State OH&S law trumps *Workplace Relations Act*

By Rita Mallia

UNIONS NSW v CARTER HOLT HARVEY WOOD PRODUCTS AUSTRALIAN PTY LTD [2006] NSWIR COMM 2

This is an interesting decision of the Full Bench of the NSW Industrial Relations Commission (the Commission), which explores the operation of s137 of *Industrial Relations Act* 1996 (NSW) (the NSW Act), the powers of the Commission in relation to industrial disputes and the termination of an employee whose employment is covered by a federal award and enterprise agreement. The matter was referred to the Full Bench by Deputy President Sams. In the case, the Full Bench overturned the long-standing decision of *Moore v Newcastle City Council Re Civic Theatre Newcastle*,[1] which stood for the proposition that federal award employees could not seek relief from unfair dismissal under state law.

The employer, Carter Holt Harvey Wood Products Australian Pty Ltd, was a body corporate for the purposes of s51(xx) of the Commonwealth Constitution. The employee, Mr Karl Safranek, had been employed by the employer for about three years. Mr Safranek witnessed another employee jumping on the tines of a forklift that he was operating. Mr Safranek reported the incident but declined to name the other employee. The employer told Mr Safranek that he was required to disclose the name of the other employee so that the company could comply with its obligations under the *Occupational Health and Safety Act* 2000 and its own safety policies. Mr Safranek and his union, the Construction Forestry Mining and Energy Union (CFMEU), Forestry Division, disputed this and suggested other ways that the company could meet its obligations. However, this was not accepted by the employer, and Mr Safranek was dismissed on the basis of his deliberate disobedience of a lawful and reasonable direction.

Immediately prior to his termination, Mr Safranek's employment was subject to the Carter Holt Harvey Customwood Oberon Enterprise Agreement 2004-2006 and the Timber Industry-CFMEU Wood Panels Award: a federal award. The CFMEU lodged an application for relief with the Australian Industrial Relations Commission (AIRC) following his termination. This action was subsequently discontinued and Unions NSW, on behalf of the CFMEU and its member, filed a notification of an industrial dispute under s130 of the NSW Act with the Commission, and an application for interim dispute orders, application for expedition and final dispute orders. Unions NSW sought:

1. a dispute order providing for the reinstatement or re-employment of Mr Safranek to a position commensurate with the position that he occupied when terminated on 23 May 2005;
2. an order pursuant to s136(1)(d) that the respondent pay Mr Safranek the remuneration that he would have been paid but for the termination of his employment; and
3. such other orders as the Commission finds are just or necessary.

The Full Bench decided that the three questions that had to be answered were:

1. whether the power granted to the Commission by s137(1)(b) of the NSW Act to order the reinstatement, or re-employment, of dismissed employees is not available in respect of employees regulated by awards made, or agreements certified, under the *Workplace Relations Act* 1996 (Cth) (the WR Act);
2. whether a reinstatement or re-employment order made under s137(1)(b) of the NSW Act would be inconsistent with the federal award and therefore invalid by reason of s109 of the Constitution and s152(1) of the WR Act; and
3. whether, in respect of an application for an order under s137(1)(b) of the NSW Act to order reinstatement or re-employment of Mr Safranek, s137(b) would be inconsistent with s170CH of the WR Act and invalid by reason of s109 of the Constitution.

In relation to the first question, the Commission concluded that such a power is available where employees are covered by federal awards. In coming to this conclusion, the Commission considered the decision of *Moore*.[2]

The Full Bench examined the difference between the powers of the Commission under s137 of the NSW Act and in relation to unfair dismissals under Part 6 of Chapter 2 of the NSW Act. The Commission made particular reference to the decision in *Sydney Water Corporation v Australian Services Union (NSW Australian Capital Territory Branch)*,[3] which highlighted the important differences between the Commission's powers in relation to unfair dismissals under Part 6 of Chapter 2 of the NSW Act and under s137 of the NSW Act. The Commission noted:

> 'Section 137(1)(b) provides the Commission with power to act quickly and in dealing by arbitration with an industrial dispute where the Commission determines that

orders under section 137 (1) (b) are necessary in order to resolve the dispute or assist in resolving a dispute. It may be, for example, that employees have been dismissed in the course of an industrial dispute and the Commission takes the view that in order to resolve the wider dispute it is necessary to make orders reinstating the employees. Depending upon the circumstances of the dispute, there may be no need for the Commission to consider questions of fairness (where the dismissal was harsh, unreasonable or unjust), as the Commission would require to do under part 6 of chapter 2."[4]

The Full Bench also took into consideration the fact that industrial disputes are collective in nature and extend beyond the grievance of an individual employee. It was satisfied that, while the relief sought by Unions NSW was the reinstatement of Mr Safranek, Unions NSW was also concerned about the company's reliance on its occupational health and safety obligations as the basis for terminating Mr Safranek. This was not a contrived dispute.

