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# Industrial Relations Commission Commercial Contracts Jurisdiction

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## SUMMARY

*Over recent times, the unfair contracts jurisdictions of the New South Wales and Queensland Industrial Relations Commissions have received much critical analysis. The changing nature of modern working arrangements has seen the jurisdiction evolve and increasingly the courts have recognised the importance that this jurisdiction plays in imposing a standard of fairness on individual contracts where the traditional collective approach does not provide sufficient security for individuals in the workplace.*

*Section 276 of the Industrial Relations Act 1999 (Qld) gives the Queensland Industrial Relations Commission very broad powers to allow it to amend or declare void a contract for service that can be characterised as an unfair contract. The jurisdiction is somewhat more limited in the New South Wales jurisdiction where the New South Wales Industrial Relations Commission is limited to ruling upon contracts or arrangements that have an industrial colour or flavour. Recent case law has demonstrated the New South Wales Court of Appeal's disapproval of the New South Wales Industrial Relations Commission's efforts to expand into the commercial contracts domain. The evolution of case law in this area is applicable to individuals and companies and it will be increasingly important for companies to be aware of any employment or service agreements that could be deemed unfair.*

*This paper highlights the major points put forward by the Queensland Industrial Relations Commission and the Queensland Industrial Court in the Newmont case, illustrating some of the history of the jurisdiction and also provides a comparison with similar provisions in New South Wales.*

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# INTRODUCTION

## The Newmont Case

The commercial contracts jurisdiction has again been brought to the fore recently by a case in the Queensland Industrial Relations Commission (QIRC) (which was the subject of an appeal to the Queensland Industrial Court (QIC)) between *Tomac Enterprises Pty Ltd v Newmont Pajingo Pty Ltd*[1] (*Newmont*). The *Newmont* case demonstrates the degree of discretion held by the QIRC in determining whether a contract for service is "unfair".

Since its inception in 1999, the unfair contracts jurisdiction of the Queensland Industrial Relations legislation[2] has been interpreted and applied generously by the QIRC. Much of the case law in relation to this extensive jurisdiction bestowed upon the QIRC has been summarised and analysed by the QIRC and the QIC in the Newmont case. Deputy President Bloomfield (and President Hall on appeal) illustrated that, in contrast to decisions handed down by the New South Wales Industrial Relations Commission (NSWIRC), the Queensland unfair contracts jurisdiction has been given much broader interpretation as regards the types of arrangements that are capable of being challenged. The QIRC is not limited to redrafting unfair employment arrangements, but can redraft commercial arrangements as well.

### The facts

The *Newmont* case involved a contract between Tomac Enterprises Pty Ltd (Tomac) and Newmont Pajingo Pty Ltd (Newmont) for the provision of underground drilling services at the Pajingo Mine run by Newmont. One of Newmont's senior managers contacted Tomac in April 2002 to discuss the possibility of Tomac performing underground drilling at the mine. During the course of negotiations, Newmont representatives allegedly made representations to the directors of Tomac that following the drilling of an initial 30,000 metres (after which time, Tomac's safety and performance would be reviewed), Tomac would be "drilling here for a long time". As there were no drill rigs available in Australia to perform the work requested, Tomac advised Newmont that it had been told of a drill rig available for purchase in Sweden that it could arrange to have transported to Australia. At the same time however, the Tomac representative expressed his concern to Newmont that 30,000 metres was not enough to justify purchasing a brand new drill rig. Based on several representations by Newmont that "if your performance is satisfactory, you will be drilling here for a long time", Tomac went ahead and purchased the drill rig and began drilling in July 2002.

[1] *Tomac Enterprises Pty Ltd v Newmont Pajingo Pty Ltd* [2005] QIRComm 5; then on appeal *Newmont Pajingo Pty Ltd v Tomac Enterprises Pty Ltd* [2005] QIC 21.

[2] Section 276, *Industrial Relations Act 1999* (Qld).

