TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s70(1) appeal against decision

J K Peddell and S E Peddell trading as Bing-I-Oysters
(T13901 of 2012)

and

Brendan Nowak

PRESIDENT PL LEARY
DEPUTY PRESIDENT TJ ABEY
COMMISSIONER B DEEGAN

HOBART, 8 August 2012

DECISION OF PRESIDENT P L LEARY AND COMMISSIONER B DEEGAN

Appeal against a decision handed down by Commissioner J McAlpine on 11/4/12 – T13833 of 2011 – appeal upheld decision of Commissioner revoked.

[1] This is an appeal against a decision of Commissioner J McAlpine in Matter T13833 of 2011 issued 11 April 2012.

[2] Before the Commissioner the respondent to the matter below argued that the Tasmanian Industrial Commission (TIC) did not have the requisite jurisdiction to hear and determine the claim by the applicant.

[3] The Commissioner found that both the employee and the employer have standing before the TIC for matters prior to 1 January 2010 and said:

> *"I turn to Mr Cameron's argument that as the application was lodged after 1 January 2010 the FWA prevails and the matter falls into that jurisdiction. I disagree. In the first instance the transitional arrangements as prescribed in Schedule 3 of the FWTA cater for the continuation of the currency of the original State awards by providing for aspects such as dispute resolution not to be included in the Division 2B State award. Further, as alluded to above, with respect to wages and time off in lieu (TOIL) for time worked these reimbursements fall due to the employee once the hours have been worked. It follows that the award breach occurred at that time, as such wages or TOIL earned and not reimbursed prior to 1 January 2010 are recoverable within the jurisdiction of this Commission.*
>
> *Under the State Award for matters of alleged award breaches the* Limitation Act 1974 *does not apply allowing for an applicant to seek a hearing at any time after the alleged breach. Deputy President Abey in his decision T13749 of 2010 addresses the issue of limitation. The matter dealt with by the Deputy President relied on a judgment of the Supreme Court in the matter Blue Ribbon Products Pty Ltd v Tasmanian Industrial Commission*[1] *which deemed the Tasmanian Industrial Commission not to be a court. In T13749 the Deputy President found that the application before him was not an "action" contemplated by s4(1) of the* Limitation Act 1974 *and consequently the said act did not apply.*

[1](No2)[2004] TASSC 28 29 March 2004

I turn now to the issue of outstanding annual leave payment. As with wages and TOIL being payable when they are worked, annual leave becomes payable when it is taken or in the case of termination of employment, at the time of termination. The pay rate applicable is that which is current at the time. The applicant terminated his employment on 26 February 2011. It follows that any annual leave payment would fall due at that time. Consequently the alleged breach would have taken place when the applicant and the respondent were subject to the FWA, therefore beyond the reach of this Commission's jurisdiction.

Mr Cameron, in my view, has failed to show that this Commission does not have the jurisdiction to hear matters pertaining to award breaches which occurred prior to 1 January 2010. I see no impediment to this Commission hearing the application with respect to alleged underpayment of wages and alleged non-payment of TOIL. The matter will proceed to hearing."

[4] The respondent has appealed the decision of the Commissioner.

[5] The grounds of appeal are:

Appeal Ground 1 [i] to [iv]:

The Commissioner made a legal error in stating that the Commission had jurisdiction to hear this matter as;

(i) *The State of Tasmania had transferred its industrial relations powers to the Commonwealth pursuant to the* Industrial Relations (Commonwealth Powers) Act, 2009.

(ii) *The Commissioner misinterpreted the provisions of the* Industrial Relations (Commonwealth Powers) Act, 2009.

(iii) *The Commissioner misinterpreted the provisions of* the Fair Work Act 2009.

(iv) *The Commissioner misinterpreted the provisions of the* Fair Work (Transitional Provisions and Consequential Amendments) Act, 2009.

(v) *The Commissioner misinterpreted the provisions of the* Limitations Act 1974.

Appeal Ground 2:

(i) The Commissioner made comparisons against times irrelevant to the timing of the actual claim and the alleged reasons for the claim.

(ii) The Commissioner made assumptions as to the application of the Shellfish Industry Award and the Shellfish Industry Award [NAPSA] as to matters which were not in evidence, and, extrapolated evidence prejudicial to the employer.

(iii) Made a decision on matters OR took into account matters that were not provided to the parties or give the parties the opportunity to address those matters or information as required under Section 20[4] of the Industrial Relations Act 1984.

Appeal Ground 3:

> *(i) The Commissioner relied upon another case that was clearly distinguishable from the matter before him."*

[6] It is not contested that as of 1 January 2010 the parties became part of the national industrial relations system consistent with the State's referral of powers pursuant to the *Industrial Relations (Commonwealth Powers) Act 2009* (Commonwealth Powers Act).

