TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s 70(1)(b) application for appeal

Frank Vincze
(T14882 of 2022)

and

Abt Railway Ministerial Corporation t/a West Coast Wilderness Railway ABN 97 434 110 683

DEPUTY PRESIDENT N M ELLIS
COMMISSIONER T LEE
COMMISSIONER T CIRKOVIC

HOBART, 12 OCTOBER 2022

Appeal against a decision of President Barclay – T14853 of 2021 – jurisdiction – competency of appeal – threshold issue – appeal not competently brought under ss 70(1)(b) or 70(1)(ba) – Not appropriate to exercise discretion to amend notice of appeal – not necessary to reach a concluded view regarding nullity – application dismissed.

DECISION

BACKGROUND

[1] On 1 July 2021, Mr Vincze (the Appellant) made an application to the Tasmanian Industrial Commission (the Commission) for a remedy as a result of his dismissal. Abt Railway Ministerial Corporation t/a West Coast Wilderness Railway (the Respondent) objected to the application on the grounds that the Commission was without jurisdiction to deal with the application. The Respondent submitted that it was a national system employer, the Appellant was a national system employee within the meaning of the *Fair Work Act 2009* (Cth) (the FW Act) and therefore the Commission was excluded from jurisdiction by virtue of the application of s 26(1) of the FW Act. The Appellant submitted that there was jurisdiction for the Commission to deal with the application, including that it could do so by relying on its powers of private arbitration.

[2] After considering the competing submissions on the jurisdictional objection, the President upheld the jurisdictional objection and dismissed Mr Vincze's application in a decision delivered on 6 December 2021 (Decision).[1] The President concluded his Decision with the following:

> "I determined that the Commission has no jurisdiction to entertain the Application. Accordingly in accordance with s 21(2)(c)(iv) of the IR Act I determined that the proceedings should be dismissed."

[1] T14853 of 2021 (the Decision).

[3] On 27 December 2021, the Appellant filed a Notice of Appeal (NOA)[2] against the decision of the President.

[4] The NOA was filed on 27 December 2021, which was within the required 21 days following the issue of the Decision, pursuant to s 71(1) of the *Industrial Relations Act 1984* (Tas) (the IR Act). The notice of appeal was in the following terms:

> "This appeal is made under paragraph 70(1)(b) of the Industrial Relations Act 1984 (Tas).
>
> This appeal is brought by Frank Vincze, the Applicant in matter T14853 of 2021.
>
> This appeal relates to T14853 of 2021, and is an appeal from the decision and order of the learned President of the Tasmanian Industrial Commission delivered on 6 December 2021.
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> The grounds of appeal are as follows:
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> 1. The learned President made a legal error at [21] in finding that the decision of the High Court in *CFMEU v AIRC* (2001) 203 CLR 645 'does not stand for the proposition that the parties themselves, absent some statutory power to do so, can give an industrial commission power to arbitrate a dispute between them', as on its proper construction, that decision of the High Court does indeed support that proposition.
>
> 2. The learned President made a legal error at [25] in finding that 'The code is not an agreement between the parties' as such a finding was inconsistent with his finding in the following sentence that the Code of Conduct referred to (the Code) 'is incorporated by clause 4 of schedule 2 of the contract of employment'.
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> 3. The learned President made a legal error at [26] in finding that the contract of employment before him (the Employment Contract) did not provide that the decision of the Commissioner who conciliates or arbitrates the dispute is agreed to be final, as on a proper construction of clause 11.3 of the Employment Contract, the decision of the Commissioner was to be final in the requisite sense.
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> 4. The learned President made a legal error at [27] in finding that the dispute settlement procedure does not apply to terminations of employment, as:
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>   (a) such a finding is not supported by the terms of clause 11 of the Employment Contract; and
>
>   (b) further and alternatively, the nature of the dispute in question was one which commenced during the currency of the employment relationship and the dispute remained capable of referral to and determination by the Commission notwithstanding the termination of the Appellant's employment.
>
> 5. The learned President erred at [28] by giving weight to an irrelevant matter, in that the content of the Code, in separately conferring a right for the Appellant to take his termination of employment to the Commission, was

[2] Lodged on 27 December 2021, by Frank Vincze (The Appellant) pursuant to s 70(1)(b) of the *Industrial Relations Act 1984* (Tas).

not relevant in determining whether that right was also conferred by the Employment Contract.