The initial 30,000 metres were completed and Tomac continued to drill. In September 2002, Tomac attempted to confirm a scope of further works with Newmont to be carried out at the mine as well as negotiate an increase in its drilling rates from $17.50 per metre to $20 per metre. Despite numerous attempts by Tomac to settle a further scope of works, Tomac did not receive anything from Newmont until April 2003 at which time Newmont provided Tomac with a letter of intent. Tomac provided a response and some suggested amendments to Newmont within a short period of time along with a request to increase its drill rate from $20 to $25.11 per metre. Tomac received no reply from Newmont, despite again attempting on numerous occasions to contact Newmont representatives. It wasn't until mid-June 2003 that Tomac received an email from Newmont stating that Newmont had decided to go out to tender for the production drilling and invited Tomac to tender for the work. Tomac's tender was unsuccessful and it subsequently sought a determination from the QIRC under s 276 of the *Industrial Relations Act 1999* (Qld) (Qld IR Act) that the contract between itself and Newmont was unfair.

At first instance, the QIRC found that the contract between Newmont and Tomac was unfair within the meaning of s 276 of the Qld IR Act. The decision was also upheld on appeal by the QIC.

## QUEENSLAND

### Section 276, Industrial Relations Act 1999

Section 276 of the Qld IR Act was introduced at the time the legislation was enacted in 1999 and has its origin in a NSW initiative introduced in 1956.[3]

"**276 Power to amend or void contracts**

(1) On application, the commission may amend or declare void (wholly or partly) a contract if it considers –
  (a) the contract is –
    (i) a contract of service that is not covered by an industrial instrument; or
    (ii) a contract for services; and
  (b) the contract is an unfair contract.

(1A) The commission must not –
  (a) amend a contract (whether made before or after the commencement of this subsection) to nclude an accident pay provision; or
  (b) declare a contract (whether made before or after the commencement of this subsection) wholly or partly void, because it does not contain an accident pay provision.

[3] Section 88F, *Industrial Arbitration Act 1940* (NSW) as amended by the *Industrial Arbitration (Amendment) Act 1959* (NSW).

(2) In deciding whether to amend or declare void a contract, or part of a contract, the commission may consider –
  (a) the relative bargaining power of the parties to the contract and, if applicable, anyone acting for the parties; or
  (b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; or
  (c) an industrial instrument or this Act; or
  (d) the Queensland minimum wage; or
  (e) anything else the commission considers relevant.

(3) An application may be made by –
  (a) a party to the contract; or
  (b) an inspector, for the party required under the contract to provide services; or
  (c) an organisation of employees or employers of which a party is, or has applied to become, a member, if it is acting with the party's written consent.

(4) The commission may consider a contract to be an unfair contract if it considers the contract –
  (a) was an unfair contract when it was entered into; or
  (b) became an unfair contract after it was entered into because of the conduct of the parties, or a variation to the contract or for any other reason it considers sufficient.

(5) The commission may make an order it considers appropriate about payment of an amount for a contract amended or declared void.

(6) A person can not make an application under this section if –
  (a) an application has been made under section 74 for the same matter; or
  (b) the person –
    (i) is not a public service officer employed on tenure under the Public Service Act 1996; and
    (ii) has an annual wage of more than $68000 or a greater amount stated in, or worked out in a way prescribed under a regulation.

(7) In this section –

**accident pay provision** means a provision for accident pay, or other payment, on account of a worker sustaining an injury.

**contract** includes –
  (a) an arrangement or understanding; and
  (b) a collateral contract relating to a contract.

**industrial instrument** includes an award or agreement made under the Commonwealth Act.

**injury** means an injury under the Workers' Compensation and Rehabilitation Act 2003.

**unfair contract** means a contract that –
  (a) is harsh, unconscionable or unfair; or
  (b) is against the public interest; or

(c) provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or
(d) is designed to, or does, avoid the provisions of an industrial instrument.