[7] Directions were issued to the parties to provide written submissions. Both parties complied with the Directions and a short hearing was held on 11 July 2012. At that hearing the parties also addressed the following questions put to them by the Full Bench prior to the hearing:

> *(i) "Is a provision dealing with the settlement of a dispute a 'law relating to compliance with an entitlement or obligation'?*
>
> *(ii) Is there a relationship between s.29 settlement of dispute powers under the IR Act and the Resolution of Disputes provision in the relevant award?*
>
> *(iii) Is compliance with an entitlement/obligation a judicial function (determination of existing rights) as opposed to the dispute settlement function (creation of new rights) which is an arbitral power?*
>
> *(iv) If compliance is a judicial function does the TIC have the jurisdiction to determine a claim?*
>
> *(v) If the TIC does not have the jurisdiction to determine the matter how and where can the applicant pursuer his pre 2010 claim or alleged award breach?"*

[8] Given our decision in relation to Appeal Grounds 1 (i) to (v) (which we have dealt with together) it is not necessary for us to deal with Appeal Grounds 2 and 3.

The Appellant

[9] The appellant submits that the provisions of s.26 of the Fair Work Act (FW Act) overrides and replaces the IR Act.

[10] Section 26 states:

> *"This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer."*

[11] Further the appellant noted that in relation to the transfer of powers pursuant to the Commonwealth Powers Act there existed exclusions set out at s.30K of the FW Act and s.5 and schedule 1 of the Commonwealth Powers Act. It was put that Long Service Leave is an excluded matter however excluded matters do not refer to breaches of an award.

[12] The appellant submitted that the issue before the Commissioner concerned the right to an already existing entitlements and referred to the comments of His Honour Justice Blow in *Blue Ribbon Products v The Tasmanian Industrial Commission No 2 of 2004* where he said:

"However the arbitral powers of the Tasmanian Industrial Commission are powers to create new rights and obligations rather than powers to make determinations as to existing rights and obligations...Orders made under section 30 are creating new rights and obligations."

[13] It was put that as Mr Nowak is seeking the enforcement of existing rights and not the creation of any new right, the TIC has no jurisdiction to deal with the matter.

[14] The Commonwealth Powers Act clearly removed jurisdiction from the Tasmanian Industrial Commission (TIC) in relation to the referred subject matters set out in s3 of that Act. They are:

*"**'referred subject matters'** means any of the following:*

(a) terms and conditions of employment, including any of the following:

(i) minimum terms and conditions of employment(including employment standards and minimum wages),

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements),

(iii) bargaining in relation to terms and conditions of employment,

(iv) the effect of a transfer of business on terms and conditions of employment,

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers,

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:

(i) freedom of association in the context of workplace relations, and related protections,

(ii) protection from discrimination relating to employment,

(iii) termination of employment,

(iv) industrial action,

(v) protection from payment of fees for services related to bargaining

(vi) sham independent contractor arrangements,

(vii) standing down employees without pay,

(viii) union rights of entry and rights of access to records,

(d) compliance with, and enforcement of, the Commonwealth Fair Work Act,

(e) the administration of the Commonwealth Fair Work Act,

(f) the application of the Commonwealth Fair Work Act,

(g) matters incidental or ancillary to the operation of the Commonwealth Fair Work Act or of instruments made or given effect under the Commonwealth Fair Work Act, but does not include any excluded subject matter."

[15] Section 6 of this Act provides for the excluded matters. Disputes concerning breaches of awards are not an excluded subject matter.

[16] It was the appellant's contention *"…that there is a clear intention that the 'second regime', the Industrial Relations (Commonwealth Powers) Act 2009, clearly states that in relation to the private sector all industrial powers other than those specifically excluded, are transferred to the Commonwealth and that the Fair Work Act 2009 has application from 1 January 2010 in relation to the private sector."*

[17] The appellant argued that it follows that an application to the TIC pursuant to s29 of the Act is not permissible after 1 January 2010. Further it was submitted that the Commissioner failed to properly take into account the provisions of Section 102 of the *Commonwealth of Australia Constitution Act* which states:

> "*Where a State law or where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of this inconsistency, be invalid."*

The Respondent

[18] The respondent did not dispute that any claims arising from employment after 1 January 2010 can only be pursued under the FW Act. However, for the period from commencement of Mr Nowak's employment in 1999 until 31 December 2009, it was argued that Mr Nowak needed to make his claim with the TIC.

[19] The respondent argued in its written submissions that section 3(1), Part 2, Schedule 3A of the Transitional Provisions Act was crucial. The final sentence reads:

> "*a Division 2B State Award is taken to <u>come into operation</u> immediately <u>after</u> the Division 2B referral commencement."* (respondent's emphasis)

[20] In the case of Tasmania the referral date is 1 January 2010.

[21] It was argued that it is clear from sub sections (1) and (2) of section 7 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act, 2009* (the Transitional Provisions Act), together with the model clause and section 13 that the transitional provisions remove the dispute resolution process from the TIC and give it to Fair Work Australia (FWA).