6. The learned President made a legal error, or alternatively erred in failing to give sufficient weight to a relevant matter, in failing to take into account that:

   (a) the Code provided that in the event of a termination of employment because of an alleged breach of the Code; the 'employee may apply to the Tasmanian Industrial Commission for appeal'; and

   (b) the Appellant had been dismissed for an alleged breach of the Code and was therefore entitled to have the Commission determine the matter by reason of express provision in the Code.

7. The learned President made a legal error at [29] by dismissing the application before him, as:

   (a) on its proper construction, the Code gave the Commission the power to deal with the Appellant's application, independently of whether such a right arose under statute;

   (b) further and alternatively, the Employment Contract gave the Commission the power to deal with the Appellant's application, independently of whether such a right arose under statute; and

   (c) further and alternatively, even if section 61 of the Industrial Relations Act 1984 (Tas) needed to be satisfied, on the material before him the section had been satisfied;

   and the Commission was seized with power to deal with the application."

[5] On 18 March 2022, the *Justice and Related Legislation (Miscellaneous Amendments) Act 2022* (Tas) received Royal Assent (the amending Act). The amending Act introduced s 70(1)(ba) to the IR Act, which provides an expanded right of appeal and allows appeals to be made against:

> "(ba) a decision made by the Commission to dismiss, or refrain from further hearing, a matter, or part of a matter, under section 21 2(c) by a party who applied for the hearing."

[6] On 6 June 2022, the Tasmanian Industrial Commission wrote to the parties, on behalf of the Full Bench, to draw their attention to s 70(1)(ba) and the decision of *Bennett v Minister Administering the State Service Act 2000* (*Bennett)*,[3] a decision of the Full Court of the Supreme Court of Tasmania. The correspondence noted that the Full Court in *Bennett* held that:

> "(2) Pursuant to the Act, s 70(1)(b) the right of appeal is a statutory remedy and not a common law or equitable right. There is nothing in s 70(1)(b) which authorises an appeal from a dismissal."[4]

[7] The Appellant contends that the appeal is within the jurisdiction of the Commission to determine. The Respondent submits that the Full Bench lacks jurisdiction to entertain the appeal. It was determined that the Full Bench would determine the jurisdictional objection of the Respondent as a threshold matter before consideration of the merits of

[3] *Bennett v Minister administering the State Service Act 2000* [2009] TASSC 95, (2009) 190 IR 202.
[4] Ibid.

the appeal.[5] The parties filed materials responsive to the jurisdictional question and the hearing on 11 July 2022 proceeded on that basis.

Relevant Legislation

[8] Rights of appeal are set out in s 70 of the IR Act, noting s 70(1)(ba) commenced operation on 18 March 2022. Section 70 provides as follows:

> ***70. Rights of appeal***
>
> *(1) An appeal may be made to the Full Bench against –*
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> *(a) a decision of a Commissioner to make, vary or rescind an award, or refuse to make, vary or rescind an award, by –*
>
> *(i) an organisation which appeared at the hearing; or*
>
> *(ii) an organisation granted, or deemed under Part V to have, an interest in the award; or*
>
> *(iii) the Minister; and*
>
> *(b) an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of the mode, terms or conditions of employment or any termination of employment, including termination resulting from redundancy, or long service leave, or breach of an award or a registered agreement by –*
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> *(i) the party who applied for the hearing; or*
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> *(ii) the party to whom the order relates; or*
>
> *(iii) the Minister; and*
>
> *(ba) a decision made by the Commission to dismiss, or refrain from further hearing, a matter, or part of a matter,*
> *under section 21(2)(c) by the party who applied for the hearing; and*
>
> *(c) a decision made by a Commissioner or the Registrar*
> *under section 43 , 55 , 59 , 61J , 61R , 61S , 63(10) , 65A , 67(4) , 67A or 75(7E) by –*
>
> *(i) any party who appeared at the hearing to which the decision relates; or*
>
> *(ii) any organisation granted, or deemed under Part V to have, an interest in the award to which the decision relates; or*
>
> *(iii) the Minister.*

[9] Sections 21, 29, 31, and 71(10) of the IR Act are also relevant to the consideration in this appeal and they are in the following terms:

> ***21. Procedure of Commission and associated matters***
>
> *(1) Subject to this Act, the Commission may regulate its own procedure.*

[5] T14882 of 2022, Transcript of Proceedings, 2.