In reaching its conclusion, the Full Bench found that the decision in *Moore*[5] had been incorrectly decided. This case has been authority for the proposition that a person covered by a federal industrial instrument could not access the state unfair dismissal regime. The basis of *Moore* was usefully summarised by the Full Bench in the current proceedings:

- The federal and state systems were separate and independent systems, with the federal system holding supremacy.
- Parliamentary speeches concerning the introduction of the 1995 and 1996 Industrial Relations Bills indicated the legislature's intention that, in order to benefit from the state system, employees under a federal award would have to move into the state system.
- That the use of the word 'employee' throughout the NSW Act 'evinces an intention to put in place a state system applicable to employees within the state industrial relations aegis' and that there was 'no section of the 1996 State Act which evinces an intention to cross the boundary into the area of federal regulation'.
- Section 12 of the *Acts Interpretation Act* 1987 (NSW), except insofar as the contrary intention appeared, meant the words 'employee', 'industry', 'industrial instrument' and 'award' as defined in the NSW Act refer to matters or things '*in and of New South Wales*'.[6]

An 'employee' under the NSW Act was said to be a person employed in an industry in and of NSW. If a federal award regulated that employment, then the connection to NSW was lost.

In overturning *Moore*, the Full Bench in the present decision formed the view that the existence of federal and state systems did not of itself mean that the state legislature intended not to legislate for the benefit of all employees in the state. Reliance was placed on a Western Australian decision, *City of Mandurah v Hull*,[7] where Justice Kennedy of the Western Australian Industrial Appeals Court concluded that the Western Australian Government had legislated for the benefit of all employees, including federal award employees. If there was an inconsistency between a law of the state and a law of the commonwealth, then the only rule by which that inconsistency was to be resolved was by reference to s109 of the Commonwealth Constitution.

The Full Bench also reviewed the parliamentary speeches that were relied upon in *Moore*, concluding that the state legislature did not require people to move into the state system to benefit from it. In doing so, the Full Bench also rejected the narrower interpretation of the word 'employee' in the NSW Act and decided that the legislation could benefit all employees in NSW. Like *City of Mandurah*, any inconsistency between state and federal law should be determined in accordance with the principles laid down by the High Court. The Full Bench concluded that the decision in *Moore* did not extend so far as to limit the operation of s137 of the NSW Act and that the effect of the decision was obiter only in that Full Bench in *Moore* did not specifically deal with the powers under s137.

In relation to s137, the Full Bench further observed that while there had been, following *Moore*, amendments to s83 of the NSW Act, (the insertion of s83(1A)), no similar >>

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amendment had been made to s137. (The effect of s83(1A) was to ensure that certain federal award employees had access to the AIRC in terms of unfair dismissal.) Further, s137 was of a different character, because it dealt with a dispute of a collective nature rather than an inter-party contest. The Full Bench concluded that, putting aside the question of constitutional inconsistency, there was nothing in the NSW Act that would indicate a statutory intention to limit the power of the Commission to order reinstatement or re-employment under s137(1)(b) to employees whose employment was regulated by state awards or agreements.

The Full Bench compared s137 of the NSW Act with the Federal Timber Industry – CFMEU Wood Panels – Award 2000, which contained provisions about notice of termination. Carter Holt Harvey argued that there was an inconsistency between state law and the federal award in that the award contained provisions relating to the termination of employment. Unions NSW submitted, and it was accepted, that there was no inconsistency because the award was of a limited nature that did not contain the right or permission to terminate an employee, but provided notice entitlements. Thus, there was no direct inconsistency between the provisions of the award and s137(1)(b) of the NSW Act.

The federal enterprise agreement, which also applied to Mr Safranek, provided a grievance dispute procedure. However, the Full Bench held that neither the award nor the agreement dealt with the matter of reinstatement or re-employment of an employee dismissed in the course of an industrial dispute, or whose dismissal resulted in an industrial dispute.

The final question that arose for the Full Bench's consideration was whether an order under s137(1)(b) of the NSW Act would be inconsistent with s170CH of the WR Act, being the termination of employment provisions of what was Division 3 of the WR Act prior to *Work Choices*. The Full Bench noted that these provisions were limited to providing relief where a termination was found to be harsh, unjust or unreasonable. In contrast, s137(1)(b) of the NSW Act does not require consideration of whether the dismissal was harsh, unjust or unreasonable. Thus, s170CH of the WR Act did not cover the reinstatement or re-employment of an employee and therefore there was no inconsistency. Section 137(1)(b) was concerned with the resolution of an industrial dispute and that, in resolving the dispute, the Commission may make orders reinstating or re-employing a dismissed employee.

The Full Bench concluded that the Commission could, in its dispute resolution powers, order reinstatement or re-employment of a dismissed employee even when they were covered by a federal award and/or agreement. Such an order

would not be inconsistent with the federal award or enterprise agreement or s170CH of the WR Act. The substantive matter was referred to Deputy President Sams for hearing and determination on the merits.