[22] It was put, however, that, critically, subsection [3] of section 7 provides:

> *"The model term does not apply to disputes about matters arising under the source award before the Division 2B referral commencement."*

[23] According to the respondent Mr Nowak's application to the TIC is a dispute about matters which arose under the source award, ie the Shellfish Industry Award, before the Division 2B referral commencement date. It was contended that Mr Nowak was correct in making one application in the Commonwealth jurisdiction for the period subsequent to

the commencement (1 January 2010) and in respect of the period of employment commencement date the model term does not apply and the TIC has jurisdiction.

[24] The respondent submitted that the payment for TOIL accrued at the time it fell due and that the relevant date when the entitlement falls due is the date *"upon which the entitlements arise and they are as the work was performed by the worker and he accrued the right to TOIL time."* Further it was contended that so far as the claim related to TOIL the determination of the entitlement would be the determination of a new right therefore the TIC had jurisdiction to hear the matter. It was acknowledged that there existed the common law right to pursue the claim for underpayment or non-payment of an entitlement in the State Magistrates' Court.

[25] Accordingly it was the Respondent's position that the TIC is the correct jurisdiction to deal with Mr Nowak's dispute concerning that period of his employment prior to 1 January 2010.

Appellant in Reply

[26] The appellant argued that it was open to the respondent to lodge an application with the Federal Court or Federal Magistrate's Court in relation to his claim pursuant to sections 563 and 567 respectively of the FWA. It was put that the respondent could also make application to the Supreme Court of Tasmania.

[27] The appellant also argued that the fact that the model term does not apply to disputes about matters under the source award prior to the Division 2B referral commencement date does not mean that the otherwise excluded dispute settlement clause is reinstated.

[28] It was also the appellant's contention that s7(3) of the Transitional Provisions Act was intended to ensure that disputes that were already in progress before 1 January 2010 were able to continue to be heard in the relevant State body.

Consideration

[29] The appeal raises a number of important questions as to the remaining jurisdiction of the TIC following the transfer of powers to the Commonwealth.

[30] There is no dispute that Mr Nowak, the applicant before the Commissioner, was employed by the appellant as a Shell Fish Farm Attendant from December 1999 until 26 February 2011. Prior to 1 January 2010 the relevant award was the Shellfish Industry Award an award of the Tasmanian Industrial Commission. The appellant carried out business as a family partnership. It is not a constitutional corporation and as a consequence joined the national workplace relations system on 1 January 2010.

[31] Mr Nowak is pursuing his claims relating to the period of his employment subsequent to 31 December 2009 in the federal jurisdiction.

[32] We have carefully considered the decision of the Commissioner and the submissions put below and on appeal. We have reached the view that the decision of the Commissioner below is misconceived and has been determined by taking into consideration the wrong issues.

[33] The original application was made pursuant to s.29(1)(A) of the IR Act which relevantly states :

"29. Hearings for settling disputes

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

(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…" (our emphasis)

[34] In this matter a claim was made in respect to payments for accumulated annual leave and to an entitlement of overtime payments or accrued Time Off in Lieu of penalty payments (TOIL) which the former employee sought to be paid on termination.

[35] In his decision the Commissioner stated: *"I see no impediment to this Commission hearing the application with respect to alleged underpayment of wages and alleged non-payment of TOIL. The matter will proceed to hearing."*

[36] The Commissioner also dealt with the matter of the application of the *Limitation Act 1974* (Limitation Act) and the decision concerning that Act of Deputy President Abey in *Blackburn v Tasmanian Paints Pty Ltd* [T13749 of 2010].

[37] Given our decision in relation to the matter on appeal we do not consider it necessary to deal with the question of the application of the Limitation Act. Suffice it to say that the question of the application of that Act to the TIC has not been authoritatively determined. Further, we are of the view that the application of the model dispute settlement clause had no relevance to the matter before the Commissioner given that the application was made under the provisions of s.29 of the IR Act and not under the dispute settlement clause of the Shellfish Award.

[38] Insofar as the Commissioner's decision placed reliance on the dispute settlement term of the Shellfish Award or the application of the model term to the dispute before him he acted on a wrong principle and made an error of law.

[39] The question of the power of the TIC to deal with award breaches is of particular importance in this appeal. Section 29 was introduced into the IR Act by amendments made in 1994. The following is an extract from the relevant second reading speech:

> *"The most significant initiative contained in the bill is that matters relating to alleged breaches of awards will be dealt with by the Tasmanian Industrial Commission. …..The intention is that anyone may apply for a dispute relating to an alleged breach of award to be heard and dealt with by the Industrial Commission.*
>
> *After hearing the matter the commission will have the power to make an order requiring the breach to be remedied in just the same way as it currently may issue an order in settlement of any other dispute….Appeal rights are provided in respect of any decision made by the commission in cases involving breach of award.*
>
> *<u>While the commission will be able to order that outstanding or underpaid sums be paid it will not be able to exercise judicial function</u>; it will have no power to*

impose penalties. Enforcement of orders will remain the province of the magistrates court…" [our emphasis]