(2) Without prejudice to the generality of subsection (1) , the Commission may, in relation to a matter before it –

(a) at or before the commencement of proceedings before the Commission, ascertain whether all private employers referred to in section 66 (1) who, and all organizations the members of which, in the opinion of the Commission, may be subject to an award made by the Commission, have been summoned to attend the proceedings, or have been given notice of those proceedings;

(b) direct that organisations or persons be summoned to attend those proceedings;

(c) at any stage of those proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied –

(i) that the matter or part is trivial;

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) . . . . . .

(iv) that, for any other reason, the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be;

…

29. Hearings for settling disputes

(1) An organization, employer, employee or the Minister may apply to the President for a hearing before a Commissioner in respect of an industrial dispute.

(1AA) For the purpose of this section, a referral of a matter to the Commission by the Employer under section 16(2)(b) of the State Service Act 2000 is taken to be an application to the President for a hearing by the State Service employee named in that referral.

(1A) A former employee may apply to the President for a hearing before a Commissioner in respect of an industrial dispute relating to –

(a) the termination of employment of the former employee; or

(b) severance pay in respect of employment of the former employee terminated as a result of redundancy; or

(c) a breach of an award or a registered agreement involving the former employee; or

(d) a dispute over the entitlement to long service leave, or payment instead of any such leave, or the rate of ordinary pay at which any such leave or payment is to be paid in respect of the former employee.

(1B) An application for a hearing before a Commissioner in respect of an industrial dispute relating to termination of employment or severance pay

relating to redundancy is to be made within 21 days after the date of termination or, if the Commissioner considers there to be exceptional circumstances, such further period as the Commissioner considers appropriate.

(1C) The Minister responsible for the Workplace Standards Authority may apply to the President for a hearing before a Commissioner in respect of an industrial dispute relating to a breach of an award or a registered agreement.

(1D) An application for a hearing in respect of a dispute, including a dispute relating to –

(a) termination of employment; or

(b) severance pay; or

(c) breach of an award or a registered agreement; or

(d) long service leave –

must contain full particulars of –

(e) the circumstances giving rise to the dispute; and

(f) the nature of the claim; and

(g) the remedy being sought by the applicant.

(1E) At any time before setting a date for a hearing, or before the date of the hearing, the Commission, of its own motion or at the request of a party to the dispute, may require the applicant to provide further and better particulars of –

(a) the nature and circumstances of the dispute; and

(b) the nature of the claim; and

(c) the remedy sought –

if the Commission considers it necessary to ensure that the Commission and the parties to the dispute are properly informed.

(2) The President must –

(a) allocate to a Commissioner for hearing an application made under this section; and

(b) cause notice of the time and place of the hearing to be given to a person who, or an organisation which, the President considers is able to assist in the settlement or prevention of the industrial dispute.

(3) At any stage of proceedings relating to a hearing under subsection (2), the Commission, of its own motion or at the request of one or more of the parties to the proceedings, may attempt to conciliate the dispute.

31. Orders arising from hearings

> *(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken.*

71. Procedure on appeals

> *…*
>
> *(10) On the hearing of an appeal, a Full Bench shall act according to equity, good conscience, and the merits of the matter without regard to technicalities or legal forms, and may direct itself by the best evidence it can procure, whether that evidence would be admissible in a court or not.*

The submissions on jurisdiction

[10] The Appellant submits that the appeal has been competently brought under s 70(1)(b). In the alternative, the Appellant contends that the appeal is permitted by s 70(1)(ba).

[11] The Respondent submits that the appeal brought under s 70(1)(b) is incompetent and therefore the Full Bench lacks jurisdiction to entertain it. In respect to the alternative proposition advanced by the Appellant, they submit that s 70(1)(ba) of the IR Act does not confer a jurisdiction on the Full Bench to hear the appeal.

[12] It is convenient to deal with the primary position of the Appellant first. That is, to consider whether the appeal has been competently brought under s 70(1)(b).