By this decision, the Commission has proactively opened its doors to employees covered by federal agreements and federal awards. It might also provide some assistance for employees under *Work Choices* to access the NSW industrial relations system in certain circumstances. Of course, much will depend on the High Court challenge to *Work Choices* and the extent to which the federal government has covered the field by the use of its constitutional corporations power. No doubt, by s16(1) of the WR Act and other provisions of the *Work Choices* legislation, the federal government asserts it has covered the field of industrial relations so far as it relates to constitutional corporations and others. Nevertheless, this decision of the Commission shows that it is prepared to entertain such arguments.

What happened to Mr Safranek?

After these proceedings, the case was settled and Mr Safranek was reinstated with back pay.

SICILIANO v MARTIN WYER AND DAVID GLASS (PR 970686) AND *COPELAND AND CONTRUCTION FORESTRY MINING AND ENERGY UNION* (PR 960005)

Two recent decisions of the Australian Industrial Registry (AIR) demonstrate a current Building Industry Taskforce (BITF) approach to preventing union officials entering building sites. In each case, the BITF tried to invoke the federal *Workplace Relations Act* 1996 (Cth) (WR Act) as the instrument entitling entry, and then argue a breach of the WRA by the official(s). However, in each case the AIR found that state-based OH&S law was, in fact, the basis for entry and an alleged breach of federal law did not arise.

In 2004, the BITF commenced proceedings before the Australian Industrial Registry (AIR) to revoke the right of entry permit of CFMEU organisers Martin Wyer and David Glass.

The BITF alleged that the organisers entered the site of MPM Constructions Pty Ltd for the purpose of shutting it down because it was union picnic day. However, the organisers maintained throughout the case that they were on site investigating breaches of safety.

Deputy Industrial Registrar (DIR) Jenkins held that he had to be satisfied that, on balance, the organisers were in fact exercising their rights under s285B and s285C the WR Act. He considered what was meant by the term 'exercising powers' under Part IX of the Act. The BITF had contended that the organisers had 'purported' to exercise their rights under the Act. DIR Jenkins held that in determining whether a permit-holder was exercising their powers, regard should be had to the facts rather than interpreted 'strictly' or at 'law'.

In considering all the facts, the DIR found that the organisers were not exercising their rights under the Act. They had entered the site and raised safety concerns. The company's own witnesses gave evidence that Mr Wyer immediately raised safety concerns and that he had produced a copy of an extract from the *Occupational Health and Safety Act*.

One BITF witness, Ms Anderson, had made written notes to the effect that Mr Wyer had raised safety issues and that he had asserted the right to enter premises under occupational health and safety laws. The DIR also commented that this fact did not appear in the witness's typed statement, which was prepared with the assistance of the BITF.

In conclusion, the DIR found that the organisers were not exercising their rights under the *Workplace Relations Act* and dismissed the BITF's application.

This follows a previous decision of DIR McCarroll in *Copeland and Construction Forestry Mining and Energy Union* (PR 960005), where the BITF brought similar proceedings against the CFMEU to revoke the permit of official, Tom Mitchell. After dealing with a number of procedural points, he dealt with the substantive complaint of the BITF that Mitchell, in exercising rights of entry under the Act, 'intentionally hindered or obstructed any employer or employee or otherwise acted in an improper manner'.

DIR McCarroll concluded that whether a person entering premises is exercising powers of right of entry is a matter of fact. The applicant argued that the organiser had shown his federal right of entry permit. The respondent denied this and contended that entry to the premises was made to investigate issues of safety under state law. Mr Mitchell's evidence, and that of the applicant's witnesses, was that Mr Mitchell had raised a number of safety issues on site. The DIR found on the facts and the differing witness versions that he could not conclude that the organiser had in fact shown such a permit.

The respondent had contended, and the DIR accepted, that in fact the organiser's entry had been consistent with the requirements of the *Occupational Health and Safety Act* 2000 (NSW). DIR McCarroll was satisfied that the nature of Mr Mitchell's business was concerned with occupational health and safety of employees on the site. The organiser held a meeting to discuss the safety issues with the project manager's consent. DIR McCarroll was further satisfied that at the meeting the organiser had addressed workers about occupational health and safety issues concerning stretcher access, loose hand rails and unsafe flooring. It was held that the organiser did not hinder or obstruct the employer or the employees. DIR McCarroll stated:

> "I am satisfied that Mr Mitchell has a genuine and long standing concern for and interest in maintaining appropriate occupational health and safety standards".

Hence, the DIR dismissed BITF's application. ■

Notes: **1** (1997) 43 NSWLR 614; 77 IR 210. **2** See n. 1. **3** [2005] NSW IRComm 305. **4** Para 13, p11. **5** See n. 1. **6** See para 49, p22. **7** (2000) 100 IR 406.

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