it purportedly cancelled CA320 of 2002 - *Building Service Contractors' Association - Queensland Division, Certified Agreement 2002* as it applied to the Applicant, was issued in excess of its jurisdiction;
- (c) A prerogative order in the nature of certiorari removing to this Honourable Court and quashing the decision of the First Respondent in proceedings CA/2006/61, insofar as it purportedly cancelled CA320 of 2002 - *Building Service Contractors' Association - Queensland Division, Certified Agreement 2002*;
- (d) In the alternative to (c), a prerogative order in the nature of certiorari removing to this Honourable Court and quashing the decision of the First Respondent in proceedings CA/2006/61 whereby the First Respondent certified the *Building Service Contractors' Association - Queensland Division, Certified Agreement 2005*, insofar as it purportedly cancelled CA320 of 2002 - *Building Service Contractors' Association - Queensland Division, Certified Agreement 2002* as it applied to the Applicant;
- (e) Such further or other orders that the Court considers appropriate."

Counsel for Stateguard Group Pty Ltd very properly acknowledges that proposed orders are pleaded in the alternative because the orders at (a) and (c) may impact upon some employer parties to CA320 of 2002 who are not parties to CA/2006/61, notwithstanding that those employers are not parties to the proceedings for prerogative relief. However, the acknowledgement highlights the difficulty with Stateguard Group Pty Ltd's application. Stateguard Pty Ltd is a party to the proceedings. As between Stateguard Group Pty Ltd and the Queensland Industrial Relations Commission and as between Stateguard Group Pty Ltd and the LHMU, the orders at (b) and (d) will settle the effect of the sentence, "This agreement cancels CA320 of 2002 - *Building Service Contractors' Association of Australia - Queensland Division, Certified Agreement 2002*". The proceedings are proceedings under the IR Act which concerns an employer (Stateguard Group Pty Ltd) which is a constitutional corporation. The extent of the exclusion of State law by s. 16(1) of the WR Act was described by Buchanan J in *Tristar Steering and Suspension Ltd v Industrial Relations Commission (NSW)* (2007) 161 IR 469 at 480 in presently relevant terms:

"45 By its terms s 16 of the WR Act declares an intent that the WR Act occupy, to the exclusion of the IR Act, (subject only to the exceptions in s 16(2), (3) and (4) - which are not here relevant), the whole field of legislative activity 'in relation to an employee or employer' (my emphasis) where the employer is an entity identified by s 6(1) of the WR Act, including a constitutional corporation. The words 'in relation to' are broad. They are not confined to exclude only actual regulation of specific rights and obligations but anything done by or under a State or Territory industrial law. Furthermore, although in many, perhaps most, cases it is the relationship of employer and employee, or the relations of an employer with its employee or employees, which will provide the practical foundation from which s 16 commences that should not be understood to import a limitation upon, or add a further gloss to, the words 'in relation to an employee or employer'. Matters which concern them individually or separately, are also within the field covered.

46 Although neither the IR Act or s 146(1)(d) are rendered wholly invalid by the operation of s 109 of the *Constitution*, invalidity arises inter alia when, and to the extent that, the IR Act otherwise operates as a grant of jurisdiction or power in relation to a matter within the field covered by the WR Act.

47 It is convenient and relevant, for the moment, to concentrate on constitutional corporations and put aside other employers to whom s 61(1) of the WR Act refers. The IR Act is rendered invalid to the extent that it 'would otherwise apply in relation to' constitutional corporations who are employers or any of their employees. Section

146 of the IR Act (whether under s 146(1)(d) or otherwise) does not, any longer, permit or authorise the IRC to perform any function 'in relation to' such employers or employees."

It does not matter whether Mr Edwards purported to order "cancellation" of CA320 of 2002 or did no more than publish an opinion about the effect of certification of CA/2006/61 which is of no legal effect. This Court is no longer permitted, in relation to employers who are constitutional corporations to assert that Mr Edwards' opinion was of no legal effect because:

"... The words 'apply in relation to' are broader than the term 'apply to'. In my view they are not confined to legal affectation but are a description of the field of operation of the State or Territory law. It is not intended that State or Territory laws (as defined) operate in the same field as the WR Act unless permitted by s 16(2), (3) or (4). It is intended that they should not." [*Tristar Steering and Suspension Ltd v Industrial Relations Commission (NSW)*, *ibid*, at paragraph 36 per Buchanan J.]