[40] Clearly the Parliament did not give the TIC judicial powers. The Minister is unequivocal in that regard. In giving the TIC the 'power' to deal with alleged underpayments the Minister said a reason for such consideration was that *"Presently when, in the Department's view, a prima facie breach has occurred and the Department is unable to effect a settlement between the disputants the only recourse is to the Court. This is seldom a satisfactory solution. Prosecutions are bedevilled with technicalities, costs are high and the process is slow..."*

[41] It would seem then that the intention of the Parliament was for the TIC to settle disputes about alleged award breaches by expressing a view as to whether a breach did or did not occur. Despite the somewhat ambiguous wording of the IR Act in this regard (i.e. the reference to *"award breaches")* it is our view that the relevant provision remains an exercise of the dispute settlement power of the TIC. Any order made by the TIC in settlement of the dispute may then be enforced in the usual way through a State court of competent jurisdiction. Despite the amendments to the IR Act in 1994 it remained open to a party to pursue an award breach through the court in the normal way without any requirement to take an action in the TIC. Also relevant to the decision on appeal is Item 60 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which states that s.26 the FW Act does not apply to a law of a referring State *"so far as that law relates to compliance with an entitlement or obligation…."*

[42] It is our view that despite the reference to award breaches in s.29 of the IR Act that section is not a law relating to *"compliance with an entitlement or obligation."* Section 29 is a law relating to dispute settlement. The TIC cannot exercise judicial power. The dispute settlement power it exercises concerns the creation of new rights and obligations and cannot be exercised in a manner which involves the determination of existing rights and obligations. The TIC is not able to enforce its own orders. These must be enforced through the Tasmanian Supreme or Magistrates Courts.

[43] It is, therefore, our view that the IR Act is not a law relating to compliance with entitlements or obligations.

Conclusion

[44] We uphold the appeal and revoke the decision of the Commissioner. The TIC does not have the jurisdiction to deal with the s.29 notification of dispute, as it relates to alleged underpayment of wages, lodged by the applicant in matter T13833 of 2011. Insofar as the original application related to long service leave the application is valid as long service leave is an excluded matter and unaffected by the transfer of powers.

P L Leary
President

[45] Appeal Ground 1 [i] to [iv]

The Commissioner made a legal error in stating that the Commission had jurisdiction to hear this matter as;

(i) *The State of Tasmania had transferred its industrial relations powers to the Commonwealth pursuant to the* Industrial Relations (Commonwealth Powers) Act, 2009.

(ii) *The Commissioner misinterpreted the provisions of the* Industrial Relations (Commonwealth Powers) Act, 2009.

(iii) *The Commissioner misinterpreted the provisions of* the Fair Work Act 2009.

(iv) *The Commissioner misinterpreted the provisions of the* Fair Work (Transitional Provisions and Consequential Amendments) Act, 2009.

[46] It is not contested that, as of 1 January 2010, both the employer and the applicant became part of the national industrial relations system consistent with the State's referral of powers pursuant to the *Industrial Relations (Commonwealth Powers) Act 2009* (Commonwealth Powers Act).

[47] The relevant legislation at the time is Part 2 – Division 2B State Instruments, Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* (Transitional Provisions Act).

[48] Section 3 relevantly reads:

"3 Division 2B State awards

(1) If, immediately before the Division 2B referral commencement:

*(a) a State award (the **source award**) was in operation under a State industrial law of a Division 2B referring State (the **source State**); and*

(b) the source award covered (however described in the source award or a relevant law of the source State) employers and employees who become Division 2B State reference employers and Division 2B State reference employees on the Division 2B referral commencement (whether or not the source award also covered other persons);

*a **Division 2B State award** is taken to come into operation immediately after the Division 2B referral commencement.*

Note 1: A Division 2B State award is a notional federal instrument derived from the source award.

…

(2) Subject to this Schedule, the Division 2B State award is taken to include the same terms as were in the source award immediately before the Division 2B referral commencement."

[49] Thus, the Shellfish Industry Award (a source award), became a Division 2B Award and came into operation immediately after 1 January 2010. Apart from the resolution of disputes clause, the terms of the Division 2B award were at the time, identical to the source award.

[Section 7 provides for the dispute settling mechanism. In essence, if a source award contains a dispute settling clause with reference to a State industrial body, (which the Shellfish Industry award did), it is to be replaced by:

"the model term that is prescribed by the regulations for dealing with disputes relating to matters arising under Division 2B State awards."

[50] Section 7(3) states:

"The model term does not apply to disputes about matters arising under the source award before the Division 2B referral commencement."

[51] It follows that clause 3 - *Resolution of Disputes*, Part VII of the Shellfish Industry award was, as at 1 January 2010, replaced with the model clause. This latter clause provides ultimately for a reference of a dispute to Fair Work Australia at which point the parties may agree on the process to be utilised by Fair Work Australia, "*including mediation, conciliation and consent arbitration."*

Appellant's Submissions

[52] Section 26 of the *Fair Work Act 2009* (FWA) states:

"(1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer."

[53] Section 27 of FWA provides for State and Territory laws that are not excluded by s26. However the *Industrial Relations Act 1984* is not cited in this section.