**worker** means a worker under the Workers' Compensation and Rehabilitation Act 2003."

## Who can apply under section 276?

"A party to the contract" may make an application under s 276 requesting that the contract be amended or declared void.[4] In the case of *Braunack & Anor v Couriers Please Ltd,*[5] the respondent submitted that the word "party" must mean individual natural person and that the term did not extend to a partnership. The QIRC held that "the relief is not limited to individual natural persons as opposed to natural persons who may constitute a partnership, nor does it exclude a corporate entity".[6] The QIC upheld the QIRC's decision on appeal[7] and it is now common ground that corporations and partnerships can make an application under s 276 of the Qld IR Act.[8] Further, it has been acknowledged by the QIC that "contracts" between large, well-advised corporations with deep pockets, may be characterised as a "contract for service".[9]

## Contract of Service or Contract for Services?

In contrast to its New South Wales counterpart,[10] which is qualified with the words "whereby a person performs work in any industry", the prerequisite to the exercise of jurisdiction under s 276 of the Qld IR Act is merely the characterisation of the contract as a "contract of service" (not covered by an industrial instrument) or a "contract for services", ie an independent contract relationship. It is this provision that seems extraordinary; namely, that the QIRC holds the power to amend or declare void any contract of service or contract for services that it deems unfair. The QIRC is able to reach into the realms of commercial contracts even if those contracts do not have an industrial character. The words of s 276 place no restriction on the QIRC in terms of the types of contract for services that it may rule upon, albeit that the very statute that gives them this power governs employment and quasi-employment relationships.

4 Section 276(3) Qld IR Act.
5 (2000) 165 QGIG 225.
6 Ibid.
7 *Couriers Please Pty Ltd v Braunack & Ors* (2001) 166 QGIG 141.
8 *Clipmont Pty Ltd & Ors v Boral Resources (Qld) Pty Ltd* (2001) 168 QGIG 121; *Tomac Enterprises Pty Ltd v Newmont Pajingo Pty Ltd* (2005) 178 QGIG 35.
9 *Couriers Please Pty Ltd v Braunack* (2001) 166 QGIG 141; *Newmont Pajingo Pty Ltd v Tomac Enterprises Pty Ltd* [2005] QIC 21.
10 Section 106, *Industrial Relations Act 1996* (NSW).

The legislation broadly defines the term "contract" to include "an arrangement or understanding" and a "collateral contract relating to the contract" and the QIRC has indicated its willingness to examine many different types of formal and informal arrangements or contracts. For example, in *Geebung Investments v Varga Group Investments (No 8) Pty Ltd,*[11] the shaking of hands was held to seal the agreement between the parties. In *Wilson v TNT Australia Ltd,*[12] the Commissioner, in confirming that she would consider all circumstances surrounding the contract, quoted the NSWIRC, stating:

> "unfairness may arise either from the terms of the contract itself, the surrounding circumstances and/or from the manner of performance or operation of the contract. It may arise simply of and surrounding the particular contract."[13]

It is also apparent that the QIRC will not restrict its considerations only to dealings between the applicant and respondent in a particular case, but rather will look to dealings between those parties and any third parties in deciding what is fair.[14]

In his appeal judgment in the *Newmont* case, President Hall acknowledged that whilst s 276 applies to "true" contracts for service, the section also applies to dealings which are not contracts under general law.[15] President Hall went on to say:

> "Section 276(7) is not a provision directed to enabling the Commission to have regard to associated arrangements or understandings, or to related collateral contracts in assessing the 'fairness' of a true contract. The purpose of s 276(7) is to make the remedies at s 276(1) and (5) available where what is impugned is not a 'true' contract but an arrangement or understanding or a related collateral contract."[16]

In applying this concept to the facts of the *Newmont* case, it is the extended definition of "contract" that was critical. Newmont focused its argument on the so-called "true" contract which was that part of the contract that was reduced to writing, namely, the performance of 30,000 metres of drilling by Tomac, together with associated works, at a rate of $17.50 per metre (and later $20 per metre). However, the QIRC's decision was directed at the fairness of the "arrangement" between the parties, not the terms of the "true" original contract or the implementation of its terms. Tomac argued, and the QIRC accepted, that there was "an arrangement or understanding" subsisting between Tomac and Newmont for drilling work whereby Tomac would be given "longer term work" if it went to the expense of obtaining a new drill from Sweden. On appeal, the QIC held that the representations by Newmont that Tomac would be drilling at the Mine for "a