The same proposition was developed more fulsomely in the same appeal by Kiefel J at paragraph 23:

"I reject the proposition implicit in some of the submissions for the second respondent that a constitutional corporation can only be affected in a relevant manner by some legally enforceable command. In the first place, where the Commonwealth intends to cover the field, the absence of regulation within the field is an exercise of legislative intent. In the second place, the notion that a party is only affected by legal obligations is an outdated notion reflecting the reasoning of the High Court in *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353. That reasoning has been swept aside by later authority, particularly *Annets v McCann* (1990) 175 CLR 564. The first applicant has locus standi to obtain the relief sought whether or not it, or any employee of it, is subject to compulsory process."

By his Outline of Submissions in Response, Counsel for Stateguard Group Pty Ltd advances the contention:

"10. Secondly, even if the narrow construction of 'obligation' advanced by the Respondent were accepted, the broad application of the words 'in relation to' as discussed by Buchanan J in *Tristar*, necessary to otherwise exclude the s. 248 application by operation of s. 16(1) WRA, would apply equally to the expression 'to the extent to which it relates to compliance with an obligation' as found in regulation 1.2(2). Regulation 1.2(2) is not restricted to State laws 'about' or 'dealing with' compliance with such an obligation."

Whilst s. 46 of the *Acts Interpretation Act 1901* (C'wth) provides for expressions used in regulations made under an Act to be given the same meaning as in the enabling legislation conferring the power, s. 46 expressly genuflects to a contrary intention. Matters of context, subject matter and purpose may not be left out of account. The purpose of s. 16(1) of WR Act is to mark out the field of operation to be denied State law. The purpose of Reg. 1.2(2) is to mark out the extent to which an otherwise excluded State law is not subject to exclusion. Regulation 1.2(2) saves the State law "...to the extent to which it relates to compliance, with an obligation", [emphasis added]; i.e. the relationship must be with compliance with and not, e.g. the creation or modification of, the obligation.

In my view this Court has no power to entertain Stateguard Group Pty Ltd's Application for Prerogative Relief.

I reserve all questions as to costs in Matter No C/2008/19.

Dated 31 July 2008.

D. R. HALL, President.

Released: 31 July 2008

Appearances:

Mr A.A.J. Horneman-Wren, for Blemrose Pty Ltd and Stateguard Group Pty Ltd, in both matters.

Mr J. Merrell, instructed by Hall Payne Lawyers for Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees, in both matters.

Ms J. Thompson, for Queensland Industrial Relations Commission.

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 - s. 341(1) - appeal against decision of industrial commission

Robert James Cunningham, Michael John Douglas Meadows, David John Herbert Watt, Brian Walter Smith, Warren Grant Denny, Robyn Gay Lyons, Stephen John Tonge, Brian Francis Ward, James William Alley, Sharon Ann Winn, who are currently trading as, or who have traded as, Flower & Hart (A Firm) AND William Hamilton Hart (C/2008/20)

PRESIDENT HALL

1 August 2008

DECISION

On 21 December 2007, the Respondent, William Hamilton Hart, filed an application in the Queensland Industrial Relations Commission seeking Declarations under s. 274A of the *Industrial Relations Act 1999* (the Act). The application, which named Flower & Hart (a firm of Solicitors) as the respondent to that application, was given the number B/2007/79. On 5 February 2008, (after Flower & Hart had filed a response) the Respondent filed an amended application in the Commission. The amended application named as the respondents to the application the present Appellants. The Declarations sought were:

- "(a) a declaration under s. 274A of the Industrial Relations Act 1999 ('the Act') that the remuneration paid to me as an employee of Robert James Cunningham, Michael John Douglas Meadows, David John Herbert Watt, Brian Walter Smith, Warren Grant Denny, Robyn Gay Lyons, Steven John Tonge, Brian Francis Ward, James William Alley, Sharon Ann Winn should have been paid without deduction of superannuation contributions;
- (b) a declaration under s. 274A of the Act that remuneration should have been paid to me by (the Appellants) for periods of annual leave taken during my employment at the rate specified in the Act; and
- (c) a declaration under s. 274A of the Act that remuneration should have been paid to me by (the Appellants) for periods of accrued but unused annual leave as at the termination of my employment at the rate specified in the Act."