[54] The Commonwealth Powers Act clearly removed jurisdiction from the Tasmanian Industrial Commission (TIC) in relation to the referred subject matters set out in s3 of that Act. They are:

*"**'referred subject matters'** means any of the following:*

(a) terms and conditions of employment, including any of the following:

(i) minimum terms and conditions of employment(including employment standards and minimum wages),

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements),

(iii) bargaining in relation to terms and conditions of employment,

(iv) the effect of a transfer of business on terms and conditions of employment,

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers,

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:

(i) freedom of association in the context of workplace relations, and related protections,

(ii) protection from discrimination relating to employment,

(iii) termination of employment,

(iv) industrial action,

(v) protection from payment of fees for services related to bargaining

(vi) sham independent contractor arrangements,

(vii) standing down employees without pay,

(viii) union rights of entry and rights of access to records,

(d) compliance with, and enforcement of, the Commonwealth Fair Work Act,

(e) the administration of the Commonwealth Fair Work Act,

(f) the application of the Commonwealth Fair Work Act,

(g) matters incidental or ancillary to the operation of the Commonwealth Fair Work Act or of instruments made or given effect under the Commonwealth Fair Work Act, but does not include any excluded subject matter."

[55] This Act also provides for exclusions in section 6, but this does not include breaches of an award.

[56] There would appear to be a conflict between the Commonwealth Powers Act *2009* and the *Industrial Relations Act 1984* as to whether the TIC can accept applications in relation to industrial disputes.

[57] The appellant contended:

> *"…that there is a clear intention that the 'second regime', the* Industrial Relations (Commonwealth Powers) Act 2009 *clearly states that in relation to the private sector all industrial powers other than those specifically excluded, are transferred to the Commonwealth and that the* Fair Work Act 2009 *has application from 1 January 2010 in relation to the private sector."*

[58] If this contention is not correct, then the doctrine of implied repeal would apply. (see *Ferdinands v Commissioner for Public Employment.)*[2] This means that the

[2] (2006) 225 CLR 130

Commonwealth Powers Act clearly transferred to the Commonwealth all those 'referred subject matters', and as such, the *Industrial Relations Act 1984*, as it applies to those same matters in relation to private sector employees, is implicitly repealed.

[59] It follows, that an application pursuant to s29 of the Act, is not permissible after 1 January 2010. The appellant further submitted that the Commissioner failed to properly take into account the provisions of Section 102 of the *Commonwealth of Australia Constitution Act* which states:

> "*Where a State law or where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of this inconsistency, be invalid."*

Respondent's submissions

[60] It is not disputed that any claims arising from employment after 1 January 2010 can only be pursued under the FWA. Mr Nowak had indeed lodged such an application. However, for the period from commencement of employment in 1999 until 31 December 2009, Mr Nowak needs to make his claim with the TIC.

[61] Section 3(1), Part 2, Schedule 3A of the Transitional Provisions Act is crucial. The final sentence reads:

> "*a Division 2B State Award is taken to <u>come into operation</u> immediately <u>after</u> the Division 2B referral commencement."* (respondent's emphasis)

[62] In the case of Tasmania the referral date is 1 January 2010.

[63] It is clear from subsections (1) and (2) of section 7, together with the model clause and section 13 that the transitional provisions remove the dispute resolution process from the TIC and give it to Fair Work Australia.

[64] However, critically, subsection (3) of section 7 provides:

> *"The model term does not apply to disputes about matters arising under the source award before the Division 2B referral commencement."*

[65] Mr Nowak's application to the TIC is a dispute about matters arising under the source award, ie the Shellfish Industry Award, before the Division 2B referral commencement date.

[66] Therefore Mr Nowak is correct in making one application to Fair Work Ombudsman for the period subsequent to 2B referral commencement (1 January 2010) and for the time prior to the referral commencement date the model term does not apply and the TIC has jurisdiction.

[67] This position is consistent with the advice from the Fair Work Ombudsman which reads:[3]

> *"It is the view of the FWO that as J.K. Peddell and S.E. Peddell trading as Bing-I-Oysters operate as a Family Partnership, and do not appear to be cited to a Federal Award, the FWO has jurisdiction from 1 January 2010.*
>
> *This is because from 1 January 2010, most employers and employees who were previously covered by state workplace relations laws are under that*

[3] Email from T Mander dated 2 March 2012 (Exhibit A1 below)

> *national workplace relations system. Private sector employees, such as those operating as sole trades, partnerships, or unincorporated entities are now covered by the national workplace relations system.*
>
> *As such, with respect to the employment of Brendon Nowak, the FWO only has jurisdiction from 1 January 2010. Entitlements arising before this time cannot be assessed by the FWO."*

[68] Accordingly it is submitted that the TIC is the correct jurisdiction to hear this dispute up until 1 January 2010.

Appellant in Reply

[69] Even if the advice from the FW Ombudsman is correct, this does not preclude the respondent from lodging his own application with the federal court or Federal Magistrate's Court in relation to his claim pursuant to sections 563 and 567 respectively of the FWA. The respondent can also make application to the Supreme Court of Tasmania. Thus, just because the Fair Work Ombudsman does not have jurisdiction, does not mean that the FWA does not apply.