[11] (1995) 7 BPR 14,551.
[12] [2001] QIRComm 52 (5 April 2001); 166 QGIG 430.
[13] *Barry v Incitec* (1991) 45 IR 143.
[14] *Gleeson v Gold Coast Bakeries (Qld) Pty Ltd* [2001] QIRComm 40 (22 March 2001); (2001) 166 QGIG 354.
[15] (2005) 178 QGIG 404 at 405.
[16] Ibid.

long time" and that Tomac would be "here for years", could have been treated as promises given the environment in which they were given.[17]

Further, it was held that whilst the term "arrangement" may be used to refer to the nature of a bargain, it has been used in the context of fiscal legislation to embrace "concerted action by which persons may arrange their affairs for a particular purpose or so as to produce a particular result"[18] and not only the initial plan but also all of the transactions by which it is carried into effect.[19] President Hall concluded that "arrangement" in s 276(7) can be no less wide.[20]

Furthermore, the QIC held that the Commissioner was entitled to go beyond the initial plan and see how the arrangement worked out, as the latter goes towards not only the question of "fairness" but also the terms of the arrangement.[21] The representations, it said, had to be taken with matters such as the continuance of work after 30,000 metres had been completed, and Newmont's failure to respond to suggestions as to performance, to determine what the venture had become.

## What is an Unfair Contract?

The QIRC may amend or declare void a contract that it considers unfair. The term "unfair contract" is defined in the legislation to include a contract that is harsh, unconscionable or unfair.

It is clear from the words of s 276(4) that a contract does not have to be unfair at the time it was entered into but can become unfair after it was entered as a consequence of the conduct of the parties, a variation or for another reason the QIRC considers sufficient. This again highlights the discretion held by the QIRC under this provision. In the *Newmont* case, Bloomfield DP found that the evidence that the contract between Newmont and Tomac was unfair within the meaning of s 276 was overwhelming. The Deputy President said that Newmont had an obligation to avoid the issue of unfairness because it was the party in the position of power. In addition, he said that Newmont knew, or must have known, that Tomac had to keep drilling because it had to pay for the drill. Bloomfield DP held that the contract became unfair, as least, from the time of Tomac's response to the letter of intent.

The appropriate test of unfairness can be found in the decision of Bechly C in *Reilly v TDG Logistics Pty Ltd.*[22] In referencing several New South Wales cases,[23] Bechly C stated:

[17] Ibid.
[18] *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 at 573.
[19] *Newton v Commissioner of Taxation* [1958] AC 450 at 465 (Privy Council).
[20] (2005) 178 QGIG 404 at 406.
[21] Ibid.
[22] (2001) 166 QGIG 430.
[23] *Agius v Arrow Freightways Pty Ltd* [1965] AR (NSW) 77; *Davies v General Transport Development Pty Ltd* (1967) AT (NSW) 371; *Palmer v TNT Australia Pty Ltd* [1995] NSWIRC 24.

> "the test of unfairness of a contract or arrangement or understanding has been found to be determinable by the application of common sense and sense of justice and the common sense approach of a juryman and that it is a moral not a legal issue.
>
> Also, in applying that test, it is not simply a case of applying standards which appear to provide a proper balance or division of advantage or disadvantage between the parties who have made a contract or arrangement. What has to be borne in mind is the conduct of the parties, their capability to appreciate the bargain that was made and the comparative bargaining positions when entering into the contract or arrangement.
>
> Further, the legislation's massive power makes it imperative that it should be exercised with proper restraint and should not become a refuge for those who are merely disgruntled with a bargain entered into on even terms. The discretion should be exercised to protect victims of wrongdoing, not to prescribe an anodyne."