By an affidavit filed in support of the application, the Respondent asserted that during his employment by the Appellants, the Appellants:

- "(a) deducted superannuation contributions from his remuneration without his consent; and
- (b) failed to pay him remuneration for any periods of annual leave taken during the second and subsequent years of his employment with the Appellants; and
- (c) failed to pay his remuneration for periods of accrued but unused annual leave as at the termination of his employment with the Appellants."

On 21 January 2008, the Respondent filed proceedings in the Industrial Magistrate's Court at Brisbane claiming certain monies against the Appellants as unpaid wages. An examination of the application filed in the Industrial Magistrate's Court shows an assertion that the sum of \$72,720.38 claimed in those proceedings represents the total money amount said to have been underpaid by the Appellants in respect of the three matters listed in the Application for Declarations filed in the Commission. By a letter dated 12 February 2008, the Respondent's solicitors forwarded the Industrial Magistrate's Court application by way of service on the Appellants. (In fairness, on 22 January 2008, one of the Appellants, Robert Cunningham, as Managing Partner of Flower & Hart, was asked whether he would accept service on behalf of all of the Appellants of the Industrial Magistrate's Court application.)

On 3 March 2008, the Appellants filed an application seeking the dismissal of the Respondent's amended application in the Commission, or, alternatively, an order that the Commission refrain until further order from hearing or deciding the matter. By a decision of 30 April 2008, now reported at 188 QGIG 10, the Commission dismissed the application. From that decision the Appellants bring an appeal to this Court.

To expose the case developed by the Appellants at first instance and re-agitated on the Appeal, it is necessary to begin with an examination of ss. 274A and 399 of the Act.

Section 274A, which was inserted by the *Industrial Relations Act and Other Legislation Amendment Act 2007*, provides:

"274A Power to make declarations

- (1) The commission may, on application, make a declaration about an industrial matter.
- (2) The commission may make the declaration whether or not consequential relief is or could be claimed.
- (3) The application may be made by -
 - (a) a person who may be directly affected by the declaration; or
 - (b) an inspector; or
 - (c) an organisation of employees or employers of which a person mentioned in paragraph (a) is a member, if it is acting with the person's written consent; or
 - (d) an organisation of employees or employers who may be directly affected by the declaration.
- (4) Subject to chapter 9, a declaration made by the commission under this section is binding in any proceeding under this Act in relation to the issue determined by the declaration."

It is not disputed that the Declarations sought by the Respondent are declarations about "industrial matters"; neither is it disputed that the Respondent was a person entitled to make the application. It is conceded that, if s. 274A is read literally, the Commission has jurisdiction to grant the application sought.

The provision of the Act pursuant to which proceedings were brought in the Industrial Magistrate's Court of Brisbane was s. 399 which provides:

"399 Recovery of unpaid wages etc.

- (1) An application may be made to a magistrate for an order for payment of -
 - (a) an employee's unpaid wages; or
 - (b) an apprentice's unpaid tool allowance under section 138; or
 - (c) remuneration lost by an apprentice or trainee because the employer has contravened section 391(2); or
 - (d) remuneration unpaid because a person contravened an order mentioned in section 140A(1).
- (2) The application may be made by -
 - (a) the employee; or
 - (b) an employee organisation of which the employee is a member, acting for the employee; or
 - (c) a person authorised by the employee to make the application, acting for the employee; or
 - (d) an inspector.
- (3) The application must be made within 6 years after the amount claimed became payable.
- (4) However, for an apprentice or trainee, the application can not relate to an amount payable more than 4 years before the commencement of this section.
- (5) On hearing the application, the magistrate -
 - (a) must order the employer to pay the employee the amount the magistrate finds to be payable and unpaid to the employee within the 6 years before the date of the application; and
 - (b) may make an order for the payment despite an express or implied provision of an agreement to the contrary; and
 - (c) may order the payment to be made on the terms the magistrate considers appropriate; and
 - (d) may award costs to either party in an amount assessed by the magistrate.
- (6) A person can not make an application under this section if an application has been made under section 278 or 400F for the same matter.
- (7) In this section -

employee includes a student to whom an order made under section 140A applies.

employer includes an employer to whom an order made under section 140A applies."