The Appellant's submissions on s 70(1)(b)

[13] The Appellant accepts that central to any consideration of the power to appeal to a full bench is the decision of the Full Court of the Supreme Court of Tasmania in *Bennett*. Relevantly, the decision in Bennett includes the following:

> *…[s 70(1)(b)] permits an appeal to the Full Bench against "an order made by a Commissioner under section 31(1) after a hearing relating to an industrial dispute in respect of ... any termination of employment ... by ... the party who applied for the hearing ...". The question that arises is whether the order of dismissal that was made by the Commissioner was an order under s31(1). It is in the following terms:*
>
> > *"(1) Subject to this section, where the Commissioner presiding at a hearing under section 29 is of the opinion, after affording the parties at the hearing a reasonable opportunity to make any relevant submissions and considering the views expressed at the hearing, that anything should be required to be done, or that any action should be required to be taken, for the purpose of preventing or settling the industrial dispute in respect of which the hearing was convened, that Commissioner may, by order in writing, direct that that thing is to be done or that action is to be taken."*
>
> *That provision authorises, for the purpose of preventing or settling an industrial dispute in respect of which a hearing is convened, the making of an order directing that anything required to be done, be done, or that any action required to be taken, be taken. No order of that nature was made by the Commissioner. The language*

used in s 31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used.

By virtue of s 30(6), the appellant bore the onus of proving to the Commissioner that his employment was unfairly terminated. If he failed to persuade the Commissioner of that, the Commissioner was authorised by s 21(2)(c)(iv) to dismiss the matter. That is what occurred here. There is nothing in s 70(1)(b) authorising an appeal from a dismissal.[6]

[14] The Appellant accepts that *Bennett* is authority for the proposition that no appeal lies under s 70(1)(b) for the dismissal of an unfair dismissal application on the merits and that such an order is not an order of the type contemplated by s 31(1).[7] However, as the order made by the President was made on jurisdictional grounds only, as opposed to a decision made after a hearing on the merits of the application, the Appellant submits that this is a "crucial difference" which distinguishes the matter being dealt with here from that in *Bennett*.

[15] The Appellant submits that as there was a hearing at which both parties had a reasonable opportunity to make submissions, on that basis it can be said that the order made by the President was "in substance" an order under s 31(1). The action the President was said to have determined was that the application be brought to an end without proceeding to a determination on the merits. Therefore, it is submitted that there is a right to appeal under s 70(1)(b).

[16] The Appellant submits that the decision in of the Full Bench of this Commission in *Dudley v Minister Administering the State Service Act 2000* (*Dudley*)[8] is consistent with the proposition they advance. The reason being that in that decision, the Full Bench rejected the argument of the appellant that when an order to dismiss an application is made following a final hearing and determination regarding an industrial dispute, the order must be one made pursuant to s 31 of the IR Act.

[17] The Appellant submitted, as a result, that the determination of the President was of a type covered by s 31 of the IR Act and therefore the appeal is within jurisdiction.

The Respondent's submissions on s 70(1)(b)

[18] There are two key elements of the Respondent's submission on this point. The first is that, consistent with the decision of *Bennett*, an appeal right under s 70(1)(b) lies only against an order made pursuant to s 31(1) and not a dismissal of a matter pursuant to s 21(2)(c)(iv) of the IR Act. As President Barclay dismissed this matter pursuant to s 21(2)(c)(iv) then this is sufficient to dispose of the appeal.

[19] The second element of the Respondent's submissions engages with the issue of *Bennett*, involving an appeal against a decision where the matter was dismissed after there had been a substantive hearing of all issues conducted, whereas in this matter the application was dismissed on a jurisdictional basis.

[20] While there is common ground that the decision under review in *Bennett* involved a substantive hearing of all issues, the Respondent submits that this gives rise to a "further pathway" to the conclusion reached in *Bennett*. The Respondent submits that the right of

[6] *Bennett (n 3)*, [16]-[18].
[7] Appellant's Submissions on Jurisdiction, [14A].
[8] T14582 of 2018.

appeal under s 70(1)(b) only accrues "after a hearing relating to an industrial dispute in respect of", relevantly, termination of employment. As the hearing before the President was on a preliminary jurisdictional issue, the hearing was not one with respect to "an industrial dispute in respect of…termination of employment". Therefore, the order made by the President was not one made "after" such a hearing and it follows that there is no right of appeal under s 70(1)(b).

Consideration of whether the appeal is competently brought under s 70(1)(b)

[21] We are not satisfied that the appeal was competently brought under s 70(1)(b) for the reasons that follow.

[22] The Full Bench must have regard to the provisions of the IR Act to determine if the appeal is competently made under s 70(1)(b).[9] It is apparent, and not in contest, that for the appeal to be competently made under s 70(1)(b) of the IR Act, there must be an order made by the Commission under s 31(1). In the matter before us, the statutory framework relied on by the President to dismiss the application is clearly s 21(2)(c)(iv) of the IR Act. The President did not purport to make an order under s 31(1) of the IR Act.