An example of where the QIRC applied the test of unfairness and held that the jurisdiction under s 276 would not apply was the case of *Burgess v Huntsman Chemicals Pty Ltd.*[24] In that case, the QIRC dismissed an application seeking orders under s 276 to amend or vary the contract on the ground of unfairness. The unfairness was said to be in the respondent's failing to provide the applicant with notice, severance, redundancy and long service leave. The applicant submitted that his status changing from employee to contractor to employee and back to contractor was unfair in being imposed on him by the respondent's business. The QIRC found that the applicant was in fact an independent contractor who had willingly entered the agreements and was not satisfied that the applicant had been in a relatively disadvantageous position in respect of his bargaining position. It was held that the applicant was familiar with taxation and financial matters and had accepted the changes that took place when his status went from employee to contractor. The contract was not unfair because there was no uneven bargaining power or undue pressure or influence. It was concluded that the applicant was merely disgruntled with a bargain entered into on even terms and the Qld IR Act offered no protection to those who are merely disgruntled.[25]

## What is an Appropriate Remedy?

Section 276(5) of the Qld IR Act leaves the decision as to a suitable remedy in each case to the discretion of the QIRC. It is therefore up to the QIRC to grant what remedy it sees fit in the circumstances of the case.

In making his decision in the *Newmont* case, Bloomfield DP turned to several cases in the New South Wales unfair contracts jurisdiction for guidance as to what was the appropriate remedy for a contract found to be unfair under s 276. Firstly, he referred to the New South Wales case of *Canizales v Microsoft Corporation*

[24] [2003] QIRComm 412.

[25] Ibid.

*and Ors*[26] where the scope of such remedy had been examined by his Honour Peterson J:

> "any unfairness flows from the structure and nature of the contract and its various terms and conditions, extended to include the manner of its operation, rather than any absolute judgment in terms of the remuneration it offered".[27]

When referring to the exercise of discretion which rested with the Commission, the Deputy President cited *Barclays Australia Investments Services Ltd and Ors v Nordby*[28] where the then Industrial Court of New South Wales in Court Session said:

> "While there may be fine issues which arise in relation to the position of the formula adopted by her Honour to calculate the amount considered 'just in the circumstances', it nevertheless represents a fair and reasonable basis for assessment. The task of assessing a 'just' monetary amount is one which, not infrequently, involves the exercise of a broad judgement without the assistance of defined and identifiable parameters or heads of loss or damage."

The Deputy President also referred to one of the leading cases on employment law in New South Wales, *Westfield Holdings v Adams*[29] where the Full Bench of the Commission in Court Session said:

> "any order shall be what the Commission considers just in the circumstances of the case. Whilst such orders should not be limited by drawing some analogy with contractual, tort or equitable remedies it is proper to have regard to the common law or equitable principles, but recognising that in particular cases those principles may be inappropriate. That is not to say that the discretion under s 106(5) is at large. As with any judicial discretion it must be exercised judicially having regard to the accepted jurisprudence which enables, and requires, limits on what orders may or should be made."

The Deputy President also referenced the Full Bench of the New South Wales Commission in Court Session which indicated in *Eagle Boys Dial-A-Pizza Australia Pty Ltd v Clifford*[30] that the amount payable under a contract amended or voided must relate logically and in its extent to the unfairness found which has led to the variation of the contract.[31] In the *Newmont* case, the senior management of Newmont represented to Tomac that it would have a contract at the mine for "years" or "a long time" or "a long term relationship". This was not the case and in fact, the arrangement was terminated much earlier than Tomac had anticipated, particularly given it had purchased a drill specifically for the arrangements with Newmont.

[26] (2000) 1999 IR 426.
[27] *Tomac Enterprises Pty Ltd v Newmont Pajingo Pty Ltd* (2005) 178 QGIG 35.
[28] (1995) 99 IR 258 at 279.
[29] (2001) 114 IR 241 (at para 161).
[30] [2003] NSWIRComm 101.
[31] *Tomac Enterprises Pty Ltd v Newmont Pajingo Pty Ltd* (2005) 178 QGIG 35.

The QIRC has indicated that it is likely to adopt a restitutionary approach to compensation:[32]

> "The nature of the orders which may be so made cover a wide field, being limited only to 'connection with' the avoided contract, and include a broad concept of restitution as well as remedial provision in respect of monies which have been paid or which were payable under the contract itself."[33]

Bloomfield DP in the *Newmont* case determined that the most suitable remedy would be to amend the original contract to provide Tomac with 120,000 metres of drilling or a total of two years drilling, whichever occurred first. The QIRC also amended the contract to provide that if Tomac completed the 120,000 metres of drilling before the expiry of two years, Newmont would reimburse the lease repayments while the drill was idle. Newmont was ordered to pay Tomac $414,250. The QIC upheld the QIRC's decision on appeal.