It is frankly conceded by the Respondent that the Declarations pursuant to s. 274A are sought in order that the Declarations (if granted) may be relied upon in the proceedings in the Industrial Magistrate's Court pursuant to s. 399, for the purpose of establishing the liability of the Appellants to the Respondent. It is conceded also that the Respondent might have ignored s. 274A and, as the Respondent would have been required to do prior to the enactment of s. 274A, might have set about

proving the matters which the Declarations will decide as between the Respondent and the Appellants in the proceedings in the Industrial Magistrate's Court. Additionally, it is common ground that; (a) the Industrial Magistrate's Court will be required to quantify the liability established by the Declarations; and that (b) on a literal interpretation of s. 274A(4) the Respondent is entitled to utilise the Declarations for the purpose and in the manner described. The contention of the Appellants is that if the Act is read as a whole, s. 274A does not carry its literal meaning and, in the alternative, if the Commission has jurisdiction to grant the Declarations, it should decline to exercise that jurisdiction because to exercise the jurisdiction would involve an abuse of process. It is, as I understand it, recognised by each of the Appellants and the Respondent that, because the Commission is a Court of Record rather than a Superior Court of Record (s. 255), the authorities bearing upon the circumstance in which a Superior Court will stay proceedings admittedly within its jurisdiction to prevent an abuse of process are not directly applicable. The Appellants' contention is that the same outcome may be reached by invoking s. 331(b) which provides:

"331 Decisions generally

The court or commission may, in an industrial cause -

- (a) ...
- (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers -
 - (i) the cause is trivial; or
 - (ii) further proceedings by the court or commission are not necessary or desirable in the public interest; or
- (c) ...".

As I understand it, the Respondent does not dispute the availability of a remedy pursuant to s. 331(b), but adds the caveat that the authorities on an analogue of s. 331(b) in the *Conciliation and Arbitration Act 1904* (Cwth), esp. *Re: Queensland Electricity Commission and Others; ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1, suggest that the balancing of interests required by s. 331(b) is so much a matter of fact and degree that it will seldom be possible to demonstrate an error in the exercise of the discretion of s. 331(b) which of the kind described in *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

Because the Appellants' arguments about statutory construction and s. 331(b) are intertwined, I shall begin with the legislative provisions from which solace is sought.

The starting point is s. 278 which provides:

"278 Power to recover unpaid wages and superannuation contribution etc.

- (1) An application may be made to the commission for an order for payment of -
 - (a) an employee's unpaid wages; or
 - (b) an apprentice's unpaid tool allowance under section 138; or
 - (c) remuneration lost by an apprentice or trainee because the employer has contravened section 391(2); or
 - (d) contributions to the approved superannuation fund payable for an eligible employee that are unpaid; or
 - (e) remuneration unpaid because a person contravened an order mentioned in section 140A(1).
- (2) An application can not be made to the commission if the total amount claimed under subsection (1) is more than \$50000.
- (3) The application may be made by -
 - (a) for a claim for occupational superannuation - an employee who is an eligible employee on whose behalf an employer is required to contribute to an approved superannuation fund; or
 - (b) for any other claim - an employee; or
 - (c) an employee organisation of which the eligible employee or employee is a member, acting for the employee; or
 - (d) a person authorised by the eligible employee or employee to make the application, acting for the employee; or
 - (e) an inspector.
- (4) The application must be made with 6 years after the amount claimed became payable.
- (5) However, for an apprentice or trainee, the application can not relate to wages payable more than 4 years before the commencement of this section.