[70] The fact that the model term does not apply to disputes about matters under the source award prior to the Division 2B referral commencement does not mean that the otherwise excluded dispute settlement clause is reinstated.

[71] It is the appellant's content that s7(3) of the Transitional Provisions Act is intended to ensure that disputes that were <u>already in progress</u> before 1 January 2010 were able to continue to be heard in the relevant State body.

Consideration

[72] There can be no doubt that the scheme of the relevant legislation intended Division 2B awards to operate prospectively from 1 January 2010. Section 3(1) of the Transitional Provisions Act quite specifically states that a Division 2B Award is taken to come into operation immediately after the Division 2B referral commencement. This is consistent with the principle that there is a presumption against retrospectivity, unless there is a clear expression to the contrary. In *Fisher v Hebburn Ltd* Fullager J said:[4]

> *"There can be no doubt that the general rule is that an amending enactment – or, for that matter, any enactment - is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement."*

[73] I am satisfied that nothing in either the Commonwealth enactments, or the State Commonwealth Powers Act, alter the status or standing of the Shellfish Industry Award prior to 1 January 2010. Specifically, there is nothing to suggest that this award is a Division 2B award prior to that date. The only question is whether entitlements which allegedly arose prior to that date can be pursued pursuant to a s29 application lodged after 1 January 2010. Clearly there is nothing in the *Industrial Relations Act 1984* which precludes such an application.

[74] It is also clear from the Transitional Provisions Act that the model (dispute settling) term does not apply disputes which occurred prior to 1 January 2010. Whilst this is supportive of a legislative scheme which overwhelmingly points to prospective operation, it is not determinative of the issue before the Commission.

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[4] (1960) 105 CLR 188 at 194

[75] Mr Nowak's application was lodged pursuant to s29(1A) of the Act, not clause 3 Part VII of the Shellfish Industry Award.

[76] Section 29 of the State Act provides a clear, unambiguous jurisdiction for the TIC to deal with disputes relating to alleged breach of an award, and if necessary, issue legally enforceable orders providing remedy. In introducing the amending legislation in 1994, Minister Beswick said:[5]

> *"The intention is that anyone may apply for a dispute relating to an alleged breach of award to be heard and dealt with by the Industrial Commission. The commission's procedures and powers in such cases will be no different from those applying in any other jurisdiction.*
>
> *After hearing the matter the commission will have the power to make an order requiring the breach to be remedied, in just the same way as it currently may issue an order in settlement of any other dispute – for instance, in matters relating to unfair dismissal. Appeal rights are provided in respect of any decision made by the commission in cases involving breach of award.*
>
> *While the commission will be able to order that outstanding or underpaid sums be paid, it will not be able to exercise a judicial function; it will have no power to impose penalties. Enforcement of orders will remain the province of the magistrates court, in exactly the same manner as is presently the case with all other orders issued by the commission.*
>
> *My department – the Department of Industrial Relations, Vocational Education and Training – will continue its traditional role of monitoring and investigating complaints relating to award breaches.*
>
> *Presently, when in the department's view a prima facie breach has occurred and the department is unable to effect a settlement between the disputants, the only recourse is to the court. This is seldom a satisfactory solution. Prosecutions are bedeviled with technicalities, costs are high and the process is slow."*

[77] There is no parallel or even similar provision in the FWA. It would seem that the only means by which Fair Work Australia could deal with a dispute concerning an alleged award breach would be if a dispute settling clause in an industrial instrument contained a provision for consent arbitration. In reality the only avenue for a legally binding resolution of an alleged award breach under FWA is through the courts. The unique character of s29 would be an important consideration if it was necessary to take into account s102 of the Constitution, dealing with inconsistency between Commonwealth and State law. However for reasons that follow, I do not consider it necessary to go down that path.

[78] The Fair Work Ombudsman (FWO) has clearly stated that it only has jurisdiction from 1 January 2010.[6] The appellant contends that even if this is correct, Mr Nowak is still able to pursue his application before the Federal Court or the Federal Magistrate's Court. I do not agree.

[79] Section 539 of the FWA sets out in table format the entities who may apply for orders for contravention of civil remedies. I make two points:

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[5] Second reading Industrial Relations Amendment Bill 1994

[6] Exhibit A1 below

[80] Firstly, for all material purposes, an inspector [FWO] has the same standing as an employee insofar as capacity to seek orders is concerned. Thus if FWO lacks jurisdiction, then so does an individual.

[81] Secondly, whilst there is a clear avenue to pursue a breach of a modern award [item 2], there is nothing which confers the status of a modern award on the Shellfish Industry Award as it applies prior to 1 January 2010. Further, there is nothing in s539 which provides for the prosecution of a pre January 2010 State Award.

[82] Simply put, there is no capacity through either the Federal Court, or the Federal Magistrates Court, to pursue an award breach in relation to an entitlement which crystallised in a source award prior to 1 January 2010.