## NEW SOUTH WALES

### Section 106, Industrial Relations Act 1996

It can be seen from many of the cases referenced earlier in this paper that the New South Wales counterpart of s 276 of the Qld IR Act, s 106 of the *Industrial Relations Act 1996* (NSW) (NSW Act), gives comparable power to the NSWIRC. Like the Qld IR Act, s 106 allows the NSWIRC to declare contracts void or to vary any contract that it deems unfair.

The opening words of s 106 of the NSW Act provide that:

> "(1) The Commission may make an order declaring wholly or partly void, or varying any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract."

The provisions in the Qld IR Act and the NSW Act almost mirror one another, albeit with one significant difference, the words "whereby a person performs work in any industry". These qualifying words in s 106 have been the subject of much litigation. The interpretation of these words and the extent of power held by the NSWIRC to rule upon contracts under s 106 continues to be a contentious issue.

The jurisdiction given to the NSWIRC under s 106 clearly includes employment contracts and arrangements. Further, arrangements with independent contractors are encompassed by those words, including where those contractors are corporate entities. Over the years, the unfair contracts provisions have been applied to employment and non-employment agreements (including franchise agreements, business sale agreements and other agreements of a commercial nature). However, the New South Wales Court of Appeal has expressed a view in various decisions that it does not consider the NSWIRC to be suited to reviewing commercial contracts.

[32] See Blades C in *Gleeson v Gold Coast Bakeries (Qld) Pty Ltd* [2001] QIRComm 40 (22 March 2001); (2001) 166 QGIG 354.

[33] *Palmer v TNT Australia Pty Ltd* [1995] NSWIRC 24 (15 March 1995) per Hungerford J.

## Overstepping the Boundaries?

### Mitchforce

In the case of *Mitchforce v Industrial Relations Commission & Ors*[34] the contract in question was a lease of property. Mitchforce had constructed a "purpose-built" tavern and obtained a liquor licence. A 10-year lease was entered into including standard terms requiring the lessee to repair and maintain the premises but also containing a covenant by the lessee to pay an additional rent of 4% of the value of the liquor purchased under the liquor licence. The lease was assigned to the Starkeys during boom conditions. There was a provision in the lease for automatic escalation of rent at a minimum rate of 8% per annum which at the time the lease was entered, seemed commercial and reasonable. However, as the economic conditions changed, the expectations of the Starkeys were not met (for example, a proposed new housing and shopping development was not constructed in the area) but the rent continued to escalate. The Starkeys fell behind in their rent and at the end of the term of the lease, Mitchforce, as lessor, refused to allow the Starkeys to exercise their option to renew the lease.

In the first instance, the NSWIRC held that the relationship between the parties under the lease contemplated the Starkeys conducting a business from the tavern and that necessarily contemplated the performance of work and therefore was a contract for the performance of work in an industry.[35] Hungerford J held that the rent had been excessive and ordered the respondent to repay the excess rent to the Starkeys. Further, his Honour ordered that the parties enter into a 10-year lease and stipulated the rental amount to be paid as well as indexation at 4% per annum.

After an unsuccessful appeal to the full bench of the New South Wales Commission, Mitchforce appealed to the Court of Appeal claiming that a hotel lease was not capable of being characterised "whereby a person performs work in any industry" and therefore did not fall within the realms of s 106. The Court of Appeal quashed the decision of Hungerford J at first instance and held that the orders were made without jurisdiction.

In his judgment, Spigelman CJ outlined a two-limb test to determine whether the contract was one "whereby" work was performed. He said that to fall within the jurisdiction of s 106, the contract had to itself directly envisage performance of work or have a recognisable impact on the conditions of that work.[36] Spigelman CJ noted that both parties contemplated that the Starkeys would conduct work on the premises as a consequence of the lease, but it could not be said that a business being conducted was a purpose of the lease.[37] Mason P concurred with Spigelman CJ's reason and added:

[34] (2003) 57 NSWLR 212.
[35] *Starkey v Mitchforce Pty Ltd* [2000] NSWIRComm 216.
[36] *Mitchforce v Industrial Relations Commission* [2003] NSWCA 151 per Spigelman J at [13].
[37] Ibid [49].