- (6) The vice president may, either before or after the start of a hearing, remit the application to a magistrate if the vice president considers the application could be more conveniently heard by a magistrate, having regard to -
- (a) the difficulty or expense of producing witnesses; or
 - (b) another good and sufficient reason, for example, cost.
- (7) A magistrate may hear and decide the application as if it had been brought before the commission, and the magistrate's decision is taken to be a decision of the commission.
- (8) On hearing the application, the commission or magistrate -
- (a) must order the employer to pay the employee -
 - (i) the amount the commission or magistrate finds to be payable and unpaid to the employee within the 6 years before the date of the application; and
 - (ii) an amount the commission or magistrate considers appropriate, based on the return that would have been accrued in relation to the contributions had it been properly paid to the approved superannuation fund; and
 - (b) may make an order for the payment despite an express or implied provision of an agreement to the contrary; and
 - (c) may order the payment to be made on the terms the commission or magistrate considers appropriate.
- (9) For an order about an unpaid contribution, the order must require the contribution to be paid to -
- (a) if the employee is employed by the employer - the approved superannuation fund; or
 - (b) if the employee is no longer employed by the employer -
 - (i) the approved superannuation fund; or
 - (ii) a complying superannuation fund; or
 - (iii) a superannuation fund nominated by the employee;
 - (iv) an eligible rollover fund; or
 - (v) if the amount is less than the amount of total benefits that may revert to an employee under the *Superannuation Industry (Supervision) Act 1993* (Cwth) - the employee.
- (10) The contribution must be paid into the unclaimed moneys fund, if a former employee in relation to whom an order is made -
- (a) can not be located after reasonable inquiry; or
 - (b) does not nominate a superannuation fund for the purpose of the order, if required by the order to do so.
- (11) A person can not make an application under this section of an application has been made under section 399, 400F or 408 for the same matter.
- (12) In this section -

employee includes a student to whom an order made under section 140A applies.

employer includes an employer to whom an order made under section 140A applies.

occupational superannuation includes an amount equal to the return that would have accrued in relation to the occupational superannuation had it been properly paid to an approved superannuation fund."

When ss. 278 and 399 are read together, it is apparent that an employee seeking to recover "wages" (in the statutory sense) of less than \$50,000 may either take proceedings under s. 278 in the Commission or take proceedings under s. 399 in the Industrial Magistrate's Court. The restrictions are that an employee who has instituted proceedings in the Industrial Magistrate's Court may not institute proceedings in the Commission, and that an employee who has instituted proceedings in the Commission may not institute proceedings in the Industrial Magistrate's Court. An employee seeking to recover "wages" (in the statutory sense) in excess of \$50,000 has no choice. Such an employee may institute proceedings in the Industrial Magistrate's Court but may not institute proceedings in the Commission.

The next section of relevance is s. 320 which provides:

"320 Basis of decision of the commission and magistrates

- (1) Subsections (2) and (3) do not apply for proceedings for -
- (a) the recovery of amounts, other than an amount ordered under section 278 of 408F; or
 - (b) an offence against this Act.

- (2) In proceedings, the commission or Industrial Magistrates Court -
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) may inform itself on a matter it considers appropriate in the exercise of its jurisdiction.
- (3) Also, the commission or Industrial Magistrates Court is to be governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of -
 - (a) the persons immediately concerned; and
 - (b) the community as a whole.
- (4) In proceedings, the commission may admit evidence given before, and the findings of, the Anti-Discrimination Commission as evidence in the proceedings.
- (5) ...
- (6) ...". [All emphasis added]

So significant are the differences between proceedings in the Commission and proceedings in the Industrial Magistrate's Court that where a s. 278 matter is remitted to an Industrial Magistrate, the Industrial Magistrate is expressly required to "hear and decide the application as if it had been brought before the Commission" (s. 278(7)). There are other important differences between proceedings in the Commission and in the Industrial Magistrate's Court going to legal representation (s. 319), recovery of costs (s. 335) and appeals (s. 341(1) and (2)).