[23] Further, we do not concur with the Appellant that there was, in substance, an order under s 31(1) made by the President. The President dismissed the application. He did not make an order that anything was to be done, nor action taken, in the manner contemplated in s 31(1). As his Honour Chief Justice Crawford stated in *Bennett*:[10]

> "No order of that nature was made by the Commissioner. The language used in s 31(1) cannot be extended to include an order of dismissal. To extend it in that way would be to abuse the language used."

[24] Accordingly, we reject the submission that the order made by the President was in substance an order under s 31(1). There is no basis for making that finding.

[25] We have considered the Appellant's submission that because the decision to dismiss the application was made on a jurisdictional basis only, not after a determination of the merits, this allows one to view the matter as "the type of matter that is within section 31(1)". We reject that proposition as there is no proper basis, on a plain reading of the legislation, to differentiate the dismissal of an application made under s 29(1A) on a jurisdictional basis only, as opposed to a merits basis. Section 31(1) provides that the Commission may make an order for a thing to be done or action taken. As said earlier, no order of that type was issued. Rather the application was dismissed for want of jurisdiction, after the parties had a reasonable opportunity to make submissions. The fact the application was dismissed on a jurisdictional basis does not alter that decision to become an order under s 31(1) in substance, or at all.

[26] We note for completeness that we see no reason to construct s 70(1)(b) in the manner contended by the Respondent. There was in fact a hearing relating to an industrial dispute in respect of, relevantly, termination of employment. That the hearing dealt with a threshold jurisdictional issue does not render it a hearing that did not relate to an industrial dispute about termination of employment. The Appellant had made an application under s 29(1A). The President made clear in the opening paragraph of the decision that he was dealing with an application relating to the termination of the Appellant's employment. The fact that the Respondent lodged a jurisdictional objection and that was dealt with as a threshold issue does not of itself render the hearing to be something other than the type contemplated in s 70(1)(b). However, this does not advance the position of the Appellant, as in our view, no order of the type contemplated by s 31(1)

[9] *Bennett (n 3)*, [14].
[10] Ibid, [17] (emphasis added).

was issued by President Barclay in the Decision and the application was dismissed by the President exercising his power to do so under s 21(2)(c)(iv) of the IR Act. Accordingly, the appeal was not competently brought under s 70(1)(b).

The submissions – s 70(1)(ba)

[27] The Appellant submits that if the appeal was not competently brought under s 70(1)(b), then it is permitted under s 70(1)(ba). It is not in dispute that this provision, if applicable to this appeal, would provide a right of appeal to the Full Bench and we agree that s 70(1)(ba) would provide a right of appeal if it was found to be applicable to this appeal. The President, at first instance, expressed his decision as a determination under s 21(2)(c)(iv) of the IR Act and s 70(1)(ba) clearly provides a right of appeal to a Full Bench from such a decision.

[28] However, the key issue in this matter is that both at the time the President made his decision, and at the time the Appellant lodged the appeal, there was no right of appeal under s 70(1)(ba). It had not commenced operation at that time. Notwithstanding that, the Appellant maintains that the appeal can be competently brought in this matter pursuant to that section. The Respondent opposes that submission on a number of grounds.

The Appellant's submissions on s 70(1)(ba)

[29] The Appellant accepts that legislation is not given retrospective operation in the absence of clear parliamentary intent and does not contend that there is evidence that the Parliament had such intent with this amendment. However, the Appellant maintains that while there is no retrospectivity involved in this matter, the Full Bench is to simply apply the legislation as it stands at the time of determining the appeal. That is, that the right of appeal is to be determined based on the legislation as at the date the appeal is determined rather than assessing the right to appeal at the date the notice of appeal was filed.

[30] The Appellant's submission in support of this proposition rests upon the key proposition that the inclusion of s 70(1)(ba) was merely procedural, rather than a change in a substantive right. In support of its proposition, the Appellant points to the decision of Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ in *Rodway v the Queen* (*Rodway*), where their Honours said:[11]

> "*The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance. But the difference between substantive law and procedure is often difficult to draw and statutes which are commonly classified as procedural - statutes of limitation, for example - may operate in such a*

[11](1990) 169 CLR 515, [4].