> "I merely add that the reasoning that sustains the primary judge's conclusion would mean that every conceivable contract for the supply of goods or services or leasing of commercial premises would fall within the Commission's jurisdiction to avoid or vary it for unfairness, since it is impossible to conceive of any such contract that will not lead to work being done by human agents in its performance. Whatever directness or other relationship Parliament intended by the use of the word 'whereby' in s 106 will have been completely dispensed with in the steady but exponential march of jurisdiction under the prevailing interpretation of that section. Something has gone seriously wrong somewhere in the process."[38]

Significantly, President Mason went on further to express his concern as to expansion of the New South Wales Commission's decisions into the jurisdiction of the Supreme Court:

> "I am profoundly troubled by the march of the Commission's jurisdiction into the heartland of commercial contracts that Hungerford J's decision and other single instance decisions in the Commission represent. This is a significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial cases. The matter is all the more troubling because I strongly disagree with the pattern of first instance jurisdictional decisions culminating in the one presently under consideration…The matter is also troubling because it must frankly be stated that the members of the Commission do not generally have the experience of judges of the Equity Division in such matters and because, on the same hypothesis, the Commission lacks the ongoing assistance of appellate and other supervision by the Court of Appeal or High Court in such matters."[39]

Notwithstanding the decision in *Mitchforce*, it can be said that "commercial" arrangements will fall within the jurisdiction conferred by s 106 where, by their terms, they lead directly to the performance of work in an industry.[40]

### Solutions 6 and QSR

The tension relating to the NSWIRC's ability to rule upon commercial contracts has again been criticised in recent cases before the New South Wales Court of Appeal.

In *Solutions 6 Holdings Ltd & Ors v Industrial Relations Commission of New South Wales & Ors*[41] (*Solutions 6* case) Solutions 6 Holdings entered into a share sale agreement to purchase the entire shareholding in a company, FishTech and Partners Pty Ltd held by the family trust of a Mr Fish. Pursuant to the share sale agreement, $18.5 million of the $19 million purchase price was paid in Solutions

[38] *Mitchforce v Industrial Relations Commission* [2003] NSWCA 151 per Mason P at [140].

[39] *Mitchforce v Industrial Relations Commission* [2003] NSWCA 151 at 241 [147], per Mason P.

[40] *Stevenson v Barham* (1977) 136 CLR 190 at 200.

[41] (2004) 208 ALR 328.

6 shares at a value of $9.75 per share. Mr Fish attempted to incorporate a floor price mechanism on the shares which would have effectively protected the value of $19 million irrespective of a fall in value of the shares, but it was never included. As a condition precedent of the completion of the sale, Mr Fish was required to enter into an employment contract with Solutions 6. The price of shares in Solutions 6 fell considerably between execution of the agreement and completion and then, in 2002, Mr Fish's employment was terminated with Solutions 6. Mr Fish applied to the NSWIRC seeking relief under s 106 in relation to both the share sale agreement and his employment contract. In response, and before the NSWIRC had heard Mr Fish's application, the claimants (Solutions 6 and others) brought an action in the Court of Appeal seeking an order of prohibition that the NSWIRC did not have jurisdiction to deal with the matter in so far as it related to the share sale agreement.

The Court of Appeal found that the share sale agreement was not a contract whereby work was performed and that it was simply a contract for the sale of a business. Further, it found that the condition that Mr Fish had to be employed by Solutions 6 did not make the contract whereby work was performed. And finally, the share sale agreement was not part of an overall arrangement whereby work was performed in an industry.