[83] I agree that an application could be lodged with the either the Tasmanian Supreme Court or Tasmanian Magistrates Court. However this has always been the case and nothing changed with the advent of the Commonwealth legislation.

[84] There can be no doubt that both the Commonwealth and State Parliaments intended that the regulation of private sector industrial relations transfer to the Commonwealth with effect (in this case) from 1 January 2010. It would seem somewhat incongruous however that either parliament intended that a jurisdiction to deal with award breaches be removed from the TIC in circumstances whereby the Commonwealth courts (or FWA) lack jurisdiction to fill the gap.

[85] A further issue for consideration arose during the hearing stage of the appeal. Item 60 of the *Transitional Provisions* Act states that the s.26 of the *Fair Work Act* does not apply to a law of a referring State *"…so far as that law relates to compliance with an entitlement or obligation…"*

[86] Taking note of the Minister's second reading speech, and in particular the comment that "…*the Commission will have the power to make an order requiring the breach be remedied…"*, I conclude that s.29, insofar as it relates award breaches, is very much focused on *"compliance with an entitlement or obligation."* Importantly this aspect can be distinguished from the power to impose penalties and enforce orders. These latter functions are clearly judicial in nature and properly the province of the courts. In my view this conclusion is supported by the full context of the judgment in *Blue Ribbon Products v Tasmanian Industrial Commission* [7] in which Blow J observed:

> "*17 In* Brandy v Human Rights and Equal Opportunity Commission *[1995] HCA 10; (1995) 183 CLR 245, the High Court held that certain provisions in the* Racial Discrimination Act 1975 *(Cth) were invalid because they purported to vest judicial power in the respondent commission ("the HREOC"). However the role of the HREOC under that legislation was markedly different from the relevant role of the Tasmanian Industrial Commission under the Act. The HREOC was purportedly empowered to decide controversies between parties as to existing rights and obligations, based upon existing facts and the law as set out in the* Racial Discrimination Act*. It was purportedly empowered to award damages, and to grant declaratory and injunctive relief. However the arbitral powers of the Tasmanian Industrial Commission are powers to create new rights and obligations, rather than powers to make determinations as to existing rights and obligations. It is also significant that the* Racial Discrimination Act *provided for determinations of the HREOC to be compulsorily registered in the Federal Court, whereupon they would be enforceable as orders of the Federal Court. Thus the legislation provided for*

[7] [2004] TASSC 28 29 March 2004

> *the HREOC to make binding and enforceable determinations. Deane, Dawson, Gaudron and McHugh JJ said at 269 that "if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power." By contrast, the decisions of the Tasmanian Industrial Commission are enforceable only though the mechanism of a summary prosecution under s31(5). In the light of the judgments that I have referred to in* Waterside Workers' Federation of Australia v JW Alexander Pty Ltd *(supra), it is clear that the s31(5) enforcement regime is consistent with arbitral power, as distinct for judicial power, being exercised.*
>
> *…*
>
> *19 In my view* Waterside Workers' Federation of Australia v JW Alexander Pty Ltd *(supra) establishes beyond doubt that, prior to the 1997 amendments, the powers of commissioners to make orders under s31 for the purpose of preventing and settling industrial disputes were arbitral, rather than judicial, in nature. Although the Act now contains detailed provisions relating to disputes as to the termination of employment, I do not think [my emphasis] that those provisions have resulted in orders for the reinstatement, re-employment or compensation of former employees having become orders of a judicial character, rather than orders of an administrative character. They are still orders creating new rights and obligations. Whilst s30(3) does create obligations on employers that exist prior to, and irrespective of, the initiation of proceedings under s29, and whilst the discretion of the Commission may have been fettered by the 2000 amendments, an order for re-instatement, re-employment or compensations remains an order creating new rights and obligations for the propose of settling an industrial dispute. Given that that is the nature of such an order, and that it may be enforced only by a summary prosecution under s31(5), I think that, consistently with the High Court authorities that I have referred to, decisions whereby such orders are made must properly be characterised as decisions of an administrative character, despite the factors identified by Mr Turner that weigh in favour of them being characterised as judicial in character."*

[87] I conclude that there is no barrier to Mr Nowak pursuing an application pursuant to s29(1A) of the Act.

[88] I would reject appeal grounds 1(i), (ii), (iii), and (iv).

Appeal Ground 1[v]

(v) *The Commissioner misinterpreted the provisions of the* Limitation Act 1974.

[89] In his decision at paragraph 26 the Commissioner said:[8]

> *"Under the State Award for matters of alleged award breaches the* Limitation Act 1974 *does not apply allowing for an applicant to seek a hearing at any time after the alleged breach. Deputy President Abey in his decision T13749 of 2010 addresses the issue of limitation. The matter dealt with by the Deputy President relied on a judgment of the Supreme Court in the matter Blue Ribbon Products Pty Ltd v Tasmanian Industrial Commission which deemed the Tasmanian Industrial Commission not to be a court. In T13749 the Deputy President found that the application before him was not an "action"*

[8] Para 27

contemplated by s4(1) of the Limitation Act 1974 *and consequently the said act did not apply."*

[90] At page 24 of the transcript below, Mr Cameron said:

"I would await your written decision as to this jurisdiction before we argue limitations and other matters."