> *way as to affect existing rights or obligations. When they operate in that way they are not merely procedural and they fall within the presumption against retrospective operation. But when they deal only with procedure they are apt to be regarded as an exception to the rule and, if their application is related to or based upon past events, they are said to be given a retrospective operation provided that they do not affect existing rights or obligations.*"

[31] The Appellant submits that a similar issue arose in *Folbigg v Attorney General of NSW*,[12] where there were no transitional provisions and consideration ensued as to whether amending legislation applied to the proceedings on-foot. The particular proceedings involved an application for judicial review of an inquiry into the criminal convictions of the plaintiff. During the proceedings, the jurisdiction for that particular application changed from the trial division of the Supreme Court of NSW to the Court of Appeal. The Attorney General submitted that the amendment was procedural as it was merely determining the forum in which existing rights could be addressed. Ultimately, the Court exercised the discretion to direct the proceedings be removed into the Court of Appeal.[13] The Appellant submits that a similar view could be taken in this matter. Essentially, that the inclusion of s 70(1)(ba) has only changed the procedure to be followed by the Commission in assessing the substantive right.

[32] The Appellant notes that in *Worrall v Commercial Banking Co of Sydney* (*Worrall*),[14] the Court determined that the distinction between "rights" and "procedure" is only an aid to interpretation and not the test. Rather the test is:

> "What did the Legislature mean when its words are read, after giving due weight to every consideration"[15]

[33] At hearing, the Appellant submitted there was nothing available to indicate the parliamentary intent of the Legislature through either the second reading speech or the explanatory memorandum of the amending Act.[16] In support of the operation of the legislation being prospective and applying at the time of hearing for matters already on foot, he acknowledged there is nothing to suggest it operates retrospectively and said:

> "I accept that it only operates prospectively, even in relation to proceedings that have already commenced."[17]

[34] Counsel submitted that the insertion of s 70(1)(ba) was not a substantive change, but rather a procedural right about the types of decisions which can be taken to appeal, in contrast to the substantive rights of Mr Vincze at the time he was dismissed. It is still the same appeal which was filed within the required timeframe and not a fresh application which, it was conceded, would be out of time.

[35] He added that the nature of the amendment is not changed due to the presence of the headings of ss 70 and 71 of the IR Act: "Rights of appeal", which deals with substantive rights of appeal, and "Procedures on appeals", which deals with procedural matters. It is an amendment dealing with the conduct of the appeal and procedural in nature.

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[12] [2020] NSWSC 1415.
[13] Ibid, [20].
[14] (1917) 24 CLR 28.
[15] Ibid, 31.
[16] T14882 of 2022, Transcript of Proceedings, 14.
[17] Ibid.

The Respondent's submissions on s 70(1)(ba)

[36] The Respondent accepts that there is an exception to the general presumption against retrospective operation for purely procedural statutes. However, it contends that the inclusion of s 70(1)(ba) was not procedural and rather involved a change in substantive rights, and therefore cannot be relied upon in this matter as the presumption against retrospectivity applies.

[37] The Respondent cites various authorities for the proposition that the presumption against retrospectivity is an accepted principle of statutory construction.[18] These included the observation of Dixon CJ in *Maxwell v Murphy*:

> "The general rule of the common law is that statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."[19]

[38] The Respondent also relies on the subsequent paragraph in *Rodway* to that cited by the Appellant, where their Honours then go on to say that: [20]

> *Where a period is limited by statute for the taking of proceedings and the period is subsequently abridged or extended by an amending statute, the amending statute should not, unless it is clearly intended, be given a retrospective operation to revive a cause of action which has become barred or to deprive a person of the opportunity of instituting an action which is within time.*
>
> *If it were given a retrospective operation, the amending legislation would operate so as to impair existing, substantive rights – either the right to be free of a claim or the right to bring a claim – and such an operation could not be said to be merely procedural. This distinction was recognised by Williams J in Maxwell v Murphy, and his remarks were adopted by the Privy Council in Yew Bon Tew v Kenderaan Bas Mara.*

[39] The Respondent contended that the inclusion of s 70(1)(ba) of the IR Act confers a substantive right rather than merely a procedural provision. The Respondent cites an earlier passage to that relied on by the Appellant in *Worrall*:

> "There can be no doubt that the power to "appeal" is a right, and not procedure. Procedure may and generally does surround it, but the central notion of an appeal is undoubtedly a right."[21]

[40] The Respondent submits that a retrospective construction of s 70(1)(ba) cannot be countenanced as it would interfere with the rights of the Respondent, namely immunity from appeal. Following the expiry of the 21 day period provided by s 71(1) of the IR Act, the Respondent submits they enjoyed immunity from any further proceedings regarding the Appellant.