It is the contention of the Appellants that the Act has established two quite distinct streams for the recovery of wages and that an intention should not be attributed to the Legislature to permit use of s. 274A to establish issues in a wage recovery proceeding which, because of its quantum, might be brought only in the Industrial Magistrate's Court. The point is taken that the very Act which introduced s. 274A also introduced provisions for conciliation in employment claims in the Industrial Magistrate's Court, (see Part 6 of the *Industrial Relations Act and Other Legislation Amendment Act 2007*), which maintained the proposition that a claim is not an employment claim if the course of action to which the claim relates is within the jurisdiction of the Commission. An impertinent rejoinder might be that the omission of a provision precluding the use of s. 274A declarations in s. 399 recovery proceedings, was contemporaneous with recognition of an Industrial Magistrate's Court stream and an Industrial Relations Commission stream and contemporaneous with a preparedness to legislate to avoid overlap in the case of Part 6. However, the real obstacle to the Appellants' argument lies not in speculation and/or advocacy but in the absence of any language in the *Industrial Relations Act and Other Legislation Amendment Act 2007** or the *Industrial Relations Act 1999* (post the Amendment) to anchor the submission that s. 274A declaration proceedings and s. 399 recovery proceedings are not to be intermingled. Section 274A weighs heavily against such a construction. Section 274A is a provision of the type which gives the Commission a new discretion to issue a declaration and, if the Commission exercises its discretion in favour of an applicant, gives a new right to the applicant; see generally the discussion in *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 at 295 to 296 per Handley JA with whom Giles JA agreed. Sections 320(1) to (3) and 274A read well together. There is no reason to suppose that the Legislature did not intend the protection against abuse to be found in the proper exercise of discretion. [*It is common ground that the Minister's Second Reading Speech (18 April 2007, 1294) does not assist. In my view, the Explanatory Note poses the same issues as the Act.]

The Appellants' submission that a Superior Court of Record will stay proceedings where the processes and procedures of the court which exist to administer justice with fairness and impartiality are sought to be used as instruments of unfairness or injustice is plainly correct, compare *Walton v Gardiner* (1993) 177 CLR at para 23 per Mason CJ, Dean and Dawson JJ. It is clear that an established category of case for grant of a stay is where there are proceedings in more than one court and the court granting the stay is not the appropriate forum to hear the matter. On the authorities one must accept that the principle applies outside the area of private international law and applies to liable proceedings in domestic courts, see e.g. *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at para 2 per Gleeson, Gummow, Hayne and Crennan JJ. (I am content to put aside the question whether in the case of domestic courts the test is whether the court asks for a stay is a "clearly inappropriate" court or whether the test is whether the rival court is a "more appropriate" forum.) I am prepared also to accept that in an appropriate case, s. 331 (and, I think, s. 274A itself) will authorise the grant of a stay to prevent abuse. However, having made all of those concessions, one encounters the difficulty that one is not concerned with exposition of the general law but with the construction of a particular statutory provision which expressly authorises, not the conduct of litigation in one court rather than another, but the conduct of part of a matter in the Commission and the other part of a matter in another court or tribunal. There may be some doubt that left to its own devices the general law would have countenanced such a proposition: but the Legislature has chosen to adopt it. To quote Kirby J in *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at para 123 [footnotes omitted]:

"There is a common tendency for lawyers to prefer judicial elaborations of the law over analysis of applicable legislation. This is a tendency which this Court, in recent years, with a single voice, has endeavoured to correct. ...".

Here, all of the complaints raised by the Appellants are to be found in the Act itself. The complaints are the obvious complaints that if the issues raised in the Application for Declarations are litigated in the Commission rather than the Industrial Magistrate's Court, the Appellants will lose the right to legal representation, the right to insistence upon the rules of evidence, the right to seek costs on a follow-the-event basis and be limited as to the grounds of any appeal. This is not a case in which relief is sought on the basis of conduct of the Respondent as might be the case where, e.g. declarations are sought in the Commission after an s. 399 case involving the same issues has been fought, evidence has closed and the Industrial Magistrate has reserved the Court's decision. All that is put against the Respondent is that the Respondent, openly rather than by way of an ambush, has sought to take advantage of a remedy expressly made available to him by the Legislature. To grant relief under s. 331 (or to exercise the discretion at s. 274A adversely to the Respondent) would be to go beyond giving effect to s. 275 and embark upon its revision.

I dismiss the Appeal.

I reserve all questions as to costs.

Dated 1 August 2008.

D. R. HALL, President.

Released: 1 August 2008

Appearances:

Mr A. Herbert, instructed by Flower & Hart, Solicitors for the Appellants.

Mr K. Watson, instructed by Milner Lawyers, Solicitors for the Respondent.

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