The Court of Appeal again criticised the NSWIRC for its ability to rule on commercial contracts:

> "Few, if any, of the members of the Commission have substantial experience of commerce or of commercial law. Where, as here, relief is sought with respect to matters which do not relate to the performance of work, the Commission is not a 'specialist tribunal' of the kind referred to in the authorities, whose expertise should be accepted by a court with a supervisory jurisdiction."[42]

The supervisory jurisdiction of the Supreme Court was also brought into play in the case of *QSR v Industrial Relations Commission of NSW & Ors*[43] (*QSR* case) where QSR sought prerogative relief in the form of an order of prohibition claiming that the NSWIRC lacked jurisdiction to hear the matter. That case involved a founding director of QSR, Batterham, commencing unfair contract proceedings in the NSWIRC claiming that it was unfair to deny him the right to exercise options that he was granted as remuneration by QSR. QSR argued that the NSWIRC lacked the jurisdiction to hear the matter, an argument which the NSWIRC rejected. QSR then applied to the Court of Appeal. Again, the Court of Appeal looked at whether the option deed was a contract whereby work was performed in an industry (which it was held was not) and whether the option deed was consideration for past work and therefore part of an overall arrangement of work. It was held that the matter did not fall within the unfair contracts jurisdiction.

[42] (2004) 208 ALR 328 at 361 per Spigelman CJ.
[43] (2004) 208 ALR 368.

## Section 179, Industrial Relations Act 1996

Section 179 of the NSW Act provides decisions of the NSWIRC with very wide protection from review by the Court of Appeal. It states that no appeals can be made from a decision or purported decision of the Full Bench of the NSWIRC for any reason. In the *Solutions 6* case, there had been no decision of the NSWIRC when the appeal was brought before the Court of Appeal. Spigelman CJ held that "section 179 does not attach to the mere existence of proceedings in the Commission. It requires a decision to have been made."[44]

Similarly, in the *QSR* case, the NSWIRC had made interlocutory orders that jurisdiction objections should be raised at trial following the filing of evidence. The Court of Appeal held that for s 179 to be invoked a decision or purported decision had to have been made and in this case the interlocutory decisions of the NSWIRC had not been decisions to establish jurisdiction but had postponed the matter to final hearing.[45]

Therefore, in both the *Solutions 6* case and the *QSR* case, the Court of Appeal found that it did have jurisdiction to hear the matters and make orders because no decision or purported decision had been made in either case. As soon as a decision is made by the NSWIRC, the Court of Appeal loses any power to intervene. In April 2005, the High Court granted special leave to appeal against the Court of Appeal's rulings in these matters.[46]

Pending a decision by the High Court in the above matters, it is currently the view of the New South Wales Court of Appeal that the NSWIRC must stay within the limits of its industrial legislative context. If a respondent in a s 106 case believes that the proceedings have a clear jurisdictional defect, it will need to seriously consider approaching the Supreme Court to seek a prohibition order restraining the NSWIRC from proceeding with the matter. If they do not, and a decision is made by the Commission, it will be very difficult for the respondent to obtain any relief from the Court of Appeal.[47]

# CONCLUSION

The potential impact of the unfair contracts jurisdiction on the affairs of employers and persons engaging contractors to provide services can be significant. Employers and anyone engaging contractors should think twice during the negotiation, performance and termination of contracts as it has been seen that it is not just the formal agreement but all related circumstances that will

[44] (2004) 208 ALR 328 at 361 per Spigelman CJ at 355.

[45] *QSR v Industrial Relations Commission of NSW & Ors* (2004) 208 ALR 368.

[46] *Batterham v QSR Ltd* [2005] HCA Trans 236; *Fish v Solutions 6 Holdings Ltd* [2005] HCA Trans 236, 22/4/05.

[47] "Stay out of commercial contracts, court tells NSW IR Commission", *Australian Industrial Law News*, 2004, Issue 7, 28 July 2004.

be considered by the courts. Unfairness may arise long after the initial contract was entered into even though the initial contract itself was fair.

At this stage, there is not a lot of certainty as to whether a case brought before the NSWIRC would succeed under s 106 of the NSW Act. In fact, it is obvious that the New South Wales judiciary has a greater concern to restrict the expansion of the unfair contracts jurisdiction into the area of commercial contracts that do not have an industrial colour or flavour. The Queensland industrial courts, on the other hand, seem more inclined to apply a broad interpretation to contracts disputed under s 276 of the Qld IR Act. It will be interesting to watch the evolution of this area of the law in these two jurisdictions, but in any event, it is certainly an area that companies and individuals alike should be wary of.

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