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[18] Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 2019) (9th ed) [10.1]; *Maxwell v Murphy* (1957) 96 CLR 261, 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194; *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, [30].
[19] (1957) 96 CLR 261, 267.
[20] *Rodway v The Queen* (n 17) (citations omitted).
[21] [1917] HCA 67; (1917) 24 CLR 28, 31.

Consideration of whether the appeal can be competently brought under s 70(1)(ba)

[41] The insertion of s 70(1)(ba) into the IR Act extends the right of appeal to include an appeal against a decision to dismiss or refrain from hearing a matter under s 21(2)(c) of the IR Act. In our view, the proper characterisation of the insertion of s 70(1)(ba) is that the subsection has included new appeal rights which were not previously available at the time the Appellant filed the NOA. We agree with the Respondent that a power to appeal is a substantive right and not merely procedural. Prior to the amendment, the appeal rights were limited to appeals against:

> A decision to make vary or rescind an award or refuse to make vary or rescind an award, s 70(1)(a); or
>
> an order under s 31(1) after a hearing relating to an industrial dispute…s70(1)(b); or
>
> a decision made under ss 43, 55, 59, 61J, 61R, 61S, 63(10), 65A, 67(4), 67A, 75(7E), or 70(1)(c).

[42] As stated above, s 70(1)(ba) has established an additional right to appeal. It is not merely a procedural provision. It creates a new right to appeal a decision to dismiss an application where, for the reasons made clear in *Bennett*, none previously existed. In the instant case, the rights of the Respondent would be interfered with if there was now a right of appeal under s 70(1)(ba). Following the expiry of the 21-day period provided by s 71(1) of the Act, the Respondent enjoyed immunity from an appeal by the Appellant by virtue of the operation of the legislation at that time.

[43] We agree with the Appellant that the distinction between "rights and procedures" is only an aid to interpretation and the test is what the legislation meant when its words are read after giving due weight to every relevant consideration. However, there is nothing in the legislation itself to suggest an intent of the Legislature that this additional right of appeal would operate so as to apply to appeals made before its operation. Nor is there anything available to indicate the parliamentary intent of the Legislature through either the second reading speech or the explanatory memorandum of the amending Act. In those circumstances, we agree that the general presumption against retrospective operation as an accepted principle of statutory construction applies in this case.

[44] As stated earlier, we are satisfied that s 70(1)(ba) enables a new right to appeal and is not merely a procedural provision. It does not reflect the nature of the appeal processes set out in s 71 which includes:

a. the timeframe to lodge a NOA;
b. the particulars required, the process for listing an appeal hearing;
c. the ability to suspend the operation of an award or decision;
d. applications to seek leave to appear;
e. admission of evidence;
f. process of arguments and evidence;
g. acting according to equity;
h. procedural directions and decisions and other matters.

[45] In coming to our decision, we have considered the placement of s 70(1)(ba) under s 70 headed 'Rights of appeal' and not under s 71, headed 'Procedure on appeals'. We observe that a heading is part of the Act and provides an indication of its subject matter and can be used in determining the meaning and scope of a provision. [22]

[22] *Acts Interpretation Act 1931* (Tas), s 6(2).

[46] We do not agree with the Appellant that the positioning of the amendment does not alter the fundamental question as to whether the amendment is merely procedural. In our view, the inclusion of the new right of appeal under the heading 'Rights of appeal' underlines that the amendment is a substantive change rather than merely procedural.

[47] Further, we concur with the Respondent's submissions on prejudice. To apply s 70(1)(ba) to this appeal fundamentally alters the substantive rights of the Respondent as they were at the time of the NOA. The Respondent would be prejudiced by the loss of the narrow nature for appeals set by the previous iteration of the IR Act and the expectation the appeal was invalid having regard to the decision in *Bennett* and principles previously adopted by this Commission.

[48] As s 70(1)(ba) affects the substantive rights of the parties, the presumption against retrospectivity applies. There is nothing in the language of s 70(1)(ba) nor in any relevant extrinsic material which indicates a contrary intention of the Parliament. Section 70(1)(ba) operates prospectively from its date of commencement on 18 March 2022, and confers no right of appeal with respect to an order for dismissal made prior to its commencement.