[91] There was no contrary submission from the respondent. In light of this position, it is somewhat surprising that the Commissioner chose to address the issue of the applicability of the *Limitation Act 1974.*

[92] I would refer this aspect of the application to a Commissioner sitting alone to hear full argument as to the application or otherwise of the *Limitation Act 1974.*

Appeal ground 2

(i) The Commissioner made comparisons against times irrelevant to the timing of the actual claim and the alleged reasons for the claim.

[93] This ground relates to the appellant's contention that at the time Mr Nowak lodged his application (14 September 2011,) the TIC did not have jurisdiction to accept the claim.

[94] This question has already been dealt with under appeal ground 1.

[95] I would reject appeal ground 2(i).

(ii) The Commissioner made assumptions as to the application of the Shellfish Industry Award and the Shellfish Industry Award [NAPSA] as to matters which were not in evidence, and, extrapolated evidence prejudicial to the employer.

[96] This ground has been largely dealt with under ground 1.

[97] The appellant makes the additional point that at the time of Mr Nowak's application, the relevant award was the Aquaculture Industry Award 2010, the Shellfish Industry Award NAPSA having been terminated on 29 July 2011.[9] It followed, Mr Cameron submitted, that the argument as to the model term was irrelevant. I agree. I have already found that the dispute settling clause has no bearing on the outcome of this matter, other than as an indicator that it was the intention of the Parliament for the amending legislation to operate prospectively.

[98] I have already found that the application was lodged pursuant to s29(1A) of the Act, and that the TIC has jurisdiction to hear the application.

[99] I would reject appeal ground 2(ii).

(iii) Made a decision on matters OR took into account matters that were not provided to the parties or give the parties the opportunity to address those matters or information as required under Section 20[4] of the Industrial Relations Act 1984.

[100] Section 20(4) of the Act reads:

[9] FWA Print 12465

> "***(4)*** *Where the Commission, in deciding any matter before it, proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information."*

[101] The appellant submits that the Commissioner erred in making a decision as to the non-application of the *Limitation Act 1974* when these matters were not specifically raised in hearing and the Commissioner did not give the parties the opportunity to make submissions.

[102] This matter was discussed under appeal ground 1(v). I would allow this ground and refer this aspect to a Commissioner sitting alone to hear and determine the question.

[103] The appellant further contends that the Commission had access to and referred to written submissions of the applicant's representative that were not made available to the respondent.

[104] At the hearing on 5 March 2012 the transcribing machine malfunctioned part way into the applicant's submission. Whilst I am not aware of what discussions or arrangements immediately followed, it is clear that the hearing proceeded to conclusion, but without the availability of transcript.

[105] In an email to the Commission sent at 11.47 am that same day, the applicant stated:

> *"Please find attached a copy of the submissions I made to the hearing this morning for the Commissioner's assistance due to the error with the recording."*

[106] The written submissions were attached. However it would seem that the respondent was not provided with a copy.

[107] The appellant submits that although the respondent (below) heard the oral submissions of the applicant's representative and was able to respond as such, the respondent did not have the opportunity of reading the written submissions provided to the Commissioner and upon which he based his decision.

[108] The respondent (to the appeal) contends that the typed notes were provided in response to a request from the Commissioner. This request was made in the presence of the appellant and no issue was taken at the time. Further, the appellant has not disclosed or asserted that any prejudice was suffered as the result of the non-provision of the notes.

[109] As a matter of course I agree that the notes should have been provided to the respondent below. In the first instance, this should be as a matter of courtesy from the applicant, but I accept that the Commission has a responsibility to ensure that this is done.

[110] At its highest, this may amount to a technical breach of s20(4). However the appellant has not identified the *"matter or information"* upon which the Commissioner relied, and which was not raised during the hearing. There can be little doubt that the applicant's representative below relied on the typed notes in presenting her oral submission. Mr Cameron has not identified any prejudice to the respondent below.

[111] As it has turned out, this matter has been treated as virtually a rehearing. In the circumstances I am satisfied that the parties have been able to present such argument and evidence as they wished.

[112] I would reject appeal ground 2(iii).

(iv) The Commissioner relied upon another case that was clearly distinguishable from the matter before him.

[113] The ground concerns the reference by the Commissioner to the decision in *Blackburn v Tasmanian Paints Pty Ltd.*

[114]The appellant contends that not only is this decision distinguishable on the facts and relevant legislation, it was flawed in its reasoning and determination.

[115] This matter has been considered and dealt with under appeal ground 1(v)

Conclusion

[116] For reasons outlined above I would reject the appeal. I would confirm the decision of Commissioner McAlpine other than the aspect dealing with *Limitation Act 1974*, which I would refer back to a Commissioner sitting alone, who would also hear and determine the merits of the application.

Tim Abey
Deputy President