[49] For these reasons, we have determined that the appeal cannot be competently brought under s 70(1)(ba).

Capacity to amend the Notice of Appeal

[50] If necessary, the Appellant seeks leave to amend the notice of appeal as follows:

> "This appeal is made under paragraph 70(1)(b) and/or (ba)."[23]

[51] For the reasons set out earlier, we have determined that the appeal was not competently brought under s 70(1)(b). Therefore, the capacity to amend the notice of appeal to include a reference to s 70(1)(b) becomes a relevant consideration.

[52] We agree with the Appellant that s 71(10) of the IR Act requires the Commission to act, on the hearing of an appeal, according to equity, good conscience and the merits of the matter without regards to technicalities or legal forms. We agree with the Appellant that this provision should be read broadly and that it allows the Commission to exercise a broad discretion to give effect to that requirement which could include a power to exercise the discretion to amend a notice of appeal. However, that there is a discretion to permit an amendment to a Notice of Appeal is not determinative. The question is whether it is appropriate to exercise the discretion to amend the NOA in the terms sought by the Appellant in the circumstances of this case.

[53] The Appellant characterises the amendment as "only three or four words in the notice of appeal" and one of a technical and legal formality.[24] We disagree with that characterisation. The amendment sought is far more than the examples cited by the Appellant: including or excluding grounds of appeal.[25] It is to amend the NOA to rely on a right of appeal that did not exist at the time the NOA was lodged. This is a substantial change rather than a matter of technicality or legal formality. Further, the amendment sought is vigorously opposed by the Respondent. In any event, as we have determined for the reasons above that the appeal cannot be brought under s 70(1)(ba), there would be no utility in exercising the discretion to amend the NOA. For these reasons we decline to

[23] (Emphasis added).
[24] T14882 of 2022, Transcript of Proceedings, 48.
[25] Ibid, 47.

exercise the discretion to allow the Appellant to amend the NOA to include a reference to s 70(1)(ba).

Consideration of the submissions as to whether the NOA was a nullity

[54] The Respondents asserts in circumstances where the original NOA is without power, the present appeal is a nullity. In those circumstances, it is not possible for the Full Bench to amend the notice of appeal.

[55] The Respondent referred to the decision in *Deveigne v Askar* (*Deveigne*),[26] where in the lead judgement McColl J referred to various authorities which had considered whether proceedings or a step within them, constitute a nullity.

[56] The analysis of McColl J is extensive and deals with the distinction between: on the one hand, an irregularity in a proceeding, and on the other hand, how that can be distinguished from proceedings being a nullity.

[57] It is important to bear in mind that the decision in *Deveigne* was an appeal dealing with a matter involving a proceeding commenced by a plaintiff against a deceased defendant to recover damages in respect to a motor vehicle accident. In the lead judgement of McColl J it was found the orders made were nullities as they were made in the name of a deceased person.[27] However, her Honour concluded in the particular circumstances of that case, that the proceedings themselves were not a nullity.[28]

[58] The Appellant submits that in respect to the matter before us, there is a live proceeding on foot and all requirements of the statute for filing the NOA were met. Further, the proceeding has not been ruled on yet and the Appellant continues to seek an amendment to the NOA, if required, as part of these proceedings, as opposed to filing a fresh application for appeal.[29]

[59] We have considered the submissions and have determined it is not necessary to reach a concluded view on the question of whether the NOA is a nullity in circumstances where we are not satisfied it is appropriate to exercise the discretion to amend the NOA for the reasons set out above.

[60] Finally, the Appellant does not object to the submission of the Respondent as to the time limit for bringing an appeal and that those time limits cannot be extended to allow a fresh appeal. Indeed, the Appellant does not seek to bring a fresh appeal.[30] However in the event that the Appellant did seek to bring a fresh appeal, we agree that such an appeal would be out of time, and there is no power to extend the time to bring such an appeal.

Conclusion

[61] For the reasons above, we find the Tasmanian Industrial Commission is without jurisdiction to hear and determine this appeal.

[62] Accordingly, the appeal is dismissed.

[26] [2007] NSWCA 45.
[27] Ibid, [173].
[28] Ibid, [176].
[29] T14882 of 2022, Transcript of Proceedings, 49.
[30] Ibid, 47.

Neroli Ellis
Deputy President

Appearances:
Mr R Millar and Mr G Szlawski for the Appellant
Mr M Jehne for the Respondent

Date and place of hearing:
11 July 2022
HOBART